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1927

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1927

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ALL INDIA REPORTER
1927 SIND
COMPARATIVE TABLES
(PARALLEL REFERENCES)

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Table No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1927 with corresponding references of the ALL INDIA REPORTER.

Table No. II.—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1927 with corresponding references of the ALL INDIA REPORTER.

Table No. III.—This Table is the converse of the **First** and **Second Tables**. It shows serially the pages of the ALL INDIA REPORTER for 1927 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing seriatim the pages of SIND LAW REPORTER, for the years 1926 and 1927 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of 20 AND 21 SIND LAW REPORTER.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

20 Sind Law Reporter=All India Reporter

SLR	A. I. R.			SLR	A. I. R.			SLR	A. I. R.			SLR	A. I. R.			SLR	A. I. R.		
1	1926	S	176	54	1926	S	137	116	1926	S	128	189	1927	S	223	277	1926	S	145
3	"	"	129	63	"	"	57	122	"	"	288	192	1926	"	213	287	"	"	6
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41	"	"	143	95	"	"	180	163	"	"	273	238	"	"	81	335	1925	"	144
43	"	"	188	100	"	"	40	171	1927	"	98	245	"	"	9	352	1927	"	16
46	"	"	150	106	"	"	159	178	1926	"	230	261	"	"	244	358	1926	"	276
50	"	"	158	111	"	"	177	183	"	"	279	266	"	"	249	362	"	"	105

21 Sind Law Reporter=All India Reporter

SLR	A. I. R.			SLR	A. I. R.			SLR	A. I. R.			SLR	A. I. R.			SLR	A. I. R.		
1	1927	S	10	91	1928	S	15	154	1927	S	53	244	1928	S	73	306	1927	S	182
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TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1927 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER

7 & 8 All India Criminal Reports=All India Reporter.

A.I. Cr.R	A. I. R.	A. I. Cr. R.	A. I. R.	A. I. Cr. R.	A. I. R.	A. I. Cr. R.	A. I. R.	A. I. Cr. R.	A. I. R.

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1927 Allahabad.**

Cr.L.J. & I. C.	A. I. R.	Cr.L.J. & I. C.	A. I. R.	Cr.L.J. & I. C.	A. I. R.	Cr.L.J. & I. C.	A. I. R.	Cr.L.J. & I. C.	A. I. R.

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1927 Lahore.**

TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1927, SIND. SECTION with corresponding references of other REPORTS, JOURNALS AND PERIODICALS, including the SIND LAW REPORTER.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1927 SIND
Column No. 2 denotes corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

A. I. R. 1927 Sind=Other Journals.

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
1	97 *I C* 398	77	20 *S L R* 291	123	28 *Cr L J* 194	206	102 *I C* 277
	21 *S L R* 220	78	97 *I C* 257		7 *A I Cr R* 345	209	103 *I C* 870
10	97 *I C* 417	85	98 *I C* 113	126	99 *I C* 554	218	103 *I C* 172
	27 *Cr L J* 1105		27 *Cr L J* 1265	128	99 *I C* 600	219	20 *S L R* 220
	21 *S L R* 1	89	98 *I C* 97		28 *Cr L J* 168	223(1)	7 *A I Cr R* 15
16	97 *I C* 641		27 *Cr L J* 1249		7 *A I Cr R* 336		20 *S L R* 189
	27 *Cr L J* 1121		21 *S L R* 43	130FB	100 *I C* 204		27 *Cr L J* 933
	20 *S L R* 352	90	98 *I C* 78	148	28 *Cr L J* 173		96 *I C* 389
18	97 *I C* 446		21 *S L R* 257		99 *I C* 605	223(2)	103 *I C* 129
	21 *S L R* 280	92	98 *I C* 467		7 *A I Cr R* 326	225	103 *I C* 440
23	97 *I C* 647		27 *Cr L J* 1347		21 *S L R* 93	228	102 *I C* 416
	27 *Cr L J* 1127		21 *S L R* 141	151	99 *I C* 871	230	102 *I C* 353
	21 *S L R* 51	97	27 *Cr L J* 1292	155	100 *I C* 389	231	28 *Cr L J* 644
24	97 *I C* 577		98 *I C* 188	159	28 *Cr L J* 349		103 *I C* 100
25	97 *I C* 623	98	27 *Cr L J* 1333		100 *I C* 829	232	103 *I C* 841
28	97 *I C* 1041		98 *I C* 405		7 *A I Cr R* 541		28 *Cr L J* 761
	27 *Cr L J* 1217		20 *S L R* 171		21 *S L R* 263	234	103 *I C* 849
	21 *S L R* 55	100	21 *S L R* 377	160	101 *I C* 438	237	103 *I C* 816
39	98 *I C* 49		98 *I C* 909	161	101 *I C* 458	239	104 *I C* 342
	27 *Cr L J* 1233	103	19 *S L R* 202		28 *Cr L J* 426	241	21 *S L R* 206
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	27 *Cr L J* 1253		28 *Cr L J* 66		28 *Cr L J* 431		103 *I C* 402
	21 *S L R* 48		7 *A I Cr R* 181		8 *A I Cr R* 31	245	104 *I C* 216
46	97 *I C* 725		21 *S L R* 356	168	101 *I C* 269	247	107 *I C* 221
49	19 *S L R* 41	108	99 *I C* 93	173	101 *I C* 471	248	104 *I C* 412
	97 *I C* 269		28 *Cr L J* 61		8 *A I Cr R* 43	251	104 *I C* 391
53	98 *I C* 104		7 *A I Cr R* 454		28 *Cr L J* 439	253	104 *I C* 185
	27 *Cr L J* 1256		21 *S L R* 159	175	101 *I C* 449	257(1)	28 *Cr L J* 959
	21 *S L R* 154	112	99 *I C* 594		28 *Cr L J* 417		105 *I C* 671
54	98 *I C* 124		28 *Cr L J* 162		21 *S L R* 331		9 *A I Cr R* 153
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58	96 *I C* 499		28 *Cr L J* 139		21 *S L R* 306		28 *Cr L J* 425
	27 *Cr L J* 947	114	98 *I C* 888	187	101 *I C* 166		101 *I C* 457
	7 *A I Cr R* 21	115	93 *I C* 444	192	102 *I C* 193	262	103 *I C* 493
59	98 *I C* 109	116	19 *S L R* 346	193	101 *I C* 802	263	100 *I C* 450
	27 *Cr L J* 1261		101 *I C* 710	194	101 *I C* 848	264	102 *I C* 321
	20 *S L R* 310	118	19 *S L R* 322	195	102 *I C* 366	265	100 *I C* 195
60	98 *I C* 72		101 *I C* 715	197	101 *I C* 844	268(1)	101 *I C* 796
62	97 *I C* 124	120	19 *S L R* 337	199	102 *I C* 311	268(2)	103 *I C* 460
66	97 *I C* 321		101 *I C* 704	202	102 *I C* 176	270	21 *S L R* 195
77	98 *I C* 128	123	99 *I C* 930	205	101 *I C* 841		86 *I C* 757
	27 *Cr L J* 1280						

THE
ALL INDIA REPORTER
1927
SIND J. C'S COURT

* A. I. R. 1927 Sind 1

RUPCHAND BILARAM, A. J. C.

Abdulla and *others*—Plaintiffs.

v.

Abdulla Haroon and *others*—Defendants.

Original Civil Suit No. 1293 of 1919, Decided on 29th June 1926.

* *Civil P. C., S. 92—Suit framing scheme—Persons interested to appoint additional trustee must bring a fresh suit under S. 92.*

Remedy of the parties interested in a trust, for the modification of a scheme, framed in a suit, by appointing additional trustees is not by an application in that very suit, but by a new suit under S. 92 : (*Case law considered.*)

[P 10, C 1]

P. S. Shahani and *Hassomal*—for Plaintiffs.

Srikishendas H. Lulla—for Defendants.

Judgment..—In this suit which was instituted under S. 92, Civil P. C., on July 5, 1923, the Court sanctioned a scheme inter alia appointing five trustees for the management of trust properties and funds reserving liberty to the parties concerned to apply at the end of one year from that date for the increase or decrease of the number of trustees so appointed. The trust properties consist of two plots bearing Survey Nos. 38 and 59 in the Chakiwala quarter of Karachi which quarter owes its name to the fact that it is inhabited mostly by oil-millers or owners of chakis. There are two buildings on plot No. 38 one of which is used as a Musjid and the other as a Madrassah. The building on plot No. 59 is given on rent and the rent realized therefrom, certain contributions recovered by the oil-millers from the purchasers of oil and certain other voluntary contributions form the trust fund. Three of the five trustees are Memons by caste, the 4th and the 5th trustees are a Ganchi and a Makrani by caste.

Two applications have now been made in the suit purporting to be under S. 151, Civil P. C., for the increase of the number of trustees ; one of them is by one Mulla Haji Ellias who claims to be the mutawalli and the Pesh Imam of the Musjid and the descendants of the alleged original donor of plot No. 38. He has applied that he should be co-opted as the 6th trustee. The other application is by Ishaq Umer a Dabgar by caste and Abba Pinio a Chaki by caste original Plaintiffs Nos. 3 and 4 in the suit, for the appointment of two additional non-Memon trustees inter alia on the ground that the Memon trustees form a majority and do things in their own way to the prejudice of the inhabitants of the quarter most of whom are said to be non-Memons.

Both the applications have been opposed by the three Memon trustees. Their contention is twofold : first, that notwithstanding the express liberty reserved to the applicants by the scheme to apply for the increase of the number of trustees, their remedy, if any, is by a regular suit instituted under S. 92, Civil P. C., with a fresh sanction of the Advocate-General, and second, that there are no grounds whatsoever to justify the proposed increase. It is urged on their behalf that the present applications are the outcome of the endeavour of the opponents to administer the trust in conformity with the directions of the

Court. It is said that they have been obtained in the discharge of their duties by the Mulla Haji Ellias who claims to be the mutawalli and who had refused to give up possession of the Madrassah building which is being used by him in a manner detrimental to the trust and that under no circumstances he or persons interested in him be appointed as trustees.

The facts connected with the applications as gathered from the admission of the parties and the documents produced by them may be beiefly stated :

The history of the trust commences with the Hijri year 1320 or 1903 A. D. when one Nurmahomed Sulleman, a Ganchi by caste and a resident of Chakiwara, first conceived the idea of collecting a fund for the betterment of the Suni Muhammadan residents of the quarter. This idea appealed to Haji Mohammed Haji Abdulla Saboowani, a rich Memon merchant, who in that very year called a meeting at his kothi not only of the Suni Muhammadan residents of that quarter but invited some of the trading and influential Memon merchants of the town and camp including Haji Abdulla Haroon, Haji Ayoob Khamisa, Haji Abdul Rahman Bachal, and Haji Moosa Ibrahim. A resolution was passed at that meeting empowering the oil-millers of Chakiwara to collect from all merchants who purchased from the oil-millers oil and oil-cakes one pice per maund for a charitable fund to be called the Musjid Islami Fund. Haji Mohamed Haji Abdulla Saboowani acted as the Secretary or Trustee of this fund. He continued as such up to the time of the institution of his present suit in 1919. He took a keen interest in the development of the trust fund and the acquisition of the trust properties and in this he was helped by the Memon merchants of Karachi. It has not been seriously disputed that the Chakiwara residents other than Memons were in no way in opulent circumstances. In 1903 there was some sort of a building on plot No. 38 as a Musjid which was in a dilapidated condition. In 2 or 3 years after the starting of the fund it was rebuilt at a cost of about Rs. 5,000 out of which Rs. 2,000 were the collections made from the purchasers of oil and the balance advanced free of interest by Haji Mohamed. By 1913 Haji Mohamed had not only recovered his loan out of the collections made by him but he had with him a sum of Rs. 3,753 to the credit of the fund. He then bought plot No. 59 with a building thereon for Rs. 8,000 and again met the deficit by getting a loan free of interest from certain Memon merchants which he likewise subsequently repaid.

In 1916 Haji Abdulla Haroon, a philanthropist Memon merchant, constructed at his own cost a building on plot No. 38 to be used as a Madrassah. A short time thereafter two other Memon merchants Messrs. Haroon Brothers and Yusif Haji Abdulla Saboowani added an upper storey to the same building to be used as a Madrassah for girls. Both these structures are said to have cost a considerable sum of money.

The suit was instituted in 1919 for removal of Haji Mohamed from his office as Secretary or Trustee on a two-fold ground, first that he had got trust properties entered in the revenue registers in the name of the Karachi Chakiwara Cutchi Memon community and, secondly, that he had put up a slab on the Madrassah school of the Cutchi Memons of Chakiwara. The plaintiffs also prayed for a scheme being prepared by the Court for the management of the trust properties and the trust fund. Shortly after the service of the summons on Haji Mohamed he died and his legal representatives were brought on the record. There was no substance whatsoever in the aspersions made against Haji Mohamed who had rendered yeoman service to the fund. He himself resided in the Jodia Bazar quarter and not in Chakiwara. The entries in the Revenue Records and the name on the slab of the "Cutchi Memon community of Chakiwara" were of no personal benefit to him and were easily explainable. As, however, no scheme had been prepared for the management of the trust the death of Haji Mohamed made it the more necessary for a scheme being sanctioned by the Court and proper trustees being appointed.

The cause of the institution of the suit which was said to have been instigated by Mulla Haji Ellias from private motives was not inquired into and by consent of parties a scheme was sanctioned providing for the trust properties being entered in the name of the

Muhammadan community of Chakiwara the slab outside the building being ordered to be removed and another slab being ordered to be substituted and placed inside the Madrassah bearing the names of the donors. A suggestion that seven trustees should be appointed to administer the trust was not accepted by the Court and only five trustees were appointed and liberty was reserved to the parties to apply for the increase or decrease of the number of trustees after the expiry of one year. Three of the trustees appointed by the Court represented the three principal communities of the quarter, viz., the Memons, the Ganchis and the Makranis. Two more were appointed as they were charitably disposed and influential persons who could be safely entrusted with the care of the trust property and funds. They happened to be Memons.

The trustees had insurmountable difficulties in managing the Mulla. He refused to permit them to carry out the orders of the Court in replacing the slab of the donors inside the building, refused to submit accounts to them to publish their own accounts, and refused to co-opt with them in improving the Madrassah for boys or to start a Madrassah for girls. It is said that a part of the Madrassah building was being misused by him as an otak which he would not give up. It appears that the Mulla claimed to be the hereditary mutawalli and the descendant of the alleged donor of this Musjid plot and contended that he was not bound by the orders of the Court. On December 4, 1924, the trustees met together and deputed the Ganchi trustees to induce the Mulla to withdraw his opposition. This attempt, however, failed. On May 4, 1925, an application was made by the Memon trustees to the Court for the Mulla being ordered to give up possession of the Madrassah building and being restrained from interfering with the management of the trustees. This application was thrown out on a technical ground and the trustees were referred to a regular suit for ejectment which was accordingly filed on July 16, 1925, and is Suit No. 617 of 1925.

One of the grounds urged in that suit is the refusal by the Mulla to permit the slab bearing the name of the donors being put up inside the building. This allegation is not seriously challenged by him and it is urged by him in his written statement that he is not bound by the decree of this Court as he was not a party to the suit. The non-Memon trustees who are co-defendants to the suit have joined hands with him in preventing his dispossession from the Madrassah building. The defence filed in that suit has been followed up by the two present applications for trustees being added. Such being the facts it would be more convenient to deal with the second objection raised by the Memon trustees which is on the merits and goes to the very root of the two applications.

Whether it is competent for the parties interested to approach the Court for the modification of a scheme by an application filed in the very suit with or without the sanction of the Advocate-General or by a new suit instituted under S. 92 with the like sanction of the Advocate-General it is not disputed that the Court must deal with the matter with the utmost possible caution, and must not disturb what has already been done by the Court. As observed by the Vice-Chancellor in *Attorney-General* v. *Bishop of Worcester* (1), it can only do so

> upon the most substantial grounds and upon clearest evidence, not only that the scheme does not operate beneficially, but that it can by alteration be made to do so consistently with the object of the foundation.

Not only there are no substantial grounds for increasing the number of trustees, but the arguments advanced at the Bar have only convinced me that nothing should be done which would weaken the hands of the Memon trustees to keep proper control over the Mulla who is at the bottom of the whole mischief, and such differences as exist among them and the non-Memon trustees will disappear as soon as the recalcitrant Mulla is made to realize that he cannot have everything in this way. The Memon trustees have given a good account of their stewardship since their appointment. The trust properties have been well managed since. They have kept proper accounts of the moneys received by them, have duly published their accounts, and have made all such collections as they possibly could notwithstanding the opposition of the Mulla. The conduct of the Mulla in refusing to

(1) [1851] 9 Hare. 328=21 L.J. Ch. 25=68 R. R. 530=16 Jur. 3=89 R. R. 471.

render accounts of the school to the trustees and refusing to put the slab was most improper. He admits using the ground floor of the Madrassah as his school office though he denies that it is his otak. One acquainted with habits of Mullas and the manner in which they conduct their schools can well realize the difference between the use of a part of the building as an office and an otak. The ground floor was built specifically for being used as a boys school and the upper floor for use as a girls school. The trustees would be failing in their duty towards the trust and to the donors if they permit the ground floor being used as the alleged office of the Mulla.

It would further appear that the Mulla claims a proprietary interest in the school. He has been hitherto getting munificent grants from the Municipality and the Government which probably yield him a decent income for himself and which he is not prepared either to disclose to the trustees or to account for. Under the circumstances he cannot be permitted to occupy the trust building which is intended for a public charitable Madrassah. It may well be conceived that with the introduction of compulsory education in Karachi and the opening by the Karachi Municipality of free schools for imparting primary education the present Madrassah which is intended for the same object, unless it is considerably improved and put under proper control, can serve no useful purpose. It is extremely doubtful if under the present regulations the Mulla can get the same grant as at present either from the Municipality or the Government. And with the decrease of his pupils who are likely to be attracted by the free and well-equipped Municipal schools and the decrease of the amount of his grant there is a probability of not only the ground floor, but the upper floor of this building being used in the near future as the rent-free residence of the Mulla. The Mulla's conduct in claiming to be the mutawalli, which, however, was not pressed at the hearing, his refusal to recognize the decree of the Court though he was present in Court when the case was proceeding and was fully cognizant of its institution and his connexion with the Madrassah at once put him out of Court, and his application is, therefore, liable to be dismissed in limine.

The second application which, again, I have no doubt has been engineered by him cannot but have the same fate. Both the applicants were parties to the suit and except the abuse levelled by the learned counsel against the Memon trustees which hardly appealed to me as sound advocacy, no arguments have been urged which could not have been urged at the hearing of the suit in support of the representation being given to them in the body of trustees. The Dabgars and the Chakis form but a minority of the population of Chakiwara. They have contributed precious little to the trust fund which has been built up by donations from the Memons or from money coming out of the pockets of the purchasers including the rich Memon merchants and commission agents dealing in oil and oil-cakes and not out of the pockets of the oil-millers of Chakiwara most of whom are poor. For the management of the trust in suit five trustees are ample, and the raising of their number in the manner suggested can only cause embarrassment to the proper administration of the trust. The liberty reserved by the scheme was not intended to be availed of either by the Mulla who had kept himself in the background at the time of the settlement of the scheme, though notices had issued to the public under O. 1, R. 8, Civil P. C. Nor was it intended to enable him to re-agitate through some of his misguided followers the question of the number of trustees which, as the draft scheme would show, was suggested at 7, but fixed at 5, and to claim a representation on the trust for the Dabgar and the Chaki communities. Plaintiff's Nos. 3 and 4 were parties to the suit. They had an opportunity at the hearing to press the claim of these communities and if they failed to press their claim they cannot be permitted to do so now on the same grounds which were available to them at the hearing. I have no hesitation in holding that both the applications fail on the merits.

With regard to the question as to the validity of the clause in a scheme reserving liberty to the parties to apply and the maintainability of the present application with or without the sanction of the Collector of Karachi, there is a divergence of judicial opinion. According to the earlier decisions of all the

High Courts it would appear that such clauses have not only been held valid but added subsequently in schemes which made no such provision and that applications similar to the present one have been entertained. In *Domodarbhat* v. *Bhogilal Karsondas* (2), where an application was made to the Court of first instance in execution proceedings for removal of a recalcitrant member of the committee of management, and disallowed, the High Court held that the proper course was not to institute a fresh suit under S. 539 of the old Civil P. C., but to adopt the more convenient procedure of amendment of the scheme by the inclusion of a provision for the removal of the trustee, if necessary. In *Prayag Dossji Varu Mahant* v. *Tirumala Srirangacharla Varu* (3), which was subsequently affirmed by the Privy Council in *Prayag Dossji Varu* v. *Tirumala Srirangacharla Varu* (4) Mr. Justice Subramania Ayyar pointed out there is ample authority for the proposition that the Court which had sanctioned the scheme for the administration of a charitable trust is competent from time to time to vary the scheme as the exigencies of the case require.

In dealing with the power of the Court to appoint additional trustees, his Lordship observed at page 324 as follows:

> The enactment of S. 539 of the Code, as it now stands, was long after the passing of the English Trustees Act of 1850. Presumably, therefore, that section may be taken as intended to confer upon the Courts in this country the same power that the Courts in England possessed at the time of its enactment. There is no reason for thinking that the Indian Legislature meant to control the power of the Courts in this country only in this one respect as to the appointment of new and additional trustees whilst conceding them powers as large as those possessed by the English Courts in other respects. Had that been the case the Legislature would have used language expressive of this limitation.

In dealing with the scheme sanctioned by the Court, the learned Judge said at page 327:

> Power should be reserved for application by the trustees or by persons interested being made to the District Court with reference to the carrying out of the directions of the scheme .... may be enforced by the District Court in execution upon application by persons interested: *Damodarbhat* v. *Bhogilal Karsondas* (2). Power should also be reserved for application being made to the High Court by the trustees or by persons interested for any modification of the scheme that may be found necessary.

(2) [1900] 24 Bom. 45=1 Bom. L. R. 509.
(3) [1905] 28 Mad. 319=15 M. L. J. 183.
(4) [1907] 30 Mad 139=34 I. A. 78=17 M.L.J. 286 (P. C.).

Both these suggestions found favour with their Lordships of the Privy Council and were adopted as Cls. 10 and 11 of the scheme as finally sanctioned by them except that no reference is made therein as to the directions in the scheme being enforced by the District Court in execution.

Following the ruling in *Prayag Dossji Varu Mahant* v. *Tirumala Srirangacharla Varu* (3) the Calcutta High Court added in 1920 similar clauses in the case of *Shailajananda Dut Jha* v. *Umeshanand Dut Jha* (5) which had been decided several years before as would appear from a subsequent report of the proceedings arising out of the same case in *Umeshananda Dut Jha* v. *Rovaneswar Prosad Singh* (6).

In the well-known Dakore Temple case *Sevak Kirpa Shankar Daji* v. *Gopal Rao Manohar Tambekar* (7) which has been before their Lordships of the Privy Council on several occasions, their Lordships finally sanctioned and approved of a scheme which contained inter alia the following clauses:

> Committee shall have power . . . to have all the rules framed by them sanctioned by the District Court of Ahmedabad to the intent that the rules, when sanctioned, shall have the same force as if they were part of this scheme.
>
> The provisions of the scheme may be altered, modified, or added to, by an application to His Majesty's High Court of Judicature at Bombay.

In *Rama Das* v. *Hanumanthu Row* (8), Sir Charles Arnold White, C. J., while referring to the observations of Subrahmaniya Ayyar, in *Prayag Dossji Varu's* case (4), referrod to above, observed that this case had gone up to the Privy Council and as no exception was taken to the remarks of the learned Judge by their Lordships of the Privy Council, we may take it that the Courts in India have the powers possessed by the Court of Chancery.

In *Sadupadhya Umeshanand* v. *Rovaneswar Prosad Singh* (9) the same case which was before the Calcutta High Court *Umeshananda Dut Jha* v. *Rovaneswar Prosad Singh* (6) the High Court held that in the circumstances of that case it was difficult to resist the conclusion that

(5) [1905] 2 C. L. J. 460.
(6) [1912] 17 C. W. N. 841=17 I. C. 969=16 C. L. J. 431.
(7) [1912] 15 Bom. L. R. 13=24 M. L. J. 199=17 I. C. 441=16 C. L. J. 640 (P. C.).
(8) [1911] 36 Mad. 364=21 M. L. J. 952=12 I. C. 449=(1911) 2 M. W. N. 387.
(9) [1918] 43 I. C. 772.

a clause should be inserted in the scheme to the effect that a member of the Committee may on good grounds established be removed by way of an application to the District Judge without the institution of a fresh suit and ordered the scheme to be amended accordingly.

In *Shroff* v. *Sonabai*, Suit No. 696 of 1918, of this Court, Madgavkar, A. J. C., granted an application made in the suit to appoint two additional trustees though the scheme, as originally sanctioned by the Court, contained no provision in that behalf. A revision application was filed against his order being Revision Application No. 1 of 1922.

In upholding the order of the learned Additional Judicial Commissioner on that point, Kennedy, J. C., and Kemp, A.J.C., observed :

> We are of opinion that although there is no power reserved in the scheme itself for the Court to change a charitable scheme yet the Court on proper grounds may in the exercise of its inherent jurisdiction alter the scheme in execution. Again it may be conceded that the persons who have been allowed to file charitable suits under S. 92 as representing the public do actually continue to represent the public in execution also. So far then there seems no objection to the order of the learned Additional Judicial Commissioner.

In *Muhammad Wahab Hussain* v. *Abbas Hussain* (10) the Court held that a suit of this nature was a suit for the administration of a public trust and that it was necessary that liberty should be reserved to the parties, the effect of making such a provision being to keep the suit alive to enable the parties to take the directions of the Court from time to time and so often as may be necessary and thereby prevent a multiplicity of suits.

In *Ayinavilli Narayanamurthi* v. *Bulusu Achayya Sastrulu* (11), Spencer, Officiating C. J., and Srinivasa Iyengar, J., struck the first discordant note as to the advisability of schemes reserving liberty to the parties to apply to the Court for directions without the necessity of filing fresh suits and without deciding the point expressed the opinion that such decrees were ultra vires having regard to the express provisions of S. 92, Civil P. C.

In the Dakore Temple Trust, rules prepared by the Committee of Management were, subject to certain modifications sanctioned by the District Judge, Ahmedabad, in pursuance of Cl. 12, sub Cl. (7) of the scheme. The Shevaks who were dissatisfied with the order treating it to be one passed under S. 47 of the Code appealed to the High Court and *ex majori cautela* also applied to the High Court for the same relief in pursuance of the power reserved to that Court under Cl. 20 of the scheme.

There was no opposition in the High Court as to the maintainability of the appeals and the High Court having accordingly allowed the appeals on the merits refrained from passing orders on the connected applications. On appeal to the Privy Council *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (12) it was held that the order passed by the District Judge had been erroneously dealt with as an order under S. 47 and that the appeals to the High Court were, therefore, incompetent. In delivering the judgment of their Lordships Sir John Edge said at page 29 (49 *M. L. J.*) :

> The learned Judge should have remembered that parties cannot by acquiescence or consent confer upon a Court a jurisdiction which it has not got. The High Court at Bombay had power conferred upon it by Cl. 20 of the scheme confirmed by His Majesty's Order in Council upon an application made to it with that object to alter, modify or add to the rules sanctioned by the District Judge; but it had no other power, and that power it did not exercise; it may, however, still be exercised upon application properly made to it.

In *Ryali Brhamayya* v. *Venkatasurya Narayanamurthy* (13) Devadoss and Waller, JJ., held that in view of the above decision of the Privy Council in the *Dakore Temple* case (12) the decisions reported as *Damodharbhat* v. *Bhogilal Karsondas* (2) and *Prayag Dassji Varu Mahant* v. *Tirumala Srirangacharla Varu* (3) could not be considered as good law and further observed that a general clause in a scheme providing for an application being made to the Court with regard to the scheme was ultra vires as being opposed to the principles of S. 92, Civil P. C., which in respect of the matters therein concerned, required the sanction of the Advocate-General. These observations were, however, obiter dicta.

In *Abdul Hakim Baig* v. *Mohamed Burrammuddin* (14), decided two months later, Devadoss, J., in a very lucid and

(10) A. I. R. 1923 Patna 420.
(11) A. I. R. 1925 Mad. 411.
(12) A. I. R. 1925 P. C. 155=49 M. L. J. 25.
(13) A. I. R. 1926 Mad. 557.
(14) A. I. R. 1926 Mad. 559=49 Mad. 580.

well-considered judgment has assigned the following four different reasons in support of his view that a clause in the scheme reserving liberty to the parties to apply in the same suit without the sanction of the Advocate-General was ultra vires :

(1) That on the settlement of a scheme the suit comes to an end, and to say that any person could apply to alter the scheme once framed would necessarily mean that the suit is pending.

(2) That when S. 92, Civil P.C., directs that for the settlement of the scheme and for other reliefs the sanction of the Advocate-General should be obtained, it would be ultra vires of any Court to obtain jurisdiction by inserting a clause in the scheme whereby the persons interested in the scheme may apply for its alteration, and the mere fact that the Court grants sanction for inclusion of such a clause cannot make it intra vires.

(3) Where the scheme has to be modified after the suit comes to an end it can only be done after the formalities required by law are complied with and the proper procedure adopted.

(4) That the analogy of the English practice where the Court of Chancery is in London and the Attorney-General is practically, if not actually, in charge of the conduct of the proceedings cannot be relied upon in India where there are many districts and subordinate Courts entitled to act under S. 92, and it is impossible for the Advocate-General to have control over persons who obtain his permission to institute the suit.

In the concurring judgment, Wallace, J., observed that where the scheme conferred no power on the Court to grant a relief claimed in the application, the only remedy to obtain the relief was by a fresh suit instituted under S. 92, but where the scheme reserved such power the true test of its legality depended on the answer whether such relief has been sought before the scheme was sanctioned, the sanction of the Advocate-General would be sought or not, and if it was to be sought, the relief could not be granted by any sort of application under the scheme notwithstanding the fact that the scheme itself purported to provide for such means of obtaining relief.

Such is the brief resume of the case-law up to date. The point at issue bristles with difficulties and is one which is not free from doubt. In my opinion the question requires to be dealt with from two different aspects : first, as to the powers of Chartered High Courts and the mofussil Courts respectively under the Codes of 1877 and 1882 to afford relief on applications made in the suit ; and, secondly, the effect of the amendment made in S. 92 of the Code of 1908 on such powers.

It is hardly disputable that the old Supreme Courts in India exercised in matters of charity an equitable jurisdiction similar and corresponding with the equitable jurisdiction exercised by the Courts of Chancery in England, *Mayor of the City of Lyons* v. *East India Co.* (15), *Mitford* v. *Reynolds* (16), *Attorney-General* v. *Brodie* (17) and that the Chartered High Courts which superseded the Supreme Court under the Indian High Courts Act of 1861 (24 & 25 Vic. Ch. 104) inherited this equitable jurisdiction and continued to exercise the same control over charities up to 1877 ; *Panchcowrie Mull* v. *Chumroolall* (18). In England both before and after Lord Romilly's Act the Courts of Chancery as *parens patriae* exercised complete control over charities and acted even without complaint if there was cause for it. The fact that proceeding had been instituted by petition with the sanction of the Attorney-General instead of by information as provided by Lord Romilly's Act 52, Geo. 3, C. 101, it was open to the Court to pass subsequent orders upon motion without the expense of a further petition : Lewin on Trusts, 12th Edition, page 1206, *In re Slewring's Charity* (19); *Exparte Friendly Society* (20) ; and *In re Chipping Sodbury School* (21). It would, therefore, appear that the Indian High Courts had, once their jurisdiction was attracted, the power to pass orders on a motion whether such motion was made on behalf of or with the permission of the Advocate-General or not.

The special provisions permitting suits being filed by the Advocate-General or

(15) [1836] 1 M. I. A. 175=1 Moo. P. C. 175=1 Sar. 107 (P. C.).
(16) [1842] 1 Ph. 185=12 L. J. Ch. 40=80 R. R. 27=7 Jur. 3.
(17) [1848] 4 M. I. A. 190=6 Moo P. C. 12=1 Sar. 335 (P. C.).
(18) [1878] 3 Cal. 563=2 C. L. R. 121.
(19) [1814] 3 Mer. 707.
(20) [1804] 10 Ves. 287.
(21) [1832] 5 Sim. 410.

by persons interested in a charitable trust with his consent were introduced for the first time in the Code of 1877 and provided that such suits may be filed either in a High Court or in a District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust was situate. These provisions were introduced in a Code which was one of procedure, and, presumably, therefore, in the absence of any express provisions in that behalf they did not take away or affect the existing jurisdiction of a Chartered High Court to control charities in the same manner as a Court of Chancery in England.

There is nothing in S. 539 as enacted in the Code of 1877 or 1882 to warrant the inference that the inherent jurisdiction of the High Court to superintend charities and to interfere on motion when once its jurisdiction wat attracted was in any way intended to be controlled by the Legislature. The effect of these provisions on the Mofussil Courts, however, stands on a different footing. It is true that on a properly constituted suit being filed the Mofussil Courts as Courts of Equity gave relief in matters of public trust but as pointed out by Woodroffe, J., in *Budree Das Hukim* v. *Chooni Lal Johurry* (22), the extent and nature of their jurisdiction was in some respects doubtful, as for instance whether relief could be given where no breach of trust was alleged, *Kalee Churn Giri* v. *Golabi* (23), and whether the Court could order a scheme to be framed : *Ganapati Ayyan* v. *Savithri Ammal* (24). S. 539 was indubitably intended to remove such doubts and to confer jurisdiction on the Mofussil Courts in the matters referred to in the section. And the question, therefore, is what jurisdiction was intended to be conferred on such Courts under S. 539 ; and it is again extremely doubtful if it was intended to confer such powers on the Mofussil Courts which are Courts of limited jurisdiction to reopen and amend the decrees once passed by them in matters of charity or that if it was so intended the Legislature should have failed to provide for it in express terms.

It is also noticeable that in the two schemes which were finally approved by the Privy Council in *Prayag Dossji Varu Mahant* v. *Tirumala Srirangacharla Varu* (4) and *Sevak Kripa Shankar Daji* v. *Gopal Rao Manohar Tambekar* (7), the power of modifying the decree was not reserved to the Court of the first instance which should have been the proper and more appropriate Court to deal with such matters but to the High Court. Liberty to apply to the District Court with reference to the carrying out of the directions or to submit the rules framed under the scheme for sanction is something different from modifying the scheme and thereby amending the decree itself. The reason for the reservation in favour of the High Court to modify this decree is not clear from the reports. The High Court was then considered to have under S. 539 concurrent jurisdiction with the District Court over trust properties which were outside the ordinary original civil jurisdiction of the High Court : see the notes to S. 539 in Broughton's Civil Procedure Code of 1877, Edition of 1878; *Achaya* v. *Ratnavelu* (25), *Rangasami Naickan* v. *Varadappa Naickan* (26). And it is not impossible that the reservation in the schemes to modify the schemes was based on the wide and inherent jurisdiction which the High Court possessed as a Court of concurrent jurisdiction and which was wanting in the District Courts. Whatever may have been the effect of S. 539 on the powers of the High Courts or the District Courts to modify a scheme after the passing of the decree in a suit filed under that section, the provisions of that section have been considerably altered by the Code of 1908.

In the first place for the words

> may institute a suit in the High Court or the District Court within the local limits of whose jurisdiction the whole or any part of the subject-matter of the Trust is situate.

have been substituted the words

> may institute a suit whether contentious or not in the principal civil Courts of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction, etc.

In the second place several new reliefs for which the suit may be filed have been added inter alia, the removal of the trustees, appointing new trustees, and merely new trustees under the trust, directing accounts and inquiries and the like.

(22) [1906] 33 Cal. 789=10 C. W. N. 581.
(23) 2 C. L. R. 128.
(24) [1898] 21 Mad. 10.
(25) [1886] 9 Mad. 253.
(26) [1894] 17 Mad. 462 (F. B.)

And lastly, an important proviso has been added as Cl. (2) to the section and which is as follows :

> Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-S. (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

Section 92, as now amended, on the one hand puts an end to the concurrent jurisdiction of the High Court and the District Court and confers exclusive jurisdiction in such matters on the principal civil Courts of original jurisdiction whether it be a High Court or not ; and on the other, its provisions have been made mandatory and restrictive in their effect so as to require the sanction of the Advocate-General even where the suit is instituted as an ordinary suit by all the persons interested in the trust. It would, therefore, appear that the inherent power of the High Court as a Court of equity has now been considerably limited by the Legislature. As rightly pointed out by Devadoss, J., in *Abdul Hakim Baïg* v. *Mahomed Burrammuddin* (14), if, in order to remove a trustee, a suit has to be filed with the sanction of the Advocate-General, to apply for his removal without such sanction merely because there is a provision to that effect in the scheme would be to set at naught the distinct provisions of law which are intended to prevent frivolous applications to Court and consequent waste of time. The same reasoning equally applies to an application to appoint new trustees or to amend a scheme already sanctioned which is nothing more than framing a fresh scheme in substitution of the sanctioned scheme.

With all due respect to the learned Judges who decided the case of *Muhammad Waheb Hussain* v. *Abbas Hussain* (10) there is a good deal of difference between an administration of a private estate and the administration of a public trust. A suit for administration of a private estate results in the Court passing a preliminary and a final decree and does not ordinarily require more time for its final disposal than a suit for settlement of partnership accounts. And no limitation has been placed on the institution of such a suit by requiring the sanction of the Advocate-General for the purpose of preventing the waste of its funds.

With regard to the case of our own Court, it appears that the attention of the learned Judges of this Court both on its Original Side and on the High Court side does not seem to have been drawn specifically to the amended provisions of S. 92. In view of the subsequent Privy Council ruling in *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (12) it is extremely doubtful if applications of this nature can now be dealt with as application in execution of the decree passed by the Court. With all due respect to the learned Judges it is equally doubtful if the Court's inherent jurisdiction can be invoked when another equally efficacious remedy is open to the party aggrieved by instituting an equally cheap suit, which remedy carries with it the further safeguard that the party approaching the Court has satisfied the officers of the Crown that prima facie he has a substantial grievance which should be inquired into by the Court. In this case the learned Judges held that the application was competent. They were not prepared to uphold the order of Madgavkar, A. J. C., appointing additional trustees without notice under O. 1. R. 8. Civil P. C., being given to the Parsi community who were interested in that trust and giving them an opportunity of being heard and the learned Judges accordingly remanded the case to the original Court. This would hardly have been done if the sanction of the Advocate-General had been obtained.

One thing more remains to be specifically mentioned and that is as to effect of the obiter dicta of their Lordships of the Privy Council in the *Dakore Temple* case (7) that the powers reserved to the High Court in that case could be exercised upon application properly made to it. What is a "proper" application has not been defined and requires further elucidation. Possibly this may be done and the point at issue set at rest by the Privy Council in the event of the subsequent judgment of the High Court in *Shankarlal Purshottam* v. *Dakore Temple Committee* (27) being made the subject-matter of an appeal.

As at present advised I entertain the view that so far as this Court, which is not a Chartered High Court, is concerned,

(27) A. I. R. 1926 Bom. 179.

the remedy of the applicants is by a fresh suit under S. 92 and not by application. But in view of the ruling of this Court which is binding on me, I record my finding on the legal question against the applicants, leaving it to the parties to have the point decided by the Bench in the event of an appeal being entertained on the merits. I hold on both the points against the applicants and dismiss both the applications with costs.

Applications dismissed.

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* A. I. R. 1927 Sind 10

KINCAID, J. C., AND TYABJI, A. J. C.

Fakir Mahomed—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revision Application No. 49 of 1926, Decided on 6th May 1926, to quash proceedings before the City. Mag., Sukkur.

* (a) *Criminal P. C., S.* 195 (1)—*Absence of complaint as required by S.* 195 (1) *renders the trying Court a Court not of compelent jurisdiction within S.* 403—*S.* 537 (a) *does not apply.*

The absence of a complaint in writing as required by S. 195 (1), of the public servant concerned or his superior makes the Court a Court not of competent jurisdiction and, therefore, renders valueless the plea of previous acquittal as a bar to his re-trial on the same facts after proper complaint is made. S. 537 (a) does not apply as in the first trial .there cannot be said to be an error, omission or irregularity. in a complaint, but an absence of complaint altogether. [P 12, C 1]

* (b) *Criminal P. C., S.* 403—*Only identity of charges is looked to and not identity of parties —Distinction pointed out between S.* 403, *Criminal P. C., and Civil P. C., S.* 11. (*Per Tyabji, A. J. C.*)

Civil Courts are familiar with the notion that a right must be enforced primarily at the instance of the person in whom it inheres ; but in cases coming before the criminal Courts the personality of the complainant is important only in exceptional cases.

Proceedings to which S. 195 refers are among the exceptions, and the operation of S. 403 in such cases must necessarily be complex and difficult ; S. 403 itself does not refer to the edentity of parties in the first and second trials as a necessary condition to the plea of autrefois acquit ; it refers only to the identity of the chargos in which respect it may be contrasted with the doctrine of res judicata in civil procedure and yet in the trial of the offences to which S. 195 refers, the personality of the complainant is a matter of primary importance ; unless the proper complainant is before the Court it is required to desist from taking cognizance of the complaint, [P 15 C 1]

* (c) *Criminal P. C., S.* 195—*S.* 195 *is really a provision of substantive law* (*Tyabji, A. J. C.*).

Section 195, though it forms a part of the Code of procedure in reality contains a provision of the substantive law of crimes. It does not deal with the competency of the Courts, nor lay down which of several Courts shall in any particular matter have jurisdiction to try the case. It in reality lays down that the offences therein referred to shall not be deemed to be any offences at all, except on the complaint to the person or the Courts therein specified ; it enhances the connotation of those offences and limits the scope of their definition. [P 15 C 1, 2]

Partabrai D. Punwani—for Applicant.

T. G. Elphinston—for the Crown.

Kincaid, J. C.—The facts of this interesting application are shortly as follows :

On 11th Septmber 1925 Sahibdino, tapedar, filed a complaint under S. 182 read with S. 109, I. P. C., to the Sub-Divisional Magistrate. In it he alleged that Fakir Mahomed, the present applicant at the instigation of three other persons Abdulla Shah, Kasim and Mohamed had made a false report to the police of Pirojo Goth. The report implicated Sahibdino and others in a case of theft and house-breaking.

Mr. Vyas, the Sub-Divisional Magistrate convicted Fakir Mahamed and the three others implicated and sentenced them to undergo four months rigorous imprisonment. On appeal the Sessions Judge, on the 2nd November 1925, reversed the convictions and acquitted them on the ground that the complaint should have been instituted not by Sahibdino, tapedar, but as required by S. 195, Criminal P. C.

On 12th December 1925, Mr. Jessaram Sub-Inspector of Police filed a complaint under Ss. 211 and 182, I. P. C. The Resident Magistrate issued processes against Fakir Mohamed and three others under S. 211, I. P. C. The District Magistrate transferred the case to the City Magistrate of Sukkur. In the City Magistrate's Court Fakir Mohamed pleaded S. 403 of the Criminal P. C. in bar of his trial. The Magistrate however, declined to consider the plea on the ground that he had no power to do so, Fakir Mohamed has now moved this Court to quash the proceedings before the learned City Magistrate.

Section 403 runs as follows on which the learned pleader, Mr. Partabrai, has relied :

(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence, shall while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge for the one made against him might have been made under S. 236, or for which he might have been convicted under S. 237.

Here, the facts on which, so the learned defence pleader in an able argument has contended, the complaint was made could have established, if proved, an offence under S. 182 or S. 211. In other words, the accused, although the complaint was under S. 182 could by reason of S. 237, Criminal P. C., have been convicted under S. 211, I. P. C. Indeed this is the section under which processes have now issued. The present trial is, therefore, barred by S. 403.

The learned Public Prosecutor has replied that the Court that previously tried Fakir Mahomed was not a Court of competent jurisdiction and that, therefore his previous acquittal cannot be pleaded in bar.

Section 195 (1) runs thus :

No Court shall take cognizance

(a) of any offence punishable under S 172 to S. 188 of the I. P. C. except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate.

Now, here the complaint was not made by the public servant concerned or any public servant to whom he was subordinate, but by Sahibdino, the tapedar. Thus the Court that tried and convicted Fakir Mohamed and three others had no jurisdiction to do so. Indeed, this is the very ground on which they were acquitted by the Sessions Court. Fakir Mohamed, therefore, cannot now plead that he has been previously tried and acquitted or convicted by a Court of competent jurisdiction.

The question, therefore, for our decision is this : Does the absence of a complaint in writing of the public servant concerned or his superior make the first Court a Court not of competent jurisdiction and, therefore, render valueless the applicant's plea of previous acquittal ?

I am of opinion that it does.

A number of cases have been quoted before us, viz. *In re Samsudin* (1), *Jivram Dankarji* v. *Emperor* (2) ; *Emperor* v. *Jiwan* (3) ; *Ganapati Bhatta* v. *Emperor* (4) and *Emperor* v. *Menghraj Devidas* (5). I have studied them all very carefully, but I do not think that they can help us to a present decision. They are all prior to the recent amendment of the Criminal P. C. and deal with the absence of sanction. S. 195 (a) of the old Code ran as follows :

No Court shall take cognizance

(a) of any offence punishable under Ss. 172 to 188 (both inclusive) of the I. P. C., except with the previous sanction, or on the complaint, of the public servant concerned or of some public servant to whom he is subordinate.

Now, in the cases cited before us the Bombay and Allahabad High Courts held that in the absence of a previous sanction the first Court was not a Court of competent jurisdiction. The Madras and Sind Courts held that the absence of the previous sanction did not affect the jurisdiction of the first Court, since absence of sanction could be cured by S. 537 (b). That clause laid down that no sentence or order passed by a Court of competent jurisdiction should be reversed on account of the want of any sanction required by S. 195 (a). Now in the present Code the words "with the previous sanction or" have been omitted, So too, has S. 537 (b). We are, therefore, not concerned with the absence of a sanction. That admittedly was not needed. We are concerned only with the absence of the complaint by a public servant.

Now S. 195, Criminal P. C., lays down that where there is no complaint in writing of the public servant concerned or of his superior, no Court shall take cognizance of an offence punishable under S. 182, I. P. C. S. 201 of the Criminal P. C. lays down the procedure to be followed by a Magistrate to whom a complaint in writing has been made and is not competent to take cognizance of the case. The wording is imperative.

He (the Magistrate) shall return the complaint for presentation to the proper Court with an endorsement to the effect.

He can take no other steps whatever. He cannot even examine the complaint.

(1) [1898] 22 Bom. 711.

(2) [1916] 40 Bom. 97=31 I. C. 361=17 Bom. L. R. 881.

(3) [1915] 37 All. 107=27 I. C. 208=13 A. L. J. 4.

(4) [1913] 36 Mad. 308=19 I. C. 310=24 M.L. J. 463.

(5) [1919] 16 S. L. R. 1.

If he does take any further steps he is acting outside his jurisdiction : *Fani Bhusan Banerjee* v. *Kemp* (6).

The Sub-Divisional Magistrate, therefore, in this case, should at once have returned the complaint to the complainant Sahibdino. He did not do so and every step that he took thereafter was outside his jurisdiction. The next question is whether the Magistrate's procedure can be validated by S. 537 (a), Criminal P. C. That section runs as follows :

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chap. 27 or on appeal or revision on account
>
> (a) of any error, omission or irregularity in the complaint, etc., etc.

Now here there is no complaint by a public servant as required by S. 195. The complaint of Sahibdino cannot be said to be an error, omission or irregularity in a complaint that was never made. Before the error, omission or irregularity in a complaint can be cured, the complaint must exist. As there is no complaint, S. 537 (a) does not apply. The Magistrate's trial was void ab initio and so, too, was any expression of opinion on the merits by the learned Sessions Judge. As was observed by the Judges in *Banerjee* v. *Bipin Behary Ghose* (7) :

> A verdict of acquittal is, no doubt, immune from challenge : but it is only when an accused has been tried and acquitted of an offence that the immunity arises.

Here, the accused, Fakir Mahomed, was undoubtedly acquitted, but he was never tried by a Court of competent jurisdiction.

He was indeed acquitted by the Sessions Judge because he could not be tried. He cannot, therefore, plead immunity now.

I would, therefore, reject the application and return the case to the Court of the City Magistrate of Sukkur. I would, however, at the same time express the hope, in which my learned brother joins, that the police authorities will carefully consider the advisability of continuing the prosecution of the applicant. He has already been once before the Magistrate, the Sessions Judge and this Court.

Tyabji, A. J. C.—The decision of this matter rests upon the construction of S. 403 of the Criminal P. C. The principle underlying that section is clear : no person should be tried twice for the same offence. It is involved that there should have been a first trial and then an attempt at a second trial ; the second trial is barred if the two are identical in certain respects. The section may, therefore, be considered in regard to the particulars laid down with reference to the identity of the first and second trials respectively. Unless the requirements of the law in regard to both trials are satisfied the section does not come into operation, and the second trial is not barred.

(A) As to the first trial S. 403 (1) requires (I adhere to the wording of the section) :

(a) a person who has been tried for an offence ;

(b) by a Court of competent jurisdiction ;

(c) conviction or acquittal of such an offence.

The explanation to the section specifies four classes of orders which do not operate as acquittals, viz. ;

(i) dismissal of a complaint ;

(ii) stopping of proceedings under S. 249 ;

(iii) the discharge of the accused ;

(iv) any entry made upon a charge under S. 274 ;

(d) such conviction or acquittal remaining in force.

(B) With regard to the second trial it is required as a general rule that it must be for the same offence, as the first trial, but in this regard two sets of provisions are made, the first of which have the effect extending the bar, and the second of restricting it :

(1) the second trial will be barred notwithstanding that it is for a different offence, provided

(a) it is on the same facts as the first trial, and,

(b) the charge on the second trial satisfies either of the following two conditions :

(i) the charge on the second trial might under S. 236 of the Criminal P. C. have been made on the facts at the first trial or

(ii) it refers to an offence for which he might under S. 237 of the Criminal P. C. have been convicted at the first trial.

(2) On the other hand if the second trial comes under any of the following descriptions, it is not barred :

(6) [1906] 10 C. W. N. 1086.
(7) A. I. R. 1926 Cal. 691.

(*a*) if it is for a distinct offence for which a separate charge might have been made against him on the first trial under S. 235 (1) ;

(*b*) when the charge on the trial for an act causing consequences, and the charge on the second trial is for a different offence from that in the first trial, such different offence being constituted by the said act together with its consequences, provided that the consequences had not happened or were not known to the Court to have happened at the time when he was convicted (in the first trial) ;

(*c*) if it is for an offence other than that in the first trial though constituted by the same acts, provided that the Court of the first trial was not competent to try the offence charged at the second trial.

In order that S. 403 should come into operation each of the two trials must satisfy the conditions above laid down for it respectively.

In the present case the applicant (who contends that the requirements of S. 403 are satisfied and prays that the second trial be stayed) was on the first trial charged with three others under S. 182, read with S. 109 of the Indian Penal Code. The second trial is on a charge under Ss. 211 and 182. The principal charge at the first trial was under S. 182 of the Indian Penal Code for giving false information with intent to cause a public servant to use his lawful power to the injury of another person. The principal charge on the second trial is under S. 211 for falsely charging another person with having committed an offence knowing that there is no just or lawful ground for the charge.

The question that arises with reference to the first trial is whether the accused was tried and acquitted by a Court of competent jurisdiction. S. 195 of the Criminal P. C., lays down that no Court shall take cognizance of an offence punishable under S. 182 of the Indian Penal Code except on the complaint in writing of the public servant to whom he is subordinate. This requirement of S. 195 was not satisfied at the first trial. Can it be deemed that the accused " has once been tried by a Court of competent jurisdiction and acquitted of such offence," for the purposes of S. 403 ?

It is necessary to refer further to the proceedings at the first trial. It does not appear whether the Magistrate's attention was drawn to S. 195 of the Criminal P. C. In any case he proceeded with the trial, and convicted the appellant and the other accused. Then there was an appeal to the Court of Session, at which the Public Prosecutor did not oppose the reversal of the conviction. The learned Sessions Judge held that it was impossible to uphold the conviction either on the merits or on the technical grounds. He referred first to the neglect of the provisions of S. 195, also to the erroneous procedure followed in other respects : and then going on expressly to deal with " the merits of the case" he referred to the nature and effect of the evidence. The final portion of this order was thus worded :

> I allow this appeal and reverse the convictions and sentences. The appellants who are on bail are discharged.

It is not easy to determine the effect of these proceedings in reference to S. 403. First, as to the procedure followed by the Magistrate. It is clear that S. 195 ought to have prevented him from taking cognizance of the complaint. The order that he ought to have made is indicated by S. 201, which requires the complaint to be returned. It is true that S. 201 contemplates that there should be another Court that is competent to take cognizance ; and as, in the case we are considering, no Court was authorised to take cognizance, an endorsement exactly in accordance with S. 201 would have been inappropriate. Had the Magistrate returned the complaint with an endorsement that it should be presented by the proper person in compliance with S. 195 his order would have followed the analogy of S. 201.

The learned Magistrate, in any case, acted in contravention of S. 195. Ultimately he convicted the accused. On appeal, the Sessions Court's powers are laid down in S. 423 ; appeals from convictions are dealt with in Cl. (b) of S. 423 ; that clause empowers the appellate Court, amongst other things, to order a re-trial by a Court of competent jurisdiction. Though there is no provision in Cl. (b) more closely approaching the requirements of the present case, even this provision could not have been

applicable. But under Cl. (c) the Sessions Court could presumably have altered the order into one returning the complaint.

Had either the learned Magistrate or Sessions Judge followed the course indicated above, and had the complaint been returned, there is no doubt that there could not have been said to have been any first trial under S. 403, barring a second trial.

On the other hand it is equally clear that the Magistrate had initially jurisdiction to consider whether the requirements of S. 195 were satisfied ; and doing so he would have had jurisdiction to make the order (however erroneous that order might in any particular case be) that the complaint satisfied the requirements of S. 195. In other words the Magistrate before whom the complaint is presented, has jurisdiction initially to determine whether the complaint is or is not presented by the proper person specified in S. 195. It is conceivable that in some cases this question may be doubtful. The Magistrate would be a Court of competent jurisdiction to determine this question, and on appeal the Sessions Court would have jurisdiction to determine whether the question had been correctly decided by the Magistrate.

The courses actually followed by both the Magistrate and the Sessions Judge were, as I have already pointed out quite different.

There is, however, a further difficulty in connexion with the first trial. The learned Sessions Judge proceeded as stated before to consider the case on the merits. (a) Had he any jurisdiction to consider the merits ? (b) In any case as he considered the formal defect of S. 195 and held on that point in favour of the accused, can the effect of his judgment be deemed to be an acquittal under S. 403, or must it be taken to have no more effect than an order that the complaint be returned for presentation by the proper person in compliance with S. 195 ? cf. *Umeruddin* v. *Emperor* (8). Both aspects of the question depend on a consideration of the provisions of the Criminal P. C., already referred to, and on those of S. 537. Under the latter section (omitting the words not now relevant):

> no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal, on account of any error, omission or irregularity in the complaint, order, judgment or other proceedings before or during trial, unless such error, omission, or irregularity has in fact occasioned a failure of justice.

It was pressed upon us that the judgment of the Sessions Court must be taken to have proceeded on S. 537.

As againt this it is argued that the learned Judge did not in terms hold that the objection on behalf of the accused under S. 195 was an irregularity in the complaint which in fact had not occasioned a failure of justice. In so far as this last argument is an objection merely to the form of the words in which the judgment is couched, I am willing to put it aside. A Court may consider that there are two objections to taking a view adverse to one of the parties, and that though the one objection does not arise unless the other is rejected, each is a valid and proper objection. The learned Judge might have considered first that the objection on behalf of the accused under S. 195 was valid, but that he would assume that it was not valid and proceed to consider the case on the merits ; and that on the merits, too, the accused should be acquitted.

It is clear that the interpretation of the learned Sessions Judge's judgment which the applicant put forward is that it is a decision on two points in the alternative, and we are asked to omit from consideration one alternative, the technical one, and to consider only the other alternative, his decision on the merits. But the difficulty in so acting is that the omission of the technical alternative, if I may so call it, leave the complete hiatus in the other alternative. In order to acquire jurisdiction to consider the merits it was necessary for the learned Sessions Judge not only to decide the technical alternative in a way contrary to that which he indicates, but it was necessary for him to decide other questions of law and fact : notably the questions, first, whether disregard of S. 195 was such an error, omission or irregularity in the complaint, as is referred to in S. 537 (a) : secondly, whether disregard of S. 195 prevents the Court from being deemed a Court of competent jurisdiction, as these words are used in Ss. 403 and 537 (a), or whether the said words refer to the character and status of the tribunal as in illustrations (f) and (g) to S. 423 : cf. *Ganapathi Bhatta* v.

(8) [1909] 31 All. 317=2 I. C. 219=6 A. L. J. 262.

Emperor (4); and, thirdly, whether or not a failure of justice had in fact been occasioned.

In considering these questions what would have had to be decided was not merely whether the proceeding as they had actually been conducted had occasioned a failure of justice between the parties before the Court, but whether for the purpose of preventing injustice, the proceedings should be accepted as proceedings not obnoxious to S. 195, viz; whether they should be deemed in effect to arise out of a complaint by the person entitled to make such a complaint. The unusual nature of these questions is obovious; civil Courts are, no doubt, familiar with the notion that a right must be enforced primarily at the instance of the person in whom it inheres; but in cases coming before the Criminal Courts the personality of the complainant is important only in exceptional cases. But proceedings to which S. 195 refers are among the exceptions, and the operation of S. 403 in such cases must necessarily be complex and difficult; S. 403 itself does not refer to the identity of parties in the first and second trials as a necessary condition to the plea of autrefois acquit; it refers only to the identity of the charges in which respect it may be contrasted which the doctrine of res judicata in civil procedure, and yet in the trial of the offences to which S. 195 refers, the personality of the complainant is a matter of primary importance; unless the proper complainant is before the Court, it is required to desist from taking cognizance of the complaint.

The difficulty in putting the correct interpretation of S. 195 in connexion with S. 403 is enhanced first, by the fact that S. 403 omits to refer to the complainant; it refers only to the identity of the charge, and the campetence of the Courts; and, secondly by oversight of the fact that S. 195 though it forms a part of the Code of Criminal Procedure in reality contains a provision of the substantive law of crimes. For S. 195 does not deal with the competency of the Courts, nor lay down which of several Courts shall in any particular matter have jurisdiction to try the case; and yet the language of S. 195 is apt to these matters and it forms part of the Chapter entitled. "Of the jurisdiction of the Criminal Courts in Enquiries and Trials." S. 195 in reality lays down that the offences therein referred to or rather the acts constituting those offences, shall not be deemed to be any offences at all, except on the complaint to the persons or the Courts therein specified; it enhances the connotation of those offences and limits the scope of their definition. This limitation of the definition is brought about by saying that no Court shall take cognizance of the offence unless this condition requisite for initiation of proceedings is satisfied: see the heading preceding S. 190.

Some of the questions to which I referred a little while ago are question of law, others of fact. The question of law whether the Magistrate had jurisdiction to proceed with the trial, and whether the erroneous proceedings could be condoned under S. 537, has been variously answered by the Courts. In *Emperor* v. *Mengharaj Devidas* (5) and *Ganapathi Bhatta* v. *Emperor* (4) it was held that the Court had jurisdiction. The contrary view was taken in *In re Samsudin* (1); *Emperor* v. *Jiwan* (3); *Jivram Dankarji* v. *Emperor* (2); *Ram Nath* v. *Emperor* (9); *Banerjee* v. *Bipin Behary Ghose* (7); *Umer-ud-din* v. *Emperor* (8). The Code has been materially altered since the decisions were given. But assuming that the learned Judge could have condoned these erroenous proceedings, he has not purported to do so. Neither has he turned his attention to those questions of fact, which must be answered as a preliminary to the exercise of any such powers that he may be assumed to have.

There is another objection taken to the application of S. 403. As I stated before in order that that section may come into operation, both the first and second trials must satisfy the conditions laid down in regard to each. Does the second trial conform to the requirements of S. 403? It is not for the same offence ipasmuch as the first trial was got on a charge under S. 182; the second under S. 211. But it is said that the second trial is on the same facts as the first and it satisfies both the alternatives with reference to Ss. 236 and 237. In regard to this point also the same question arises in a new shape. Did the Court which held the first trial have jurisdiction to try the offence which is the subject of the charge on the second trial, S. 403, sub-S. (4).

(9) A. I. R. 1926 All. 231.

Summing up, therefore, the position is this: A Magistrate proceeds to take cognizance of an offence in circumstances in which S. 195 of the Criminal P. C. lays down that he shall not take cognizance of it. On appeal the Sessions Judge points out the Magistrate's initial error in at all taking cognizance of the offence, and goes on to say that even so, on the merits the accused ought not to have been convicted. The decisions of the Court are not agreed as to whether the Sessions Judge had power to condone the initial error. The Sessions Judge does not purport to condone it, nor does he address his mind to those questions which must admittedly be considered before such power to condone (assuming that they exist) can be exercised. And now it is argued that the said proceedings before the Sessions Court, viz., the acquittal of the accused on the complaint of a person not authorized to present the complaint prevents the person authorized to do so from prosecuting the proceedings.

It seems to me clear that it would be contrary both to the spirit and the letter of S. 403 to consider that further proceedings are barred in these circumstances.

It is a matter for the authorities on whose complaint alone the Magistrate can take cognizance of the alleged offence under S. 211 to consider carefully whether further proceedings are in the present case necessary in the interest of justice. For the proceedings may be obnoxious to S. 195 either merely in a formal sense, in which case the second trial would be a mere repetition of the first or it may be that the failure of the proper person to bring the complaint at the first trial has gone to the root of the matter—has prevented the proper evidence or the true facts being laid before the Courts and rendered the first trial futile on the merits no less than on account of the disregard of formalities of procedure. Between these two alternatives a great number of cases may occur, and it is for the authorities to consider the circumstances before coming to a decision. As the learned Judicial Commissioner has already said I associate myself entirely in the remarks in the last paragraph of his judgment.

So far as this application is concerned, I agree that it should be dismissed.

Application dismissed.

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* A. I. R. 1927 Sind 16

KINCAID, J. C. AND LOBO, A. J. C.

Emperor—Prosecutor.

v.

Shahu and *others* — Accused — Opponents.

Criminal Reference No. 45 of 1926, Decided on 23rd March 1926.

* *Criminal P. C., S.* 439 (4)—*High Court cannot convert a finding of acquittal into one of conviction only when there is complete acquittal—Acquittal under a particular section but conviction under another—High Court can alter acquittal under that section into a conviction.*

The prohibition in sub-S. (4) refers to a case where the trial has ended in a complete acquittal, not to a case where the trial has ended in a conviction but where the Court has wrongly applied the law or has wrongly found some fact not proved, and has, in consequence, held that the conviction should be under some section of the Code other than the section properly applicable. In such a case High Court is competent in revision to convict the accused under the section under which he was wrongly acquitted: *A. I. R.* 1924 *Bom.* 456; *A. I. R.* 1922 *All.* 487, *not Foll.*; 37 *Mad.* 119; *A. I. R.* 1924 *Rang.* 93 and 23 *Cal.* 975, *Foll.* [P 18, C 1]

T. G. Elphinston—for the Crown.

C. C. Lewis—for Opponents.

Judgment.—The facts which have given rise to this interesting revision matter are very simple and are somewhat as follows:

Some time before the alleged offence the deceased Sanwan and his brother Mushtaq bought for Rs. 40 a cow from Shahu, Accused No. 1, in the case before us. After the purchase of the cow a certain Gul Dito identified the animal as his own. He said that it had been stolen and he took it away. Sanwan and Mushtaq went to Shahu and informing him that the cow had been taken away by Gul Dito, called upon Shahu to help them to recover it. As Shahu refused they declined to pay him the purchase-money of Rs. 40. Shahu was dissatisfied with this solution of the question and repeatedly demanded his money. The matters came to a head when a council of the caste ordered Shahu to get back the cow if he wanted Rs. 40. Shahu refused and he and his sons got up with their hatchets and wanted to attack Sanwan and Mushtaq straight away. The council drove them off. They went away and threatened violence. Five or six days later about 9 a. m. Sanwan was walking down a lane in the village of

Matiari when he met Shahu and his three sons (Accused Nos. 1, 2, 3 and 4 in the case). They were all armed with hatchets. Sanwan was unarmed. Shahu, Accused No. 1, struck the first blow on the forehead of Sanwan with his hatchet. Thereafter he seized Sanwan, knocked him down while Daru and Murid hit at him with hatchets. The villagers assembled, whereupon, Shahu and his three sons ran away. Two onlookers, Yar Mahomed and Haji Vidho, carried Sanwan to the bunglow of Haji Mahomed Shah some 50 paces away. Haji Mahomed Shah sent his clerk, Kazi Nek Mahomed, to report to the police. The report was received by the Head Constable, Mahomed Khan, and he went to the scene of the offence. He found Sanwan in Haji Mahomed Shah's bungalow. He prepared a mashirnama and recorded the dying declaration of Sanwan. He sent the wounded man with a letter to the dispensary at Matiari but the doctor had gone out. Sanwan was then conveyed to Hyderabad. The Medical Officer, Mr. Mulchand, examined the wounded man and found an incised wound on the forehead, an incised wound on the right arm and an incised wound on the left hand all of them caused by hatchet blows. Sanwan died at 9 a. m. on the 10th of June 1925. The Medical Officer has expressed the opinion that the injuries would have caused death in any circumstances and that even if the deceased had been treated at Matiari the result would not have been different.

The learned Sessions Judge convicted the Accused No. 2 under S. 304 (a) of the Indian Penal Code and sentenced him to undergo 7 years' rigorous imprisonment. He sentenced the Accused Nos. 3 and 4 under S. 324 of the Indian Penal Code and sentenced them to 12 months' rigorous imprisonment each. He convicted Accused No. 1 under S. 324/109 of the Indian Penal Code and sentenced him to simple imprisonment for six months. The convicts appealed and a Bench of this Court summarily dismissed their appeal but issued notice to the accused Shahu, Daru and Murid (Accused Nos. 1, 3 and 4) to show cause why their sentences should not be enhanced.

An interesting question of law has been raised by the learned solicitor for the respondents. He has urged that while it is possible to enhance the sentences of the accused their convictions cannot be changed into convictions under another section. He has relied upon the wording of S. 439, Cl. 4.

It runs as follows :—

> Nothing in this section applies to an entry made under S. 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

This section has been differently interpreted by the various High Courts in India. In the case of *Emperor* v. *Shivaputraya Durdundaya* (1) the Bombay High Court took the view that where the Sessions Judge had altered a conviction under S. 326 of the Indian Penal Code to one under S. 323 of the Code, the High Courts were powerless to restore the conviction under S. 326, Macleod, C. J., observed as follows :

> Under the powers given to the Courts under S. 439, Criminal P. C., we cannot convert a finding of acquittal into one of conviction. It was argued on the authority of a Punjab case [*Bhola* v. *Emperor* (2)] that 'acquittal' in S. 439 means a complete acquittal on all the charges framed but we cannot agree with that view. Unless we set aside a conviction and direct a re-trial we can only enhance the sentence up to the limit which is admissible under S. 323, Indian Penal Code.

A similar view was expressed by Gokal Prasad and Stuart, JJ., in the Allahabad High Court in the case of *Emperor* v. *Sheo Darshan Singh* (3). There a Sessions Judge had tried Sheo Darshan Singh of the offence of murder but had found him guilty of culpable homicide not amounting to murder. Notice had been issued by the High Court to Sheo Darshan Singh to show cause why he should not be convicted of the offence of murder and why the sentence passed upon him should not be enhanced. Their Lordships found that it was not open to them to convict him of murder and they gave their reasons as follows :

> We cannot, however, change the conviction into a conviction of murder. Sheo Darshan Singh was acquitted by the Session Judge of the offence of murder and we cannot, in revision, convert a finding of acquittal into one of conviction.

A contrary opinion, however, has been expressed by the Madras High Court in *Kambam Balli Reddi* v. *Emperor* (4). Their Lordships took the view that the

(1) A. I. R. 1924 Bom. 456=48 Bom. 510.
(2) [1904] 12 P. R. 1904=110 P. L. R. 1904.
(3) A. I. R. 1922 All. 487=44 All. 332.
(4) [1914] 37 Mad. 119=22 I. C. 756=15 Cr. L. J. 180.

acquittal referred to in sub-S. 4 of S. 439 referred to a case where the trial ended in a complete acquittal. Their Lordships' words were as follows :

Sub-s. (4) of S. 439, which enacts that 'nothing in this section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction' is not, if rightly construed, inconsistent with this view. The prohibition in sub-S. (4) refers to a case where the trial has ended in a complete acquittal, not to a case like the present, where the trial has ended in a conviction but where the Court has wrongly applied the law or has wrongly found some fact not proved, and has, in consequence, held that the conviction should be under some section of the Code other than the section properly applicable as any other construction would be inconsistent with the power to 'alter the finding' given to the Court as a Court of Revision by virtue of its power to exercise the power conferred on a Court of Appeal by S. 423, cl. (b) and the terms of a Statute should not be so construed as to involve an inconsistency between its different parts.

A similar opinion was expressed by the Rangoon High Court in *On Shwe* v. *Emperor* (5). The same view too found favour with the Calcutta High Court in *Queen-Empress* v. *Jabanulla* (6) where their Lordships held that when a prisonor had appealed from a conviction the High Court could under the provisions of S. 423 read with S. 439 convert a finding of acquittal into one of conviction in spite of cl. (4) in S. 439.

We consider the view expressed by the Punjab, Madras, Calcutta and Rangoon High Courts to be the correct one. Indeed the view expressed by the Bombay High Court with all due deference to the eminent Judges who gave that decision, might lead to most unfortunate results. A Magistrate might rightly convict a prisoner under section of the Indian Penal Code and a Sessions Judge might wrongly acquit the prisoner under that section and convict him under some other section of an offence which the prisoner had not committed. If Macleod, C. J. were correct, the High Court would then be powerless in revision to do anything but to acquit the prisoner. The conviction of the Sessions Judge could not be confirmed because the prisoner had not ex-hypothesi committed the offence of which the Sessions Judge had found him guilty. Nor could he be convicted of the offence which he had really committed because he had been acquitted by the Sessions Judge and it would not be open to the High Court to convert an acquittal by the Sessions Judge into a conviction.

Having expressed our views to this extent we do not propose to exercise the powers which we believe vest in us for we think that the section, namely, 324 under which the prisoners have been convictod enables us to deal with them adequately. We enhance the sentence of Accused No. 3 and 4 (Daru and Murid) to three years' rigorous imprisonment and that of Accused No. 1 (Shahu) to two years' rigorous imprisonment.

Sentence enhanced.

(5) A. I. R. 1921 Rang. 93 =1 Rang. 136.
(6) [1896] 23 Cal. 975.

A. I. R. 1927 Sind 18

RUPCHAND BILARAM, A. J. C.

Shaw Wallace and Co. and *another*—Applicants.

Insolvency Petition No. 136 of 1925, Decided on 18th May 1926.

(a) *Provincial Insolvency Act*, (1920), *S.* 6—*Closing business and asking creditors to communicate with pleaders of the firm is an act of insolvency.*

When during the temporary absence of the proprietor of a firm, the manager for the time being closed the business and put up a notice under the signature of his pleaders requiring the creditors to communicate with the pleaders,

Held : that these acts are sufficient to constitute an act of bankruptcy within Cl. (d), Sub-Cls. (2) and (3), and Cl. (g) of S. 6 of the Act. [P. 19 ,C. 1]

(b) *Contract Act*, *S.* 247 *and S.* 239 — *Minor though participating in profits of a firm is not a partner.*

A person who is under the age of majority cannot become a partner by contract. He cannot, therefore, be a member of the " firm " as defined in S. 239. He may be admitted to the benefits of a firm but cannot be made personally liable for any obligations of the firm. His share in the property of the firm is liable for the obligations of the firm and the share of which S. 247 speaks is no more than his right to participate in the property of the firm after its obligations have been satisfied : 30 *Cal.* 539 (*P. C.*) and *A. I. R.* 1922 *P. C.* 237, *Foll.* [P. 20, C. 2]

(c) *Minor—Firm carried on for benefit of minor and adult persons can be adjudged insolvent—Contract Act*, *Ss.* 11 *and* 247 — *Presidency Towns Insolvency Act*, *S.* 99.

A person under the age of majority cannot be adjudicated as insolvent for failure to pay the debts of a trading firm though he has a right to participate in its property after its obligations are discharged. It does not, however, follow that a trading concern carried on for the benefit of one or more adult persons and a minor may not be adjudicated as insolvent in the firm name in which its business was carried on, and the pro-

perty of such concern dealt with in the insolvency proceedings for the benefit of the general body of creditors : *Lovell* v. *Beauchamp*, (1894) A. C. 607, *Foll.* [P 20 C 2; P 21 C 1]

Dipchand Chandumal — for Applicants.

Kalumal Pahlumal—for minor Debtor.

Judgment.—This is an application by two petitioning creditors to adjudicate the firm of Hiralal Shivnarain as insolvents. It is stated in the petition that the firm inter alia consisted of one Brijlal Mansharam as its partner and carried on business at Karachi and elsewhere.

The right of the petitioning creditors to present the petition has not been seriously contested. Messrs. Shaw Wallace and Co., one of the petitioning creditors have a secured claim extending to over a lac of rupees which has merged into an award made rule of the Court. The balance of the amount due to them after deducting the estimated value of their security is several thousands of rupees far in excess of the minimum of Rs. 500 prescribed by the Act to found the petition. The acts of insolvency complained of are more or less admitted by Brijlal the principal person concerned in the carrying on the business of the firm. He admits having left Karachi shortly before the petition though he explains that it was for the purpose of arranging for funds to pay off his pressing creditors, and further admits that during his absence, the manager for the time being closed the business and put up a notice under the signature of his pleaders requiring the creditors to communicate with the pleaders. These acts are sufficient to constitute an act of bankruptcy within the meaning of Cl. (d), sub-Cls. (2) and (3) and Cl. (g) of S. 6 of the Act.

The main point urged in the case is as to the form in which the order of adjudication should be passed.

An application has been filed on behalf of Shubhkaran, a minor, by his guardian one Beharilal objecting to the firm of Hiralal Shivnarain being adjudicated as insolvents. It appears that Shivnarain is the name of his adopted father and Hiralal is the name of Shivnarain's father. The circumstances under which Brijlal continued to carry on business of the firm of Hiralal Shivnarain after the death of Shivnarain and which form the substratum of this objection may be briefly stated :

The firm of Hiralal Shivnarain has been in existence in Karachi for over forty years. It was started by Hiralal a Marwari resident of Delhi. He died in Sambat 1968 or 1911 A. D. The business was continued by his son Shivnarain in the same name. Brijlal who had worked as a paid servant of Hiralal for five years during his lifetime and had left his service was taken back into the business by Shivnarain in Sambat 1971 or 1914 A. D. as a partner with three annas share. Shivnarain died in Sambat 1976 or 1919 A. D. leaving a mother Chandibai and a widow Rampiari, the latter being a minor then. He also left three daughters but no son. Chandibai who acted as the de facto guardian of Rampiari and managed the estate with the aid of one Hurmukhrai, the son-in-law of Shivnarain, permitted Brijlal to continue to carry on the business and within a few days thereafter raised his share to five annas in the rupee. Three months later Rampiari was made to adopt Subhkaran as her son and the estate which vested in him on his adoption continued under the same management and the business carried on as before.

The chief business of Hiralal Shivnarain at Karachi was in piecegoods which were indented for through local importing firms and sold by the firm either locally or up-country. It is a matter of common knowledge that so long as the markets keep steady or so long as the importing firms consider their dealers sufficiently strong to make good the estimated loss on such goods, they do not demand immediate payment for the goods on arrival and allow a latitude of two or three years' time to their dealers to pay for and take delivery of the goods according to their convenience, and in the meanwhile they store such goods in their own godowns subject to their lien for the unpaid purchase money. This practice enabled the firm of Hiralal Shivnarain to invest their surplus capital in the subsidiary business of buying and selling lands at Karachi and of retaining in their possession as the assets of the firm immovable property at Karachi as a guarantee of their solvency and as an inducement to the importing firms to afford greater facilities to the firm to take delivery of their goods at their convenience.

The purchase and sale of the immovable properties also afforded them an opportunity of speculating in land and making some profit therefrom. A khata of the purchases and sales made by the firm appears to have been maintained in the firm's books which were treated in every respect as the firm's property. For properties purchased during the time of the partnership between Shivnarain and Brijlal and which are still in existence the firm paid a sum of Rs. 1,41,000. After Shivnarain's death, Brijlal likewise purchased certain properties on behalf of the firm and in the name of the firm with the exception of one property which he purchased in the name of Hurmukhrai Shivnarain. For all such properties which have not been sold and still belong to the firm Brijlal paid a sum of Rs. 2,30,000. The total capital of the firm therefore, locked up in the purchase of immovable properties is Rs. 3,71,000. All this money is said to be the profits of the firm during prosperous years.

In 1922 the cloth market had considerably declined and the estimated loss on the piecegoods lying on their account and risk was heavy. A sum of Rs. 1,85,000 was required to be paid as the purchase price or as deposit of piecegoods which had been stored for a long time. An application was made under the Guardians and Wards Act, VIII of 1890, to the District Judge, Delhi, in whose jurisdiction the minor Shubhkaran resided for appointment of four guardians of the property of the minor. These guardians were (a) Chandibai the mother, (b) Hurmukhrai the son-in-law, (c) Brijlal, the partner, and (d) Srilal, the paternal uncle of Shivnarain.

These four persons were duly appointed as guardians and permitted by the Court to mortgage certain properties to pay for the piecegoods. Exhibit 13 is the application for guardianship ; Exs. 11 and 12 are the orders passed by the Court. The guardians mortgaged some of the firm's properties and the business was carried on for three years more, the accounts of the business being submitted every six months to the District Judge, Delhi. The business, however, seems to have suffered further losses both on account of the decline of the piecegoods market and the land market resulting in the closing of the business and the filing of the present petition.

As the minor Shubhkaran is not represented in these proceedings by his certificated guardians, it is urged that his objections cannot, as a matter of right, be considered by the Court. This is no doubt true to a certain extent. The interests of the certificated guardians or at any rate some of them are adverse to the minor, and as any delay in the passing of an order of adjudication until such time as the minor is properly represented is likely to prejudice the general body of creditors. I have considered his case suo moto and have permitted the learned pleader appearing for him to appear *amicus curiae*.

He has contended that the only order which the Court can pass under the circumstances of the present case is an order of adjudication against Brijlal personally having the effect of vesting his personal property only in the Official Receiver and that the Official Receiver should then institute proceedings against Shubhkaran for settlement of the account of the business carried on in the name of Hiralal Shivnarain and for recovery of such property as may come to the share of Brijlal. He has further stated that it is not open to the Court to pass an order of adjudication against the firm of Hiralal Shivnarain, however limited such order may be so as not to prejudicially affect the minor.

Two propositions are no doubt now well settled : first, that a person who is under the age of majority cannot become a partner by contract : *Mohori Bibee* v. *Dharmodas Ghose* (1). He cannot, therefore, be one of the group of persons who are called the " firm" as defined by S. 239, Indian Contract Act. He may be admitted to the benefits of a firm but cannot be made personally liable for any obligations of the firm. His share in the property of the firm is liable for the obligations of the firm and the share of which S. 247 Indian Contract Act speaks is no more than his right to participate in the property of the firm after its obligations have been satisfied : *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (2). And secondly, that a person under the age of majority cannot be adjudicated as insolvent for failure to pay the debts of a trading firm though he has a right to

(1) [1903] 30 Cal. 539=30 I.A. 114=7 C.W.N. 441=8 Sar. 374 (P.C.).
(2) A.I.R. 1922 P.C. 297=49 Cal. 560.

participate in its property after its obligations are discharged. It does not, however, follow that a trading concern carried on for the benefit of one or more adult persons and a minor may not be adjudicated as insolvent in the firm name in which its business was carried on, and the property of such concern dealt with in the insolvency proceedings for the benefit of the general body of creditors.

In *Lovell* v. *Beauchamp* (3) where the firm of Beauchamp Bros. consisted of two partners Ralph Beauchamp an adult and Gilbert Walter Beauchamp an infant, the receiving order passed by the lower Court as against the firm of Beauchamp Bros. was amended by the House of Lords to be one against Beauchamp Bros. other than Gilbert Walter Beauchamp, which was said to operate as a valid receiving order against Ralph Beauchamp personally and in order to protect the partnership assets for the benefit of the creditors, the trustee in bankruptcy was appointed as receiver of the partnership assets.

Under the rules of the English Bankruptcy Act, Rr. 285 and 288, the Court may pass a receiving order against a firm but is required to pass an order of adjudication against the individuals constituting the firm. That distinction is, however, done away with under the Indian Acts and the case of *Beauchamp Bros* (3), in so far as the form in which an order of adjudication may be passed in lieu of a receiving order has received legislative recognition in cl. (ii) of S. 99 of the Presidency Towns Insolvency Act of 1909 which reads as follows :

"99. (ii) In the case of a firm in which one partner is an infant, and adjudication order may be made against the firm other than the infant partner.

Though Cl. (ii) refers to an infant as a partner in the firm and not as a person admitted to the benefits of the firm in conformity with the ruling of the Privy Council in *Mohori Bibee's* case (1) it would appear that its effect is the same and that an order of adjudication may be passed against the firm other than the infant which will have the effect of vesting the property of his adult partners in the Official Assignee and would vest in him all such rights and powers as the adult partners had in dealing with the property of the firm before the order of adjudication. It would also appear that in such a case it is competent for the Insolvency Court by virtue of S. 7 of the Presidency Towns Insolvency Act corresponding to S. 105 of the English Bankruptcy Act of 1914 to decide for the purpose of doing complete justice or making a complete distribution of property, all such questions as may arise between the adult partners of the firm and a person under the age of majority who has been admitted to the benefits of that firm and for that purpose to appoint the Official Assignee as Receiver of the assets of the firm as was done in *Beauchamp's* case (3).

Similar provisions exist in the Provincial Insolvency Act and the rules framed thereunder which are in force in Sind. S. 79, Cl. (c) empowers the Local Government to prescribe by rules the procedure to be followed where the debtor is a firm. It contemplates a firm being adjudicated as insolvent. R. 10, Cl. (5) of the Sind Provincial Insolvency Rules, 1925, declares what the effect of such order is, while S. 4 of the Act, which corresponds to S. 7 of the Presidency Towns Insolvency Act likewise empowers the Insolvency Court to deal with the equities between the adult members of the firm and a person under the age of majority admitted to its benefits.

Reliance has been placed on the case of *Sanyasi Charan Mandal* v. *Asutosh Ghosh* (4) where the case of *Lovell* v. *Beauchamp* (3) was distinguished. It is sufficient to observe that this case was decided under the provisions of the repealed Provincial Insolvency Act III of 1907 which was defective in several particulars. It contained no express provision for an order of adjudication being passed against a firm in the firm name. It was an Act passed prior to the present Civil P. C. Act V of 1908, which incorporated in O. 30 the provisions of O. 48-A of the Rules of the Supreme Courts and recognized proceedings being instituted by and against firms in the firm name and also against an individual carrying on business in an assumed name to be sued in that name as a firm name. The provisions of S. 4 of the present Act likewise find no place in the old Act.

(1) [1915] 42 Cal. 225=26 I. C. 836.

(3) [1894] A.C. 607=63 L. J. Q.B. 802=43 W R. 129 11 R. 45=71 L.T. 587 1 Manson 467.

No question of a dissolution of partnership property on the insolvency of such partners arises in the present case. Shubhkaran is not a partner in the business and there is no occasion, therefore, for a suit for dissolution of the partnership with him being filed. All that Shubhkaran is entitled to is such portion of the assets of the business carried on by Brijlal in the name of Hiralal Shivnarain as may remain after its debts are discharged ; and, if prior to his insolvency Brijlal could deal with the property himself, there is no reason why the Official Receiver in whom his rights have vested may not deal with them.

With all due respect to the learned Judges of the Calcutta High Court, I am not prepared to accept the view that the appointment of the trustee in bankruptcy as Receiver of the partnership assets by the House of Lords in *Beauchamp's* case (3) was passed in the original action instituted by the creditors for recovery of their debts against the firm of Beauchamp Bros. which was decreed by the Court of Queen's Bench without any reserve notwithstanding the objection of the minors and which was also before the House of Lords. It purports to have been based on the bankruptcy proceedings. In Lindley on Partnership at page 800, Edition of 1924, it is stated as follows :

> As on the bankruptcy of one only of several partners the joint assets do not vest in his trustee, an action in the Chancery Division to ascertain the share of the bankrupt was formerly necessary ; but now the Court in Bankruptcy can itself ascertain such share.

There is no limitation in this passage excluding the rights of the Bankruptcy Court to determine such share where one of the partners is an infant, and if the Bankruptcy Court is competent to determine the share, it may as well appoint a Receiver pending the determination of such share. An order passed in the form suggested in the case of *Beauchamp Bros.* (3) has obvious advantages. The petitioning creditors have no personal knowledge if Brijlal had any other adult partners in the business whose names he is now interested in withholding. The order will further facilitate the Official Receiver in the recovery of the outstanding and other property of the firm in the possession of debtors who are accountable to the firm.

It is urged that there can be no firm consisting of one person only and that an order of adjudication of a firm in which there are no partners is a misnomer. If an individual carrying on business in the name of the firm which he has adopted may be proceeded with and adjudicated in the name of the firm, there is no reason why he may not be likewise adjudicated when he has admitted a person under the age of majority to share with him in the business.

A firm inter alia denotes the style or title under which one or several persons carry on business as also the partnership itself, that is, the individuals forming the partnership : Byrne's Law Dictionary. Certain questions may arise on the one hand as to the rights of the creditors to follow up in these proceedings the property of the partnership business carried on by Shivnarain with Brijlal during his lifetime and also with regard to the right, if any, to hold the private property of Shubhkaran liable for the debts of the business which is alleged to be his "kul achar" and to have descended to him from his ancestors and which was merely continued by his de facto and de jure guardian during his minority. I wish to express no opinion on either of the two points at present as Shubhkaran is not properly represented before me.

For the present, I pass an order adjudicating the firm of Hiralal Shivnarain of Karachi excluding Shubhkaran Shivnarain as insolvents, and order that the property of Brijlal and the assets of the business carried on by him in the name of Hiralal Shivnarain do vest in him. I further appoint the Official Receiver as Receiver of all the assets of the said business and of all the property which was in the possession of Brijlal at the date of the present petition with liberty to Shubhkaran to apply for any of such property being released from the hands of the Official Receiver.

This order will not affect the creditors from proceeding by a regular suit against the private property belonging to Shubhkaran, if they consider that such property is liable for their debts.

Order accordingly.

A. I. R. 1927 Sind 23

KINCAID, J. C., AND BARLEE, A. J. C.

Karachi Municipality—Applicant.

v.

Jafferji Tayabji—Accused— Opposite Party.

Criminal Application No. 66 of 1926. Decided on 29th June 1926, from an order of the City Mag., Karachi, D/- 25th January 1926.

Bombay District Municipal Act, (3 of 1901) S. 86—Magistrate's order on appeal under S. 86 is not revisable by High Court under Criminal P. C., S. 435.

Under S. 86 a Magistrate hearing an appeal is merely an appellate authority having jurisdiction given by the Act to deal with the question of a civil liability. He is, therefore, not an inferior criminal Court within S. 435, and the High Court has no power to revise his order : 9 *Bom. L. R.* 1347, *Foll.* [P 23, C 1,2]

Kundanmal Dayaram—for Applicant.

Srikishendas H. Lulla—for Opposite Party.

T. G. Elphinston—for the Crown.

Judgment.—The facts of this interesting application are very simple. A certain Seth Jafferji Tyabji or his contractor occupied a plot of Municipal land with the Municipality's permission from the 17th of May to the 10th of September 1924. On the 14th of December 1924, the Municipality sent Seth Jafferji a notice of demand for Rs. 192-6-7. This sum admittedly he paid. He appealed under S. 86 of the Bombay District Municipal Act on the ground that the money could not be recovered from him under S. 82. He made certain other objections which we need not consider here. On the 25th January 1926, the learned City Magistrate, Mr. Richardson, held that the amount was not recoverable under S. 82 and allowed the appeal. Against this order of the Magistrate the Municipality has applied to us under Ss. 435 and 439 of the Criminal P. C.

At the outset of the case, the learned Public Prosecutor to whom we are obliged for his assistance in the matter, raised a preliminary objection that no revision lay. He drew our attention to the case *In re Dalsukhram Hargovandas* (1). It was therein laid down by their Lordships that :

under S. 86 of the Bombay District Municipal Act, 1901, a Magistrate hearing an appeal of the kind mentioned in the section is merely an appellate authority having jurisdiction given by the Act to deal with the question of a civil liability. He is, therefore, not an inferior criminal Court to which alone the revisional jurisdiction of the High Court applies under S. 435 of the Criminal P. C., 1898.

That case, as it seems to us, is on all fours with the present. A notice of demand was made under S. 82 of the Municipal Act and was set aside by the learned City Magistrate under S. 86. As in doing so, he was not acting as an inferior criminal Court, we have no power to revise his order.

Mr. Kundanmal, who has argued the case for the Municipality with much ability, has pressed upon us the view that the matter was outside the purview of S. 82 and that, therefore, in hearing an appeal under S. 86, the learned City Magistrate went outside his jurisdiction. It seems to me, however, that this is a dangerous argument. It would amount to this. The power of the learned City Magistrate would be limited to confirming or at least not interfering with all acts of the Municipality under S. 82. If they were proper acts, the learned City Magistrate would naturally confirm them. If, on the other hand, they were improper acts we would have no jurisdiction in the matter and, therefore, could not interfere with the order of the Magistrate. The proper view, as it appears to us, is that the Municipality endeavoured to use the summary procedure of S. 82 to recover a sum of money that may or may not have been due to them under some other sections. They used the printed form under which notices of demand are made under S. 82 and they informed the opponent that he could appeal under S. 86 to the City Magistrate. In trying to levy a sum of Rs. 192-6-7 by an improper procedure they laid themselves open to correction by the learned Magistrate. In correcting them he was not acting outside his jurisdiction. As he was acting within the jurisdiction conferred on him under S. 86, we have no power, according to the principle laid down in the case reported as *In re Dalsukhram Hargovandas* (1) to revise this decision.

We, therefore, dismiss the application.

Application dismissed.

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(1) [1907] 9 Bom. L. R. 1347.

A. I. R. 1927 Sind 24

RUPCHAND BILARAM, A. J. C.

Haroon Haji Hamid—Plaintiff.

v.

Meherali Din Mahomed—Defendant.

Original Civil Suit No. 52 of 1926, Decided on 23rd March 1926.

(a) *Transfer of Property Act, S. 3—Notice to agent in the course of business is sufficient notice to principal—Contract Act, S. 229.*

Both under S. 229, Contract Act, and S. 3 of T. P. Act a notice to the agent in the course of the business transacted by him on behalf of his principal has as between the principal and third parties the same effect as if it had been given to or obtained by the principal: 25 *All.* 1 (*P.C.*), *Rel. on.* [P 25, C. 1]

(b) *Transfer of Property Act, S. 106—Person not prepared to accept 15 days notice is not entitled to ask the notice to be served in the manner prescribed under S. 106.*

On the one hand S. 106 requires a notice of only fifteen days to be given to terminate the tenancy, and on the other it prescribes the manner in which such notice should be delivered. Unless the defendant is prepared to accept the shorter statutory notice of fifteen days it is not open to him to claim that he should be served with the notice in the manner prescribed by that section. [P. 25 C. 1]

Nadirshah Naoroji—for Plaintiff.

Srikishendas H. Lulla—for Defendant.

Judgment.—This is a suit by a landlord to eject his monthly tenant. The only defence to the action is as to the validity of the notice to quit.

It appears that on July 31, 1925, the plaintiff sent a notice, Ex. 4-1, to the defendant asking to vacate the premises at the expiry of a full calendar month from that date. On August 17, 1925, Messrs. Srikishindas & Co., Pleaders, by their letter, Ex. 4-2, replied on behalf of the defendant inter alia disputing the validity of the notice on the ground that it was delivered to the defendant on August 1, and was, therefore, insufficient.

The defendant failed to vacate the premises and as the plaintiff would not accept rent from him, Messrs. Srikishindas & Co. sent the rent with their letters, Exs. 4-3 and 4-4 dated September 17, 1925, and October 8, 1925. Thereupon the plaintiff's pleaders sent the letter, Ex. 4-5, on October 21, 1925, to Messrs. Srikishindas & Co. asserting that the notice, Ex. 4-1, was duly delivered to the defendant on July 31, 1925, and that the plaintiff was, therefore, entitled to sue in ejectment, and without prejudice to that contention stated as follows:

However, to avoid unnecessary dispute and litigation over a minor point, we under instructions from our client hereby give notice to your client through you as his legal advisers, that your client should vacate the premises at the end of the next calendar month of November, failing which ejectment proceedings will be at once started against you at his risk as to costs and consequences, which please note.

Nearly twenty-one days thereafter the plaintiff's pleaders received the reply, Ex. 4-6, dated November 12, 1925, from Messrs. Srikishindas & Co. to the following effect:

We have to-day informed him of the contents of your letter of the 21st ultimo, delivered to us on the 22nd. He instructed us to confirm the previous correspondence. It is no use going to details now.

You will please see that if your client really intends giving our client a valid notice to quit, he must address himself direct to our client, as our client does not see us except when he has to send your client rent which he does not receive from him in the usual course.

The plaintiff declined to serve any fresh notice on the defendant. He refused to accept the rent for the month of December 1925, sent by the same firm of pleaders with letter, Ex. 4-7, dated January 11, 1926, and instituted the present suit, basing his cause of action on this second notice to quit, Ex. 4-6 dated October 21, 1925. The defendant is represented by the same firm of pleaders in this suit and Mr. Srikishindas has challenged the validity of the notice, Ex. 4-6, on an alternative ground. He has urged that the notice was not valid as it was not served on the defendant personally or on a member of his family as contemplated by S. 106 of the Transfer of Property Act. In the alternative he has contended that his firm were not the agents of the defendant for receiving a notice to quit and that the notice served on them was, therefore, likewise invalid. A somewhat similar defence was raised before Fulton, J., in *Bhojhabai Allarakhia* v. *Hayem Samuel* (1), and disallowed, and with the observations made by his Lordship in that case I respectfully concur. According to English Law a notice to quit need not be served personally upon the tenant. It may be served upon his agent and when so served it is not necessary to prove that it actually came to his knowledge. It is sufficient if the fact of the agency is established: Halsbury's Laws of England,

(1) [1898] 22 Bom. 754.

Vol. 18, para. 920; *Doe* v. *Ongley* (2); *Tanham* v. *Nicholson* (3). Apart from the provisions of S. 106, Transfer of Property Act, the same considerations would apply here. Both under S. 229, Indian Contract Act, and S. 3 of the Transfer of Property Act a notice to the agent in the course of the business transacted by him on behalf of his principal has as between the principal and third parties the same effect as if it had been given to or obtained by the principal: *Raja Rampal Singh* v. *Balbhadar Singh* (4). On the one hand S. 106, Transfer of Property Act, requires a notice of only fifteen days to terminate the tenancy, and on the other it prescribes the manner in which such notice should be delivered. Unless the defendant is prepared to accept the shorter statutory notice of fifteen days it is not open to him to claim that he should be served with the notice in the manner prescribed by that section. The notice was admittedly communicated to him on November 12, 1925, i. e., eighteen days before the termination of the tenancy, and was, therefore, good notice under S. 106, Transfer of Property Act. He has claimed the customary notice of one month, and, therefore, it is sufficient if it be shown that Messrs. Srikishindas & Co. were his agents for receiving the notice.

In *Doe* v. *Ongley* (2) such authority was presumed when the notice was served on the attorney who had paid the rent. In the present case Messrs. Srikishindas & Co. not only paid the rent both before and after the receipt of Ex. 4-5 but they failed to disclaim their authority up to November 12, 1925, and thereby induced the plaintiff to presume that they had such authority and to act on it to his prejudice. I hold that they had the authority and the notice is valid. There will, therefore, be a decree for ejectment, for arrears of rent and mesne profits at the same rate as claimed and costs. The defendant will be at liberty to remove the entire construction by him without causing any injury to the rest of the property. This should be done within 10 days.

Suit decreed.

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(2) (1850) 10 C.B. 25 : 20 L.J.C.P. 26.
(3) (1872) 5 H.L. 561 : Ir. R. 6 C.L. 188.
(4) (1903) 25 All. 1 : 29 I.A. 203 : 8 Sar. 310 (P.C.).

A. I. R. 1927 Sind 25

LOBO, A. J. C.

Devsi Narain Patel—Plaintiff.

v.

Hassanand and *another*—Defendants.

Original Civil Suit No. 768 of 1925, Decided on 30th April 1926.

(a) Civil P. C., O. 12, R. 6—Admission must be clear and to the effect that money is recoverable in the action in which admission is made.

In order to entitle the plaintiff to have judgment on an admission there must be a clear admission that the money is due and recoverable in the action in which the admission is made and the admission also must be clear and unequivocal. An ambiguous admission in a written statement that a certain sum of money was due to the plaintiff is not such an admission as would justify an order under O. 12, R. 6.

[P. 26, C. 2 & P. 27, C. 1]

(b) Civil P. C., O. 39, R. 10—Admission which is insufficient under O. 12, R. 6 is also so under O. 39, R. 10.

An admission insufficient for an order under O. 12, R. 6 is also insufficient for an order under O. 39, R. 10 as the scope of O. 39, R. 10 is admittedly less wide than that of O. 12, R. 6 for it is confined to an admission contained in the pleadings. [P. 27, C. 2]

Kimatrai Bhojraj—for Plaintiff.

Dipchand Chandumal and *Sugandal H. Jeswani*—for Defendant No. 1.

Order.—This is an application which as amended is one under O. 12, R. 6 and O. 39, R. 10, Civil P. C. The plaintiff in the first instance asks the Court to enter judgment in his favour for Rs. 10,892-12-6, on the admissions of the defendant alleged to be contained in his written statement as well as in certain correspondence prior to the suit. In the alternative he prays that the Court may order the amount be deposited in Court or paid to the plaintiff with security subject to the further orders of the Court.

The plaintiff's suit is for taking of partnership accounts and for the recovery of a specific sum of Rs. 2,753. He alleges that he and the defendant in January 1924, entered into a partnership for the purchase, sale and export of scrap iron in the name and style of Pherwani Devsi & Co., that the said firm purchased from the plaintiff one thousand tons of scrap iron on 18th January 1924, at the rate of Rs. 25 per ton, and that 43½ tons of scrap iron were also purchased by the firm from other sources; that the value of these goods amounted to Rs. 25,000 odd from which the plaintiff was to be paid Rs. 10,450 cash while the balance of

Rs. 15,000 was to be invested in the partnership. He admits the receipt of Rs. 8,000 and claims the balance of Rs. 2,450 with interest from the defendant. The plaintiff also alleges that the defendant committed various breaches of the partnership agreement, that he falsely alleges that there was a shortage in the scrap iron supplied by the plaintiff, and prays for the accounts of the partnership with Defendant No. 1 being taken and the amount found due thereon paid to him. The second subsidiary prayer is for the sum of Rs. 2,450 referred to above with interest thereon.

The written statement of the defendant is not very clearly put but if analyzed will be found to contain a twofold defence. The substance of it is that the C. & I. Engineering Co. in which the defendant is a partner held an order from Genoa for the supply of a thousand tons of scrap iron; that it was agreed that the plaintiff should supply the goods. If they fetched Rs. 25,000 and a profit of Rs. 3,000, Rs. 10,000 was to be given to the plaintiff and Rs. 15,000 was to form the plaintiff's share of capital in a partnership to be started between the plaintiff and the defendant in the name of Pherwani Devsi & Co., for the purchase and sale of scrap iron otherwise the goods were to be shipped by the C. & I. Engineering Co., on account of the plaintiff and the defendant was to be paid Rs. 1,500. The C. & I. Engineering Co. were to be the shipping agents in the one event of Pherwani Devsi & Co., in the other, of the plaintiff. It is alleged that the plaintiff delivered only 742½ tons, that these goods fetched an amount far below Rs. 25,000, that a claim for short delivery by the Genoa firm had to be met and that in these circumstances the goods were shipped for and on account of the plaintiff by the C. & I. Engineering Co. and that the plaintiff has to pay the defendant Rs. 1,500.

On these grounds it is urged that the suit as brought mainly for settlement of partnership accounts of the firm of Pherwani Devsi & Co. is incompetent. Without prejudice the defendant contends that he is entitled to Rs. 1,500 from the plaintiff and to Rs. 3,000 as damages for breach of the agreement to enter into partnership with him. Paragraph 24 of the written statement which is without prejudice states:

> . . . The C. & I. Engineering Co., who hold the moneys received on account of the plaintiff have repeatedly called upon the plaintiff to settle the whole account but he has failed to do so. The said firm even tendered a cheque for the amount that was due on the account but the plaintiff refused to accept the same.

This is the admission in the pleadings relied on by the plaintiff in support of the present application. In the case of *Landergan* v. *Feast* (1) (which was a decision in respect of O. 32, R. 6 of the English Rules which is similar in all material respects to O. 12, R. 6, Civil P. C.), it was said by Lopes, L. J., that:

> There must be a clear admission that the money is due and recoverable in the action in which the admission is made.

That decision has been cited and adopted by the Calcutta High Court in the case of *Galstaun* v. *Sassoon & Co.* (2) where Justices Mookerji and Rankin held that:

> In order to entitle the plaintiff to have judgment on an admission there must be a clear admission that the money is due and recoverable in the action in which the admission is made.

And again that "the admission also must be clear and unequivocal."

I have analyzed the written statement above, and the only possible conclusion I can come to is that the admission in para. 24 of the written statement, if it is an admission, is not such an admission as would entitle the plaintiff to ask the Court to enter judgment against the defendant in the light of the authorities I have referred to. There is no admission that any amount is payable to the plaintiff by the defendant in the suit. There is an admission made without prejudice that the firm of the C. & I. Engineering Co. in which the defendant is a partner has tendered a cheque for a certain amount. Even assuming that this amounts to an admission by the defendant, it is not an admission that the money is due and recoverable in the present action, for the main defence of the defendant is that there never was partnership between him and the plaintiff, and that, therefore, the suit which is mainly for taking the accounts of a partnership between the plaintiff and the defendant is incompetent.

Indeed the admission referred to above, if it is an admission, is as vague and ambiguous as the one dealt with by the learned Judges of the Calcutta High

(1) [1886] 34 W. R. 691=55 L. T. 42.
(2) A. I. R. 1924 Cal. 190.

Court in the case of *Koramall* v. *Mungilal* (3), where it was held that an ambiguous admission in a written statement that a certain sum of money was due to the plaintiff was not such an admission as would justify an order under O. 12, R. 6, Civil P. C.

So much for the admissions in the pleadings. The admission alleged to be contained in certain correspondence which passed between the parties prior to suit is, if anything, more ambiguous.

In the first place, at the present stage when the whole correspondence that passed between the parties has not been put in or explained by either party, it is scarcely fair to pick out individual letters and point to ambiguous admission therein as entitling the plaintiff to an order under O. 12, R. 6, Civil P. C. But even looking to the letters that have been relied on by the plaintiff for the above purpose, I cannot but come to the conclusion that they do not contain a clear and unequivocal admission that any amount is payable by the defendant to the plaintiff and recoverable in this suit. Mr. Kimatrai first referred to a letter dated 2nd July 1924, and to the following passage therein :

> The accounts in respect of the only transaction on partnership account are practically closed except for adjustments or shortage already reported to you.

To my mind this letter does not help the plaintiff. It is written on the letter heads of the C. & I. Engineering Co., and is signed by the defendant for the C. & I. Engineering Co. Again reliance is placed on a letter dated 15th August 1924, written by the pleader for the defendant to the plaintiff. The following passage therein is relied on :

> It is not feasible in view of the feelings between the parties to carry on the partnership any longer. No useful purpose can be served by depositing the balance in our client's hands in the joint name of the agreement parties. The best course would be to settle up the accounts at once, and take the balance due from our client.

It is obvious from a perusal of this letter that the learned gentleman who wrote it had entirely misappreciated the case of the defendant. That case has been set out in the written statement ; it may be true or it may be false, but as I have said above, the writer of the letter of the 15th August had certainly not been able to grasp the situation. Nor is there any admission in the letter that any specific sum of money is due and recoverable by the plaintiff from the defendant. Again reliance is placed on a letter of the 2nd of April 1925. The passage therein runs as follows :

> The amounts that are due to you after meeting all my claims remain in my books without interest from the day the transaction closed which please note.

This letter again is written obviously for the C. & I. Engineering Co. It is on their letter heads and is signed by the defendant. This letter was followed up by another letter on 13th April 1925, with which was enclosed a cheque for Rs. 6,185-4-11 as being the amount due from the defendant to the plaintiff. This is undoubtedly the strongest letter in favour of the plaintiff's contention of an admission in clear and unambiguous terms contained in the correspondence prior to suit, but the authorities which I have cited before require not only that the admission must be clear and unambiguous, but that it should be an admission that the money is due and recoverable in the action, which is before the Court, and I have stated above that the main defence of the defendant is that the suit as one for accounts of a partnership is incompetent. On these grounds I feel that the plaintiff has not succeeded in making out a case for entering a judgment against the defendant for any amount at all.

But the application is also based on O. 39, R. 10, Civil P. C. I do not, however, think that the plaintiff in the circumstances referred to above is entitled to get under the provisions of O. 39, R. 10, Civil P. C. what he cannot secure under the provisions of O. 12, R. 6, Civil P. C. Obviously the same principle with regard to a clear and unambiguous admission of money recoverable by the plaintiff from the defendant in the action in question governs O. 39, R. 10, as it governs O. 12, R. 6, Civil P. C. And, in my opinion, an admission insufficient for an order under O. 12, R. 6, Civil P. C. is also insufficient for an order under O. 39, R. 10, Civil P. C. The scope of O. 39, R. 10, Civil P. C. is admittedly less wide than that of O. 12, R. 6, Civil P. C. for it is confined to an admission contained in the pleadings.

For these reasons, I dismiss the application of the plaintiff, but make no order as to costs.

Application dismissed.

(3) [1920] 23 C. W. N. 1017=54 I. C. 836.

* * A. I. R. 1927 Sind 28

KINCAID, J. C., AND RUPCHAND BILARAM, A. J. C.

Emperor—Appellant.

v.

Stewart—Accused—Respondent.

Criminal Acquittal Appeal No. 1542 of 1926, Decided on 5th February 1926, from an order of acquittal by Kennedy, J. C.

* * (a) *Criminal P. C., S. 417—Order refusing to amend charge followed by acquittal is appealable.*

Although S. 417 gives no power of appeal against an order refusing to amend charges, but if such order is followed by an original or appellate order of acquittal, the Local Government may direct the Public Prosecutor to present an appeal : *Telang, J. in* 16 *Bom.* 414, *not Foll.* [P 29 C 2]

Per Rupchand Bilaram, A.J.C.—An interlocutory order which has resulted in the acquittal of the prisoner on charges for which he was tried, may no doubt, be made a ground of appeal under S. 417, Criminal P. C. But where the interlocutory order is an order passed under S. 227, Criminal P. C., refusing to add a fresh charge and for which a fresh prosecution is permissible, in that case there has been no acquittal of the prisoner in respect of such additional charge, and cannot be relied on as a ground in support of an appeal against the acquittal on other charges altogether : *Telang, J., in* 16 *Bom.* 414, *Foll.* [P 39, C 12]

* (b) *Practice—Discretion will not be ordinarily interfered with in appeal—Criminal P. C., S. 227.*

An appellate Court should be very slow to interfere with the discretion of a trial Court if not exercised in a perverse or arbitrary manner : 26 *All.* 288 (*P. C.*) and 42 *Bom.* 380 *P. C., Rel. on.* [P 30 C 1]

Where the trial Court feared that the recasting of the charges would embarrass the Jury and possibly prejudice the accused in his trial,

Held : that it cannot be said that such a reason was capricious or involved any disregard of any legal principle and certainly does not call for interference by High Court in appeal. [P 30 C 1]

(c) *Evidence Act, S. 8—Evidence of conduct or character is admissible if otherwise relevant—Evidence Act, S. 54.*

It is not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue : *Makin v. Attorney-General for New South Wales,* (1894) A. C. 57, *Foll.*

Evidence of defalcations both prior or subsequent whether such defalcations formed the basis of another charge on which the accused may have been acquitted or not are admissible in evidence to prove guilty intent as also to anticipate the defence of the non-existence of such intent. [P 30 C 2]

(d) *Penal Code, Ss. 403 and 436 — Criminal misappropriation and breach of trust.*

It is a possible view that an accused is guilty of criminal breach of trust between the misappropriation and the re-payment, but Court should be slow when re-payment is at once made on demand to assume guilt in accused person. Criminal liability is not the same as civil liability : *Lanier v. Rex,* (1914) *A. C.* 221, *Rel. on.* [P 31 C 2]

(e) *Criminal P. C., S. 193—Object of S. 193 would be frustrated if fresh charge is added or substituted in Sessions Court.*

The object of S. 193, Criminal P. C., in requiring that a Court of Sessions shall not take cognizance of an offence unless the accused has been committed to it by a competent Magistrate is to secure to the accused who is charged with a grave offence a preliminary enquiry which would afford him the opportunity of becoming acquainted with the circumstances of the offence, and to enable him to make his defence. This object would indubitably be frustrated, if a fresh charge is substituted or added in the Sessions Court on which the prosecution have not led evidence even in the Sessions Court but intend to lead evidence. [P 34 C 2]

(f) *Criminal P. C., S. 227—Object.*

It is doubtful if S. 227, Criminal P. C., intended to confer jurisdiction on the Sessions Court to add or substitute a new charge or fresh evidence led or to be led in the Sessions Court for the first time : 3 *Mad.* 351, *Rel. on.* [P 34 C 2]

(g) *Criminal P. C., S. 227—Instead of amendment of charge, acquittal on existing charge and fresh trial on new facts, is safer to avoid miscarriage of justice.*

Besides asking for an amendment which is likely to prejudice the prisoner, it is always open to the Crown to have the prisoner acquitted upon the original charge and to have him charged anew before the Magistrate according to the new facts. [P 35 C 1]

* (h) *Criminal P. C., S. 417—Order excluding evidence is appealable.*

Order excluding evidence can legitimately be attacked in an appeal against the order of acquittal. [P 39 C 2]

Parsram Tolaram—for the Crown.

T. G. Elphinston—for Respondent.

Kincaid, J. C.—The facts of this interesting appeal are shortly as follows :

Stewart, the respondent, was the Manager of the Palace Cinema. He was appointed to this post (Ex. 3) on the 8th January 1920, by Madan & Co. of Calcutta, a company that owns some 60 theatres all over India. His salary was

Rs. 450 per mensem and free quarters. The appointment was renewable from year to year and terminable on 3 months' notice.

On the 19th October 1924, Mr. Jehangir Madan, the Managing Director of Messrs. Madan & Co., paid a surprise visit to Karachi and visited the Palace Theatre. He demanded the accounts and files. He found some items not entered and asked Stewart about them, whereupon Stewart handed over Rs. 824 to cover them. Subsequently Mr. Madan took criminal proceedings against Stewart. The latter was committed to the Sessions Court of Karachi and tried by Mr. Kennedy, then Judicial Commissioner, with the aid of a jury. On the 7th August 1925 the jury unanimously found Stewart not guilty and the Court agreeing with their verdict directed that Stewart be acquitted and discharged.

On the 22nd October 1925, the Crown appealed against the order of acquittal on the grounds of refusal to amend the charges and misdirection and improper exclusion of evidence offered by the prosecution.

At the hearing Mr. Elphinston lodged a preliminary objection that no appeal lay.

It must be remembered that the accused would ordinarily have been tried by a First Class Magistrate on charges of criminal breach of trust as a clerk or servant (S. 408, Indian Penal Code). But Stewart was a European British subject so he claimed the right of trial under Ch. 33 of the Criminal P. C. In such circumstances an appeal lies to the High Court both on a matter of fact as well as on a matter of law : S. 449, Criminal P. C.

This statement of the law has not been seriously disputed by Mr. Elphinston, the learned counsel for the accused. He however has relied on the case of *Queen Empress* v. *Vajiram* (1). In that case Mr. Branson on behalf of the accused argued that no appeal lay against an order refusing to allow the addition of fresh charges. The argument of Mr. Branson commended itself to Telang, J., although he admitted that his decision thereon was not necessary for the disposal of the case. Telang, J.'s opinion was, therefore, an obiter dictum and with all respect to that eminent Judge, I find myself unable to follow it. S. 417 runs as follows :

> The Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

This section, no doubt, gives no power of appeal against an order refusing to amend charges, but if such order is followed by " an original or appellate order of acquittal " the Local Government may direct the Public Prosecutor to present an appeal. Here, there was an order of acquittal by the Sessions Judge. Therefore, an appeal by the Crown lay. The preliminary objection must thus be overruled.

I shall first deal with Charges Nos. 1 and 2, as they involve considerations different from Charge No. 3.

The charges against the accused were that he committed criminal breach of trust as a servant in the employment of Madan Theatres Ltd. and in such capacity being entrusted with certain money to wit :

During the year 1924.

(i) Rs. 570-12-6 received by him by cheque from the Secretary, Karachi Gymkhana, on or about 23rd September, 1924.

(ii) Rs. 531 received by him by cheque from the Secretary, Sind Club, on or about 23rd September, 1924.

The first theory of the prosecution was that these cheques had not been credited in the accounts and had, therefore, been embezzled. Further enquiry disclosed the fact that Stewart did pay these cheques into the account of the Palace Theatre at the Imperial Bank. By mistake the Bank clerk entered in the pass book the sum of Rs. 1,500 as paid in cash. This error seems to have misled both Stewart and the prosecution but the pay slips (Exs. 43 and 44) showed that Rs. 1,500 were paid partly in cash and partly in cheques ; and among the cheques were the two given to Stewart by the Secretaries of the Karachi Gymkhana and of the Sind Club.

On finding out their error the Crown wished to alter the charges from criminal breach of trust in respect of the value of the two cheques, to criminal breach of trust in respect of similar sum in cash. This the learned Sessions Judge refused to do. The ground of his refusal was that the whole course of the prosecution would

(1) [1892] 16 Bom. 414.

have to be altered and that the Court would have to go into the accounts from the beginning to see whether the cash had really been there on the 23rd September 1924, and if so whether it had then been abstracted by the accused.

Mr. Parsram for the Crown has contended that S. 227, Criminal P. C., vests wide powers in the Judge and that he should have exercised them. We are not, however, considering now whether it would have been open to the Judge to exercise his powers under S. 227 but whether he so misused the direction vested in him by that section that our interference is called for.

On this point a number of authorities have been quoted by the appellant's counsel but it is not necessary to refer to them all. It has been repeatedly held by the highest tribunals that an appellate Court should be very slow to interfere with the discretion of a trial Court if not exercised in a perverse or arbitrary manner. It will suffice if I refer to two instances. In *Jaipal Kunwar* v. *Indar Bahadur Singh* (2) their Lordships of the Privy Council observed :

> Their Lordships are always slow to reverse the decisions of Courts below made in the deliberate exercise of a discretion entrusted to them by Law.

Again in *Rehmat-un-nissa Begum* v. *Price* (3) the Privy Council reversed the decision of the High Court because it had interfered with the discretion exercised by the trial Judge. Their reasons were :

> In there circumstances the real question is whether there was or is any justification for questioning or disturbing the discretion exercised by the original Court when it passed the decree for dissolution in Nawab's favour. It cannot be said that the Court acted capriciously or in disregard of any legal principle in this exercise of its discretion. On the contrary, there are elements in the case which can fairly be regarded as ample warrant for the first Court's decision.

Now in this case the learned Judge undoubtedly feared that the re-casting of the charges would embarrass the jury and possibly prejudice the accused in his trial. It cannot be said that such a reason was capricious or involved any disregard of any legal principle. To me this reason seems wise and weighty and certainly does not call for our interference. In justice, moreover, to the accused it should, I think, be said that even if the charges had been re-cast, the result of the trial would most probably not have been different. For on the 30th September the accused, so far as I can judge from Ex. 7, does not appear to have had in cash a sum equal to that of the two cheques alleged at one time to have been embezzled.

There remains the third charge. The Crown wished to lead evidence of other irregularities of the accused to show that the alleged misappropriation of Rs. 202-14 was a dishonest misappropriation. Some of this evidence is on the record but the learned Judge in his summing up observed: "We are not to take into consideration the other allegations as to frauds committed by the accused." This observation, so the Crown Prosecutor has contended, excluded valuable evidence for the Crown and so unduly prejudiced the jury in the accused's favour.

The law on the admission of evidence, such as the Crown here wished to have had placed before the jury, has been summarized with great lucidity in *Makin* v. *Attorney-General for New South Wales* (4) :

> In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.

Now the law, as stated above, was not unknown to the learned and experienced trial Judge. This is clear from his order Ex. 21:

> Speaking generally, evidence which is adduced to prove that the accused has committed acts which are not the subject of charges in a trial is irrelevant and must be excluded, unless it is

(2) [1904] 26 All. 238=31 I.A. 67=7 O.C. 239=8 Sar. 625 (P.C.).

(3) [1918] 42 Bom. 380=45 I. C. 568=45 I. A. 61 (P. C.).

(1) [1894] A. C. 57=58 J. P. 148=63 L.J.P.C. 41=6 R. 373=17 Cox, C. C. 704=58 J. P. 148=69 L. T. 778.

otherwise relevant. It is urged in the present case that this evidence is relevant as tending to show conduct or knowledge but I am not satisfied that any such evidence at present is necessary. It is obvious to admit evidence which is not strictly necessary would, as pointed out above, have the effect of prejudicing the accused and possibly of misleading the Court. Except therefore, in so far as it is necessary for the purpose of introduction and explanation, I propose wholly to exclude all evidence as to any other acts of defalcations of which the accused may be suspected to have been guilty and confine the evidence rigorously to evidence tending to connect the accused with the three charges with which he has been charged in the present trial.

This order shows that the Crown did not urge the learned Judge to admit the evidence excluded by him so as to show the design and intention of the accused or to rebut his defence but to prove his conduct and practice; in other words to show that he was a person likely by his conduct and character to have committed the offence with which he was charged. The learned trial Judge's refusal to admit such evidence was, undoubtedly, a proper refusal.

In justice, however, to the accused I shall recapitulate the facts underlying the third charge. He used to advertise the Star Cinema in a local paper the *Sind Observer*. On the 31st May the books show a payment to that newspaper of Rs. 302-14-0. This sum was admittedly never paid. The accused's explanation is that he took the money himself to pay it to the *Sind Observer*, but the newspaper office had been changed and he could not find it. He made 2 or 3 attempts to do so but failed. Eventually he was able to communicate with the Manager of the *Sind Observer* and on the 3rd August he discussed the Theatre's debt, which by that time had grown airy to fresh advertisements.

There was a dispute about an item of Rs. 116 for the year 1923. Eventually Stewart gave and the Manager took Rs. 360-6-0 leaving the question of the disputed balance to be settled later. This sum Stewart paid by two cheques, one of Rs. 260 given him by Katrak & Co as payment for certain Glaxe slides shown by the Cinema, a cheque for Rs. 81, drawn by the bar contractor Khery and Rs. 19-6-0 in cash. Now the Glaxe cheque was not entered in the Company's books so that Stewart was at this time Rs. 562-14-0 (Rs. 260 plus Rs. 302-14-0), out in his account. But since he now paid Rs. 360-6-0 over to the *Sind Observer*, the amount due by him to Madan & Co. was reduced to Rs. 202-8-0. It is this sum that the accused was charged with having criminally misappropriated.

Now in the first place it must be remembered that directly the Manager Mr. Madan questioned the accused about his accounts, he actually paid him Rs. 260, to cover the Glaxe cheque. So far, therefore, from retaining Rs. 202-8-0 he overpaid his debt by Rs. 57-8-0. The learned Public Prosecutor has contended that repayment does not condone the offence and that the accused was guilty of criminal breach of trust between the misappropriation and the re-payment. This is, no doubt, a possible view. But Judges should be slow when re-payment is at once made on demand to assume guilt in an accused person. Criminal liability is not the same as civil liability. This was authoritatively expounded by Lord Shaw of Dunfermline in *Lanier* v. *Rex* (5). The following passage from his judgment illustrates this:

> The mixture of the funds of another with one's own funds may be in many cases natural and proper, in other cases convenient but irregular, and in the third, both irregular and criminal. The distinctions between these cases require to be treated with the greatest judicial care, so as, while preserving the amplest civil responsibility, to prevent the third of criminal category from being extended to mistaken though convenient acts....(otherwise) all persons taking charge even for a day, or at the earnest solicitation of friends, of funds for investment, could be held criminally liable for errors in investment, or even for sanguine forecasts about investments, although their motives had been generous and their conduct undeniably honest.

In this case there are two circumstances that in our opinion, point to the honesty of the accused. The first is that he did his utmost to find the office of the Sind Observer in order to pay the money due to the newspaper. The learned trial Judge doubted the truth of that story, but will not seem preposterous to any one who knows Karachi city, its size and the insignificance of the office of the Sind Observer. It may be said that the accused should, on finding himself unable to pay the Sind Observer the Rs. 302-14-0 have made a cross entry in the account books. This brings us to the second circumstance in the accused's favour.

(5) [1914] A. C. 221=83 L. J. P. C. 116=21 Cox. C. C. 53=110 L. T. 326=30 T.L.R. 53.

He did not keep the account books himself. They were kept by an incompetent individual called Appu who also sold tickets. It is true that they were signed daily by the accused. But the accused repeatedly wrote to Messrs. Madan & Co., to have the books audited and to send him some trained accountant as he himself knew nothing of book-keeping.

It must also be remembered that Appu, although an ignoramus, was at the same time a Parsi and would, therefore, have probably reported to Mr. Madan any criminal irregularities, committed by Stewart. It is noteworthy that the Crown have not called Appu as a witness. It is, therefore, evident that the 3rd charge brought against the accused must have failed before any jury. In these circumstances, it is really unnecessary to consider the other evidence that the Crown wished to lead in the lower Court. (The judgment then narrated the several pieces of evidence and proceeded.) This cursory examination of the evidence which the Crown wished to lead is sufficient to show that it would not have helped the Jury to arrive at a decision adverse to the accused. Indeed if led, this evidence would probably have fortified the Jury's belief in his innocence.

There is only one other matter to which I would now refer and that is the observation of the learned trial Judge that it was still open to the Crown to proceed against the accused for other alleged frauds, committed by him while Manager of Messrs. Madan & Co. I wish to record our opinion that such action would be an abuse of the process of the Court. The accused has been tried twice and acquitted on charges of criminal breach of trust. The Crown has lodged an appeal against one acquittal. That appeal as I have shown, is not justified by the record. To bring the accused to trial again would be to lend the power of the Crown to the gratification of private malice. We reject the appeal and order the accused's bail bond to be discharged.

Rupchand Bilaram, A. J. C.—Briefly stated, the facts as disclosed by the evidence of the complainant, Jehangir Jamshedji Madan, and leading up to the prosecution of the opponent, Stewart, for embezzlement are to the following effect :—

The complainant is one of the Directors of Messrs. Madan Ltd. and one of the proprietors of Messrs. F. F. Madan & Co., who are the Managing Agents of Messrs. Madan Ltd. The head office of the complainant and his Company is at Calcutta. The Company bought the local Palace Theatre in 1920, and appointed the opponent as their General Manager, he being in the employment of the former owner of the concern. They sent down one Ranghina, a Parsi, from Calcutta to work as the accountant and cashier at the Palace Theatre who was primarily responsible for keeping accurate accounts. In 1921 they shifted Ranghina from the Palace Theatre to another local concern of theirs called the Star Cinema. About the time Ranghina was transferred one Appu was appointed as cashier and for sometime he kept accounts till one Bharda another Parsi, was sent down from Calcutta to keep the accounts. Both Ranghina and Bharda helped the opponent in the general management of the business in addition to keeping accounts. Bharda left in February 1924, and Appu thereafter again kept the accounts and worked as a cashier. He was helped off and on by Ranghina and by Burjorji, Ex. 35, a Parsi operator at the Cinema. The accountant in charge was required to prepare monthly accounts, which were countersigned by the opponent and submitted to the head office at Calcutta.

The local expenses of the Palace Theatre were about Rs. 4,000 per month. The opponent was empowered to retain in his hands sufficient funds from the intakings for his monthly expenses and send on the excess earings to the Bank. He could cash cheques made out in the name of the Company but had no power to withdraw any sums deposited in the Bank. The earnings of the Theatre consisted of certain cash money and cheques received from sale of tickets on credit and also cheques received in payment of certain advertisements printed in the daily programmes of the Theatre or exhibited by slides at the show during the usual intervals between different parts of the pictures and during the intervals of a theatrical performance when any such performance was given by a touring Company.

The opponent was permitted to cash the cheques and to use the money for the purposes of the Company. He had living

quarters in the main Theatre building wherein he kept the Company's money in an iron safe belonging to the Company. During the time Bharda worked as an accountant, there were certain discrepancies and on 21st March, 1924, the opponent wrote a letter, Ex. 26, drawing the attention of the Company to the facts that the accounts had been so badly kept that at the end of the preceding year he held surplus cash in hand which he could not account for. He pointed out in that letter that he did not know anything about accounts and book keeping and added as follows :

Mr. Ranghina went and took over the Star Cinema in November, 1921, and it was with regret that you left me with the whole of last year without any accountant. Mr. Ranghina came and instructed Mr. Appu from time to time as to how the books were required to be kept but this man seemed to be very slow at the accounts. Hence my request, to send me an accountant in the place of Mr. Ranghina. I quite realise I am responsible to you for all discrepancies but at the same time if the accountant neglects to enter up items or makes wrong figures in the totals as you have pointed out he must be held responsible.

In October, 1924, the complainant paid a surprise visit to the Palace Theatre, and on 20th October, 1924, asked for the accounts being shown to him and the amount shown as the balance in the account books being handed over to him which was done. He then asked for a sum of Rs. 240 being paid to him which according to the complainant had been realised by cashing a cheque for that amount issued by the Imperial Tobacco Co. in payment of slide advertisement charges and which was said not to have been entered in the account books. The opponent got perplexed and immediately paid up the amount and was then informed that his services were dispensed with. On the 22nd October, 1924, the complainant asked for payment of the amounts due on certain other cheques said to have been likewise cashed by the opponent, including a cheque of Messrs. Katrak & Co., in respect of a slide advertisement for Glaxe, and received immediate payment of different sums aggregating to Rs. 580.

Up to that time the opponent was living in his quarters, and was in possession of the Company's safe wherein he kept his private money as well. The complainant further found out from the inquiries that the opponent had received a cheque for Rs. 531 from the Secretary, Sind Club, and another cheque for Rs. 570-2-6 from the Secretary, Karachi Gymkhana, which were both cashed by him, and the amounts embezzied by him and that the opponent had attempted to screen his offence by obtaining a duplicate cheque from the Secretary, Karachi, Club, dated the 22nd October, 1924, which he handed over to the complainant and by his further attempting to offer cash to the Secretary, Karachi Gymkhana, in lieu of a duplicate cheque being issued, and on his failing in that attempt, by paying to Appu the equivalent amount on the 23rd October, 1924. The complainant admits that during this inquiry opponent was insolent to him. After some further inquiry in to the matter the complainant filed a private complaint against the opponent for embezzlement.

In the Committing Magistrate's Court, the complainant who was represented by competent legal advisers and had the sole charge of the prosecution, placed certain insufficient materials and on which the learned Additional City Magistrate committed the opponent to this Court on its Sessions Court side on a charge which was defective on the very face of it the opponent having been charged with embezzlement of Rs. 3,000 consisting of different items spread over a period of 2 years. At the request of the Crown the charge was amended. The complainant had the option of selecting three specified items said to have been misappropriated by the opponent in each year, and in respect of the items embezzled in each year there was a separate charge and a separate trial. Both the trials have resulted in his acquittal. The present appeal is in respect of embezzlement in 1924, and the charge as amended by the Crown clerk is in respect of the following three counts :

(1) Rupees 570 received by you by cheque from the Secretary, Karachi Gymkhana, on or about 23rd September 1924 ;

(2) Rupees 531 received by you by cheque from the Secretary, Sind Club, on or about 23rd September 1924 ;

(3) Rupees 202-14-0 being the difference between the amount actually paid by you to the Sind Observer Press on or about 4th August 1924, and the total of the amounts received by you from Katrak & Co. on or about 2nd August 1924, viz., Rs. 260 and the amount debited by you against your principals on 31st May 1924, as paid to the Sind Observer Press, viz., Rs. 302-14-0.

It was only at a very late stage of this trial and after evidence was laid down

that the Crown asked for the charge in respect of the first two counts being amended. It was proved by evidence that both the cheques of the Karachi Gymkhana and of the Sind Club had been sent to the Imperial Bank of India (who then acted as the bankers of the Company) by or under the direction of the opponent on 1st October 1924, and formed part of the sum of Rs. 1,500 remitted on that day and were duly credited to the Company in the Bank's pass book in one lump sum. Exhibits 31 and 15 are the original cheques. Exhibit 31 is dated the 23rd September 1924, and Ex. 15 is dated the 19th September 1924. Both the cheques were produced before the Additional City Magistrate and were marked by him as Exs. 56 and 57. Exs. 43 and 44 dated 30th September 1924, are the Pay in Slips addressed to the Imperial Bank of India showing details of the Rs. 1,500 sent to the Bank. Ex. 44 shows Rs. 1,114-12-6 was made up of cheques. The counterfoils of Exs. 43 and 44 were in the possession of the complainant. The inspection of the counter-foil book or the most casual enquiry at the Imperial Bank would have satisfied the complainant that the opponent had not cashed the two cheques.

The Crown had ample notice that the first two counts of the amended charge would not stand for a moment and it was the duty of the Crown to draw the attention of the Court to it before the empanelling of the jury. At the stage at which the learned Acting Judicial Commissioner was asked to amend the charge, it was almost impossible for him to do so without either discharging the jury and ordering a new trial or adjourning the trial to a future date to enable the opponent to meet the amended charge : (Vide S. 227, Cr. P. C.). There was, however, a further difficulty in the way of the Crown which rendered it inequitable and, in my opinion, unfair to the accused to permit the amendment asked for at that stage. The amended charge would have required a scrutiny of accounts for a sufficiently long period to ascertain whether in the first place there were defalcations in the accounts, and if so, if the opponent was criminally responsible for such defalcations. The sum of Rs. 1,500 made up inter alia of the two cheques in dispute was sent to the Bank on 1st October 1924.

At the request of the learned Assistant Public Prosecutor we have looked into the previous day's cash balance and I find that if we exclude the two items of Rs. 796-14-0 and Rs. 467-4-0 which are credited on the 30th September and which were indubitably items paid in by cheques, the opponent had not got in his hands a sum of Rs. 1,500 in cash to be sent to the Bank on the following day, i. e., the 1st October. The accounts had been kept by incompetent accountants from 1921, the opponent had complained to the head office about it, and the strangest part of the whole case was that the accountants Bharda and Appu who had kept the accounts were not Crown witnesses at all. The complainant who was at Calcutta had no personal knowledge of the accounts, and the learned Acting Judicial Commissioner had no materials before him to convince him that a prima facie case had been made out in respect of the embezzlement of Rs. 1,001-12-6 as a cash balance of a running account. The opponent was entitled to a full and fair inquiry into the matter in the Magistrate's Court, before he was put on trial before a jury.

The object of S. 193, Cr. P. C., in requiring that a Court of Sessions shall not take cognizance of an offence unless the accused has been committed to it by a competent Magistrate is to secure to the accused who is charged with a grave offence a preliminary enquiry which would afford him the opportunity of becoming acquainted with the circumstances of the offence, and to enable him to make his defence. This object would indubitably be frustrated, if a fresh charge is substituted or added in the Sessions Court on which the prosecution have not led evidence even in the Sessions Court but intend to lead evidence. And I entertain grave doubts if S. 227, Cr. P. C., intended to confer jurisdiction on the Sessions Court to add or substitute a new charge on fresh evidence led or to be led in the Sessions Court for the first time. In *Mutirakal Kovilagatha Rama Varma Raja* v. *Queen* (6) the act of the Sessions Judge in adding a charge on fresh evidence was considered as an improper assumption of jurisdiction and pronounced as ultra vires. I cannot conceive of a case more clear in which the opponent was entitled to claim that he

(6) [1881] 3 Mad. 351.

should not be harassed on certain vague allegations not founded on legal evidence, and that he should be afforded an opportunity of satisfying the committing Magistrate that no prima facie case had been made out.

It was indubitably within the direction of the learned Judge to allow an amendment. And it is well established that a Court of Appeal or Revision would always be slow to interfere with the exercise of discretion vested in the lower Court [*Jaipal Kunwar* v. *Indar Bahadur Singh* (2)] and would not do so unless it holds that, firstly, such discretion had been erroneously exercised and, secondly, that it had manifestly and unfairly prejudiced one of the parties as per Jessel, M. R., in *Mellor* v. *Sidebottom* (7) referred to with approval in *Premsuk Das Assaram* v. *Udairam Gungabux* (8). The order of the learned trying Judge is on the one hand manifestly correct, and on the other hand it has in no way unfairly prejudiced the Crown.

We repeatedly pressed the learned Assistant Public Prosecutor to satisfy us that the acquittal of the opponent was likely to be effectively pleaded as a bar to a fresh trial under S. 403, Cr. P. C., but he very cautiously avoided answering our question and failed to urge one single argument on the point. If notwithstanding the vicious method in which Bharda and Appu kept the accounts the complainant thinks that he can make out a prima facie case of embezzlement against the opponent, it is open to him to institute fresh proceedings against the opponent. He has, therefore, no cause of grievance whatsoever. As pointed out by Couch, C. J., in *Reg* v. *Govindas Haridas* (9) besides asking for an amendment which is likely to prejudice the prisoner, it is always open to the Crown to have the prisoner acquitted upon the original charge and to have him charged anew before the Magistrate according to the new facts and then there need be no failure of justice. This is the course adopted by the learned trying Judge in the present case and, in my opinion, it was the only one which was open to him to adopt at that stage. Assuming, therefore, that an appeal against this order is competent under S. 417, Criminal P. C., it fails.

The second ground as stated in Para. 7 of the memo. of appeal is that the learned Judge excluded evidence of certain other defalcations committed by the opponent in the year 1924 which tended to prove the dishonest intent of the opponent, and negatived any defence of mistake or accidential omission.

In *Reg* v. *Richardson* (10) where a clerk was charged for embezzlement by increasing the figures of cash payments and keeping the difference of money Williams, J., permitted the defence of many other incorrect entries of the same nature to negative the defence of mistake. This case forms the basis of illustration (b) to S. 15 of the Indian Evidence Act which permits evidence of entries of the same nature being given where the question is whether the false entry with which a prisoner is charged is accidental or intentional.

The case of *Reg* v. *Richardson* (10) was referred to with approval in *Reg* v. *Stephens* (11) where on a charge of embezzelment of three separate sums from the same master in the course of the same work the evidence for all the counts was held properly considered under each, Mainsty, J., quoting with approval Roscoe on Evidence, p. 94, where it is said :

> There are cases in which much greater latitude is permitted and evidence is allowed to be given of the prisoner's conduct on other occasions, where it has no other connexion with the charge under enquiry than it tends to throw light on what were his motives and intention in doing the act complained of. This cannot be done merely with a view of inducing the jury to believe that because the prisoner has committed a crime on one occasion, he is likely to have committed a similar offence on other, but only by way of anticipation of an obivious defence such as the prisoner did the act of which he was accused, but innocently and without any guilty knowledge or that he did not do it, because no motive existed in him for the commission of such a crime or that he did it by mistake,

and observing that it is not with a view of proving guilt, but of proving the intention with which it was done that you anticipate it (by such evidence). Furthermore such evidence cannot be excluded merely because it tends to prove the commission of other crimes : per Lord Herschel in *Makin* v. *Attorney-General for New South Wales* (4) or that

(7) [1877] 5 Ch. D. 342=25 W. R. 401=46 L. J. Ch. 398=37 L. T. 7.
(8) [1918] 45 Cal. 138=22 C. W. N. 204=44 I. C. 233=28 C. L. J. 498.
(9) 6 B. H. C. Cr. 76.
(10) [1861] 2 F. & F. 343=8 Cox. C. C. 448.
(11) [1888] 16 Cox. C. C. 387=52 J. P. 823=58 L. T. 776.

it refers to acts on which the prisoner has been tried and acquitted, the only point for consideration of the Court being

> whether evidence was relevant in support of the subsequent charge, and the fact that it tended to show that the accused was in fact guilty of the former charge on which he was acquitted did not render it the less admissible : per Lord Russel, C. J., in *Reg* v. *Ollis* (12).

As a general proposition of law it would, therefore, appear that evidence of defalcations both prior or subsequent, whether such defalcations formed the basis of another charge on which the accused may have been acquitted or not are admissible in evidence to prove guilty intent as also to anticipate the defence of the non-existence of such intent. And though, no doubt, the proper function of the Judge is to adjudicate on the relevancy of such evidence and not as to its weight or probative value which must be left for consideration of the jury, it does not follow that every alleged act of defalcation by an accused person may be proved against him on a trial for embezzlement. It must be pertinent to the specific point at issue and should be capable of shedding light on the inquiry or of affording ground for reasonable presumption or inference. And as pointed out by Bray, J., in *Rex* v. *Bond* (13)

> bearing in mind the strong prejudice that would necessarily be created in the minds of jury by evidence of this class, ... the greatest care ought to be taken to reject such evidence, unless it is plainly necessary to prove something which is realy in issue.

The learned Judge had, no doubt, a difficult task before him. He was not prepared to admit evidence which was not relevant. It would have been within his rights to reject evidence of particular defalcations tendered before him if he had indicated in his order the nature of such defalcations. There is, however, no definite indication in his order as to what this evidence was.

With all due respect to the learned Judge, I am of opinion that the order passed by him was unfortunately couched in terms which were too wide. Though the learned Judge has qualified his order by observing that at that stage he was not satisfied that the evidence of other alleged defalcations was necessary he has observed that the charge under all the counts was so distinct and precise that there was no need whatsoever of proving by indirect or deductive means knowledge or practice and that except in so far as it was necessary for the purpose of introduction and explanation he proposed wholly to exclude all evidence as to any other acts of defalcations of which the accused may be suspected to have been guilty and to confine the evidence rigorously to evidence tending to connect the accused with the three counts with which he was charged in that trial.

Speaking for myself, I think, the Crown is justified in attacking this order as not proper and one which misled the Public Prosecutor in not tendering evidence of certain prior defalcations relied on by him in proof of the guilty intent of the accused. Under the circumtances, it has been necessary to examine the different acts of defalcations which the Crown wished to prove in the lower Court. The learned Assistant Public Prosecutor has enumerated twelve different instances, and in doing so, he has travelled far beyond para. 7 of his memo. of appeal in referring to alleged defalcations not only in 1924, but also those in 1922 and 1923. Items Nos. 1 to 3, dealt with by the learned Judicial Commissioner in his judgment, which I have had the privilege of reading, refer to the year 1924 and the rest to the years 1922 and 1923.

All the items may be conveniently divided in two parts : firstly, payments made to the opponent for slide advertisement either by cheques or otherwise and said not to have been specifically entered in the account books as such payments; and, secondly, the alleged temporary misappropriation of Rs. 5,000 which was the subject of a separate charge with certain other items in the second trial which was then pending against the opponent, and in which he was subsequenty acquitted.

The relevancy of this evidence can only be considered with reference to the third count, and it is, therefore, necessary to carefully scrutinize this count. The case of the prosecution is that on the 31st May 1924, the accused caused Rs. 302-14-0 to be debited in the account as having been paid to the Manager of the *Sind Observer* who is one Patel, but

(12) [1900] 2 Q. B. 758=64 J. P. 518=69 L. J. Q. B. 918 =83 L. T. 251=49 W. R. 76=19 Cox, C. C. 554=16 T. L. R. 477.

(13) [1906] 2 K. B. 389=75 L. J. K. B. 693=95 L. T. 296=70 J. P. 424=54 W. R. 586 =21 Cox, C. C. 252=22 T. L. R. 633.

but no payment was made to him on that day, that on the 2nd August, 1924, the opponent received a cheque for Rs.260 for the slide advertisement of Glaxo from Messrs. Katrak and Co., and on the 4th August 1924, he paid to Patel Rs. 360 instead of Rs. 302-14-0 in part payment of his bill, in cash and partly by cheques, one of which was the Glaxo cheque for Rs. 260 ; that he made no credit entry for Rs. 260 as received from Glaxo and Co., and no relevant debit or credit entries showing that Rs. 302-14-0 were not paid out on the 31st May, and that Rs. 360 were instead thereof paid out on 4th August ; that the total sum for which he was accountable was Rs. 302-14-0 plus Rs. 260 ; that he paid Rs. 360 to Patel and that he had, therefore, misappropriated the balance of Rs. 202-14-0.

It was admitted by the complainant that in October 1924, when he taxed the opponent for failure to account for the cheque of Rs. 260 in the account books he paid up Rs. 260 to him. It would, therefore, appear that the opponent had, as a matter of fact, ultimately overpaid the complainant by Rs. 57-2-0 on those two items. It was further admitted by the complainant that from 1920 up to 1924 no specific credit entries had been made in the account books showing the different amounts received from slide or programme advertisements except a sum of Rs. 36 credited for programme advertisements (l. 55, p. 28).

The opponent was not charged with the temporary embezzlement of Rs. 302-14-0 on the 31st March 1924, and it was not possible for the Crown to do so. The opponent admittedly kept the cash, often-times extending to three or four thousands of rupees, with himself and that if he wished to temporarily accommodate himself with such a small sum of money as Rs. 302-14-0 it was convenient for him to do so without taking Appu in confidence or making the entry of payment to Patel. No evidence was offered of a similar entry of payment to anyone else having been made or caused to be made in the accounts. His explanation was that the non-payment on that day was due to the office of the *Sind Observer* having been shifted to another place of which he was not aware and to his having paid Rs. 360 when Patel called personally to settle the dispute over his bills, and that was in consequence of this personal settlement that Rs. 360 were given to him in part payment of his bills.

The fact that the payment was made partly by a cheque is again equally explained by a reference to the cash-book-Ex. 7. The sale of tickets between the 1st and the 4th August was Rs. 802-10-0 only. The nominal cash balance on the 31st July was Rs. 1,295-6-0 which included cheques of the value of Rs. 1,246. The opponent had to make payments for salaries, the Government entertainment tax and other charges, aggregating to Rs. 1,800 which he paid on the 5th August. He was also required to keep in hand sufficient funds for his ordinary expenses, and though he could cash cheques or hand them over in part payment of the liabilities of the Company, if once the cheques were credited in the account with the Bank he could not withdraw money from the Bank. These facts sufficiently account for this cheque of Rs. 260 being handed over to Patel.

The Crown has urged that the failure to make the necessary entries was due not to the neglect of Appu who was admittedly an incompetent accountant but due to the intentional failure of the opponent to inform him about the receipt of this cheque or due to the express instructions given by the opponent to Appu (who, as suggested by the committing Magistrate, was in collusion with the opponent) not to make entries of such cheques to enable him to embezzle moneys and that the evidence of the failure to make similar prior entries was, therefore, admissible.

There are two obvious answers to it, firstly, that in 1922 and 1923 the accounts were kept by Ranghina and Bharda during those years. Both of them had been sent from Calcutta and were not alleged to be in collusion with the opponent ; and secondly, the complainant could not possibly urge that no entries of cheques received in payment of slide advertisements were made in the accounts for four years from the very time he bought the Palace Theatre without his knowledge or concurrence. He manages 78 cinemas throughout India and knows that slides are exhibited every night and paid for.

During the year 1924 no less than 34 different slides were shown at the Palace

Theatre (vide the list Ex. 12) and it is not alleged that payments received by the opponent in respect of any one of them finds specific mention as such in the ledger and cash-book. The only entries of receipts which have been carefully and scrupulously made in these books refer to the sale of tickets and the entertainment tax payable to Government. Full details of such entries were evidently required to be made for the satisfaction of the Government authorities and have been duly made. Monthly accounts were submitted to the complainant for four years with no specific details of the cheques received for slide advertisements and without protest.

It was not the defence of the opponent and could not have been the case for the prosecution that all such cheques were through mistake or inadvertence not entered in the accounts so as to render the evidence of cheques handed over to the opponent and not entered in the books relevant to the issue. If the factum probandum or the specific conclusion to be arrived at was whether the cheque of Rs. 260 was not entered inadvertently but intentionally, and with the object of defrauding and it was sought to be proved by showing that though cheques paid for slide advertisements were usually entered in the books a few of them including the cheque for Rs. 260 were not so entered, the evidence would have been relevant. But it would, in my opinion, be improper to lead evidence of a few cheques not specifically credited in the account books, if as was the fact that no cheques of a like nature had ever been credited, and to the knowledge of the complainant. The object of leading evidence of this nature under the circumstances of the present case would have been nothing more than to mislead the jury and was rightly excluded.

The other alleged defalcation of Rs. 5,000 which was the subject-matter of the charge in the connected proceedings again was not of a like nature so to be relevant to the present enquiry. It was said that the opponent had received Rs. 5,000 on 14th February 1923, from the Manora Stores as purchase price of certain cinema outfit, ordered out by the Stores, paid by them in advance to the opponent and which he got credited in his personal account in the Bank and which he subsequently paid over to the complainant. He was personally responsible to the Manora Stores for this amount till the outfit was handed over to them and found by them to be in accordance with the contract. The money was not received by the opponent as the Manager of the Palace Theatre and had nothing to do with his defalcations as such. The evidence under this head was not of the same specific kind as that in question, but of a different character. This evidence again was clearly inadmissible : *Amritlal Hazra* v. *Emperor* (14) and *Emperor* v. *Panchu Das* (15).

In view of para. 7 of the memo. of appeal, and the fact that the learned Assistant Public Prosecutor was not in charge of the Crown case at the Sessions trial, I entertain grave doubts if the prosecution wished to lead evidence of defalcations prior to 1924. I, therefore, do not propose to go into them specifically and would observe that if at all any person could have relied on the evidence of such defalcations it was the opponent. He had already complained of the manner in which the accounts were being kept, and the excess he had in his hands at the end of 1923.

With regard to Items Nos. 1 to 3 which refer to 1924, it would appear that evidence was as a matter of fact led in respect of Items Nos. 1 and 3. Item No. 1 was according to the complainant the causa causans of his suspicion and of his making inquiries into the matter and Item No. 3 formed part of the very count with which the opponent was charged. Item No. 2 was a case of mere delay in making the entry and not a case of defalcation. In my opinion the learned Judge would have been quite within his rights if he had disallowed the evidence in respect of Items Nos. 2 and 4 to 12 on the merits as not being relevant to the third count.

I am also not satisfied that assuming that this evidence was relevant, its exclusion has or could have prejudiced the Crown. Appa who was principally responsible for failure to make proper entries in the account books was being withheld from the Court, and in the

(14) [1915] 42 Cal. 957 =19 C. W. N. 676=29 I. C. 513 =21 C. L. J. 331.
(15) [1920] 47 Cal. 671 =24 C. W. N. 501 58 I. C. 929 =31 C. L. J 402 (F. B.).

absence of his evidence, the probative value of his failure to make the entries in question would have been nil. It is true that the opponent made good certain amounts due on the cheques for slide advertisements. His conduct in doing so, coupled with his insolence to the complainant which seems to have been the cause of this prosecution, was consistent with his innocence. The fact that he had made good the amount in respect at least of the cheques for Rs. 240 and Rs. 260 Items Nos. 1 and 3 was before the jury and if his making good these two amounts was considered by the jury as compatible with the innocence, evidence that he had also made good the amount alleged to have been paid to him in 1922 to 1923 by Messrs. Lokumal & Co., or by any other firm for similar advertisement charges would not have mattered one way or the other. In my opinion the second ground urged by the learned Assistant Public Prosecutor, therefore, also fails.

As the appeal fails on the merits it is hardly necessary to discuss the preliminary objection raised by Mr. Elphinston as to the maintainability of this appeal. He has contended that as the only ground on which the appeal is based is the validity of two interlocutory orders, it is incompetent under S. 417, Criminal P. C., which provides for an appeal against an order of acquittal and not against an interlocutory order. In support of his contention he has relied on the dictum of Telang, J., in *Queen-Empress* v. *Vajiram* (1). The two orders, however, stand on different footings, and the passage relied on by the learned counsel clearly brings out the distinction. An interlocutory order which has resulted in the acquittal of the prisoner on charges for which he was tried, may, no doubt, be made a ground of appeal under S. 417, Criminal P. C., But where the interlocutory order is an order passed under S. 227, Criminal P.C., refusing to add a fresh charge and for which a fresh prosecution is permissible, in that case there has been no acquittal of the prisoner in respect of such additional charge, and cannot, in my opinion, be relied on as a ground in support of an appeal against the acquittal on other charges altogether. If an appeal were preferred and allowed, the only relief the appellate Court would grant is to order a fresh trial. This relief is open to the Crown even in the absence of an appeal being preferred and allowed. In such a case there would be no occasion for an appeal. The following observations of Telang, J., at page 428 clearly bring out the distinction between an interlocutory order refusing to add a new charge and an interlocutory order which has prejudiced the enquiry on the very charge for which the accused has been tried and acquitted :

> The order refusing to allow additional charges is not an order which falls within those terms. It is not even an order which can be said to form the basis of the order of acquittal, or a necessary condition of its tenability. An order, for instance, excluding as irrelevant a body of evidence tendered for the Crown might lead to an acquittal as a logical and inevitable consequence. I do not wish, in the above remarks, to be understood as saying that, in such a case, the Government on its appeal against the acquittal would be bound by the order excluding evidence as one from which it could not appeal.

With all due deference to the learned Judicial Commissioner I respectfully concur with the observations of Telang, J., and I am of the opinion that in the present case though the order refusing to substitute a new charge was not appealable, the order excluding evidence was one which could legitimately be attacked in an appeal against the order of acquittal and fell within the purview of S. 417, Criminal P. C.,

I agree with the learned Judicial Commissioner that no grounds have been made out to justify our interference with the order of acquittal and that this appeal should, therefore, be dismissed

Appeal dismissed.

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* A. I. R. 1927 Sind 39

KINCAID, J. C., AND RUPCHAND BILARAM, A. J. C.

Emperor—Prosecutor.

v.

Lukman and *others*—Accused.

Criminal Reference No. 43 of 1926, Decided on 5th August 1926, made by the Dist. Mag., Thar and Parkar, on 16th March 1926.

(a) *Criminal trial—Revision — Findings of fact of lower appellate Court will be accepted unless they are based on no legal evidence.*

It is the settled practice of the Sind J. C.'s Court that in dealing with revision applications

the Court accepts findings of the lower appellate Court as correct unless such findings are based on no legal evidence or are manifestly erroneous. [P 41 C 1]

✲ (b) *Criminal P. C., S.* 439 (6) — *Application for enhancement of sentence—Accused can challenge findings of fact only when he has not appealed—If he has appealed and lost, ordinary rule governing revision applications will apply.*

Where an accused person has not appealed against his conviction at all, it may be open to him to claim the right of attacking the findings of fact in the same manner and to the same extent to which he could have done if he had appealed to the lower Court. But he cannot claim the same privilege where he has appealed and lost, unless he can bring his case within the ordinary rule as applicable to revision applications. [P 41 C 2]

✲ (c) *Penal Code, S.* 430— *Act done on another's property affecting it injuriously—Actual damage need not be proved.*

Every person has a perfect right to do a particular act upon his own land, and if a person breaks open his bund or opens his own sluice, no one can complain of it, until some injurious consequence follows from it. As soon as such a consequence follows, the injury and not the original act, becomes a cause of action. In such a case the mischief would consist, not in breaking the bund, or in opening the sluice but in flooding or withering up the complainant's crops.

But where the property was not of the accused but Government property (kotwah) and the mischief complained of as giving a cause of action to the Crown was the change in the kotwah which diminished its utility and affected it injuriously,

Held : it was not necessary for the Crown to rely on the injury caused to the lands of other persons who were receiving water as giving a cause of action and to prove actual damage resulting therefrom. [P 42 C 2]

✲ (d) *Penal Code, S.* 430 — *Section refers also to cases where water is intended for use by particular person and diverted by accused to his own use.*

The words " diminution of the supply of water for agricultural purposes " in S. 430 cannot be limited to those cases only where the water has been allowed either to go waste or has been diverted for non-agricultural purposes. The section read as a whole also refers to cases where the water is intended for use by particular persons for particular purposes and is diverted by an accused person for his own purposes though of a like nature : 34 *M. L. J.* 206 ; 10 *Bom.* 183 and 35 *Cal.* 497, *Rel. on* : 31 *All.* 210, *Expl.* and *Dist.* [P 43 C 1]

(e) *Interpretation of statutes — Marginal notes can be used to explain ambiguity in section.*

There is no objection to Court's referring for the purpose of explaining the ambiguity, if any, in the section to the marginal note : 4 *All.* 387 and 20 *Cal.* 609, *Rel. on.* [P 43 C 2]

(f) *Criminal P. C., S.* 239—*Same transaction —Tests.*

Proximity of time, continuity of action and purpose, and such subsidiary acts as would make the co-accused *particeps criminis* or an accessory after the fact are the tests to determine whether an offence was committed in the same transaction : 1 *S. L. R.* 73, *Foll.* [P 45 C 1]

T. G. Elphinston—for the Crown.

Fatehchand Assudamal and *Dialmal Jahormal*—for Accused.

Rupchand Bilaram, A. J. C.—The accused were convicted by the First Class Magistrate, Umerkot, under S. 430, Indian Penal Code, and were sentenced to pay a fine of Rs. 150 each. Their convictions have been confirmed on appeal. The case has now come before us on a reference made by the District Magistrate, Thar Parkar, for consideration of the enhancement of their sentences.

The accused have claimed their right under S. 439, Cl. (6), Criminal P. C., of being permitted to show cause against their convictions and have contended, first, that the prosecution evidence was interested and unreliable and that it should not have formed the foundation for a conviction, secondly, that the joint trial of all the accused was illegal or at any rate irregular resulting in serious prejudice to them and, thirdly, that the offence, if any, committed by them falls under the purview of S. 426 and not under S. 430, Indian Penal Code. They have further contended that the circumstances of the case do not warrant the enhancement of their sentences.

Accused Nos. 1 and 2 are neighbouring zemindars. Accused No. 3 is the employee of Accused No. 2 and Accused No. 4 is his son. The lands owned by Accused Nos. 1 and 2 receive their water supply from the kotwah which is a Government canal taking off ex the Thar Wah. In low inundation seasons there is a deficiency of water in the kotwah and its supply is controlled and regulated by the Public Works Department. The kotwah is provided with regulators at miles 4, 6 and 8 from its mouth, and the sluices of the zemindari karias which take off from the kotwah are likewise provided with certain mechanical contrivances called gates, which can be lowered to any height thereby either wholly or partially cutting off the supply of water to the zemindari karias. Gates are provided with locks to prevent their being tampered with after they have been lowered. If one of the regulators is closed it has the effect of preventing water from flowing down and to head up against it to the required level so as to allow it to flow freely into

the zemindari karias immediately above it. If the water does not rise to the required height by closing the regulator then the sluices of the karias immediately above the area which is to receive its supply of water, are reduced by the operation of the gates. Water is supplied to each particular area by rotation, so as to allow an equitable distribution of the supply of water amongst the different zemindars having their lands on the kotwah.

The sluice of the karia of Accused No. 1 is at 4 miles and 4 furlongs from the mouth of the kotwah and that of Accused No. 2 is a furlong lower down and on the opposite side of the bank. The case for the prosecution was that the zemindars between the 4th and 6th mile received their supply of water up to the midnight of the 20th of June 1925, when the regulator at the 6th mile which up to that time had been closed was lifted up so as to allow the water to flow down freely up to the 8th mile, and as the water was not expected to head up at the 8th mile regulator to the required height, Vassu, a Darogah of the Public Works Department commenced lowering the gates of the zemindari karias on the morning of the 21st of June so as to cut off the supply of water of all the karias above the 6th mile to the extent of half and that after he had lowered the gates of the karias of Accused Nos. 1 and 2, they tampered with the locks and drew a full supply of water for their lands thereby seriously affecting the utility of the kotwah and causing a diminution of the supply of water for agricultural purposes below the 6th mile. On these facts, the accused have been convicted.

With regard to the first point, it is urged that it is open to the accused to attack the findings of fact of the learned Sessions Judge as if this was a first appeal. I can find nothing in S. 439, Cl. (6) to warrant the suggestion made on behalf of the accused. It is the settled practice of this Court that in dealing with revision applications the Court accepts findings of the lower appellate Court as correct unless such findings are based on no legal evidence or are manifestly erroneous. No sufficient reasons have been advanced to show why this rule should not be followed in the present case. In my opinion the evident object of enacting Cl. (6) of S. 439 was that an accused person should not be denied an opportunity of challengiug the findings of fact where he had remained content on account of the light sentence inflicted upon him and had, therefore, not cared to resort to a higher Court to have his conviction set aside. It is highly improbable that it was the intention of the Legislature to confer on an accused person any more or greater rights than he could have claimed if he had of his own accord moved the higher Court for having his conviction set aside. The words used by the Legislature in S. 439, Cl. (6) are :

"That he shall be entitled to show cause against his conviction."

The extent and the mode in which an accused person can show cause against his conviction have not been defined. Where, therefore, an accused person has not appealed against his conviction at all, it may be open to him to claim the right of attacking the findings of fact in the same manner and to the same extent in which he could have done if he had appealed to the lower Court. But he cannot, in my opinion, claim the same privilege where he has appealed and lost. I think it is not open to the accused in the circumstances of the case to challenge the findings of fact unless they can bring their case within the ordinary rule as applicable to revision applications. The conviction of the accused is based on the evidence of three eye-witnesses, namely, Wasu, the Muccadam, and the two lessees, Purtoomal and Assandas, who possess lands below the 6th mile, and also the evidence of the Sub-Divisional Officer to whom a report was made, and who visited the scene of the offence on the following day and found that the gates had been tampered with. The evidence of the eye-witnesses has been attacked as interested and our attention has been drawn to certain minor discrepancies as to their movements before and after the accused are said to have tampered with the gates. The learned trying Magistrate who observed their demeanour was satisfied that their evidence was substantially true and that it was amply corroborated by the evidence of the Sub-Divisional Officer. In this estimate of their evidence the learned Sessions Judge has agreed. The accused have failed to convince us that there are any grounds which should induce us to come to a different conclusion or to hold that their conviction was

not based either on legal evidence or on evidence which was manifestly erroneous.

With regard to the second point again the joint trial of the accused depends upon the question whether the offence committed by them formed part of the same transaction or not. This was a question of fact pure and simple. The Crown case was that all the accused had acted in concert in committing the offences and had tampered with the gates at the same time within the presence of one another. Wasu stated in the lower Court that at the very time that the Accused Nos. 2 to 4 raised the gates of their sluice Accused No. 2 shouted out to Accused No. 1 that he should do likewise and that he should not delay. This statement, if true, coupled with the other circumstances of the case, was prima facie evidence that the accused had acted in concert. The accused failed to raise the plea of want of jurisdiction either in the first Court or in the appellate Court. And in the absence of any special circumstances which do not exist in the present case, this plea does not deserve much consideration at our hands. I am not satisfied that the joint trial of Accused No. 1 and Accused Nos. 2 to 4 was not justified or that it has resulted in any prejudice. I may further mention that when questioned whether the accused were prepared to stand a fresh trial, their learned pleaders after consulting them stated to the Court that in the event of the Court being of the opinion that if a fresh trial was to be ordered, they would prefer to waive the objection. This in itself is an admission on their part that there has been no serious prejudice to them.

The third point requires more serious consideration. In the first place, it is contended that as there was no proof that the zemindars below the 6th mile had suffered any loss by the diminution of the supply of water, the accused could not be convicted of mischief. Reliance was placed on two cases of the Madras High Court reported as *Appellate Side Proceedings 22nd October* 1868 (1); and *Appellate Side Proceedings 12th November* 1874 (2) where no actual loss had been caused to anyone up to the date of the charge and no offence was held to have been committed. In each of those cases, the only property that was actually changed was the land of the accused and so far as the situation of water was altered, that water if it was the property of anyone was the property of the accused so long it was on his own land. As pointed out in para. 18 of Mayne's Commentary on the Indian Penal Code, every person has a perfect right to do a particular act upon his own land, and no one can complain of it, until some injurious consequence follows from it. As soon as such a consequence follows, the injury and not the original act, becomes a cause of action: *Backhouse* v. *Bonomi* (3) and *Darley Main Colliery Co.* v. *Mitchell* (4). In such a case the mischief would consist not in breaking the bund, or in opening the sluice but in flooding, or withering up the prosecutor's crops. The observations in the judgments of Mr. Justice Seshagiri Aiyar and Mr. Justice Moore in *Kullappa Naicker* v. *Paleni Ammall* (5) referring to and following the two earlier decisions mentioned above were likewise based on the assumption that the bund which had been damaged was not proved to belong to the complainant. In the present case, however the Kotwah and the gates of sluices are not the property of the accused but Government property and the mischief complained of as giving a cause of action to the Crown was the change in the Kotwah which was Government property which diminished its utility and affected it injuriously. In the circumstances, it was not necessary for the Crown to rely on the injury caused to the zemindars below the sixth mile as giving a cause of action and to prove actual damage resulting therefrom. It was sufficient for the Crown to prove either that the accused intended to cause or knew that they were likely to cause wrongful loss or damage to the zemindars below the six mile. The accused knew that the supply of water to the Karias had been reduced with the object of giving a fuller supply of water to the zemindar below the sixth mile, and they may, therefore, be fairly presumed to have known that by taking a larger quantity of water than they

(1) 4 M. H. C. R. App. 15.
(2) 7 M. H. C. R. 39.
(3) [1861] 9 H. L. C. 503=34 L. J. Q. B. 181=9 W. R. 769=4 L. T. 754=7 Jur. N. S. 909.
(4) [1886] 11 A. C. 127=51 J. P. 148=55 L. J. Q. B. 529=54 L. T. 882.
(5) [1920] 11 L. W. 148=54 I. C. 617=(1920) M. W. N. 131.

were entitled to after the period of their rotation was over, they were likely to cause wrongful loss to the zemindars below the sixth mile. All the ingredients, therefore, of the offence of mischief as defined by S. 425 were sufficiently established. And there was no further onus on the prosecution to prove actual damage.

It was next urged that in any case, the act of the accused does not amount to an offence under S. 430, I. P. C. The section reads as follows: (Here section is quoted).

It is urged that as the accused admittedly used water for agricultural purposes though for their own, there was no "diminution of water for agricultural purposes," but on the contrary the supply of water was used for such purposes. Reliance has been placed on the judgment delivered by me as a Single Judge on the Sessions Court Side in *Changomal* v. *The Crown*, Criminal Appeal No. 253 of 1925, wherein I accepted that view. Reliance has also been placed on the well-established canon of construction that a penal statute must be construed, strictly and that as so construed, the first part of S. 430 does not contemplate the case where the water had actually been used for agricultural purposes by the accused.

On a further consideration of the point I am afraid the words "diminution of the supply of water for agricultural purposes" cannot be limited to those cases only where the water has been allowed either to go waste or has been diverted for non-agricultural purposes. The section read as a whole shows clearly that it also refers to cases where the water is intended for use by particular persons for particular purposes and is diverted by an accused person for his own purposes though of a like nature. The words "diminution of the supply of water" apply equally to water for animals which are property. This can only refer to animals which are the property of a particular person and, therefore, provide for punishment of a person who diminishes the water supply intended for animals of a particular person by using it for his own animals as well. Similarly with regard to "any manufacture" the diminution of supply has reference to the manufacture of a particular person. In *Chidambaram Pillai* v. *Muhamad Khan* (6) while dealing with the question whether S. 430 was limited to acts of waste only pure and simple, Napier, J., has taken a similar view of the section and has pointed out that the section has reference to the actual utilization of the particular water by particular persons who are deprived of it, by the mischief complained of and not to the use to which such water is put by the accused.

If there is any doubt of this point, it is sufficiently removed by the marginal note to the section which refers to "Mischief by injury to works of irrigation or by wrongfully diverting water." Whatever may be the English rules as to the effect of the marginal notes, there appears to be no objection to my referring for the purpose of explaining the ambiguity, if any, in S. 430 to the marginal note which has been admittedly published by the Legislature as part of the section. See *Lal Singh* v. *Kunjan* (7), *Kameshar Prasad* v. *Bhikhan Narain Singh* (8) and *Administrator-General of Bengal* v. *Prem Lall Mullick* (9). The marginal note clearly shows that the section was intended to provide for wrongful diversion of water, that is, diversion from the specific purpose for which it was intended at the time of the offence. In *Ramakrishna Chetti* v. *Palaniandi Kudambar* (10), *Queen-Empress* v. *Jagannath Bhikaji Bhave* (11), *Chenguna Naidu* v. *Emperor* (12) and *Emperor* v. *Shaik Arif* (13) a diversion of water by an accused for purposes of his own though in some cases of a like nature for which it was intended has been held to fall within S. 430.

In *Bansi* v. *Emperor* (14) Mr. Justice Tubdall sitting as a Single Judge altered the conviction of the accused from one under S. 430 to one under S. 426 though he maintained the same sentence against the accused. And in doing so his Lordship observed at p 211 (of 34 *All.*) as follows:

> The object of this application is really to secure a reduction of sentence. I have examined the record, and there is nothing in the evidence to show of what class the canal was, the bank of which was cut; that is, whether it was the bank to the main canal or of a distributary. Is

(6) [1918] 34 M. L. J. 206=44 I. C. 580=23 M. L. T. 248.

(7) [1882] 4 All. 387=(1882) A. W. N. 83.
(8) [1893] 20 Cal. 609.
(9) [1894] 21 Cal. 732.
(10) [1876] 1 Mad. 269.
(11) [1886] 10 Bom. 183.
(12) [1911] 2 M. W. N. 349=12 I. C. 527=12 Cr. L. J. 551.
(13) [1908] 35 Cal. 437=12 C. W. N. 1534.
(14) [1912] 34 All. 210=13 I. C. 829=9 A. L. J. 162.

is impossible in the absence of evidence on the point to hold that the act done was one which caused or was likely to cause a diminution of the supply of water for agricultural purposes. It appears that the applicants wanted it for the purpose of sowing their field. As they were unable to obtain it in a lawful manner, they proceeded to steal it. As the record stands, it is impossible to uphold the conviction under S. 430 of the Indian Penal Code.

There is nothing in this judgment to show that the use of the water by the accused for agriculturial purposes of his own was by itself considered sufficient to reduce the offence to one under S. 426, Indian Penal Code. As a matter of fact, that point appears not to have been raised in that case and was not decided. Moreover, as the sentence of imprisonment was not reduecd, the point at issue was, therefore, hardly material. The only other case to which our attention has been drawn is *Har Narain* v. *Emperor* (15), where in the absence of reliable evidence to prove the requisite intention or knowledge on the part of the accused person that a diminution of water was likely to be caused by the act complained of, Mr. Justice Walsh altered the conviction to one under S. 426.

What quantum of ovidence is sufficient to provo knowledge that a diminution of water was likely to be caused in any particular case must depend upon the facts of that case. So far as the circumstances of this case are concerned hardly any evidence was required. The elaborato arrangements made by the Public Works Department for controlling water and wrongful tapping of water by the accused after their turn coupled with the fact that the water did not rise to the required height at the 8th mile formed a very strong substratum for holding that the diminution of water caused by the wrongful act of the accused was likely to result in injury to the zomindars below the 6th mile.

I hold, therefore, that the accused have been rightly convicted under S. 430, Indian Penal Code. (The judgment then dealt with the extenuating circumstance s in favour of the accused and enhanced the fine in case of Accused 1 and 2 to Rs. 500 and Rs. 1000 respectively and in the case of Accused Nos. 3 and 4 maintained the same fine).

Kincaid, J. C.—(After setting out the acts the judgment proceeded. At, the hearing the learned pleaders for the appellants relying on S. 439 (6), Criminal P. C., went into the merits of the case and argued strenuously that the findings of fact of the lower Courts were wrong.

Now S. 439 (6) runs as follows :

Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-S. (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction.

Still as I read this section, it does not override the time honoured practice of the High Courts of India not to upset, save in exceptional circumstances, concurrent findings of fact of two lower Courts. The section must be interpreted consistently with that practice. In other words, while it is open to an accused person while showing cause against the enhancement of his sentence, to show cause against his conviction, the High Court will not interfere lightly with that conviction if supported by the findings of facts of a Magistrate and a Sessions Judge. Here the Magistrate tried the case with great care and both Magistrate and the Sessions Judge wrote excellently-considered judgments. In these circumstances this Court will not disturb their findings of fact.

Several legal points were raised in arguments. The first was that the offence was not one under S. 430, I. P. C. As I read S. 430 two matters have to be proved to obtain a conviction, viz.. (1) that mischief has been caused ; (2) that the mischief done took the form of doing an act which caused or which the offender knew to be likely to cause a diminution of the supply of water for agricultural purposes. Here undoubtedly the accused must have known that they were likely to cause loss or damage to the lower riparian proprietors by opening their karias. They, therefore, committed mischief and the form that the mischief took, was, causing the said proprietors a diminution of water for agricultural purposes. It has been suggested that there was no diminution of the water for agricultural purposes as even the stolen water was so used. But that is not the correct way to interpret the section. S. 430 only deals with an aggravated from of mischief as defined in S. 425. The diminution of water for agricultural purposes is only one of the kinds of mischief that the Code punishes.

(15) [1919] 41 All. 599=51 I. C. 201=17 A.L. J. 686.

It does not matter whether the stolen water is afterwards used by the thief for his own agricultural purposes. It is sufficient if mischief is caused to the sufferer and that by that mischief his agricultural water is reduced.

Again it has been argued that evidence must be led to show that loss to the crop actually ensued from the act of the accused. But this is an impossibility. No one can tell whether a crop will or will not grow, whether it gets water or not. All one can say is that if it gets more water it is likely to grow better. If it gets less water, it is likely to grow worse. In this case the act of the accused certainly reduced the water in the canal. There was, therefore, less water for the lower riparian owners. The act of the accused in opening their sluices was thus likely to cause these lower owners loss.

Finally it has been contended that there was a misjoinder of charges. Pratt, J. C., in *Crown* v. *Ghulam* (16) observed :

> I agree with my learned colleague that the area of facts covered by the expression 'same transaction' cannot be exactly defined. They vary with the circumstances of each case. The nearest approach to definition is supplied by the tests suggested in the case of Fakirapa and Balabhai, i. e., proximity of time, continuity of action and purpose, and subsidiary acts as would make the co-accused *particeps criminis* or an accessory after the fact. Where these tests apply, there can be no doubt.

Here all these tests were satisfied. Lukman and Mahomed Din, with his son and servant were all present at the same time and the same place. They both did the same act, namely, the breaking of the locks on their sluices. They evidently had the same purpose because when Lukman hesitated, Mahomed Din shouted to him not to delay. There was, therefore, no misjoinder of charges.

I now return to the question of enhancement of sentence. The offence committed by the accused is an extremely grave one and one, as the learned District Magisirate has observed, very difficult to detect. Had I been sitting alone, I should certainly have inflicted a sentence of imprisonment ; in order not to differ from my learned brother I agree to enhance merely the fines imposed on Accused Nos. 1 and 2. The Accused No. 1 is sentenced to pay a fine of Rs. 500 and the Accused No. 2, who was the ringleader is sentenced to pay a fine of Rs. 1,000. The fines of the other two accused are confirmed but not enhanced.

The extra money to be paid on or before 12th August. The bonds executed by them to continue.

Sentence enhanced.

(16) [1906] 1 S. L. R. 73=8 Cr. L. J. 191.

A. I. R. 1927 Sind 45

KINCAID, J. C. AND BARLEE, A. J. C.

Emperor—Prosecutor.

v.

Khuda Bux and *another*—Accused.

Criminal References Nos. 112 and 129 of 1926, Decided on 28th June 1926, made by the Dist. Mag., Larkana.

(a) Criminal P. C., Ss. 435 and 438—Scope.

Section 438 must be read with S. 435. [P 45, C 2]

(b) Criminal P. C., S. 438—Remarks in Sessions Judge's judgment — District Magistrate cannot refer.

The Sessions Judge is not a Criminal Court inferior either to the District Magistrate or the Sub-Divisional Magistrate, neither of whom is empowered by law to make reports to the High Court taking exception to certain remarks of the Sessions Judge in the course of his judgment : 1 *S. L. R.* 40 *Cr., Foll.* [P 46, C 1]

Judgment.—We propose to deal with two Criminal References Nos. 112 and 129 of 1926 together. In both matters, the learned District Magistrate has forwarded to this Court copies of letters from the Sub-Divisional Magistrate, Larkana (Mr. Davies). The learned Sub-Divisional Magistrate has criticized in them the action of Mr. Sanders, the learned Sessions Judge, and has taken exceptions to certain remarks made by the learned Sessions Judge in the course of his judgments. These letters the learned District Magistrate has forwarded to us for suitable orders.

We have had the advantage of hearing the learned Public Prosecutor in these matters and he has drawn our attention to the wording of S. 435 and S. 438 of the Criminal P. C. As it seems to us S. 438 must be read with S. 435. Although the Sessions Judge or the District Magistrate may under S. 438 report the results of his examination of proceedings to the High Court for their orders, still those proceedings may be, as laid down in S. 435, proceedings before an inferior criminal Court. Now, the Sessions Judge

is not a criminal Court inferior either to the District Magistrate or the Sub-Divisional Magistrate. Neither the learned Sub-Divisional Magistrate nor the learned District Magistrate was, therefore, empowered by law to make these reports to this Court. A similar view was expressed by Crouch, A. J. C., in the case of *Crown* v. *Shah Nawaz* (1). And we cannot do better than quote that learned Judge's own words :

> Now it is clear from the tenor of the rulings quoted, especially from that in *Queen-Empress* v. *Karamdi* (2), that the High Courts have everywhere regarded as objectionable the submission by a District Magistrate of a report in criticism of orders passed by the Sessions Court, and it is evident that the entertainment of such reports as a matter of ordinary procedure could lead to nothing but friction between the local authorities and would be apt to prove detrimental to the administration.
>
> While, therefore, we do not debar ourselves from exercising the powers conferred on us by S. 439, from whatever source the information calling for our interference may reach us, we must at the same time express our view that, save in exceptional cases, it is undesirable that we should entertain reports of this character, emanating from, and based upon, no other authority than the sole and independent opinion of the District Magistrate . . . . . In cases, therefore, where that officer feels it necessary to call into question the adequacy of a sentence passed by the superior Court, we think that he should not instruct but inform the Public Prosecutor; and it will then be open to that functionary, after taking such measures as are suggested by Mr. Justice Straight in *Queen-Empress* v. *Shere Singh* (3), and subject to any general or special instructions that he may receive from the Local Government, to lay the matter before us of his own initiative, should he deem that the circumstances require it.

We do not think here there are any special circumstances that would justify us in exercising the powers conferred by S. 439, apart from the reports of the learned District Magistrate. We, therefore, dismiss the references and order the record to be returned.

References dismissed.

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(1) [1905] 1 S. L. R. 40 Cr.=8 Cr. L. J. 161.
(2) [1896] 23 Cal. 250.
(3) [1887] 9 All. 362=(1887) A. W. N. 64.

* A. I. R. 1927 Sind 46

KENNEDY AND RUPCHAND BILARAM, A. J. Cs.

Ramsing Jabalsing—Plaintiff—Appellant.

v.

Parsram and *another*—Defendants—Respondents.

Second Appeal No. 13 of 1924, Decided on 4th March 1926, from the decree of the Dist. J., Sukkur, D/- 20th December 1923, in First Appeal No. 94 of 1923.

* *Transfer of Property Act, S. 60—English principle that in mortgages time is not of the essence does not apply in India—Limitation Act, Art. 148.*

The doctrine of equity recognized by the English Courts that the time stipulated in a mortgage-deed is not of the essence of the contract has no application in India, in the absence of statutory law or any established practice to that effect and therefore on the breach of the condition of re-payment, the contract executes itself, and the transaction is closed and becomes one of absolute sale without any further act of the parties or accountability between them : 1 *Mad.* 1 *P. C., Foll.*

Even in Sind the Court would not permit the mortgagor to re-open the transaction entered into before the extension of the Transfer of Property Act to Sind and redeem the property if the time for payment was passed : 1 *S. S. D.* 301 and 1 *S. L. R.* 96, *Ref.* [P 48 C 2]

Tolasing Khushalsing—for Appellant.
G. A. Kikla—for Respondents.

Judgment.—This second appeal arises out of a suit for redemption of an alleged mortgage or mortgages. The plaintiff-appellant is the son and legal representative of one Jabalsing, the original mortgagor. The defendants-respondents are the sons and legal representatives of one Choithram, the original mortgagee. It appears that on July 12, 1900, Jabalsing mortgaged without possession certain agricultural lands bearing Survey Nos. 47, 48 and 49 to secure the payment of a loan of Rs. 1,260. He made default in payment. On June 6, 1901, the parties submitted their disputes to private arbitration by a reference which inter alia recites that Jabalsing was not in a position to pay the debt, that he was prepared to sell the property to Choithram, and that the arbitrator was empowered to decree the sale of the property on such terms as he thought fit.

This reference resulted in a consent decree being passed in Suit No. 739 of 1901 in terms of the award passed by the

arbitrator. The award is inartistically drawn up and is not free from circumlocution and redundancy. Paragraph 1 of the award recites that the mortgaged property is sold to Choithram by virtue of the award for the sum of Rs. 1,260, that Jabalsing has no interest therein, and that he would get the name of Choithram brought on the revenue records in place of his own name. Paragraph 2 allows Jabalsing three years' time to pay Rs. 1,260 by two instalments, the first instalment of Rs. 306 on or before May 6th, 1903, and the second instalment of Rs. 954 on or before June 6th, 1904, and provides that on due payment of the two instalments Jabalsing would be entitled to get back the property, and on his failure to pay either instalment he would have no claim to the land and would effect the necessary mutation of names in the revenue registers.

Paragraph 3 declares that the possession of the property was to be in the hands of Choithram who was at liberty to cultivate it or not and in the event of his realising any produce he was to account for it to Jabalsing. Paragraph 4, however, in clear terms declares that Jabalsing was to remain in physical possession of the property and to enjoy its produce, and that in the event of his making default in payment of the instalments Choithram had the right to obtain possession and get mutation of names effected in execution proceedings. Paragraph 5, which is the last paragraph of the award, reiterates with greater emphasis what is stated in paras. 1, 2, and 4 and makes no mention of the terms of para. 3 of the award.

With the object of paying the first instalment of Rs. 306 Jabalsing made certain arrangements with one Udhowdas, and he, Udhowdas, and Choithram again submitted their alleged disputes to a private reference, which resulted in an award made a decree of the Court in Suit No. 850 of 1903 by which Choithram relinquished his rights over Survey No. 47 and Udhowdas was declared to be its owner, in consideration of his having paid Rs. 306 to Choithram as the amount due on the first instalment and a further sum of Rs. 202 to Jabalsing for his own use.

This award, which is more precise, declared that Jabalsing would remain in possession of the survey number and enjoy its produce, that he would pay three instalments of Rs. 48 each on the 4th of May in each of the three years, 1904, 1905 and 1906, and pay Rs. 464 on May 4th, 1907, and on his doing so he would be entitled to get back the land from Udhowdas. If he made default in payment of any instalment, Udhowdas would have the right to get possession of the survey number, and have mutation of names effected in execution proceedings, and Jabalsing would have no further right therein.

On May 5th, 1904, Jabalsing and Choithram put in a consent application for adjustment of the decree in Suit No. 739 of 1901 which recites that Jabalsing had received Rs. 400 from Choithram as consideration for the out and out sale of Survey No. 49 and two acres out of Survey No. 48 out of which he had paid Rs. 337 in part satisfaction of the second instalment and had obtained one year's time to pay the balance, and that in the event of his failure to pay same within the time allowed Choithram would become the owner of the remaining portion of Survey No. 48 and be entitled to get possession thereof and to have mutation of names effected.

Jabalsing made default in payment of the instalments to Udhowdas and also of the balance of the amount to Choithram. On January 1st, 1907, Udhowdas obtained possession of the land transferred to him under the decree of 1903 and in his turn sold to Choithram.

In March 1907 Choithram obtained possession of the remaining portion of Survey No. 48 and got mutation of names effected by applying in execution proceedings in Suit No. 739 of 1901. Choithram and his heirs continued in possession of the land till 1921 when the present suit was instituted.

It is contended on behalf of the plaintiff that the award in Suit No. 739 of 1901 created a usufructuary mortgage in favour of Choithram, and nothing more, and that he was entitled to redeem that portion of Survey No. 48 which Choithram got possession of by applying in execution proceedings in that suit. It is further urged that in any case both the awards in Suit No. 739 of 1901 and in Suit No. 850 of 1903 at most amounted to mortgages by way of conditional sale and that the plaintiff was, therefore,

entitled to redeem both the Survey Nos. 48 and 49 on payment of the amount due in respect of the said mortgages.

For the purpose of proving that the first transaction amounted to a usufructuary mortgage, the learned pleader for the plaintiff has placed great reliance on para. 3 of the award, and has urged that as soon as Choithram obtained possession of any portion of the land in execution proceedings, he was bound to account for its produce to the mortgagor.

We are unable to accede to his contention. We must read the award as a whole and as far as possible give effect to every part of it. The circumstances leading up to the reference and the award, as also the subsequent conduct of the parties, is against any supposition that the award was either intended to create, or was treated as having created, a usufructuary mortgage. Jabalsing had made default in payment of Rs. 1,260. He was prepared to sell the property to Choithram. He left it to the arbitrator to settle the terms and the arbitrator allowed him three long years to pay up the principal amount and made Choithram to forgo interest for that period subject to the condition that if he failed to pay the instalments his equity for redemption was to be extinguished.

It is not difficult to reconcile para. 3 of the award with the rest of it, if it be assumed that the arbitrator was anxious to give the transaction an appearance of an out and out sale by declaring that Choithram was in judicial possession of the land from the date of the award and at the same time to secure to Jabalsing the enjoyment of the produce of his land so long as he acted up to the terms of the award by further declaring that in the event of Choithram taking physical possession of the land in his right as owner, he should account for the produce to Jabalsing during the period in which Jabalsing had made no default.

Clause (3) was never intended to be acted upon and was not acted upon. Jabalsing was conscious that his rights of redemption would be irretrievably lost if he made default as is shown by his anxiety to enter into the subsequent transactions and by the fact that during his lifetime he never claimed to redeem the property.

We have no hesitation in holding that the award in Suit No. 739 of 1901 did not create a usufructuary mortgage at all. The first contention of the plaintiff, therefore, fails. The second contention of the plaintiff is based on the doctrine of equity recognized by the English Courts that the time stipulated in a mortgage-deed is not of the essence of the contract. But, as pointed out by their Lordships of the Privy Council in *Thumbusawmy Moodelly* v. *Hossain Rowthen* (1) this doctrine has, in the absence of statutory law or any established practice to that effect, no application in India, and that on the breach of the condition of re-payment, the contract executes itself, and the transaction is closed and becomes one of absolute sale without any further act of the parties or accountability between them.

The Transfer of Property Act which gives effect to the English doctrine of equity was extended to Sind long after the mortgage had executed itself by breach of the condition. And apart from there being any established practice to the contrary, the old Sadar Court of Sind had in a case coming from the same district, as early as 1885, held in *Sileman* v. *Lalumal* (2) that in this Province the Court would not permit the mortgagor to re-open the transaction and redeem the property if the time for payment was passed. The same view was accepted by a Bench of this Court in *Ghulam Muhammad* v. *Hariram* (3). Assuming that the two transactions were mortgages by way of conditional sale, the plaintiff is not entitled to any relief.

Under the circumstances it is not necessary for us to go into the further questions raised on behalf of the defendants as to the transactions being by way of out and out sale with a condition for re-purchase on certain terms and to the right, if any, of the plaintiff being further barred by the subsequent execution proceedings. The appeal fails and is dismissed with costs.

Appeal dismissed.

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(1) [1876] 1 Mad. 1=2 I. A. 241=5 Sar. 531 (P. C.).
(2) 1 S. S. D. 301.
(3) 1 S. L. R. 96.

A. I. R. 1927 Sind 49

RAYMOND, A. J. C.

Abdulali Moosabhoy—Plaintiffs.

v.

Gokaldas Lalji and *another*— Defendants.

Civil Suits Nos. 1040, 958 and 842 of 1918, Decided on 9th January 1922.

(a) *Evidence Act, Ss.* 101 *and* 103—*Sale of immovable property.*

The burden lies heavily on the person alleging it to prove that the vendee of immovable property agreed to take the property with a defective title. [P. 50, C. 1]

(b) *Contract Act, S.* 55—*Contract for sale of land—Court must look at the substance of the agreement for ascertaining time of performance.*

As regards contracts for the sale of land the Court must look not at the letter, but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really intended no more than that it should take place within a reasonable time : 40 *Bom.* 289 (*P. C.*). *Appl.* [P. 50, C. 2]

(c) *Contract—Variation—Buyer cannot extend time without seller's consent and claim damages prevailing on deferred date.*

The buyer has no right without the consent of the other party to extend the time for performance and claim damages prevailing on the deferred date in case of breach. [P. 50, C. 2]

(d) *Contract Act, S.* 73— *Defective title—Sale of land—Damages are to be assessed in usual way unless otherwise contracted.*

Section 73 does not admit of any distinction between a contract to sell immovable property or any moveable commodity, and damages with respect to a breach in either are to be assessed on the same standard. In cases of breach of contract for sale of immovable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way, unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages : 21 *Bom.* 175 and 32 *Bom.* 165, *Foll.* [P. 51, C. 1]

(e) *Contract Act, S.* 73—*Measure of damages.*

The proper measure of damages for a breach of contract is the difference between the contract price and the market price at the time of the breach. [P. 52, C. 1]

(f) *Contract Act, S.* 73—*Plaintiff must prove damage and extent of it—If he fails, presumption is to be made against him.*

Section 73 makes it compulsory for the plaintiff to prove that he has suffered damage and the extent to which he has suffered before a Court can award him damages for breach of contract, and if he does not give the best evidence, every presumption should be made against him, but this does not relieve the Court altogether of the duty of assessing the damages, as best it can, on evidence and materials actually before it. [P. 52, C. 2]

Issardass Oodharam—for Plaintiffs.

R. V. Castellino—for Defendants.

Judgment.— A plot of land with buildings thereon bearing Survey No. 21 B, Survey Sheet B7, admeasuring 705 square yards, situated in Rambagh Quarter, Karachi, originally belonged to Bherumal Lekhraj. On the 3rd August 1912, he sold it to Aminuddin, Meher Bux and Khuda Bux, sons of Shamsuddin, and Moula Bux, the son of Meher Bux, for the sum of Rs. 42,000. On the 16th February 1918, Aminuddin, Khuda Bux, Meher Bux and Mahomd Yusif, the son of Moula Bux, the latter being dead, sold the said property to Gokaldas and Ramji for Rs. 68,000. Moula Bux, at his death, left him surviving his widow Bukhtawar, two sons Mahomed Yusif and Mahomed Usman and a daughter Hajran. These were alive at the time of the sale to Gokaldas and Ramji, the son Mahomed Usman and the daughter Hajran being minors ; and admittedly Mahomed Yusif had no power to dispose of their share in their father's estate. On the 23rd February 1918, Gokaldas and Ramji agreed to sell to the firm of Abdulali Moosabhoy the said land for Rs. 75,000. Abdulali Moosabhoy, in turn, agreed, on the 9th March 1918, to sell the said land to Sunderji and Valabdas for Rs. 80,000 ; and lastly, Sunderji, having acquired the share of his partner Valabdas, agreed to sell the said land to Husseinio Mamo for Rs. 84,000 on the 30th April 1918.

In the latter part of August 1918, when the time arrived for the completion of the contracts, and notices were issued by the respective parties it was found that the title was defective, inasmuch as the contract to sell to Ramji and Gokaldas was not effected by all the sharers in the property and as no satisfactory arrangements were arrived at in giving to the respective vendees a clear and marketable title, suits have been filed, Suit No. 1040 of 1918 by Abdulali Moosabhoy against Gokaldas and Ramji, Suit No. 958 of 1918 by Sunderji Keshowji against Abdulali Moosabhoy and Suit No. 842 of 1918 by Husseini Mamoo against Sunderji Keshowji. With the consent of the pleaders for the respective parties the three suits have been heard together as the fundamental question in all is identical and it has been agreed that the evidence recorded in Suit No. 1040 of

1918 is to be treated as evidence in the other two suits.

Now in Suit No. 1040 of 1918 plaintiffs sue to recover from the defendants Gokaldas and Ramji the sum of Rs. 45,000 of the purchase price paid to them, the receipt of which they admit, and the interest thereon, Rs. 15,000, as damages being the difference between the contract price and the market rate, and Rs. 1,500 which they allege is the expense they have been put to by the suit filed against them by their vendees. Mr. Castellino for the defendants admitted that the title was defective, but asserted that the plaintiffs were aware of the defect and agreed to take the conveyance if the shares of the heirs of Moula Bux were transferred to the names of Haji Meher Bux in the revenue records. The burden undoubtedly lies heavily on the defendants to prove that plaintiffs agreed to take the property with a defective title. The kabala between the parties is Ex. 22; it recites the payment of Rs. 5,000 as earnest money and stipulates for the payment of the balance within three months from the date of execution of the kabala, viz., 23rd February 1918, on the vendor's executing the sale-deed and effecting registration and mutation of names. It is entirely silent as to the plaintiffs taking such title as the defendants could give, nor is there any reference to the plaintiffs' knowledge of a defect in the title.

The sanad of the property is Ex. 6; it stood in the names of the original purchasers from Bherumal, above referred to; but, on the 4th March 1918, there is an endorsement that the entire share of Maula Bux in the plot is transferred to Bakhtawar, wife of Moula Bux, Mahomed Yusif and Mahomed Usman and Hajran, minors, by their guardian, Mahomed Yusif; and, on the 16th August 1918, there is another endorsement that the entire share belonging to Bakhtawar, wife of Moula Bux, Mahomed Yusif Mahomed Usman and Hajran is transferred to Haji Meher Bux. Admittedly Mahomed Yusif has been dealing with the shares of his minor brother and sister on his own responsibility and without any authority from the Court appointing him guardian of the minor's property, nor is it shown that either he or anyone else was empowered to deal with the share of Bakhtawar in her husband's estate. (Then his Lordship discussed the evidence and proceeded.) It seems to me that time was not of the essence of the contract in any of the three cases before me. As laid down by the Privy Council in the case of *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (1):

> Section 55, Indian Contract Act, did not lay down any principle which differed from those that obtained as regards contracts for the sale of land by which equity in such a case looks not at the letter, but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really intended no more than that it should take place within a reasonable time.

The surrounding circumstances in the present case clearly show that the intention of the parties of the contract was the performance of the contract within a reasonable time. Mr. Castellino relies on Ex. 33, a letter addressed by the plaintiffs' pleader to the defendants and dated the 30th October wherein defendants are called to make out a good title within seven days from the receipt of the notice, and argues that the date of the breach was the 7th November. But this argument involves a fallacy. The time was not extended at the request of the seller and the buyer has no right without the consent of the other party to extend the time and claim damages prevailing on the deferred date. *Ogle* v. *Vane* (2). It was on the 30th August 1918, that plaintiffs first addressed a letter to the defendants informing them of the objection that had been taken to the title of the property not being perfect, and if they were unable to convey a good title to the property they would be responsible for the consequences. This letter was followed by another letter dated the 6th September, Ex. 29, complaining of the defendants' failure to reply to the previous letter and concluding with the words:

> if you fail to show us that your vendors have good title to the property by to-morrow we will infer that their title is not good and will hold you responsible.

The reply of the defendants is dated the 5th November, Ex. 13, in which it may be here remarked there is no reference to the plaintiffs having agreed to accept a defective title but simply that they have communicated to their

(1) [1916] 40 Bom. 289=32 I. C. 246=43 I. A. 26 (P. C.).
(2) [1868] 3 Q. B. 272=37 L. J. Q. B. 77=9 B. & S. 182=16 W. R. 463.

vendors the objections raised, and are awaiting their reply. In my opinion the plaintiffs are right in dating their cause of auction as arising in the month of September which allows for a reasonable time having been given to the defendants to fulfil their part of the contract.

The question of damages allowable to the plaintiffs must be considered in the light of S. 73, Indian Contract Act. This section does not admit of any distinction between a contract to sell immovable property or any moveable commodity, and damages with respect to a breach in either are to be assessed on the same standard. In *Nagardas Saubhagyadas* v. *Ahmed Khan* (3) it was said:

> The Legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities.

In *Ranchhod Bhawan* v. *Monmohandas Ramji* (4) it was held that S. 73, Indian Contract Act, imposes no exception on the ordinary law as to damages whatever the subject-matter of the contract. In cases of breach of contract for sale of immovable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way, unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages. This ruling was approved of in *Nabin Chandra Saha* v. *Krishna Baroni Dassee* (5). Mr. Castellino has argued that as the contract could not be performed by the defendants through no fault on their part, plaintiffs are not entitled to any damages but only to refund of the earnest money and the costs of the agreement and inspection of the title-deeds, and he relied on the case of *Vallabdas Tulsidas* v. *Nagardas Jathabhai* (6). This case is not strictly applicable as in the first instance what was held therein was that if it were found that there was an implied agreement that if, without any default on the part of the vendor, he was unable to make out a marketable title, the bargain would be off, and the vendor would only have to pay the purchaser's costs of the agreement and of the inspection of the title-deeds.

But in the case before me there is not the faintest indication of any implied agreement between the parties, and further I am not prepared to concede that the bargain fell through without any default on the part of the vendor-defendants. It was the duty of the defendants to be vigilant and have the agreement in their favour executed by all that had a share in the property in question, and, though they failed to do so, there was no insuperable obstacle to the defect being remedied, as the defendants' vendors could have been persuaded to take such steps as were necessary to convey to the defendants a perfect title, but the defendants beyond sending a notice to their vendors, Ex. 12, drawing their attention to the objections to the title raised by their purchasers and the purchasers from them, do not appear to have taken any further proceedings, and have not taken any legal action against their vendors. Now, in considering the relief to which the plaintiffs are entitled there can be no doubt that they are entitled to a refund of the sum of Rs. 45,000 part of the purchase price paid to the defendants and this is conceded. Mr. Castellino has not disputed the sum of Rs. 2,178-5-8 claimed as interest at 9 per cent. per annum on the above sum to be computed from the dates when the payments were made.

Plaintiffs further claim Rs. 15,000 as damages and the question arises whether they have established their claim to this amount. Plaintiffs say they claim this amount as the difference between the contract price and Rs. 90,000 which latter amount is the price alleged to have been offered to Hussainie for the property in question. There is little doubt that till May 1918, there was a rising market in land, as the various sales of the property in question unmistakably indicate. The point is whether in September which I reckon as the due date for the performance of the contract the market was rising or falling. Evidence has been led as to the condition of the land market, and I shall briefly discuss it. (Then the judgment discussed the evidence and proceeded). I must confess that the evidence led as to the market rate is not of a very satisfactory character and the only conclusion

(3) [1897] 21 Bom. 175.
(4) [1908] 32 Bom. 165 = 9 Bom. L. R. 10-7.
(5) [1911] 38 Cal. 158 = 9 I. C. 525 = 15 C. W. N. 420.
(6) [1921] 23 Bom. L. R. 1213.

that I can come to on the materials before me is that the land market was rising in March April and May 1918, and possibly as one witness remarks, it was at its highest in May 1918, but shortly after that it showed a tendency to fall apparently owing to the difficulty experienced by purchasers in the money market. Now as I have already remarked plaintiffs claim Rs. 15,000 as damages in Suit No. 1040 of 1918, the difference between Rs. 75,000 the price at which the property in suit had been contracted to be purchased, and Rs. 90,000 which is alleged to be the market price, the latter figure being apparently mentioned, as in Suit No. 842 of 1918, a prior suit, plaintiff Husseinio Mamo assesses his damages on the alleged offer of Rs. 90,000. I have already held that I am far from being satisfied as to the genuineness of this offer and to my mind the evidence on this point has been clearly designed from Husseinio with the view of extorting heavy damages from Husseinio Mamo's vendors, and I entirely disbelieve it. The proper measure of damages for a breach of contract is the difference between the contract price and the market price at the time of the breach. Plaintiffs have themselves in para. 7 of their plaint stated that the cause of action arose about the 10th September 1918, when the plaintiffs' vendees could not get a marketable title from defendants and cancelled the contract with the plaintiffs, or in the alternative about 1st November 1918, when defendants finally committed breach. It appears to me that the cause of action is correctly reckoned as arising in September 1918 ; but whether it be deemed to arise in September or November 1918, it does not vary the basis on which damages should and can be assessed ; for on the evidence adduced as to the market rate there seems to me no escape from the conclusion that in either of these months the land market was decidedly falling.

It is a well-known principle of law that the loss or damage for which compensation is recoverable in case of breach must be either (1) : such as arises naturally in the usual course of things from the breach or (2) ; such as the parties knew at the time of the contract to be likely to result from it. Now the profit which plaintiffs would have made out of their contract with Sunderji and Valabdas, if the defendants had fulfilled their contract, could be recovered only if the defendants knew about it or were informed at the time of making the contract. But there is not an iota of evidence on the record which would avail to prove that defendants were aware at the time they made the contract with the plaintiffs that the latter were to make a profit out of the transaction by the re-sale of the property. Hence in the present case plaintiffs cannot recover by way of damages the profit of Rs. 5,000 that they would have made if the defendants had fulfilled their part of the contract, by the sale to Sunderji and Valabdas of the property in suit at the price of Rs. 80,000. S. 73 of the Contract Act makes it compulsory for the plaintiff to prove that he has suffered damages and the extent to which he has suffered before a Court can award him damages for breach of contract.

In *Joseph* v. *Shew Bux* (7), a Privy Council case, it was laid down that in a suit for damages for not taking delivery of goods if the party whose duty it is to prove damages does not give the best evidence, every presumption should be made against him ; if there is any range, the range should be taken against him, but this case does not relieve the Court altogether of the duty of assessing the damages, as best it can on the evidence and materials actually before it. Nor is the Court empowered to give nominal damages merely. Plaintiffs appear to me to have entirely failed to prove any damages sustained by them arising in the usual course of things out of the breach of the contract by the defendants and there are no materials before me to enable me to assess any damages in their favour. Both in September and November 1918, the land market had fallen and I feel convinced that the plaintiffs would have been glad to be relieved of their obligation to take up the land were it not that their vendees filed a suit against them for damages and they were in turn reluctantly driven to claim damages from their vendors. I hold that no damages have been proved to have been sustained by plaintiffs by reason of defendants' breach of contract and consequently plaintiffs are not entitled to any.

(7) [1919] 36 M. L. J. 151=17 A. L. J. 158=49 I. C. 691=21 Bom. L. R. 615 (P. C.).

Plaintiffs have next claimed a sum of Rs. 1,500 on account of expenses incurred by reason of Suit No. 958 of 1918 filed against them by Sunderji Keshowji. No details have been supplied as regards this item though the Manager of the plaintiffs' firm has been examined as a witness. But apart from the absence of proof as regards this loss, I cannot reckon it as the natural and direct result of the breach of contract in the ordinary course of things. It would be a remote and indirect loss even if any had been proved to have been sustained, and I must disallow it. (The rest of the judgment is not material).

Order accordingly.

A. I. R. 1927 Sind 53

KINCAID, J. C., AND BARLEE, A. J. C.

Dadlomal and *others*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revision Application No. 171 of 1926, Decided on 6th September 1926, from an order of the S. J., Hyderabad (Sind), D/- 6th June 1926.

Criminal P. C., S. 403—Property stolen on different dates—That it is received by receiver on different dates, can be presumed—Burden lies on accused receiver to prove that he received it at one and the same time—Otherwise previous acquittal of receiver does not bar his subsequent trial for receiving another item.

When it has been proved that thefts occurred at quite different dates the presumption is that the property passed from the hands of the thief to the receiver at different dates also. The burden is then shifted from the Crown to the accused to show that although the property was stolen at different times he received it at one time only. When this is not proved a subsequent trial in respect of different items of property stolen on a different date is not barred by a prior acquittal with regard to another item of property under S. 403 : 27 *Cr. L. J.* 872, *Foll.* ; 15 *Cal.* 511; 1. *I. R.* 1923 *All.* 547 and 1925 *Patna* 20, *not Foll.* [P. 54. C. 2]

E. Raymond—for Appellants.

T. G. Elphinston—for the Crown.

Judgment.—The facts of this revision application are shortly as follows: In August 1925, a theft was committed from a surveyor called Ratanchand in the village of Moro. The property stolen was reported as worth about Rs. 5,000. The Police investigated the offence and during their investigation they searched the premises occupied by three persons Dadlomal, Namomal and Kimatmal and they attached property worth about Rs. 1,000. Ratanchand was sent for by the Police and he identified as his pair of ear-rings, a gold ring, some handkerchiefs and dhoties.

It so happened that on the 26th of December 1924, some 8 months previous to the theft in the village of Moro, a theft had been committed from one Santumal in the village of Bhiria. It also appears that yet a third crime was committed of a similar nature in the village of Daulatpur. After the attachment of the property the applicants were prosecuted and convicted together with persons alleged to have been the thieves of receiving property stolen in the Bhiria theft. They were acquitted on appeal by the learned Sessions Judge of Hyderabad. Subsequently these three persons Dadlomal, Namomal and Kimatmal were prosecuted as receivers of property stolen from Ratanchand in the Moro theft case. They were convicted by the learned Resident Magistrate of Naushahro on the 31st of March 1926. They appealed to the Sessions Court of Hyderabad but the learned Sessions Judge confirmed their convictions and sentences and dismissed their appeal on the 8th of June 1926. Against this order of the learned Sessions Judge they have come in revision to this Court.

We have heard with great interest the arguments addressed to us by the learned pleader, Mr. Raymond. He has urged that his clients, the applicants, should be acquitted under the provisions of S. 403, Criminal P. C. As I understand the learned pleader's argument, it amounts to this. The receiving of stolen property even if it was stolen at different times and by different people amounts to one offence unless it can be shown by the Crown that the receiving took place for different occasions: that the burden of proving this lies on the Crown. In therefore, the accused have been tried and acquitted of receiving stolen property in the Bhiria case they cannot under S. 403 of the Criminal P. C. be tried again for receiving stolen property in the Moro theft case. The learned pleader's argument, it must be admitted, derives support from the cases reported in *Ishan*

Muchi v. *Queen-Empress* (1), *Sheo Charan* v. *Emperor* (2) and *Emperor* v. *Bishan Singh* (3). With all deference, however, to the learned Judges who decided those cases there are two contrary rulings to be found in the decisions of this Court.

The learned pleader has pressed us to refer this matter to the decision of the Full Bench. We have given his request our careful consideration but we regret that we are unable to accede to it. As it seems to me the result of the learned pleader's contention would be this: provided that a receiver managed to get an acquittal on a charge of receiving property in one theft, it would be impossible to punish him no matter in how many other cases he had received stolen property provided that the property was attached at one time. The case is aggravated here by the fact that the accused could not possibly have been tried in the former case for receiving the stolen property now in question. Under the new Code, S. 239 empowers a Magistrate to try together the thieves and the receivers. Acting on this amendment the learned Magistrate in the Bhiria case did try together the receivers and the thieves. But as the Bhiria thieves were not shown to have taken part in the Moro theft the present applicants could not have been tried for receiving Moro property in the former case.

In spite of the learned pleader's argument, I still adhere to the view I expressed in the case of *Ghulamo* v. *Emperor* (4). There property had been stolen at different places and at different dates and I observed that the presumption was that the property then stolen passed from the hands of the thief to the receiver at different dates also. I still think that this is a perfectly fair presumption to draw. The chief wish of a thief when he steals property is to dispose of it as soon as he can. The possession of property is the strongest piece of evidence against him. In this case where the Bhiria theft and the Moro theft occurred at an interval of 8 months it is extremely unlikely that the thief or the thieves would keep the Bhiria property with him for that period until he added to it the property stolen from Ratanchand's house in the Moro village. I would again repeat the words which I used before and which were quoted with approval in the case of *Iso* v. *Crown* (Criminal Revision Application No. 2 of 1926) by my learned brother Mr. Lobo, A. J. C.:

> When it has been proved that thefts occurred at quite different dates the presumption is that the property passed from the hands of the thief to the receiver at different dates also. The burden, in our opinion, is then shifted from the Crown to the accused under S. 106 of the Indian Evidence Act. This matter was within the knowledge of the accused and it was for him to show that although the property was stolen at different times he received it at one time only.

A second point was raised by the learned pleader for the applicants. It was true, so he said, that his clients were joint in the sense that they lived in the same house but that did not establish their joint control over the stolen property found in their possession. This question, however, has been carefully considered by the learned trying Magistrate in his exhaustive judgment. The learned Sessions Judge concurred in that finding. It is a finding of fact and we see no reason to disturb it in revision.

We have not been addressed on the question of sentence and we do not think that the sentences passed on the applicants were unduly severe.

We dismiss the application and we confirm the conviction and sentences passed on the applicants.

Application dismissed.

(1) [1888] 15 Cal. 511.
(2) A. I. R. 1923 All. 547=45 All. 485.
(3) A. I. R. 1925 Patna 20=3 Pat. 503.
(4) [1923] 27 Cr. L. J. 872.

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* A. I. R. 1927 Sind 54

RUPCHAND BILARAM AND TYABJI, A. J. Cs.

Bhikachand and *another*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revision Applications Nos. 122 and 123 of 1926, Decided on 23rd July 1926, from the orders of Kincaid, J. C., D/- 19th April 1926, in Criminal Appeals Nos. 244 and 245 of 1925.

* (a) *Penal Code, S. 499—Libel—Publication is sufficiently proved when it is shown that accused did the act which had the quality of communicating to third persons.*

No doubt, one of the elements of the offence of defamation is that the imputation complained of should be made or published by the accused

and the onus of proving it is on the prosecution. In the case of a defamatory libel that element is however sufficiently proved when there is evidence that the accused intentionally did any act which had the quality of communicating to a third person or persons generally the alleged libel. And it is not necessary for the prosecution either to allege or to prove that the act of the accused was directed at communicating the libel to any specified person, or persons or that the libel, as a matter of fact was brought to the notice of such person or persons. Swearing an affidavit containing libel and using it in Court is sufficient publication. [P55 C 2, P56 C 1]

(b) *Penal Code, S. 499—Imputation of insolvency to a trader amounts to defamation.*

An imputation of insolvency against a person in the way of his trade is per-se defamatory: *Robinson* v. *Merchant*, (1845) 7 *Q. B.* 918 *Rel. on.* [P 56 C 2]

(c) *Criminal trial — Revision—Findings of fact are interfered with only in exceptional cases.*

It is only rarely and in exceptional circumstances that the Sind Judicial Commissioner's Court interferes in revision with findings of fact of the lower appellate Court and only in cases when the findings are supported by no legal evidence or are so manifestly erroneous as to have resulted in a miscarriage of justice. [P 56 C 2]

Tahilram Maniram and *Motiram Idaumal*—for Applicants.

T. G. Elphinston—for the Crown.

Rupchand Bilaram, A. J. C.—These two applications are connected and arise out of a dispute between near relations. The applicants Tikamdas and Bhikachand are both cousins. They are the nephews of one Khanchand who died in 1919 leaving behind him two widows, Isribai and Pevibai, and three minor sons. The complainant Menghraj is the father of Pevibai and is on her side. Isribai, as the senior widow of Khanchand was evidently in charge of his estate which chiefly consisted of a business carried on by the deceased in partnership with the applicants and certain strangers during his lifetime. This business was carried on by Isribai after his death up to 1924 when there were disputes between the partners and the partnership was dissolved. A fresh business was thereafter started by Isribai in partnership with the applicants and one Pragji. She was entitled to recover large sums of money from her old partners for which she instituted a suit in this Court and obtained an interim consent order for payment of a sum of Rs. 50,000 to her. This led to Pevibai's filing with the help of her father Menghraj an application under the Guardians and Wards Act to this Court for the appointement of Nazir as the guardian of the minors' estate.

We are not at present concerned with the motives of Pevibai in filing the application which, it has been urged, was filed at the instigation of the old partners who had to pay this large sum of money and who are said to have approached her through Menghraj. In answer to her application Tikamdas filed an affidavit in which inter alia, he stated as follows:

That Pevibai is a tool in the hands of the enemies of the firm and has been approached through her father who is a discharged bankrupt and even now is heavily involved and has been convicted on a charge of gambling.

The guardianship application was dismissed by Kennedy, Acting J. C. Thereafter the complainant and three other persons moved the Commissioner in Sind to appoint the Court of Wards to take charge of the minors' property. As a counter move to that application Bhikachand as the attorney of Isribai filed a petition before the Commissioner in Sind inter alia making imputations against Menghraj which are as follows:

Menghraj Gangaram is the father of Pevibai. He has put up his daughter as a 'junior widow' of the petitioner's deceased husband. He is a discharged insolvent and has been more than once convicted of gambling.

Thereupon the complainant filed two prosecutions against the applicants Tikamdas and Bhikachand before the City Magistrate of Karachi under S. 500, Indian Penal Code, which led to their conviction and to each of them being fined Rs. 300. Their appeals have been dismissed by the learned Judicial Commissioner. They have now come to us in revision.

The first point urged before us and which is pertinent to the application of Tikamdas only is as to the nature of the charge framed against him which inter alia specified that the publication of defamatory libel in his case was said to have been made to the Commissioner for swearing affidavits in the Court of the Judicial Commissioner of Sind. It was contended that there was no obligation on the Court Commissioner to read the affidavit before attesting it and in the absence of proof that the libel contained therein was brought to his notice the accused was entitled to an acquittal. I am not prepared to accede to this argument. No doubt, one of the elements of the offence of defamation is that the imputation complained of should be

made or published by the accused and the onus of proving it is on the prosecution. In the case of a defamatory libel that element is, however, sufficiently proved when there is evidence that the accused intentionally did any act which had the quality of communicating to a third person or persons generally the alleged libel. And it is not necessary for the prosecution either to allege or to prove that the act of the accused was directed at communicating the libel to any specified person or persons or that the libel, as a matter of fact, was brought to the notice of such person or persons.

The communication of a defamatory libel to the person defamed by means of a postcard instead of a covered letter in *Sadgrove* v. *Hole* (1), and in *Queen* v. *Sankara* (2), the production of a printed copy of a libel in *In re Periyasawmi Kotasawmi Tevar* (3) the filing of a petition in a Court in *Greene* v. *Delanney* (4) are some of the instances which were held to amount to sufficient publication without proof of the contents of the documents containing the libel being brought to the knowledge of any specific person other than the person defamed. The complaint against the present applicant was not limited merely to his having sworn the affidavit before the Court Commissioner but of having sworn it and used it in Court. There was no occasion, therefore, for the learned City Magistrate to specify in the charge that the applicant had published or made known the libel to the Commissioner for taking affidavits or to any other specified person. A reference to the applicant having made or published the libel was sufficient to maintain the charge. The inclusion of the name of the Commissioner for taking affidavits as the person to whom the publication was made was, in my opinion, a mere surplusage. There is also no question in the present case of the applicant having been prejudiced by the alleged error or defect in the charge. He knew all along what the case of the prosecution was and the alleged defect, if any in the charge is sufficiently covered by S. 225 and cured by S. 537 of the Criminal P. C.

(1) [1901] 2 K. B. 1=70 L. J. K. B. 455=49 W. R. 473=84 L. T. 647.
(2) [1883] 6 Mad. 384.
(3) 1 Weir. 580.
(4) 11 W. R. Cr. 27.

The second point urged on behalf of both the applicants Tikamdas and Bikhachand is that the imputation contained in the affidavit and the petition, namely, (1) that the complainant was a discharged insolvent and (2) that he was a convicted gambler were substantially true and that they were at any rate made in good faith within the meaning of Exceptions 9 and 10 to S. 499, Indian Penal Code. As declared by S. 105 of the Evidence Act the onus was clearly on the applicants to prove both these points. They failed to convince the learned Judicial Commissioner on either of the two points. Our revisional jurisdiction, though unlimited, can only be exercised on certain well-recognized principles. It is well settled that it is only rarely and in exceptional circumstances that this Court interferes in revision with findings of fact of the appellate Court and only in cases when the findings are supported by no legal evidence or are so manifestly erroneous as to have resulted in a miscarriage of justice. In order to succeed, the applicant must, therefore, satisfy us that their case falls within the above principles.

With regard to the first imputation a preliminary objection was also raised that this imputation was not per se defamatory and that in the absence of evidence that it was likely to cause harm to the complainant the applicants were entitled to an acquittal. There is no substance in the preliminary objection. There is evidence both of the complainant and of the documents produced by the applicants themselves that the complainant was a trader of some sort. An imputation of insolvency against a person in the way of his trade is per se defamatory : per Lord Denman, C. J., in *Robinson* v. *Merchant* (5). There is, however, a good deal to be said in support of the contontion that the first imputation was substantially true. There is a certain amount of documentary evidence in support of the plea that the complainant was an insolvent or in such impecunious circumstances as to lead the applicants into the belief that he was an insolvent. Exhibits 12 to 21 are certified copies of decrees and execution applications commencing from 1916 and ending with 1924 which show that the complainant had

(5) [1845] 7 Q. B. 918=10 Jur. 156=15 L. J. Q. B. 135.

all along been unable to pay small trade debts as then became due. In execution of a decree for rent he obtained his release on 22nd of February 1923, on giving security that he would apply for insolvency. He has admitted that he has not paid the amount of that decree up to now and has attempted to explain it by averring that he was not able to find the whereabouts of the decree-holder who is a pleader of this Court and is now practising in Shikarpur. His explanation that he pays Rs. 85 per month to one Virji, in whose shop he is now carrying on business which amount does not represent the rent of the shop only but something more, is somewhat suspicious. And it is open to the attack that the arrangement between him and Virji, by which the shop, is known as Virji's shop is intended to avoid the attachment of the shop goods by his creditors.

On this evidence the learned City Magistrate was constrained to hold that complainant was an impecunious person. There is no reference to this evidence in the judgment of the learned Judicial Commissioner. It is not impossible that the applicant or his legal adviser who drafted the affidavit for him under his instructions intended to describe the complainant as an undischarged insolvent. If that had been so it would have been another matter. The expression discharged insolvent does not, in my opinion, attach any more ignominy to the complainant than would have attached to him if he had been referred to as an insolvent. A discharged insolvent may equally be a person who had at one time applied for insolvency but who had obtained his discharge from the Court there being nothing radically wrong with him to induce the Court to refuse his discharge and, therefore, not a person who may not be given credit. Often honest people are compelled to apply for insolvency on account of the circumstances over which they have no control and who, after they have got their discharge, inspire the same confidence as they inspired before their insolvency. If the charge had been limited to the first imputation only it would have no doubt required our serious consideration before it could be maintained. But in order to succeed the applicants have to satisfy us that the findings in respect not only of one but of both imputations made by them are such as could not be maintained.

Nothing has been urged by the learned pleaders for the applicants to satisfy us that the finding with regard to the second imputation is manifestly erroneous. There is evidence on the record to justify the finding of the learned Judicial Commissioner that the applicant had no reasonable grounds for stating that the complainant was a convicted gambler or in persisting in that plea. At their request a search was made by the learned City Magistrate from his own record to see if the complainant has been convicted of gambling. This search proved futile. The attempt by the applicants to prove by oral evidence that the complainant had been convicted of gambling equally failed. The learned City Magistrate held that the defence witnesses were false. In his estimate of the witnesses the learned Judicial Commissioner has agreed, and we are bound by that finding. It is further noteworthy that it was not the applicants' case that they had been informed by any of the defence witnesses that the complainant had been convicted of gambling or that they had acted on information so supplied.

This was a belated and puerile attempt on their part to give some sort of evidence in support of their case. There is nothing whatsoever on the record to justify the inference that the applicants had acted in good faith which, as defined by S. 52 of the Indian Penal Code, denotes that they should have acted with due care and caution before making such a serious allegation against the complainant.

The last point urged on behalf of both the applicants is as to the severity of the sentence. The learned Judicial Commissioner has given very good reasons for not reducing the sentence. He has pointed out that if the applicants had not persisted in their conduct in trying to convince the Court that the complainant was a convicted gambler and had expressed regret before him he might have listened to their arguments with more sympathy. Notwithstanding the observations of the learned Judicial Commissioner the applicants have not even expressed regret before us and have again pressed the same points. I,

therefore, see no reason to interfere with the sentence which is one of fine only and under the circumstances does not appear to me to be too severe.

Tyabji, A. J. C.—I have had the benefit of reading the judgment prepared by my learned brother, but the conclusion at which I have arrived has not been without some doubt.

In the first place it is certainly unfortunate that in the case of Tikamdas no attention was paid to the fact that publication is of the gist of the offence of defamation and should have been clearly and definitely proved by the prosecution in the Magistrate's Court. But the defamatory statement was made in an affidavit, intended to be used in judicial proceedings. The circumstances in which the defamatory statement was made and the object of making it render this point entirely technical. The imputation was not made in an unguarded moment, or in the heat of a dispute so that it may be considered that if no one was present at the time it was made, there would be no publication. It seems to me, therefore, that the view taken by the learned Judicial Commissioner on this point, which is reduced to one of pure technicality, is not such as ought to be disturbed. Still it cannot be denied that this question refers to a very important ingredient in the offence charged and I wish to guard against anything said by me being taken to imply that the fact of the publication of the slander can be omitted from due consideration in trials for defamation.

In the second place it was strongly urged that though the defamatory statements may not literally have been true they come very near the facts, and, it is suggested, some parts of the allegation cannot be proved only because unfortunately appropriate evidence is not available. The fact is that in their eagerness to do damage to the cause of the complainant and to disprove claims to high social status (which were perhaps exaggerated and unfounded) the accused themselves made imputations against the complainant the truth of which they were not able to establish. The law of defamation must afford protection even to those whose character and reputation may not be of the very highest and it is no defence to say that though the complainants may not be all that the accused have said they are not as good as they might have been.

Considering together both the points I have mentioned I felt much doubt in my mind whether the fine is not excessive. My own inclination would have been to impose a very much smaller fine. But we are sitting in revision and in view of the considerations that have been referred to on this head in the judgment already delivered it does not seem to me that it would be right to interfere with the amount of the fine. For these reasons I agree that these applications should be dismissed.

Applications dismissed.

A. I. R. 1927 Sind 58

KINCAID, J. C.

Tikamdas Mulchand — Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 245 of 1925, Decided on 19th April 1926, against a judgment of the City Mag , Karachi, D/- 19th October 1925.

(a) *Penal Code, S. 499—Statements in affidavit.*

Calling a person discharged bankrupt and gambler convict, in an affidavit, amounts to defamation. [P. 59, C. 1]

(b) *Penal Code, S. 499—Publication—Criminal P. C., S. 221.*

A plea that though there was publication of the statement, there was no publication to person mentioned in the charge is a highly technical plea and the defect in the charge is curable under S. 537, Criminal P. C. [P. 59, C. 1]

Motiram Idanmal—for Appellant.

T. G. Elphinston—for Opposite Party.

Judgment.—The facts in the appeal are very similar to those in Criminal Appeal No. 241 of 1925. The only point of difference is that the passage complained of occurred in an affidavit and not in a petition. Bhikhchand made an application in a petition for guardianship filed by Pevibai. His cousin Tikamdas supported the application with an affidavit. In it he wrote :

Pevibai is a tool in the hands of enemies of the firm and has been approached through her father who is a discharged bankrupt and even now is heavily involved and has been convicted on a charge of gambling.

For the reasons given in my judgment in *Bhikchand v. Emperor* (1) I find that these words amount to defamation within the meaning of S. 499, I. P. C. I also find that the accused is not entitled to the benefit of any of the exceptions to that section.

One new point, however, has been raised by the learned pleader for the appellant, Mr. Motiram. He has contended that his client was charged with publication of the defamation to the Commissioner for taking oaths and affidavits in the Court of the Judicial Commissioner and that proof of such publication is wanting. I do not, however, think that this argument has any weight. The affidavit was certainly sworn before the Commissioner for taking affidavits and it is quite likely that he read it. But even if he did not and there was no publication to him, there certainly was publication to others. The affidavit was filed in a civil proceedings and went into the office of the Judical Commissioner, where it must certainly have been seen and read. Indeed no one would make an affidavit save with the intention that it be seen and read. The argument, therefore, of the learned pleader amounts to this: There was publication but not publication to the person mentioned in the charge. The plea is, therefore, highly technical. The defect in the charge if any, can be cured by S. 537, Civil P. C.

I confirm the lower Court's finding and sentence and dismiss the appeal.

Appeal dismissed.

(1) A. I. R. 1926 Sind 258.

A. I. R. 1927 Sind 59

KINCAID, J. C.

Ghulam Kadir—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Transfer Application No. 88 of 1926, Decided on 9th July 1926, for transfer of case pending with the Sub-Divl Magistrate, Larkana.

(a) *Criminal P. C., S. 110—Permanent residence of the person complained against within jurisdiction of the Court taking cognizance is not necessary.*

There is nothing in S. 110 to support the plea that the person complained against should be a permanent resident within the jurisdiction of the Magistrate in whose Court proceedings are taken: 36 *Mad.* 96, *Foll.* [P. 60, C. 1]

(b) *Criminal P. C., S. 110—Convenience is no ground for transferring a case to Court within whose jurisdiction the person complained against has permanent residence.*

The fact that it would be inconvenient for the person against whom proceedings have been started under S. 110 to summon witnesses from the place of his residence is no ground for transferring the case to the Court within whose jurisdiction such a person resides: 14 *A. L. J.* 1074, *Rel. on.* [P. 60, C. 1]

Partabrai D. Punwani—for Petitioner.

T. G. Elphinston—for the Crown.

Judgment.—The facts of this transfer application are shortly as follows:

On the 17th of December 1925, the Sub-Divisional Magistrate of Larkana passed an order against the applicant under S. 117, Cl. (3), Criminal P. C., calling upon him to produce two sureties for two thousand rupees. Previously, on the 7th of November 1925, the Inspector of Police had filed a complaint against the applicant before the said Magistrate under S. 110, Criminal P. C., and on the same day, it would seem, the learned Magistrate passed an order under S. 112, Criminal P. C., against the applicant and a formal order for his arrest under S. 114.

The applicant has asked for the transfer of these proceedings and his pleader, Mr. Partabrai, has raised two points in argument. (1) He has complained that his client was not a resident of the Larkana District but of Sukkur. The proper tribunal, therefore, to deal with him was not the Sub-Divisional Magistrate of Larkana, but some Sub-Divisional Magistrate of Sukkur district (2). The learned pleader has argued that even if this Court were to consider that a permanent residence was not required by S. 110 still as the applicant came on a summons as a defence witness, it was not proper to arrest him in Larkana. The learned pleader has also argued that in view of the fact that the applicant is a resident of Sukkur District and that the witnesses of both sides reside in that district, it would be more convenient that the trial should take place in Sukkur and not in Larkana.

As regards the first point, the wording of the section itself is clear:

"Whenever . . . . . a Sub-Divisional Magistrate . . . . receives information that any person within the local limits of his jurisdiction . . . ."

There is nothing there to support the plea that the person complained against should be a permanent resident within the jurisdiction of the Sub-Divisional Magistrate. I am justified in this view by the case *In re Kora Ranjan* (1). Their Lordships observed :

The law simply says 'Any person within the local limits', and this we understand to mean any person who is within the local limits at the time when the Magistrate takes action under the section. The object of the section is the prevention of crime, and its object would, in our opinion, be liable to be defeated if its scope were restricted to persons residing within the Magistrate's jurisdiction.

This view was followed by the Allahabad High Court in *Emperor* v. *Munna* (2) ; Walsh, J., observed :

The section is perfectly plain. The Magistrate is given power to deal with persons who have a general reputation as bad characters, who happen to be within his jurisdiction . . . . . No language is used in the section bearing upon the question of residence at all."

A similar view was taken by the Calcutta High Court in *Emperor* v. *Durga Halwai* (3), remarks at p. 157. Their Lordships observed :

In none of the Ss. 107 to 110 does the word 'residing' occur and to read it into those sections would involve a complete alteration of their scope and effect.

Coming to the second point raised by the learned pleader, the learned Sub-Divisional Magistrate's report has not borne out this allegation. Even if it be admitted that the applicant went to Nawabshah as a defence witness, it does not seem to me to affect the case. The defence witnesses have no more right of safe conduct when they go to Court than any other persons who are required by the King-Emperor to attend his Courts of justice.

As regards the plea of inconvenience, this point was raised in the case of *Emperor* v. *Munna* (2) to which I have already referred. Walsh, J.'s remarks are in point :

In cases of this kind arguments *ab inconvenienti* can always be produced on either side. On the one hand it may be said that a man accused of an evil reputation beyond the jurisdiction in which his residence is situated, might be subjected to great inconvenience in having to summon witnesses from a distance. It may be that that is one of the risks that travellers run in this country, but if they are persons of good character it does not strike me as a very serious one. On the other hand, it is obvious that a notorious thief who had made the continent too hot for himself might remain at liberty enjoying a notorious reputation as a thief and in his defence set up his residence in France.

For the reason above given, I see no reason to grant an order of transfer and I reject this application.

Application rejected.

(1) [1913] 36 Mad. 96=17 I. C. 413=23 M. L. J. 535.
(2) [1916] 14 A. L. J. 1074=35 I. C. 822.
(3) [1916] 43 Cal. 153=30 I. C. 442=19 C. W. N. 1022.

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* A. I. R. 1927 Sind 60

LOBO, A. J. C.

Lloyds Bank, Ltd.—Plaintiffs.

v.

F. O. Devidas Kalliandas— Defendants.

Civil Suit No. 434 of 1926, Decided on 12th August 1926.

* *Civil P. C., O. 37, R. 3—Application under—Question to be decided is whether there is triable issue between the parties—When there is triable issue, leave should be granted, without requiring deposit or security from defendant—Whether plaintiffs are or are not holders in due course is triable issue.*

The question to be considered on an application under O. 37, R. 3, Civil. P. C., is whether or not a triable issue was disclosed by the defendents on affidavit or otherwise, a 'triable issue' meaning a plea which was at least plausible. Once the Court comes to the conclusion that there is a triable issue in the case, it must grant leave to defend without requiring defendant either to pay the amount claimed into Court or to furnish security therefor. Such a condition must be imposed only in exceptional cases where, for instance, there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in only in order to obtain further time : *A. I. R.* 1924 *Mad.* 612, *Foil.* [P. 61, C. 2]

The question whether the plaintiffs are or are not holders in due course for value is a triable issue between the parties. [P. 62, C. 1]

Judgment.—This a suit for Rs. 32,000 odd on eight bills drawn by Messrs. Garnet W. Edmunds on the defendants, the firm of Devidas Kalliandas & Co. of Multan City. The plaintiffs allege that they are holders in due course for value of the bills in question. The bills were unconditionally accepted by the defendants but were subsequently dishonoured on presentation. The suit is brought under O. 37 of the Civil P. C. The defendants have applied for leave to defend mainly on two grounds : (1) that the bills sued on were drawn by Messrs. Garnet W. Edmunds on the defendants to cover the value of certain peicegoods ordered by the defendants

from Messrs. Garnet W. Edmunds; that the goods which these bills actually cover are not in accordance with the orders of the defendants, being inferior in quality, different in finish, shade and colours, some of the goods never having been ordered by the defendants. They, therefore, allege there has been a total failure of consideration; (2) that the bills were accepted by the defendants on the understanding that the goods, the value of which they represented, were of description answering the contract and were the goods ordered by the defendants.

In arguments a 3rd ground was urged by the learned pleader who appeared for the defendants, viz, that the plaintiffs, Llyods Bank Ltd. were not holders in due course for value, but were merely the agents of Messers. Garnet W. Edmunds, the original drawers, for collection of the bills.

I have allowed the defendants to raise this 3rd ground and I feel that I am justified in permitting them to do so. The record shows that no copy of the plaint was served on the defendants. The summons served upon them, a copy of which is on the record, merely states that a suit has deen filed against defendants under O. 37, cf the Civil P. C. for Rs. 32,000 odd on eight bills of exchange, copies of which are annexed. The defendants reside at Multan and were served there. They had to apply for leave to defend within 10 days and it was clearly impossible for them within that period to obtain a copy of the plaint and acquaint themselves with the allegations therein made by the plaintiffs.

Now, the principles upon which leave to defend should be granted in such suits has been laid down by the Madras High Court in the case of *Periya Miyana Marakayar and Sons* v. *Subramania Iyer* (1). The learned Chief Justice in that case, following the rulings of the House of Lords in *Jacobs* v. *Booths Distillery Co.* (2), *Cold* v. *Delap* (3) and *Jones* v. *Stone* (4), held that the question to be considered on an application under O. 37, R. 3, Civil P. C., was whether or not a triable issue was disclosed by the defendants on affidavit or otherwise; a triable issue meaning a plea which was at least plausible. The learned Chief Justice said:

> Once the Court comes to the conclusion that there is triable issue in the case, it must grant leave to defend without requiring the defendant either to pay the amount claimed into Court or to furnish security therefor. such a condition must be imposed only in exceptional cases where, for instance, there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in only in order to obtain further time.

Had this suit been filed by the original drawers of the bills in question, Messrs. Garnet W. Edmunds, I think the defendants would have been entitled to leave to appear and defend on the grounds raised by them in their application for leave to defend. On the other hand, if the allegation of the plaintiffs, that they are holders in due course for value, had been admitted by the defendants, there would, in view of the proviso to S. 43 of the Negotiable Instruments Act, have been no triable issue between the parties. But the question, whether the plaintiffs are or are not holders in due course for value, is in this case itself a triable issue.

I have been referred in argument to S. 118 (g) of the Negotiable Insuments Act and the presumption referred to therein. This is a rule of evidence which might affect the question of the burden of proof. It cannot, in my opinion, be held to preclude the defendants from proving that the plaintiffs are not, as a matter of fact, holders in due course for value.

Again I have been referred to the letters 'A-B' endorsed on the bills in suit showing that the bills in question were advanced bills and not bills for collection. On the other hand, it is pointed out that banks, in respect of such bills as I am here concerned with, are, as a rule, collectors or agents for the original drawers. I have also been referred by the defendants to para. 5 of their application for leave to defend, wherein they state that the shippers, Messrs. Garnet W. Edmunds have offered them an allowance ranging from 7½ to 12 per cent. in order to induce them to take up the goods. This would prima facie indicate, it is argued, that the original drawers are still interested in the bills in suit.

(1) A. I. R. 1924 Mad. 612.
(2) [1901] 50 W. R. 49=85 L. T. 262.
(3) [1905] 92 L. T. 510.
(4) [1894] A. C. 122=70 L. T. 171=63 L. J. C. P. 68=6 R. 437.

The question, therefore, whether the plaintiffs are or are not holders in due course for value, is a triable issue between the parties.

Again, I have been referred to the case reported in *Motishaw and Co.* v. *Mercantile Bank of India Ltd.* (5), but the position of the Mercantile Bank in that case as discounters of the bill in question does not appear to have been questioned.

I would, therefore, grant leave to the defendant's to appear and defend the suit. At the same time I feel that this leave should not be unconditional as I have grave suspicions that the defence set up is not entirely honest.

Though the amount in suit is large, the plaintiffs hold the goods against which the bills in suit were drawn, as security. The placing of impossible conditions on the defendants, after granting them leave to appear and defend, would be taking away with one hand what the Court has granted to them with the other. I think the position will be satisfactorily met if I make the leave granted to the defendants to appear and defend conditional upon their furnishing security to the satisfaction of the Nazir of this Court to the extent of Rs. 10,000 (ten thousand) which come to about 1/3rd of the claim in suit. As a matter of fa t I limit this security to Rs. 10,000 because this is not the only suit in which I propose to grant leave to defendants to defend. Security to be furnished within 14 days. If security is not furnished within 14 days the suit will be called up in Chambers for further orders.

Leave granted.

(5) [1917] 41 Bom. 566=37 I. C. 258=18 Bom. L. R. 521.

A. I. R. 1927 Sind 62

KINCAID, J. C., AND LOBO, A. J. C.

Mir Ali Nawaz and *others*—Plaintiffs—Appellants.

v.

Mir Ali Asghar and *others*—Defendants—Respondents.

First Appeal No. 14 of 1919, Decided on 29th April 1926, from the original judgment of the 1st Class Sub-J., Sukkur, D/- 23rd December 1918 and findings of another S. Judge, D/- 5th October 1925.

(a) Deed—Construction—Deeds in India must be liberally construed—English canons of construction are not to be applied.

Deeds and contracts of the people of India should be liberally construed. The strict canons of construction employed in dealing with deeds in England where conveyancing is a fine art should not be applied : 37 *All.* 869, *App.* [P. 64, C. 2]

(b) Deed—Construction.

The principles of Common Law with reference to joint contracts should not be applied. [P. 65, C. 1]

(c) Deed—Construction— Whether contract is joint or several is a question of construction.

The question whether a contract is joint or several or joint and several is a question of construction, that is a question of the intention of the parties to the contract : 12 *C. W. N.* 84, *Foll.* [P. 65, C. 2]

(d) Contract Act, S. 65—Portion of contract becoming unenforceable—Vendee is not entitled to refund—Contract Act, S. 23.

Purchasers are not entitled to refund of purchase money by reason of the fact that they are deprived of the benefit of a portion of what they purchased under a deed of conveyance, which turned out to be unenforceable. [P, 66, C. 1]

Tolasing K. Advani—for Appellants.

T. G. Elphinston, Tahilram Maniram and *Kimatrai Bhojraj*—for Respondents.

Judgment.—The appellant in this matter is Mir Ali Nawaz one of the two sons of Mir Fakhur-ul-din a jagirdar and zemindar of the Shikarpur district who died some time before 1875 possessed of large tracts of agricultural land. The other son was Mir Shah Nawaz who died on 23rd July 1910, leaving as his heirs inter alia, the present Respondents Nos. 1 to 6. On 28th September 1875, the two sons of Mir Fakhur-ul-din effected a partition with their cousins of the agricultural lands left by him under which they acquired as tenants-in-common a third of the said lands described in the deed of partition as "Block No. 3." This Block No. 3 included certain lands watered by the Kazi Wah in Dehs Jalil, Jagan and Kazi Wah, which for convenience sake will hereafter be referred to as the Kazi Wah lands.

On 1st November 1877, Mir Shah Nawaz went under the protection of the Manager Encumbered Estates under the Sind Encumbered Estates Act then in force. He was released from management on 10th February 1884, the Sind Encumbered Estates Act then in force being Bombay Act 20 of 1881. Under S. 28 of that Act, which corresponds with S. 29 of the present Sind Encumbered Estates Act 20 of 1899 Mir Shah

Nawaz became after his release incapable of alienating his estate including his share in the Kazi Wah lands which had been under management, beyond the period of his life. On 1st December 1884 the two brothers Mir Shah Nawaz and Mir Ali Nawaz leased the Kazi Wah lands to one Mulsing for a period of 10 years.

On 13th September 1887, Mir Shah Nawaz and Mir Ali Nawaz between themselves effected by an award decree a partition of a great portion of the agricultural lands up to that date held by them as tenants-in-common; the Kazi Wah lands, however, were excepted from the partition and the brothers continued as tenants in-common thereof in equal shares.

On 1st December 1888, Mir Shah Nawaz and Mir Ali Nawaz sold to Nebhandas, Lalchand and Mulchand, sons of Seth Pahlumal for the sum of Rs. 8,000, an undivided half of the Kazi Wah lands with all appurtenances subject to the rights of Mulsing under the lease of 1st December 1884, five years whereof were still to run. The deed of conveyance which is the most important document in this appeal is Ex. 122. Respondents Nos. 7-14 in this appeal are the heirs and legal representatives of the purchasers, the three sons of Seth Pahlumal.

As stated before, Mir Shah Nawaz died on 23rd July 1910, and on 12th March 1917, his heirs the present Respondents Nos. 1 to 6, instituted in the Court of the First Class Subordinate Judge of Sukkur, Suit No. 23 of 1917 for partition of the Kazi Wah lands. They impleaded in the said suit as Defendants Nos. 1-8 the present Respondents Nos. 7 to 14 and the appellant as Defendant No. 9. They claimed a half-share in the said lands. In substance their contention in support of their claim to partition and separate possession of a half-share were that in the undivided 8-annas share in the Kazi Wah lands conveyed to the predecessors-in-title of Respondents Nos. 7-14 the plaintiffs were entitled to 4-annas share which had belonged to Mir Shah Nawaz as the sale thereof beyond the lifetime of Mir Shah Nawaz was void under the provisions of the Sind Encumbered Estates Act; in the remaining undivided 8-annas share the plaintiffs as tenants-in-common with Mir Ali Nawaz in equal shares were entitled to a 4-annas share. The appellant admitted the claim of the plaintiffs in the suit and claimed a 4-annas share in the lands sought to be partitioned. The present Respondents Nos. 7-14 pleaded that the sale by Mir Shah Nawaz was binding on the plaintiffs, that they were estopped from disputing the same and that in any case the plaintiffs could not be given the relief sought by them without refunding a proportionate part of the purchase-money and the cost of large improvements carried out by them. Respondent No. 15 who is a lessee of some survey numbers in the Kazi Wah land was impleaded as Defendant No. 19 in the suit. He claimed exclusive ownership in some of the survey numbers referred to in the plaint.

A preliminary partition decree was passed by the First Class Subordinate Judge of Sukkur on 23rd December 1918, by which he allowed the plaintiffs (Respondents Nos. 1-6) partition of one-fourth of the whole land in suit except certain survey numbers held to belong to Defendant No. 10 (Respondent No. 15) and of an additional one-fourth share in the land shown to have belonged to Mir Shah Nawaz and which had gone under management. He allowed Defendants Nos. 1-8 (Respondents Nos. 7-14) partition of an 8-annas share, and in respect of Defendant No. 9 (appellant) he held that his right in the one-fourth allowed to the plaintiffs would be effected to that extent and allowed him partition of the remainder. In effect the learned Subordinate Judge by his decree allowed the present respondents Nos. 7 to 14 to retain the full benefit of the purchase of 1st December 1888, at the costs of the appellant. Mir Ali Nawaz filed the present appeal contending mainly that the learned Sub-Judge had permitted the present Respondents Nos. 7—14 to make out a case not set out in their pleadings and which he had no opportunity to meet and had disposed of the suit against him on the basis thereof.

On 14th August 1922 the High Court (Kennedy, J. C., and Madgavkar, A.J. C.) by their order held that Respondents Nos. 7-14 (referred to as the bania respondents, a description which we shall hereafter retain) had been allowed by the learned Subordinate Judge to suc-

ceed on an equitable claim not set up by them in their pleadings but made out for them in final arguments, and that the appellant, Mir Ali Nawaz had no opportunity to meet such a case. On paying the costs of the appeal up to that date the bania respondents were given three months to amend their pleadings. This the Bania respondents did by 22nd September 1922. On 2nd May 1923, the High Court directed the heirs of Mir Ali Nawaz (he being then dead) to put in if so disposed, a replication by 15th July. This having been done the High Court on 28th August 1923, framed the following additional issues and referred them for trial to the Court of the First Class Subordinate Judge of Shikarpur which had in the interval come into existence and taken over Shikarpur cases, reserving to both parties the right to call further evidence.

1. Was the contract with Shah Nawaz and Ali Nawaz joint as alleged in Para. 17 (a) of the amended written statement or was each of them as a tenant-in-common purporting to sell his own quarter-share. 2. Are the defendants entitled to claim full and proper performance of the contract from Ali Nawaz exclusively (Paras. 4 to 6 of the rejoinder). 3. Did Ali Nawaz go under the protection of the Manager? 4. If so, what is the effect thereof on the claim of defendants? 5. Are the defendants in this suit entitled to the relief claimed by them in Para. 17 (b) of their amended written statement (covers Para. 11 of the rejoinder). 6. Are the appellants entitled to retain possession of any part of the land in possession of the respondents? If so on what terms regarding cost of improvement and the purchase price, Can the question be raised in this suit? (8 to 12 of rejoinder).

The learned First Class Subordinate Judge of Shikarpur having certified his findings on the issues referred to him for decision and the Bania respondents having filed objections to the said findings the appeal is now before us for final disposal.

It has been conceded in argument that the points for determination in this appeal are substantially represented by the additional issues framed by the High Court on 28th August 1923, and the appeal has been argued on this basis.

The learned First Class Subordinate Judge of Shikarpur before whom the parties called no additional evidence has held on a construction of the sale-deed, Ex. 122, and by applying the principle involved in S. 47 of the Transfer of Property Act that Mir Shah Nawaz and Mir Ali Nawaz as tenants-in-common conveyed to the predecessors in-title of the Bania respondents each his own quarter-share in the Kazi Wah lands and that it was not a joint contract.

Now there are passages in the deed of conveyance, Ex. 122, which lend support to the argument that it was intended to be a joint conveyance. The vendors state that an undivided half of the entire land and canal has been sold by them for Rs. 8,000. The deed recites:

That the vendors as well as their heirs and assigns have thereafter no right, claim or interest whatsoever in the said property sold; that the owners are responsible for any risk whatsoever; that if the purchasers sustain any loss whatsoever the vendors and their heirs and property shall in every way remain bound and liable therefor; that if the land sold is proved to be mortgaged previously or if any objection, claim or dispute whatsoever arises the vendors are liable for all such responsibility together with costs and risks.

But in attempting to construe Ex. 122. it must be borne in mind in the first place that it is not the production of a skilled and practised conveyancer, but a deed drawn up in the vernacular as far back as 1888 in the mofussil of Sind and in all probability by a village scribe whose knowledge of conveyancing was nil and who probably kept a small collection of deeds of sale, mortgage, etc., one or other of which he adopted as occasion arose with such changes as were absolutely necessary to suit the requirements of the client he was writing for. To such a deed the dictum of the Privy Council that deeds and contracts of the people of India should be liberally construed [*Thakur Vasonji Moraji* v. *Chandra Bibi* (1)] is pre-eminently applicable. To construe such a deed as we have before us in accordance with the strict canons of construction employed in dealing with deeds in England where conveyancing is a fine art would in our opinion, be entirely out of place. In the second place it must be remembered that it would be impossible to arrive at a true construction of the deed, Ex. 122, without having well in mind the nature of and the limitations attached to the estate held by each of the vendors. They were tenants-in-common in equal shares of the Kazi Wah lands, and as stated in Mitra's Law of Joint Property and Partition, page 194:

Under the Muhammadan Law the jointness of the property consists only in the same tangible thing or incorporated right being the subject

(1) [1915] 37 All. 369=29 I. C. 781=29 M L. J. 130 (P. C.).

of ownership by several individuals ; (see also Williams on Property, 23rd Edition, page 148).

Further whereas Mir Ali Nawaz had an absolute estate in 8-annas undivided share in the Kazi Wah lands, Mir Shah Nawaz by reason of the provisions of the Sind Encumbered Estates Act possessed in his 8 annas undivided share after his release from management what for convenience sake may be described as a mere life interest. Thus again in construing Ex. 122 the maxim " caveat emptor " cannot be overlooked. There is no evidence on the point one way or the other, indeed after the lapse of more than 30 years no evidence could be expected, but the probabilities certainly are that the predecessors-in-title of the Bania respondents knew very well what they were getting under the conveyance, Ex. 122, and that their vendors were each selling a half of their estate in the Kazi Wah lands. The learned counsel who appeared for the Bania respondents has on the point now under consideration cited before us a number of authorities both English and Indian to which we must now refer.

In S. 841 of Halsbury's Laws of England, Vol. 10, the learned author lays down the principles of the English Common Law relating to joint covenants by two or more persons. But it has been pointed out by the learned commentators in Pollock and Mulla's Indian Contract Act, 5th Edition, at page 287, that the series of sections of the Contract Act commencing with S. 43 materially varies the rules of the Common Law as to the devolution of the benefit of and liability on joint contracts.

The passage cited from Norton on Deeds, 1906 Edition, at page 512, similarly deals with the principles of Common Law with reference to joint contracts.

The case of *White* v. *Tyndall* (2) is again distinguishable as that was a case of an existing lease by two persons containing joint covenants to pay a yearly rent and keep the demised premises in repair ; the decision is based entirely on the principle of Common Law relating to joint covenants. The same remarks apply to the case of *National Society for the Distribution of Electricity* v. *Gibbs* (3).

(2) [1888] 13 A. C. 263.
(3) [1900] 2 Ch. 280=69 L. J. Ch. 457=82 L. T. 443=48 W. R. 499=16 T. L. R. 348.

In fact it appears to us that on the question we are at present discussing—the construction of the contract evidenced by the deed, Ex. 122, and of the covenants therein contained—reference to English authorities and decided cases can serve no useful purpose.

The case of *Mohamed Ishaq* v. *Sheikh Akramul Huq* (4) is really of no assisttance to the Bania respondents. There was no deed of dower in that case. On the contrary in the case in question Mukerji, J., laid it down that

> The question whether a contract is joint or several or joint and several is a question of construction, that is a question of the intention of the parties to the contract.

After a very careful consideration of the document, Ex. 122, in this appeal, of the circumstances attending the execution thereof and of the intention of the parties thereto we have come to the conclusion that the learned First Class Subordinate Judge of Shikarpur has rightly decided that it was not a joint contract and that each of the vendors Mir Shah Nawaz and Mir Ali Nawaz purported thereby to sell 4-annas out of his own share in the Kazi Wah lands. We are further of opinion that the learned Subordinate Judge very rightly applied the principles of equity involved in S. 47 of the Transfer of Property Act and the illustration thereto in construing the document Ex. 122, vide *Rameswar Koer* v. *Mahomed Mehdi Hossain Khan* (5) and *Krishna Shetti* v. *Gilbert Pinto* (6). In this view of the matter it is unnecessary to refer to the cases of *Jamna Bai* v. *Vasanta Rao* (7) and *Sain Das* v. *Ram Chand* (8) cited by the learned counsel who appeared for the Bania respondents as the contracts in these cases were admittedly joint contracts and the cases are, therefore, clearly distinguishable.

It practically follows that the Bania respondents are not entitled to claim full and proper performance of the contract from the heirs of the appellant exclusively. The point involved in additional Issue No. 2 has been discussed at length by the learned Subordinate Judge of Shikarpur at lines 100 to 140 of his

(4) [1908] 6 C. L. J. 358=12 C. W. N. 84.
(5) [1899] 26 Cal. 39=25 I. A. 179=2 C. W. N. 633 =7 Sar. 413 (P. C.).
(6) [1919] 42 Mad. 654=9 L. W. 431=50 I. C. 898=36 M. L. J. 367.
(7) [1916] 39 Mad. 409=34 I. C. 213=43 I. A. 99 (P. C.).
(8) A I. R. 1924 Lah. 146=1 Lah. 334.

judgment and with his finding we are in complete agreement. No argument was addressed to us by either side on the findings of the learned Subordinate Judge of Shikarpur on additional Issues Nos. 3 and 4. In any case we accept his findings on these issues.

The authorities cited by the learned counsel for the Bania respondents in connexion with the 5th additional issue were on the basis that his clients succeeded in establishing their claim to a full 8-annas share in the Kazi Wah lands. This by reason of our determination of the points involved in additional Issues Nos. 1 and 2, they cannot do; they are entitled to retain only a 4-annas share out of the 8-annas share now in their possession. No doubt complete justice must be done to the parties in effecting a partition in such a suit as this. But at present there is only a preliminary decree for partition and the question as to what particular portion of the Kazi Wah lands should be assigned to the Bania respondents in satisfaction of their 4-annas is really a matter for the lower Court and the commissioner who is appointed to effect a partition by metes and bounds.

Lastly with regard to the point involved in the 6th additional issue it is only necessary to point out that no evidence has been given by the Bania respondents of any improvments effected by them, and they are clearly not entitled to any refund of purchase-money by reason of the fact that they are deprived of the benefit of half of what they purchased under the deed of conveyance, Ex. 122: vide *Mir Mahomed Khan* v. *Pohumal Motumal* (9); *Mir Mahomed* v. *Khubomal* (10) and *Parshottam Veribhai* v. *Chhatrasangji Madhavsangji* (11).

The result is that in the partition of the Kazi Wah lands in suit ordered by the preliminary decree under appeal the heirs of the appellant Mir Ali Nawaz will be entitled to a 4-annas share, the Respondents Nos. 1-6 the heirs of Mir Shah Nawaz to an 8-annas share and the Bania Respondents Nos. 7-14 to a 4-annas share. The preliminary decree, so far as it relates to Respondent No. 15, has not been challenged.

The appeal is, therefore, allowed and the preliminary decree for partition varied in the manner indicated above. Subject to the order as to costs made by the High Court on 14th August 1922, the appellant will have his costs in this and the lower Court from Respondents Nos. 7 and 14. These respondents as well as Respondents Nos. 1-6 will bear their own costs throughout.

Decree varied.

(9) [1913] 7 S. L. R. 55=21 I. C. 514.
(10) [1913] 7 S. L. R. 58=21 I. C. 517.
(11) [1917] 41 Bom. 546=40 I. C. 1002=19 Bom. L. R. 545.

✻ A. I. R. 1927 Sind 66

LOBO, A. J. C.

Official Receiver—Applicant.

v.

Tirathdas-Mewaram and *another*—Opposite Party.

Judicial Misc. Application No. 409 of 1925 and Insolvency Appeal No. 76 of 1922, Decided on 29th June 1926.

✻ (a) *Provincial Insolvency Act* (1920), *Ss.* 53 *and* 28 (7)—*Doctrine of "relation back" cannot be imported in S.*53—*Transfer more than two years before adjudication cannot be annulled*—*Provincial Insolvency Act, S.* 28 (7).

The doctrine of "relation back" cannot be imported into S. 53 so as to make it appear that the point of time from which the two years are to be calculated is the date of the presentation of the petition and not the date when the transferrer is adjudged insolvent: and therefore a transfer effected more than two years before the order of adjudication but within two years of the date of the presentation of the petition cannot be annulled under the section: *A. I. R.* 1924 *Lah.* 374 and *A. I. R.* 1925 *Bom.* 480, *Foll.* 35 *M. L. J.* 296 and 46 *Cal.* 991, *not Foll.* [P 70, C 1]

✻ (b) *Provincial Insolvency Act* (1920), *Ss.* 4 *and* 53—*Application under S.* 53 *barred*—*Recourse to S.* 4 *can be had*—*S.* 4 *is very wide in scope and gives the same powers as S.* 102, *of English Bankruptcy Act.*

The fact that the application as one under S. 53 is time barred does not prevent the Official Receiver from having recourse to S. 4. The section is extremely wide and empowers the Court to decide all questions whether of title or priority or of any nature whatsoever, and whether involving matters of law or of fact which may arise in any case of insolvency, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. [P 70, C 2]

An Insolvency Court in India would be right in assuming jurisdiction under S. 4 of the Provincial Insolvency Act in cases where the Bankruptcy Court in England would exercise jurisdiction under S. 102 of the English Bankruptcy Act: 37 *All.* 65, *Rel. on*; *A. I. R.* 1926 *Sind* 140 and *A. I. R.* 1926 *Sind* 133, *Dist.* [P 71, C 1]

✻ (e) *Arbitration — Reference to arbitration without the intervention of Court, pending suit in competent Court—Reference and award are valid.*

A reference to arbitration, pending a suit in a competent Court, without the intervention of the Court is not illegal and the award passed on such a reference is valid and legal : 16 *S. L. R.* 171 (*F. B.*), *Rel. on.* [P 72 C 2]

✻ (*l*) *Civil P. C., O.* 21, *R.* 2—*Application to record adjustment is in the nature of suit.*

Application to record an adjustment of a decree, especially if contested, is in the nature of a summary suit : *A. I. R.* 1923 *Patna* 239, *Rel. on.* [P 74 C 1]

✻ (e) *Civil P. C., O.* 21, *R.* 2—*R.* 2 *applies to awards under Arbitration Act.*

The provisions of O. 21, R. 2, relating to adjustment of decrees are equally applicable to awards under Indian Arbitration Act : *A. I. R.* 1925 *Sind* 293, *Rel. on.* [P 75 C 1]

(*f*) *Deed—Construction—Mortgage or charge—Want of due formalities of a mortgage would not convert a mortgage into charge—No reference to sale of hypothecated property—Charge is created—Transfer of Property Act, Ss.* 100 *and* 58.

If an instrument is expressly stated to be a mortgage, and gives the power of realization of the mortgage-money by sale of the mortgaged premises, it should be held to be a mortgage. The fact that the necessary formalities of due execution were wanting would not convert the mortgage into a charge. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien, or directs the realization of money from a particular property, without reference to sale, it creates a charge : 35 *Cal.* 837, *Foll.* [P 75 C 1,2]

✻ (*g*) *Civil P. C., O.* 21, *R.* 2 — *Compromise affecting immovable property more than Rs.* 100 *after decree — Petition embodying compromise presented to Court and recorded—Registration is not necessary—Registration Act, S.* 17 (2) (6).

A compromise made after decree, affecting any immovable property of the value of over Rs. 100 and embodied in a petition presented under O. 21, R. 2, Civil P. C., which has been recorded by the Court is exempt from registration : 43 *Mad.* 688, (*F. B.*), *Foll.* [P 76 C 1]

T. G. Elphinston—for Applicant.

Kimatrai Bhojraj—for Opposite Party.

Judgment.—The facts connected with this matter are somewhat involved and need to be set out with some elaboration. Early in 1920 disputes and differences arose between the firms of Khemchand-Ramdas and Tirathdas-Mewaram on the one hand, and the firm of Udernomal-Kishindas on the other, relating to the contracts for the purchase and sale of yarns and piece-goods between the parties. Quite a number of suits were filed in the Small Causes Court, Karachi, by Messrs. Khemchand-Ramdas against Messrs. Udernomal-Kishindas for damages on some of the yarn contracts. That the disputes and differences involved large money claims, and that the suits in the Small Causes Court were intended merely as a preliminary skirmish, is evident from the fact that many of the stalwarts of the Karachi Bar were arrayed in this litigation on one side or the other.

By a reference (Ex. 9) dated 23rd February 1920, the firms of Khemchand-Ramdas, Tirathdas-Mewaram and Udernomal-Kishindas referred to the arbitration of Messrs Dipchand, T. Ojha and Dharamdas Thawerdas, pleaders, all their disputes and differences in respect of piece-goods and yarn contracts including the subject-matter of the suits pending in the Small Causes Court to which I have referred above. The reference proved abortive but was followed in May 1920, by another and similar reference (Ex. 7) in favour this time of Messrs. Bugtani and Dharamdas Thawerdas. This reference provided that the arbitrators should make their award within a week and that in default the reference was to stand revoked.

No award was made as provided for in the reference, but on 10th July 1920, the disputants executed yet another reference (Ex. 4) in favour of the same arbitrators. On 17th July 1920, the arbitrators Messrs. Bugtani and Dharamdas made and signed their award (Ex. 5). Under this award Messrs. Udernomal-Kishindas became liable to pay to Messrs. Khemchand-Ramdas and Tirathdas-Mewaram the sum of Rs. 40,000,

in full satisfaction and settlement of all the claims and dealings between the parties

with a proviso that on payment by Messrs. Udernomal-Kishindas on certain fixed dates of three instalments of Rs. 11,000 odd each

the claim of Messrs. Khemchand-Ramdas and Tirathdas-Mewaram shall be deemed to be fully satisfied.

The first of these instalments was payable on 18th December 1920. It was further provided that on the award being made a rule of the Court

Messrs. Khemchand-Ramdas shall withdraw all their suits pending in the Court of Small Causes against the firm of Udernomal-Kishindas.

The award was filed under the provisions of the Indian Arbitration Act and became a rule of the Court in Judicial Miscellaneous No. 128 of 1920 on 20th August 1920. The suits in the Small Causes Court were withdrawn a few days

later. The instalment payable under the award on 18th December 1920, was not paid, there were certain negotiations between the parties and as the result thereof an application under O. 21, R. 2, Civil P. C., to record an adjustment of the award decree was presented to the Court on 20th December (Ex. 6). Under this adjustment the firm of Udernomal-Kishindas had to pay to Messrs. Khemchand-Ramdas and Tirathdas-Mewaram Rs. 34,950 on or before 18th May 1921, on failure to do so they had to pay Rs. 40,000 with interest thereon at 9 per cent. The adjustment gave the creditors a second mortgage lien on a plot of land with buildings thereon bearing Survey No. 20, Survey Sheet A-9 measuring 423 square yards and situated in the Old Town Quarter of the City of Karachi, Mr. Ghulamali Fudoo having the first mortgage lien on the said mortgage property for Rs. 3,000 and interest. The application, Ex. 6, concludes thus :

> the first party to be at liberty to recover the amount due to them under this adjustment by sale of the said mortgage property in execution.

Exhibit 6 is signed by Rochiram Ramdas on behalf of Messrs. Tirathdas-Mewaraman by Mulchand Assanmal on behalf of Messrs. Khemchand-Ramdas and by Dayaram Versimal and Assanmal Udernomal on behalf of the firm of Udernomal-Kishindas.

On 21st December 1920, Madgavakar, A. J. C., passed the following order which is endorsed on the back of Ex. 6 : " Let the adjustment be recorded as prayed for." No payment was made by Messrs. Udernomal-Kishindas on or before 18th May 1921, and on 5th November of the same year the judgment-creditors applied in execution for sale of the immovable property Survey No. 20, Sheet A-9 (Ex. 14). A sale proclamation was ordered to issue on 16th January 1922, (Ex. 15). The sale was fixed for 1st April. It did not, however, take place as a series of consent applications were filed by the judgment-debtors between April and September 1922. (Exs. 16-1 to 16-4) for postponement of the sale.

On 8th September 1922, Nindabai, widow of Naomal Udernomal filed Suit No. 811 of 1922 in this Court for a declaration that she was entitled, inter alia, to the property Survey No. 20, Sheet A-9, as being the separate property of her deceased husband Naomal and for an injunction restraining the judgment-creditors (impleaded as Defendant No. 4) from bringing the said property to sale in execution of their award decree. An interim injunction was obtained and subsequently confirmed ; it is still in force. On 10th September 1922, the firm of Udernomal-Kishindas presented an application to be adjudicated insolvent ; an adjudication order was made on 10th March 1923, and the estate of the insolvent firm became vested in the Official Receiver. By an order of the Court dated 24th September 1923, the Official Reciver was brought on the record in Suit No. 811 of 1922 as Defendant No. 6. In his written statement filed on 8th October 1923, the Official Receiver, inter alia, denied the validity " of the mortgage created " by the insolvent firm of Udernomal-Kishindas in favour of the firm of Khem-chand-Ramdas and Tirathdas-Mewaram, and contended further

> that the said mortgage lien is not legal or enforceable as it violates the provisions of the Indian Registration Act and Transfer of Property Act.

These contentions were later embodied in Issues Nos. 8 and 9 in suit which read as follows :

> 8. Were the proceedings in Judicial Miscellaneous No. 128 of 1920 collusive and fraudulent ? If so, is the award binding on the parties in the suit ?
>
> 9. Does the said award create a valid mortgage lien on the properties in suit in favour of Defendant No. 4 ?

On 5th October 1925, the Official Receiver presented an application to the Insolvency Court, Judicial Miscellaneous No. 409 of 1925, purporting to be under S.54 of the Provincial Insolvency Act to set aside the transfer by the insolvents Udernomal-Kishindas of property, Plot No. 20, Sheet A-9, in favour of Messrs. Khemchand Ramdas and Tirathdas Mewaram involved in Ex. 6. The grounds put forward by the Official Receiver in support of his application are contained in paras. 4 and 5 thereof which read as under :

> 4. The said transfer not having been made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith for valuable consideration is void as against your petitioner.
>
> 5. The said transfer is also void on the following grounds :
>
> (i) The original reference in Judicial Miscellaneous No. 128 of 1920 is not signed by the parties, but the signature of Versimal Udernomal is a forgery. (ii) The reference gives no power to create any mortgage lien. (iii) The adjust-

ment of the award decree is not recognized by O. 21, R. 2, Civil P. C. (iv) The adjustment being an agreement between the parties and creating a mortgage lien over property of the value of over Rs. 100 requires to be registered under the Transfer of Property Act and the Registration Act.

This application is now before me for disposal having been transferred to me in February 1926, as the points involved therein are practically covered by Issues Nos. 8 and 9 in Suit No. 811 of 1922. It has been agreed before me that these issues and this application be heard together and that the evidence recorded in this application be treated as evidence in Suit No. 811 of 1922. Mr. Elphinston, who appeared in support of this application on 26th April 1926, applied to amend the same by treating it as an application under Ss. 53 and 4 of the Provincial Insolvency Act. This application to amend was allowed.

In arguments before me some of the points raised in the original application filed on 5th October 1925, have been abandoned by Mr. Elphinston who appeared for the Official Receiver. In fact he has confined himself to the following three points and it is, therefore, upon these points that I proceed to dispose of the matter and incidentally also of Issues Nos. 8 and 9 in Suit No. 811 of 1922. The points are :

(1) That the reference and award, Exs. 4 and 5, were invalid covering as they did matters involved in suits pending at the time and matters outside such suits.

(2) That the adjustment, Ex. 6, is of no value and not binding on the Official Receiver as O. 21, R. 2, Civil P. C., applies to decrees only and not to awards filed under the Arbitration Act ; that the Court had no jurisdiction in fact to order that such an adjustment be recorded.

(3) That no mortgage was created by the so-called adjustment, Ex. 6, by reason of the provisions of S. 59 of the Transfer of Property Act and S. 17 of the Indian Registration Act.

Before, however, dealing with these points it is necessary for me to dispose of a point raised by Mr. Kimatrai who appears for the firms of Khemchand-Ramdas and Tirathdas-Mowaram in the nature of a preliminary objection. He has argued that this application as one under S. 53 of the Provincial Insolvency Act is barred by limitation as the so-called alienation sought to be set aside was more than 2 years prior to the adjudication of Messrs. Udernomal-Kishindas as insolvents ; that further application is incompetent under S. 4 of the Act as this section was never intended to cover cases which clearly fell within the purview of S. 53 of the Act.

Now the adjudication order in Insolvency No. 76 of 1922 re Udernomal-Kishindas was passed on 10th March 1923. Exhibit 6 which is the alleged offending alienation was recorded on 21st December 1921, clearly, therefore, more than 2 years before the order of adjudication. The question is whether for the purposes of S. 53 of the Provincial Insolvency Act, and by reason of S. 28, Cl. (7) thereof, the order of adjudication relates back to and takes effect from the date of the presentation of the petition which in this case being 10th October 1922, would bring the application within time. There has been a conflict of decisions on this point.

The earlier rulings distinctly favour the application of the doctrine of " relation back." To this class belong the cases of *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (1) and *Rakhal Chandra Purkait* v. *Sudhindra Nath Bose* (2). Both were cases, under the old Provincial Insolvency Act, 3 of 1907, but the wording of Ss. 36 and 16 (6) of that Act is almost identical with that of the corresponding Ss. 53 and 28 (7) of the present Act. The decision in the Calcutta case is based largely on an argument ab inconvenienti, that in the Madras case more on a speculation as to the intention of the Legislature. In *Sheo Nath Singh* v. *Munshi Ram* (3) the correctness of the decision in the Madras case referred to above was assumed. The case itself is distinguishable as it referred to an alienation by an insolvent between the dates of the presentation of his insolvency petition and the order of adjudication. To such a case undoubtedly the doctrine of " relation back " was applicable. More recently, however, the High Courts of Lahore and Bombay have dissented from the earlier view and held that the doctrine of " re-

(1) [1918] 35 M.L.J. 296=8 L.W. 251=19 I C. 283=(1918) M.W.N. 487.
(2) [1919] 46 Cal. 991=52 I.C. 717=24 C.W. N. 172.
(3) [1920] 42 All. 433=55 I.C. 941=18 A.L.J 449.

lation back" to which effect is given by S. 28 (7) of the Provincial Insolvency Act (V of 1920) cannot be imported into S. 53 so as to make it appear that the point of time from which the two years are to be calculated is the date of the presentation of the petition and not the date when the transferrer is adjudged insolvent. In the case of *Ghulam Muhammad* v. *Panna Ram* (4), a Divisional Bench of the Lahore High Court after reviewing all the earlier authorities held that S. 16 (6) of the Provincial Insolvency Act (3 of 1907) does not govern S. 36, and that therefore a transfer effected more than 2 years before the order of adjudication but within 2 years of the date of the presentation of the petition cannot be annulled under the section. As against the argument *ab inconvenienti* which influenced the decision in the case reported as *Rakhal Chandra Purkait* v. *Sudhindra Nath Bose* (2), the learned Judges aptly quoted the following passage from Maxwell on the Interpretation of Statutes (5th Edition) :

> It matters not in such a case what the consequence may be when by the use of clear and unequivocal language capable of any one meaning, anything is enacted by the Legislature, it must be enforced, even though it be absurd or mischievous.

The case of *Nagindas Dahyabhai* v. *Gordhandas Dahyabhai* (5) was one under the present Provincial Insolvency Act. Here again the earlier rulings have been exhaustively reviewed by Sir Norman Macleod and Mr. Justice Coyajee who arrive at the same conclusion as the Divisional Bench of the Lahore Court though it does not appear from the report of the case that the learned Judges were referred to or had before them the case of *Ghulam Muhammad* v. *Panna Ram* (4). The following passage sums up the conclusion of this particularly strong Divisional Bench of the Bombay High Court.—

> Therefore, in our opinion, if it had been intended that a voluntary transfer should be avoidable if made within 2 years from the date of the presentation of the petition on which the adjudication order is made, there was no reason why that should not have been as clearly stated in S. 53 as it is in S. 54.....The mere probability that in some cases a voluntary transfer cannot be defeated on account of the delay in making the adjudication order after the presentation of the petition, cannot provide sufficient ground for interpreting the words in S. 53 otherwise than according to their clear meaning.

(4) A.I.R. 1924 Lah. 374.
(5) A.I.R. 1925 Bom. 480=49 Bom. 730.

I have been carefully through all the rulings on this point and have come to the conclusion that the sounder view is that expressed by the High Courts of Lahore and Bombay in the cases I have cited above. The application, therefore, as one under S. 53 of the Provincial Insolvency Act must be held to be time-barred.

I cannot, however, agree with Mr. Kimatrai that S. 4 of the Provincial Insolvency Act does not cover the present application or that the fact that the application as one under S. 53 is time-barred prevents the Official Receiver from having recourse to S. 4. S. 4 of the Provincial Insolvency Act which is taken almost verbatim from S. 102 of the English Bankruptcy Act is extremely wide and empowers the Court to decide all questions whether of title or priority or of any nature whatsoever, and whether involving matters of law or of fact which may arise in any case of insolvency, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. The English authorities under S. 102 of the English Bankruptcy Act make it clear that the Bankruptcy Court ought not under this section to assume jurisdiction where the Receiver claims only the same right as the bankrupt himself would have had but ought to leave the matter to be dealt with by the ordinary tribunals ; but that where by operation of the Bankruptcy Law the Receiver has a higher and better title than the bankrupt the Bankruptcy Court ought to decide the matter itself.

I have been unable to find any Indian decision on the scope of S. 4 of the Provincial Insolvency Act which is a new section first introduced in the Act of 1920. I have been referred in argument to judgments of Mr. Rupchand, A. J. C., reported as *Official Receiver* v. *Lachmibai* (6) and *In re Naraindas Sunderdas* (7), as bearing on the point ; but the former makes no reference to S. 4 while the reference thereto by the learned Judge in the latter is merely en passant and of no value. As, however, the section largely reproduced S. 102 of the English Bankruptcy Act I feel I am on safe ground in

(6) A.I.R. 1926 Sind 140.
(7) A.I.R 1926 Sind 133.

stating that, in my opinion an Insolvency Court in India would be right in assuming jurisdiction under S. 4 of the Provincial Insolvency Act in cases where the Bankruptcy Court in England would exercise jurisdiction under S. 102 of the English Bankruptcy Act.

Now, it is clear that in the present case the Official Receiver is not merely making a claim or asserting a right that the insolvents themselves might have made or asserted ; he is claiming a higher and better title than the insolvents vested in him by S. 53 of the Provincial Insolvency Act. He clearly, therefore, is entitled to invite the Insolvency Court to exercise jurisdiction vested in it by S. 4. Further, in my opinion, the Official Receiver is entitled to do so though in fact an application by him under S. 53 would be time-barred. I am fortified in my opinion by the case of *Bansidhar* v. *Kharagjit* (8), where even in a case falling under Act III of 1907 in which the present S. 4 of Act V of 1920 finds no place, it was held that an Insolvency Court had jurisdiction to enquire into a fictitious transfer of property by an insolvent to a third party although the transfer took place more than 2 years before the adjudication order when any application by the receiver under S. 36 was time-barred under that section. The learned Judges who decided that case overruled the contention that in such circumstances the Insolvency Court should refuse to interfere and that the receiver's only remedy was to bring a regular suit. The case has been cited with approval in *Kochu Mahomed Asan Tharagan* v. *Sankaralinga Mudaliar* (9). I hold, therefore, that what I have referred to as Mr. Kimatrai's preliminary objection must fail and I proceed to discuss the three points raised by Mr. Elphinston for the Official Receiver.

Mr. Kimatrai complained, and in my view rightly so, that the first of these points (that the reference and award Exs. 4 and 5 were invalid covering as they did matters involved in suits pending at the time and matters outside such suits) had not been raised by the Official Receiver in his application and was being put forward for the first time by Mr. Elphinston in final argument. I am, however, satisfied that Mr. Kimatrai has had ample opportunity of studying and arguing the point of law though raised at a late stage and I, therefore, disregard the technical objection taken.

The facts and circumstances leading up, and subsequent, to the reference and award, Exs. 4 and 5, have been deposed to by the witnesses examined before me, Exs. 8, 13, 18 and 22. It is not necessary for me to refer to this evidence in detail but to my mind it clearly establishes the following facts :—

(1) There were in early 1920 bona fide contracts for purchase and sale of piece-goods and yarns between Messrs. Udernomal-Kishindas on the one hand and Messrs. Tirathdas-Mewaram and Khemchand-Ramdas on the other.

(2) Breach of contract in respect of these dealings was alleged against Messrs. Udernomal-Kishindas and large amounts were being claimed from them by Messrs. Tirathdas-Mewaram and Khemchand-Ramdas. These two firms for all practical purposes in this case may be regarded as two branches of a family business, one branch doing business in piece-goods in the name and style of Tirathdas and Mewaram, the other branch doing business in yarns in the name and style of Khemchand-Ramdas.

(3) Some eleven test suits were filed in the Court of Small Causes, Karachi, by Messrs. Khemchand-Ramdas against Messrs. Udernomal-Kishindas on some of the yarn contracts. This brought matters to a head, both parties prepared to fight the suits out to the best of their ability.

(4) Later wiser counsels appear to have prevailed and the parties agreed to save both time and money by referring to arbitration under the Indian Arbitration Act all disputes between them relating to piece-goods and yarn contracts including the disputes in the test suits already filed.

(5) In spite of several references proving abortive the arbitration was pushed through. The parties were related to each other by marriage ; once they had agreed to submit their disputes to the arbitration of their respective pleaders a more friendly atmosphere appears to have been created : but there was all through a genuine contest between the parties and the award, Ex. 5, ultimately made

(8) [1915] 37 All. 65=26 I.C. 926=12 A.L.J. 1273.

(9) [1921] 44 Mad. 524=40 M.L.J. 219=14 L. W. 505=62 I.C. 495=(1921) M.W.N. 236.

and filed in Court without objections by either party was a genuine award disposing of genuine disputes and in no sense of the word collusive as has been faintly urged in arguments.

(6) The award provided that on its being made a rule of the Court the suits in Small Causes Court should be withdrawn without costs being claimed by either party. The award in this respect was duly carried out in August 1926.

Now looked at from the point of view of reason and common sense it would appear from these facts, established as I hold them to be by the evidence, that there was nothing illegal or invalid about Exs. 4 and 5, and yet it has been strenuously argued and a number of authorities have been cited in support of the argument that Exs. 4 and 5 are, as a matter of fact, illegal and invalid. I do not quarrel with the correctness of most of the decisions cited by Mr. Elphinston on this point. What I do desire to emphasize is that none of them can be fairly said to apply to the established facts of this case as is manifest on an analysis of these decisions.

The Full Bench decision in *Haji Umar* v. *Shivaldas* (10) was on a reference in the following terms:

Whether parties to a suit pending in a Court of competent jurisdiction have the power to refer without the leave of the Court the matter which forms the subject-matter of the suit to arbitration, whether under the Civil P. C., or the Indian Arbitration Act, and whether if they do so and an award is passed in such matter by private arbitration the Court has jurisdiction either to file the award and pass a decree thereon under the Civil P. C., or to file the award under the Indian Arbitration Act.

The answer to this very specific reference by Kennedy, J. C., was that the parties had the power to so refer, that the Court had not the power to file such an award and pass a decree on it under the Second Schedule of the Civil P. C. or to allow the award to remain filed under the Indian Arbitration Act, but that the point was really one of little importance as the Court would in such a case act under O. 23, R. 3, Civil P. C., and record the award as an adjustment. At page 178 (16 *S. L. R.*) the learned Judicial Commissioner states:

The only case which I can see where difficulty may arise is in cases (which are not very common) where a whole series of disputes between the parties are referred to arbitration though one of these transactions is actually the subject of a pending suit.

Now this is exactly the position in the case before me and this position is clearly not covered either by the reference in *Haji Umar* v. *Shivaldas* (10) or in the learned Judicial Commissioner's answer thereto. This position is again left untouched by Madgavkar, A. J. C. who concurred with Kennedy, J. C., in the case referred to, for at page 179 (16 *S. L. R.*) of the report he states very distinctly:

I propose to confine myself as strictly as possible to the questions referred . . I desire to refrain from any opinion as to what the correct procedure is in hypothetical cases, such as a reference including matters outside the suit.

Apart from this distinguishing feature the Full Bench case referred to does not favour Mr. Elphinston's contention as all the learned Judges composing the Bench were unanimous in holding that a reference to arbitration without the intervention of the Court of the subject-matter of a pending suit was not in itself illegal or invalid nor was an award passed on such a reference in itself illegal or invalid. (vide pages 178, 186 and 192 (16 *S. L. R.*) The judgment of Rankin, J., in the *Dekari Tea Co.* v. *Assam Bengal Ry. Co.* (11) was based on the following facts. In a suit by the plaintiffs for damages for loss of tea entrusted to the defendants for carriage, the Court disposing of the issues involving the question of liability decided against the defendants. The suit was then adjourned as the Court was informed that the parties were likely to come to an agreement as to the quantum of damages to be allowed. By a letter signed by both parties to the suit this question was then referred to the arbitration of a merchant who after going into the evidence adduced before him awarded a certain figure to the plaintiff. This award was then sought to be recorded as an adjustment under O. 23, R. 3, Civil P. C. The application was opposed, the defendants contending that the amount could not be inserted in the decree by consent and that there was no valid reference to arbitration. The learned Judge upheld the contentions of the defendants relying mainly on the judgment of Macleod, J., in *Shavaksha Dinsha Davar* v. *Tyab Haji Ayub* (12).

(10) [1921] 16 S. L. R. 174 (F. B.).

(11) A. I. R. 1921 Cal. 239.

(12) [1916] 40 Bom. 386=37 I. C. 110=18 Bom. L. R. 559.

But as pointed out by Madgavkar. A. J. C., in the Full Bench case in *Haji Umar* v. *Shivaldas* (10) the judgment of Macleod, J., in *Shavaksha Dinsha Davar* v. *Tyab Haji Ayub* (12) has been overruled in *Manilal Motilal* v. *Gokal Das Rowji* (13) and Macleod, C. J., was himself a party to overruling his own decision.

Apart, therefore, from the fact that there is no resemblance between the facts in the *Dekari Tea Co.'s* case (11), and in the case now before me, Rankin, J.'s judgment can hardly be considered good law in view of the Full Bench ruling in *Haji Umar* v. *Shivaldas* (10) and the judgment of the Bombay High Court in *Manilal's* case (13). Not more than a passing reference need for this reason be made to the case of *Amar Chand Chamria* v. *Banwari Lall Rikshit* (14). This is another judgment of Rankin, J., who follows his previous ruling in *Dekari Tea Co.'s* case (11), and dissents from the view of the Bombay High Court in *Manilal's* case (13). Both these judgments of Rankin, J., are referred to and not followed by a Divisional Bench of our Court in the case of *Firm of Bolmal-Chelaram* v. *Firm of Jhamandas-Kisharam* (15).

The last case cited by Mr. Elphinston in support of his argument that Exs. 4 and 5 the reference and award are illegal and invalid is the case of *Rampratap Chamria* v. *Durgaprosad Chamria* (16). As the judgment in this case of Mookerji and Rankin, JJ., has been quite recently upheld by the Privy Council (*Ram Protap Chamria* v. *Durga Prosad Chamria* (17)., a somewhat more detailed reference thereto seems necessary. In this case during the pendency of a suit the parties thereto except an infant defendant and a person not a party to the suit entered into an agreement whereby they appointed certain persons as arbitrators for the purpose of settling disputes between themselves. Some of those disputes were the subject-matter of the suit, some of them were not. On an application by the plaintiff in the suit a consent order was obtained directing that all matters in difference in the suit between the parties should be referred to the final decision of persons appointed arbitrators as aforesaid. The arbitrators made an award which dealt with matters not included within the scope of the suit and was in excess of their authority in respect of matters included within its scope. The award was filed under the Indian Arbitration Act and the Civil P. C. It was held that the award was invalid and could not be enforced either under the Arbitration Act or under Sch. 2, Civil P. C. The reason for thus holding is thus put by Rankin, J.:

> It is quite impossible that one and the same arbitration should be held as to matters within the jurisdiction of the Court and matters without the jurisdiction of the Court: between the parties to the suit and between them and other persons: under the Code provided by the Indian Arbitration Act and under the Code provided by the Second Schedule: under the superintendence and control of the Judge who has seisin of the suit, and of the Judge disposing of business under the Indian Arbitration Act: partly upon an order of reference and partly under an agreement.

Again, I cannot imagine what similarity there is between the facts in this Calcutta case and in the case now before me. No general principles are enunciated whether by the Divisional Bench in the Calcutta case or by their Lordships of the Privy Council; the decision of both turns on the peculiar facts and circumstances of the case before them and can, in my opinion, have no application to the case before me wherein the whole position is so entirely different.

I hold, therefore, that Exs. 4 and, 5, the reference and award, are legal and valid.

This brings me to the consideration of Mr. Elphinston's second point, viz., that the adjustment, Ex. 6 is of no value and not binding on the Official Receiver as O. 21, R. 2, Civil P. C., applies to decrees only and not to awards filed under the Arbitration Act; that the Court had no jurisdiction in fact to order such an adjustment to be recorded.

Now, appealing again to the principles of reason and common sense, it would appear that just as the law has by O. 21, R. 2, Civil P. C., afforded a judgment-debtor under an ordinary decree who has satisfied his judgment-creditor in whole or in part a means of protecting himself against an unjust or fraudulent demand, the same protection should be afforded to a judgment-debtor under an award which by law is enforceable as a decree. The

(13) [1921] 45 Bom. 215 = 59 I. C. 51 = 22 Bom. L. R. 1043.
(14) A. I. R. 1922 Cal. 101 = 49 Cal. 603.
(15) A. I. R. 1925 Sind 253 = 18 S. L. R. 111.
(16) A. I. R. 1921 Cal. 557.
(17) A. I. R. 1925 P. C. 203 = 53 Cal. 253.

object of O. 21, R. 2, being what it is, there is no reason why it should not apply as well to award decrees as to ordinary decrees in civil suits. The argument against the applicability of R. 2 of O. 21, Civil P. C., to award decrees comes to this : that the procedure provided in the Civil P. C. in regard to suits can be made applicable to other proceedings in a civil Court only by reason of S. 141, Civil P. C., that there are rulings of most of the High Courts in India and even of the Privy Council that S. 141, Civil P. C., does not apply to proceedings in execution ; that an application to record an adjustment of an award decree such as Ex. 6 is a proceeding in execution and, therefore, the provisions of O. 21, R. 2, Civil P. C., are not applicable thereto by reason of S. 141.

Now, in the first place, I really doubt whether an application to record an adjustment under O. 21, R. 2, Civil P. C. is a proceeding in execution of a decree. In the case of *Sheonandan Chowdhury* v. *Debi Lal Chowdhury* (18) a Divisional Bench of the Patna High Court considered that an application under O. 21, R. 100, Civil P. C., was not a proceeding in execution but in the nature of a summary suit. It seems to me that an application to record an adjustment of a decree, especially if contested, is equally in the nature of a summary suit.

Apart, however, from this argument by analogy there is no ruling which lays down the proposition for which the applicant in this case contends, and reason and common sense are undoubtedly in favour of the applicability of O. 21, R. 2, Civil P. C., to award decrees as well as to decrees in ordinary suits governed by the Civil P. C. Mr. Elphinston relied on an order of Kemp, A. J. C., in Judicial Miscellaneous No. 153 of 1920. All that the learned Judge there says is that O. 21, R. 29 relating to stay of execution has no application to the case of a decree passed on an award. I am sure nothing could have been further from the mind of the learned A. J. C. than that a stay order of his in a miscellaneous proceeding should be cited as an authority in support of any proposition of law. As a matter of fact it appears to me that the learned A. J. C. has merely accepted the view expressed by Sir Basil Scott in *T. K. Gajjar* v. *Lallubhai Dhurmchand* (19). In any case neither Kemp, A. J. C., nor Sir Basil Scott attempted to lay down anything more than this : that the execution of an award filed under S. 11 of the Indian Aribitration Act cannot be stayed under O. 21, R. 29 Civil P. C., and it would be to my mind improper to extend the application of these rulings by analogy to an application for adjustment of a decree under O. 21, R. 2, Civil P. C. The case of *Chokalingam Chetty* v. *Raman Chetty* (20) was also referred to in this connexion. It has, however, little application to the point under consideration. On the other hand several cases have been cited before me—two of them decisions of our Court and all entitled to great respect—in which the provisions of the Civil P. C., relating to the execution of decrees have been held applicable to award decrees. In *Purusottam Das Narain Das* v. *Louis Dreyfus & Co.* (21) Rankin J., held that the provisions which relate to the execution of a decree against a firm apply in the case of an award which has been filed ; the award being against the firm. In *Adamji Jufferji & Co.* v. *Shumsudin Imamdin* (22) Raymond A. J. C., holds that the fact that an award made under the Arbitration Act is enforceable as a decree would attract to itself the applicability of the provisions regarding the execution of decrees. The point again arose in the case of *Ramsing Jettsing* v. *Rewachand Kewalram* (23). A Divisional Bench of our Court there held that when an award filed under the Indian Arbitration Act is adjusted and under the terms of the adjustment duly certified to the Court, a person has rendered himself liable as a surety, he can be proceeded against in execution proceedings under S. 145, Civil P. C. The following remarks of Madgavkar A. J. C., at page 259 (17 *S. L. R.*) of the report are very pertinent :

> To the need of a consolidated enactment relating to the law of arbitration, the Courts have repeatedly called attention. The present case is an instance in point. It can hardly be doubted; looking at the intentions of the Legislature that the facilities for the execution of awards which

(18) A. I. R. 1923 Patna 239=2 Pat. 372.

(19) [1911] 35 Bom. 196=8 I. C. 179=12 Bom. L. R. 860.
(20) A. I R. 1925 Rang, 155=2 Rang. 587 (F. B.).
(21) [1920] 47 Cal. 29=56 I. C. 325.
(22) A. I. R. 1925 Sind 293=19 S. L. R. 1
(23) A. I. R. 1925 Sind 25=17 S. L. R. 257.

the law intended are not less than those for the execution of the ordinary decrees.

I feel no hesitation in holding that there is no substance in this second point raised by Mr. Elphinston and that the provisions of O. 21, R. 2, Civil P. C., relating to the adjustment of decrees are equally applicable to awards under the Indian Arbitration Act when they have been filed in Court.

There now remains for consideration the third and last point that no valid mortgage was created by the adjustment, Ex. 6, by reason of the provisions of S. 59 of the Transfer of Property Act and S. 17 of the Indian Registration Act.

Now, the first question that arises in connexion with this point is what is it that Ex. 6 purported to give the opponents? Was it a second mortgage on the property in question or was it a mere lien or charge? In arguments Mr. Kimatrai stated he did not claim a mortgage, Ex. 6 gave the opponents a charge only. Mr. Elphinston has argued that all along the opponents have been claiming a mortgage. Exhibit 6, he argues, refers to the security given as a "Second mortgage lien." In Ex. 16/2 the property is referred to as "mortgaged property." In Issue No. 9 in Nindabai's suit the phrase used is "mortgage lien." Rochiram, Ex. 13, at line 75 of his deposition styles it a "second mortgage." He contends that what was intended to be created was a simple mortgage such as is defined in S. 58 (b) of the Transfer of Property Act. If this argument and contention be so and then clearly no valid mortgage has been created as the principal money secured by Ex. 6 is admittedly more than Rs. 100 and Ex. 6 is neither attested nor registered. (S. 59, Transfer of Property Act.)

The test for distinguishing a mortgage from a charge is thus laid down in the case of *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (24).

> A charge created for payment of a legacy or annuity.....by a Will or trust deed is not difficult to distinguish from a mortgage, but the difficulty that arises in cases of liens created by other acts of parties specially for payment of debts, must be solved in each case from the terms and expressions used in the instruments creating them and the formalities actually observed in execution. If an instrument is expressly stated to be a mortgage, and gives the power of realization of the mortgage-money by sale of the mortgaged premises, it should be held to be a mortgage. The fact that the necessary formalities of due execution were wanting would not convert the mortgage in to a charge. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien, or directs the realization of money from a particular property without reference to sale, it creates a charge.

The test referred to above is really taken by the learned Judges from the English case of *Tancred* v. *Delagea Bay & East Africa Ry. Co.* (25). The passage I have referred to was again cited with approval in the case of *Akhoy Kumar Banerjee* v. *Corporation of Calcutta* (26). Applying this test to the document before me, Ex. 6, I find it difficult to resist the conclusion that Ex. 6 gives the opponents a charge on the property therein referred to and not a mortgage and that it never was intended that the opponents should have anything more than a charge. Exhibit 6 is not a mortgage-deed or an instrument of mortgage. On the face of it it purports to be nothing more than an "application" under O. 21, R. 2, Civil P. C., to record an adjustment. It does not give the opponents the power of realization by sale of the mortgaged premises in any of the recognized ways; a mortgagee is given such power under the provisions of the Transfer of Property Act, i. e., by sale through the Court in execution of the decree in a regular mortgage suit for foreclosure or sale, or of sale by public or private auction without the intervention of the Court in virtue of such a power of sale reserved to the mortgagee by the instrument of mortgage. The power of sale given by Ex. 6 is peculiar, limited and outside the provision of the Indian Law relating to realization of moneys secured by mortgage by sale of the mortgaged property. Exhibit 6 states:

> The first party to be at liberty to recover the amount due to them under this adjustment by sale of the said mortgage property in execution.

The money due is described as money due under an adjustment; the realization may be by sale in execution. In fact, in my opinion, all that Ex. 6 does is to direct the realization of the sum adjusted from the property therein described. Several other authorities partially bearing on this point were referred to in argument by one side or the other: in

(24) [1908] 35 Cal. 897=7 C. L. J. 492=12 C. W. N. 849.

(25) [1889] 23 Q. B. D. 239=58 L. J. Q. B. 459=61 L. T. 229=38 W. R. 15.

(26) [1915] 42 Cal. 625=19 C. W. N. 37=27 I. C. 161=21 C. L. J. 177.

the view I have taken it would unnecessarily prolong this judgment were I to refer to all of them. Several of them besides turn on facts which are entirely distinguishable from the facts in the case before me. Since I hold that Ex. 6 created a charge and not a mortgage the provisions of S. 59, Transfer of Property Act, have no application thereto and this part of Mr. Elphinston's contention must fall to the ground.

The next question to be considered is whether Ex. 6, which has not been registered is under S. 17 of the Indian Registration Act compulsorily registrable, or whether it is exempt from registration under Cl. (2) (6) of that section,

A considerable conflict of opinion prevailed on this point between the High Courts of Madras, Calcutta and Allahabad prior to 1920. We have, however, the Full Bench ruling of the Madras High Court in *Thazhathitathil Poovvanaji Ayissa* v. *Puthan Purayil Kondron Chekru* (27), which in any case, so far as that Court is concerned, settled the point finally. After a review of the conflicting rulings, most of which have been cited in arguments before me, but which it is unnecessary for me to refer to in detail, the Full Bench held that a compromise made after decree, affecting any immovable property of the value of over Rs. 100 and embodied in a petition presented under O. 21, R. 2, Civil P. C., which has been recorded by the Court, is exempt from registration. The point in a somewhat different form arose in the same year in the case of *Chellaram* v. *Nautram* (28), decided by a Divisional Bench of our own Court and reported as 14 *S.L.R.* at page 245. It was there held that a document unregistered though needing registration, may be produced in Court as the basis of a compromise application and the Court may act upon it.

To my mind the Full Bench ruling of the Madras High Court is essentially in point and I am prepared to follow it.

Mr. Elphinston attempted to distinguish the Madras case on the ground that the adjustment therein considered created no new rights in the parties thereto, that the rights of the parties to the properties referred to in the adjustment existed previously and the adjustment merely parcelled out the properties among the parties in separate lots. I am afraid I cannot accept the attempted distinction. In the case of *Joti Kuruvetappa* v. *Izari Sirasappa* (29) it was held that in a suit for money, where the plaint prays for a simple money-decree, an agreement, by which the parties agree that the amount decreed according to the compromise should be a charge on certain properties was 'lawful' and 'related to the suit' so as to be embodied in the decree. It is true this was a decision under O. 23, R. 3, Civil P. C., but I do not see why the Court should not have the same power in recording the adjustment of a decree under O. 21, R. 2, Civil P. C.

It has been argued that a Court has no power to alter its own decree, that the order passed by the Court on Ex. 6 is, therefore, a nullity, that in order to attract the application of the exemption in S. 17 (2) (6), Registration Act, the decree or order of the Court must be a proper decree or order of the Court and not a nullity. The authorities cited in support of this argument are every one of them distinguishable. In *Kotaghiri Venkata Subbamma Rao* v. *Vellanki Venkatarama Rao* (30) their Lordships of the Privy Council in the peculiar circumstances of that case did lay down that a High Court had no power to alter its own decree except under the provisions of either S. 206 (now S. 152) or S. 623 (now O. 47) of the Civil P. C., but their Lordships proceed to say—and this is all important :

> instead of attempting the alteration in the decree, the High Court could properly have made the compromise a rule of Court, and have stayed all proceedings against the defendant who was a party to it except for the purpose of enforcing it against him.

That is exactly the position here. The order passed on Ex. 6 is not an alteration of the decree; it is an order recording the compromise of a decree or making it a rule of the Court. The case of *Jhabar Mohomed* v. *Modan Sonahar* (31) was a decision on S. 257 (*a*) of the Civil P. C. of 1882. There is no provision in the Code of 1908 corresponding to S. 257 (*a*) of the Civil P. C. of 1882.

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(27) [1920] 43 Mad. 688=12 L. W. 35=39 M. L. J. 77=58 I.C. 554=(1920) M. W. N. 431 (F. B.).
(28) [1921] 14 S. L. R. 245=61 I. C. 118.
(29) [1907] 30 Mad. 478=16 M. L. J. 354.
(30) [1901] 24 Mad. 1=27 I. A. 197=10 M.L.J. 221=7 Sar. 678 (P.C.).
(31) [1885] 11 Cal. 671.

Fateh Muhammad v. *Gopal Das* (32) is of no assistance to the applicant. The point there was whether an adjustment of a decree by the parties thereto did or did not extinguish the decree by substituting therefor a new contract between the parties.

The case referred to and reported as *Bindesri Naik* v. *Ganga Saran Sahu* (33), has no bearing on the point whatever. In fact the only case which lends some support to the contention I am now dealing with is that of *Lodd Govindoss Krishnadoss* v. *Ramdoss Vishnadoss* (34). The judgment of the Madras High Court, as reported, is entirely meagre, and favours the construction therein placed on O. 21, R. 2, Civil P. C. I must respectfully dissent. In my opinion, therefore, Ex. 6 is exempted from compulsory registration under S. 17, Indian Registration Act, and the applicant must fail on the third point raised by Mr. Elphinston on his behalf.

The result is that this application by the Official Receiver to set aside the transfer by the insolvents Udernomal-Kishindas of property Plot No. 20, Sheet A-9, involved in Ex. 6, must be dismissed with costs.

Application dismissed.

(32) [1885] 7 All. 424=(1885) A. W. N. 76.
(33) [1898] 20 All. 171=25 I. A. 9=7 Sar. 273 (P. C.).
(34) [1915] M. W. N. 225=28 I. C. 376=17 M. L. T. 222.

A. I. R. 1927 Sind 77

KINCAID, J. C.

Mahomedally and *another*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Transfer Application No. 86 of 1926, Decided on 8th July 1926, for transfer of the case pending with the Sub-Divl. Mag., Rohri.

Criminal P. C., Ss. 190 and 110—S. 190 does not apply to proceedings under S. 110.

The provisions of S. 190 do not apply to proceedings taken under S. 110 by a Magistrate upon information received from any person other than a police officer : 27 *All.* 172, *Foll.* [P 77 C 2]

Partabrai D. Punwani — for Applicants.

T. G. Elphinston—for the Crown.

Judgment.—The present application has been made to this Court, in its High Court jurisdiction under S. 526 of the Criminal P. C. The applicants have asked that the proceedings initiated against them under S. 110 of the Criminal P. C. should be transferred to another Court. The chief ground of this application is that the Sub-Divisional Magistrate has already formed an opinion against the applicants from private inquiries made by him. In support of this allegation the learned pleader has relied on the application made by the accused to the Sub-Divisional Magistrate in which copies of certain papers were asked for and refused by the learned Magistrate.

A legal point has been raised by Mr. Partabrai who has contended that under S. 190 (1) sub-Cl. (*c*) when a Magistrate takes cognizance of an offence upon information received from any person other than a police officer or upon his own knowledge or suspicion, he must inform the accused before any evidence is taken that he is entitled to have the case tried by another Court. Here, the learned Sub-Divisional Magistrate did not give the applicants an opportunity of electing to be tried by another Court. This point was raised in *In the matter of the petition of Mithu Khan* (1). The acting Chief Justice Knox decided the plea against the learned pleader's contention. He observed :

> No authority has been shown to me for this and I am not prepared without authority to apply the provisions of S. 190 and limit by them the wide and unfettered language used in Ss. 110 and 112 of the Criminal P. C.

A contrary view, however, seems to have been taken by the Calcutta High Court. Nevertheless, even there their Lordships admitted that the law did not expressly apply Ss. 190 and 191 to S. 110. In my humble view, the decision of his Lordship, the Chief Justice of the Allahabad High Court was the correct one. I therefore, reject the legal plea of the applicant.

The learned pleader has laid great stress upon the refusal of the learned Sub-Divisional Magistrate to supply his clients with certain copies. The learned Magistrate, however, in his report has said :

> The only thing I did was that when some persons gave me information under S. 110, Criminal

(1) [1904] 27 All. 172=(1904) A. W. N. 206=1 A. L. J. 685.

P. C. I recorded it, as I thought, I must according to law. I do not know if those men had any grudge against the accused. I did not want to launch proceedings against the accused at my own initiative and of my own accord.

The learned Magistrate does not seem to have expressed any opinion one way or the other. Nor do I think that the applicants have any right to demand copies of this information. It must be remembered that the Magistrate has not initiated these proceedings and is now proceeding upon a police challan. Anything which passed before him before the police challan is no longer a part of the present proceedings.

I cannot see any ground for supposing that the learned Sub-Divisional Magistrate will not try the applicants in the unbiased manner that the Sub-Divisional Magistrates usually do. I, therefore, dismiss the present application and order the papers to be returned to the Sub-Divisional Magistrate.

Application dismissed.

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* A. I. R. 1927 Sind 78

LOBO, A. J. C.

Lalchand Khushaldas and *others* — Plaintiffs.

v.

Hussainio Mamo and *others* — Defendants.

Original Civil Suit No. 380 of 1922. Decided on 29th June 1926.

(a) *Provincial Insolvency Act, S. 51 — Composition.*

The execution of a composition deed by a debtor amounts to an act of insolvency: 26 *Lom.* 476, *Rel. on.* [P 80, C 2]

(b) *Civil P. C., O. 7, R. 1—Description of suit in heading does not determine nature of suit —Jurisdiction—Plaint.*

The description of a suit in the heading of a plaint does not determine the nature of the suit, nor does the main question in the suit determine its nature e. g., the fact that the main question in a suit is one relating to breach of contract does not make the suit exclusively one for damages for breach of contract. [P 81, C 1]

(c) *Transfer of Property Act, S. 3—Claim for damages, return of earnest money with interest and a part of purchase price—Claim is an actionable claim and not merely a right to sue —Debt means actually existing debt.*

Where in a suit based on a contract between the parties for purchase and sale of immovable property, in regard to which the plaintiffs, alleging a breach on the part of the defendants, pray for recovery of earnest money, for recovery of part purchase price paid, for recovery of interest on the aggregate of these two sums and for damages for breach of contract the suit is not a mere suit to recover damages for breach of contract though a claim for damages is included therein. So far as the reliefs relate to return of earnest money, part purchase-money and interest thereon they constitute a claim to a beneficial interest in moveable property affording ground for relief. [P 81, C 1,2]

The word "debt" means an actually existing debt, that is, a perfected and absolute debt not merely a sum of money which may or maynot become payable at some future time or the payment of which depends upon contingencies which may or may not happen. [P 81, C 1]

(d) *Provincial Insolvency Act, S. 38—Assignment of whole property for benefit of creditors —Debtor is divested of all interest which can be attached in execution subsequently against him.*

A bona fide assignment by a debtor of his entire property for the benefit of his creditors divests him of any interest which can be the subject of attachment subsequently issued in execution of a decree against such debtor until the trusts of the deed of assignment have been carried out: *A. I. R.* 1924 *Lah.* 709; 1 *B. H. C. R.* 233 and 8 *B. H. C. R.* 215, *Foll.* [P 82, C 1]

* (e) *Civil P. C., S. 47—Transfer of right under pending suit—Assignee not brought on record—Assignee cannot execute the decree passed in the suit, though he becomes owner thereof—Civil P. C., O. 21, R. 16.*

Where a decree-holder has, during the pendency of the suit in which he subsequently obtains a decree, assigned his rights to a third party who is not brought on the record, the assignee has no right to execute the decree that is subsequently passed. But the decree vests in the assignee in equity: *Case law referred.* [P 82, C 2]

* (f) *Transfer of Property Act, S. 6—Contract to assign property to come in existence in future—Assignment is complete when property comes into existence.*

A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment. [P 83, C 1]

Kalumal Pahlumal—for Plaintiff.

Assudamal Rewachand and *Jhamatmal Valiram*—for Respondents.

Judgment.—The Defendants Nos. 2 (a) and (b) in this suit carried on a grocery business in Karachi in the name and style of Keshavji Ladha. On 9th March 1918, these defendants in partnership with one Valabdas Gangaram agreed to purchase from the firm of Abdul Ali Moosabhoy a plot of land with buildings thereon bearing Survey No. 21-B, Survey Sheet No. B-7 Rambaugh Quarter, Karachi, for a sum of Rs. 80,000. Rs. 4,000 were paid to the sellers as earnest money.

Some time in April of the same year Valabdas Gangaram settled with the Defendants No. 2 and retired from the partnership. On or about 30th April 1918, the boom in land was then prevailing in Karachi, the Defendants No. 2 agreed to re-sell the property referred to above to the Defendant No. 1 in this suit for Rs. 84,000, and received from the Defendant No. 1 Rs. 5,000 as earnest money. The kobala required the Defendant No. 1 to take a conveyance direct from Abdul Ali Moosabhoy. The period for completion of their purchase by the Defendants No. 2 from Abdul Ali Moosabhoy was due to expire before the period within which the Defendant No. 1 was bound to complete; in order to induce Abdul Ali Moosabhoy to extend the former so as to coincide with the latter the Defendants No. 2 paid them a further sum of Rs. 5,200 towards the purchase price. Messrs. Abdul Ali Moosabhoy were not really the owners of the property in question, they had in their turn contracted to purchase it from one Gokaldas Lalji and others. Soon after June 1918 there was a slump in the land market and the contracts referred to above were never completed. On 26th September 1918, the Defendant No. 1 filed Suit No. 842 of 1918 of this Court against the Defendants No. 2 for return of earnest money, interest thereon and damages for breach of contract, in all Rs. 11,100. Exs. 10, 11 and 14 are certified copies of the plaint, decree and written statement in this suit.

The Defendants No. 2 promptly replied by filing on 2nd November 1918, Suit No. 958 of 1918 of this Court against Messrs. Abdul Ali Moosabhoy. Their claim therein was valued at Rs. 20,000 consisting of Rs. 4,000 earnest money paid by them, Rs. 5,200 paid towards purchase price, Rs. 414-8-0 interest; Rs. 4,000 damages and Rs. 6,385-8-0 further damages occasioned by the filing of Suit No. 842 by the Defendant No. 1. Exs. 8, 9 and 13 are certified copies of the plaint, decree and written statement in this suit.

While these suits were yet pending the Defendants No. 2 failed in business and entered into a composition with the large majority of their creditors. Exhibit 7, dated 9th December 1920, is the composition deed. The Plaintiffs Nos. 1 to 3 in this suit are the trustees appointed under this deed of composition. The Defendant No. 1 the plaintiff in Suit No. 842 of 1918 was invited to join in the execution of the said deed but elected to stand out. The trustees, Plaintiffs Nos. 1 to 3 entered upon their duties as such but made no attempt to have themselves brought on the record in Suits Nos. 842 and 958 of 1918 referred to above. They obviously should have done so; why they did not does not appear on the record. The suits referred to were finally disposed of on 9th January 1922. Suit No. 842 of 1918 was decreed against the Defendants No. 2 for Rs. 5,100 costs and interest (Ex. 11), the Rs. 5,100 obviously representing the earnest money paid by Defendant No. 1 with interest till date of suit. Suit No. 958 of 1918 was decreed against Messrs. Abdul Ali Moosabhoy for Rs. 9,614-8-0 costs and interest (Ex. 9), the Rs. 9,614-8-0 obviously representing the earnest money and part purchase-money paid by the Defendants No. 2 with interest till date of suit. No damage were allowed in either of these suits.

In February 1922 Messrs. Abdul Ali Moosabhoy the judgment-debtors in Suit No. 958 of 1918 deposited in Court the decretal amount about Rs. 11,393. In execution of his decree in Suit No. 842 of 1918 the Defendant No. 1 promptly attached the amount deposited and later withdrew therefrom the amount of Rs. 6,646-8-3. On 20th February 1922 the plaintiffs, as trustees under the composition deed, applied to withdraw the amount of the decree in favour of the Defendants No. 2 which had, as stated above, been deposited in Court by the judgment-debtors. They found they had been forestalled by the Defendant No. 1 and had to content themselves for the time being with taking the balance lying in Court some Rs. 4,747. On 30th March 1922 the trustees filed the present suit against the Defendant No. 1 for recovery of Rs. 6,646-8-3 withdrawn by him. The insolvent debtors were impleaded as Defendant No. 2. On 11th April 1922 the Defendants No. 2 finding themselves harassed by some of their creditors who with the Defendant No. 1 had stood out of the composition of December 1920, applied to have themselves adjudicated insolvent and for the appointment of an interim Receiver. Exhibits 15 and 17 are certified copies

of these applications. They were adjudicated insolvents on 11th August 1922.

On 5th December 1922, the Official Receiver in whom the estate of the Defendants No. 2 had vested by virtue of the adjudication order applied to the Insolvency Court under S. 4 of the Insolvency Act (5 of 1920) for a declaration as against the trustees under the composition deed of December 1920, of his superior claim to the estate of the insolvents, etc. On 31st August 1923, by a consent order the trustees, Plaintiffs Nos. 1 to 3, undertook to hand over to the Official Receiver the estate of the Defendants No. 2 so far as it remained unadministered. Exhibit 18 is a certified copy of this application and the order thereon. In November 1923 the Official Receiver was brought on the record of this suit as Plaintiff No. 4. The Defendants No. 2 obtained their discharge on 17th October 1924. A certified copy of this order is Ex. 19.

On 19th April 1926, as nothing further remained to be done in connexion with the insolvency proceedings in regard to the Defendants No. 2 the proceedings were ordered by the Insolvency Court to be recorded. Exhibit 20 is a certified copy of that order. Now the plaintiffs' claim in this suit, shortly put, is as follows:

Under the deed of composition Ex. 7, dated 9th December 1920, they say the entire property of the Defendants No. 2 existing or acquired thereafter by realization or otherwise was assigned to and became vested in the trustees (inter alia the claim of the defendants in Suit No. 958 of 1918 pending against Abdul Ali Moosabhoy) for the benefit of the creditors; the Defendants No. 2 had, therefore, no interest in that claim at the time a decree was passed against Messrs. Abdul Ali Moosabhoy in Suit No. 958 of 1918; on the claim ripening into a decree on 9th January 1922, the decree equally became vested in the trustees, the Defendants No. 2 having no interest therein. The Defendant No. 1 had, therefore, no right to attach and withdraw from Court any portion of the decretal amount in Suit No. 958 of 1918 deposited by the judgment-debtors in Court in execution of any decree held by him against the Defendants No. 2. Having, as a matter of fact, done so, he is bound in law to hand over the amount so withdrawn by him to the plaintiffs, trustees or to the Official Receiver, Plaintiff No. 4.

Two written statements have been filed by the Defendant No. 1, the second after the joinder of the Official Receiver in December 1923. The two sets of issue set out below sufficiently indicate the nature of his defence:—

1. Was any valid composition deed entered into between the Defendants No. 2 and their creditors as alleged?
2. Is the said deed fraudulent and void, and did it convey any title to the plaintiffs?
3. Did all the property of the Defendant No. 2 of any kind and nature whatever then existing or thereafter acquired or realized vest in the plaintiffs by virtue of the said deed?
4. Did the claim in Suit No. 958 of 1918 on the file of this Court also vest in the plaintiffs by virtue of the said composition deed and had the Defendant No. 2 no saleable interest left in the same at the time of the passing of the decree in the said suit?
5. Did the amount of the decree in Suit No. 958 of 1918 vest in the plaintiffs by virtue of the composition deed immediately on the passing of the decree in the said suit and had the Defendant No. 2 no saleable interest in the said judgment debt or did they hold the same as trustees for and on behalf of the plaintiffs as alleged?
6. Had the Defendant No. 1 no right to attach and recover the decretal amount in Suit No. 958 of 1918 for reasons given in paras. 4 and 6 of the plaint?
7. Is the suit by the plaintiffs msintainable?
8. Is the Official Receiver a necessary party to the suit?
9. Can the plaintiffs have any preference over the Official Receiver and has any cause of action accrued to them?
10. To what relief, if any, are the plaintiffs entitled?
11. General.

Additional Issues.

1. Is the Defendant No. 1 bound by the composition deed referred to in para. 1 of the plaint?
2. Has plaintiff No. 4 any cause of action against Defendant No. 1?
3. Can the plaintiff No. 4 recover the amount of claim in this suit from Defendant No. 1?
4. Are the allegations in para. 4 of the amended plaint proved?
5. Is the suit bad for misjoinder of plaintiffs and causes of action?

Now there are a few salient points in this case, the decision on which will enable me to dispose of this double set of issues some of which, by the way, overlap, while others have become unnecessary in view of the joinder of the Official Receiver as Plaintiff No. 4. As the case moreover, has been argued largely on these salient points it will be more convenient that my judgment should proceed on the same lines.

The first of these points is whether Ex. 7 was a valid composition deed which vested in the Plaintiffs Nos. 1 to 3 as trustees the claim of the Defendants No. 2 against Messrs. Abdul Ali Moosabhoy in Suit No. 958 of 1918. The validity of Ex. 7 has been attacked on several grounds. It has first been argued that the document is not a composition deed at all as it clearly contemplates and provides for payment to creditors in full and this is essentially not the purpose or meaning of a composition deed as laid down in the case of *Shekh Adam Hasanali* v. *Chandra Shankar* (1). The decision in the case relied on was based entirely on a construction of the document before the Court. That Ex. 7 does not contemplate payment to the creditors in full but provides for a compounding of debts is clear on a reference to the contents of the document. Clause (7) is of no assistance to the Defendant No. 1; it merely empowers the trustees to pay in full, or to compound at a higher rate with those creditors

> who refuse to come in under and take advantage of these presents.

Clause (22) provides that in respect of the balance remaining due to the creditors after they received the last dividend which the trustees may be able to distribute, the creditors will accept bundis to be executed by the debtors not to be recoverable or realized

> until and unless the debtors are in a position able to pay such debt or debts.

Exhibit 7, therefore, clearly contemplates that the property of the debtors transferred to the trustees will be insufficient to pay the creditors in full, and provides that the balance will be—what may well be described as—payable when available. This cannot in reason be called payment in full. Besides this the point in the case referred to was whether the document there was admissible in evidence not being registered. That was the only point decided. Exhibit 7 has been registered and the case is, therefore, really of no help whatever.

The next objection to Ex. 7 (this is not really an objection to its validity) is that it contains no absolute transfer of the debtors' property to the trustees but merely appoints the trustees agents for distributing certain property among the creditors. Such a transfer, it is argued, does not vest the property of the debtors in the trustees to the extent of preventing such property from being attached by a creditor in execution of a decree against the debtors. The argument is based upon Cl. (9) of Ex. 7 under which the debtors appoint the trustees their lawful attorneys for filing suits, selling properties, etc. But obviously Cl. 9 cannot be read by itself. The very scheme of the deed involves an absolute transfer to the trustees of all the property of the debtors for the compounding of their debts. Obviously Cl. (9) had to be inserted to enable the trustees to handle and deal with the immovable property of the debtors.

Again Ex. 7 has been attacked as a fraudulent preference. Reliance is placed for this strange argument on Cl. (7) of the deed to the contents of which I have referred above. When the creditors themselves were parties to Ex. 7 and agreed that such of the composition scheme might, if necessary, be given preferential treatment, I fail to understand where the fraudulent preference comes in.

Lastly, it was argued as against Ex. 7 that the execution thereof by the debtors amounted to an act of insolvency and that on the debtors being adjudicated insolvents the transfer involved in Ex. 7 became void as against the Official Receiver under S. 54 of the Provincial Insolvency Act. In support of the argument were cited the cases of *Karsandas* v. *Magandal* (2), *Ex parte Hughes* (3) and *In re Wood* (4). These cases merely lay it down that the execution of a composition deed by a debtor amounts to an act of insolvency. S. 54 of the Insolvency Act can have no application whatever as Ex. 7 was executed in December 1920, while the Defendants No. 2 applied to be adjudicated idsolvents in April 1922.

Exibit 7 is, in my opinion, a perfectly valid deed of composition. Now Cl. (1) of Ex. 7 recites that

> the said debtors do hereby, as beneficial owners thereof, assign and convey unto the trustees all their moveable and immoveable properties whatsoever wheresoever situate including inter alia the property shown in the schedule B hereto. . . .'

Clause 2 reads:

> The trustees shall, at such times and in such manner as they shall think fit and proper, call

(1) [1912] 14 Bom. L. R. 506=15 I. C. 850.

(2) [1902] 26 Bom. 476=4 Bom. L. R. 91.

(3) [1893] 1 Q. B. 595=62 L. J. Q. B. 358=41 W. R. 466=68 L. T. 629.

(4) [1872] 7 Ch. A. 302=20 W. R. 403=41 L. J. K. B. 21.

in, collect, compel payment of or receive such part of the property as is outstanding . . . .

Clause (12) states :

The properties shown in the schedule B are only by way of description and are the properties which have so far been ascertained as belonging to the debtors. The trustees shall have full power to take hold and possession of any other property of the debtors coming to their knowledge besides that shown in the schedule B.

Lastly para. (6) of the Schedule B to Ex. 7, which is a schedule of the properties belonging to the Defendants No. 2 reads as follows :

All the assets and outstandings due to the debtors according to their books of account, including all rents, and profits at present due in respect of the immoveable properties, and all claims made by the debtors for which suits are pending in the Karachi Courts.

It would, therefore, appear prima facie that the claim of the Defendants No. 2 against Messrs. Abdul Ali Moosabhoy in pending Suit No. 958 of 1918 vested in the Plaintiffs Nos. 1 to 3 by virtue of Ex. 7. It has been argued, however, that this claim consisted of a mere right to sue which was unassignable to the Plaintiffs Nos. 1 to 3 by reason of S. 6 (e) of the Transfer of Property Act. The argument certainly needs investigation. It is contended that the very heading of the plaint in Suit No. 958 of 1918, Ex. 8, describes the suit as one for damages for breach of contract and that such a claim for damages is unassignable in law. This is certainly so, but the description of a suit in the heading of a plaint does not determine the nature of the suit. Neither does the fact that the main question in a suit is one relating to breach of contract make the suit exclusively one for damages for breach clontract. What the suit really is for is clearly indicated in para 7 of Ex. 8 It is a suit based on a contract between the parties for purchase and sale of immovable property in regard to which the plaintiffs, alleging a breach no the part of the defendants, pray for recovery of earnest money, for recovery of part purchase price paid, for recovery of interest on the aggregate of these two sums and for damages for breach of contract. The question is whether the claim, in a suit so composed amounts to a debt to an actionable claim or chose in action or to a more right to sue.

In the case of *Haridas Acharjia Chowdhry* v. *Baroda Kishore Acharjia* (5) the word 'debt' was defined as meaning an actually existing debt that is, a perfected and absolute debt not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not happen. Taking this definition as a test the claim under consideration is clearly not a debt.

In the case of *Jewan Ram* v. *Ratan Chand Kishen Chand* (6) the assignment of a right to sue for unascertained damages for breach of contract was held invalid as an assignment of a mere right to sue. In *Firm of Gerimal Hariram* v. *Firm of Rughunath Kalianji* (7) it was held that an assignment by the Official Receiver of outstandings which consisted of unascertained claims for damages for breach of contract was invalid being an assignment of mere rights to sue. On the other hand, the Madras High Court had held in the case reported as *Venkateswara Aiyar* v. *Raman Nambudri* (8) that an executory contract for the conveyance of land is not a mere right to sue and may therefore, be assigned. While the Lahore High Court in *Akhtar Beg* v. *Haq Nawaz* (9) have held that a transfer of all the rights of the vendee under a contract to sell land, even after the vendor has refused to perform the contract, is not a transfer of a mere right to sue, although a right to sue is involved in it. But these and other cases which have been cited before me have really little more than an academic interest. Suit No. 958 of 1918, as I have described it above, is obviously not a mere suit to recover damages for breach of contract though a claim for damages is included therein.

To my mind the claim of the plaintiff in Suit No. 958 amounts clearly to an actionable claim within the meaning of that term in S. 3 of the Transfer of Property of Act. So far as the reliefs relate to return of earnest money, part purchase-money and interest thereon they constitute a claim to a beneficial interest in moveable property not in possession of the plaintiffs which the civil Courts recognize as affording ground for relief. I must, therefore, hold that Ex. 7 was a valid composition deed which vested in

(5) [1900] 27 Cal. 38=4 C. W. N. 87

(6) [1921] 25 C. W. N. 235.
(7) [1921] 16 S. L. R. 71.
(8) [1916] 3 L. W. 435=33 I. C. 693=19 M. L. T. 329.
(9) A. I. R. 1921 Lah. 709.

the Plaintiffs Nos. 1 to 3 as trustees the claim of the Defendants No. 2 against Messrs. Abdul Ali Moosabhoy in Suit No. 958 of 1918. Now what was the effect in law of such a composition deed against creditors of the Defendant No. 2 who, like the Defendant No. 1, chose to stand out of the arrangement? This is the second salient point in the case.

In the case of *Bamanji Manikji* v. *Naoroji Palanji* (10) Chief Justice Sausse, following the English authorities, held that a bona fide assignment by a debtor of his entire property for the benefit of his creditors divests him of any interest which can be the subject of attachment, subsequently issued in execution of a decree against such debtor until the trusts of the deed of assignment have been carried out. Naoroji, the attaching creditor in this case, was, like the Defendant No. 1 in the case before me, one of the creditors who had refused to join in the execution of the deed of composition. He had subsequently filed a suit against the debtor, obtained a decree and in execution thereof had attached certain moveables formerly the property of the debtor which had been sold by order of the trustees.

Bapuji Auditram v. *Umedbhai Hathesingh* (11) is another authority very much to the same effect. It was held therein that the assignment in a trust deed, by which a person assigns all his property to trustees for the benefit of his creditors, protects the assets so assigned from all creditors.

Following the above cases I hold that in consequence of Ex. 7 the Defendant No. 1 could not in execution of his decree against the Defendants No. 2 in Suit No. 842 of 1918, attach any property formerly belonging to the Defendants No. 2 which had vested in the plaintiffs-trustees.

This brings me to the last of what I have referred to before as the salient points in the case. It has been argued that even assuming that the actionable claim of the Defendants No. 2 against Messrs. Abdul Ali Moosabhoy involved in Suit No. 958 of 1918 vested in the plaintiffs-trustees by reason of Ex. 7, the plaintiffs-trustees having failed to take the necessary and usual steps to have themselves brought on the record of the said suit, the decree that was subsequently passed neither vested in them nor were they entitled to execute that decree. That what was assigned to the trustees under Ex. 7 was the actionable claim in Suit No. 958 not the decree that came subsequently to be passed, therein. The decree, when passed was, therefore, the property of the Defendants No. 2, and the money paid into Court thereunder was rightly attached and availed of by the Defendant No. 1 in execution of his decree in Suit No. 842 of 1918. One of the propositions of law involved in this argument, viz., that where a decree-holder has, during the pendency of the suit in which he subsequently obtains a decree, assigned his rights to a third party who is not brought on the record, the assignee has no right to execute the decree that is subsequently passed, I am prepared to concede. This proposition has been laid down by a number of cases of which the following are instances: *Basroorvithil Bhandari* v. *Rama Chandra Camthi* (12); *Dost Muhammad* v. *Altaf Hussain Khan* (13); *Peer Mahomed Rowthen* v. *Raruthan Ambalam* (14); *Silu Peda Yelligadu* v. *Surya Rao* (15); *Ari Chetty* v. *Theerthamalai Chetty* (16) and *Mathurapore Zemindari Co., Ld.* v. *Bhasaram Mondal* (17). All these cases are based on O. 21, R. 16, Civil P.C. or the corresponding section of the earlier Civil P. C., and on the principle that an executing Court is governed by the provisions of the Civil P. C., and will not entertain claims by assignees, to execute decrees when such claims are based on equitable grounds. To the same effect is the very recent case of *Genaram Kapurchand* v. *Hanmantram Surajmal* (18).

But to argue that the plaintiffs-trustees cannot execute the decree in Suit No. 842 of 1918 is one thing; to say that the decree never vested in them is quite another. The confusion arises by regarding the decree in Suit No. 958 of 1918 as something different from and unconnected with the actionable claim in the suit which ultimately ripened into

(10) 1 B. H. C. 233.
(11) 8 B. H. C. A. C. 245.

(12) [1907] 17 M. L. J. 391=2 M. L. T. 197.
(13) [1912] 17 I. C. 512.
(14) [1915] 30 I. C. 831.
(15) [1916] 2 L. W. 1122=29 M. L. J. 693=31 I. C. 542=(1916) 1 M. W. N. 119.
(16) [1916] 3 L. W. 521=34 I. C. 791.
(17) A. I. R. 1924 Cal. 661=51 Cal. 703.
(18) A. I. R. 1926 Bom. 406.

the decree. To my mind the actionable claim in Suit No. 958 of 1918 having vested in the plaintiffs-trustees by virtue of Ex. 7 the decree subsequently passed in the suit equally vested in them and became their property. The following passage in the judgment of Sargent, C. J., in the case of *Purmanandas Jiwandas* v. *Vallabdas Wallji* (19) entirely supports my view :

> It appears that the plaintiffs in this suit were trustees of the property of one Runchoredas Camji, who died in the year 1859, having by his Will left all his property to them as trustees for the applicant, Purmanandas, with directions that it should be assigned to him as soon as he came of age. This assignment was made by the trustees to Purmanandas in the most general terms in 1870 after the suit was filed and while it was still pending. By the deed of assignment the trustees transfer to Purmanandas 'all moveable property, debts, claims and things in action whatsoever vested in them,' which would include the claim which was the subject-matter of the then pending suit ; and the effect of this assignment was, in equity, to vest in Purmanandas the whole interest in the decree which was afterwards obtained.

The principle of equity referred to in this case was defined by the Master of the Rolls, Sir George Jessel, in the case of *Collyer* v. *Isaacs* (20) as follows :

> A man cannot in equity, any more than at law assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment.

This equitable principle, I find, is recognized in the case in *Basroorvithil Bhandari* v. *Ramachandra Kamthi* (12) which I have referred above.

I must, accordingly, hold against the Defendant No. 1 this point as well.

To the argument, somewhat half-heartedly advanced, that the Defendant No. 1 not being a party to Ex. 7 was free to recover by suit from the Defendants No. 2, that under S. 55 (6) (b) of the Transfer of Property Act the Defendant No. 1 had a lien on the property contracted to be purchased for his earnest money, that, if in order to save the property from attachment money is deposited in Court the lien attaches to the money so deposited, I need not refer in detail. It is obviously more ingenious than sound, considering that the property in question did not belong to Messrs. Abdul Ali Moosabhoy who deposited the money, and further that there was no privity of contract between the Defendant No. 1 and Messrs. Abdul Ali Moosabhoy.

Having disposed of these salient points in the case I now proceed to record as briefly as possible my findings on the issues :

My finding on Issue No. 1 is in the affirmative for reasons recorded.

As to Issue No. 2 no fraud has been alleged or proved. Finding in the negative.

My finding on Issue No. 3 is in the affirmative ; so also my finding on Issue No. 4.

My finding on Issue No. 5 is in the affirmative. The Defendants No. 2 had no interest in the Rs. 6,646-8-3 withdrawn by the Defendant No. 1. The latter became a trustee for the amount after he had withdrawn it.

My finding on Issue No. 6 for reasons recorded is in the negative.

Issues Nos. 7 and 8 became unnecessary when the Official Receiver was joined.

On Issue No. 9 it appears to me that the Official Receiver was really not a necessary party and had no cause of action against the Defendant No. 1. Under S. 28 of the Provincial Insolvency Act what vested in the Official Receiver on the passing of the adjudication order in 1922 was the existing property of the Insolvents-Defendants No. 2. The sum of Rs. 6,646 odd now sued for by the plaintiffs Nos. 1 to 3 ceased to be the property of the Insolvents Defendants No. 2 long before the adjudication order. The point is of little importance in the case as it is admitted for the plaintiffs that whatever is realized by the Plaintiffs Nos. 1 to 3 in execution of the decree they will obtain in this suit must be handed over to the Official Receiver.

My answer to Issue No. 1 of the additional issues is in the negative. Defendant No. 1 not being a party to Ex. 7 is not bound thereby.

As to Additional Issue No. 2 my finding on Issue No. 9 covers it so also as to additional Issue No. 3.

As to additional Issue No. 4 there is no evidence worth the name. In any case no finding is necessary.

Additional Issue No. 5 has not been pressed. In any case my answer thereto is in the negative.

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(19) [1887] 11 Bom. 506.
(20) [1882] 19 Ch. D. 342=30 W. R. 70=51 L. J. Ch. 14=45 L. T. 567.

As a result of these findings there will be a decree in favour of the Plaintiffs Nos. 1 to 3 against the Defendant No. 1 for Rs. 6,646-8-3 with costs of the suit and interest at 6 per cent. from date of suit till payment. The Plaintiffs Nos. 1 to 3 will hold any amount recovered by them under this decree at the disposal of Plaintiff No. 4, the Official Receiver.

Suit decreed.

A. I. R. 1927 Sind 85

KINCAID, J. C. AND RUPCHAND BILARAM, A. J. C.

Bukshan and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 48 of 1926, Decided on 29th July 1926, from an order of the S. J., Larkana, D/- 19th March 1926.

(a) Criminal trial—Prima facie case made out against the accused—Accused cannot safely rely on infirmity of prosecution evidence or presumption of innocence.

If prima facie case is made out against the accused, he cannot rely safely on the presumption of innocence or on the infirmity of the evidence for the prosecution ; and then it is open to the Court to convict him. The force of suspicious circumstances is augmented whenever the party attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain : 7 *S. L. R.* 109, *Foll.*

[P 87 C 1]

(b) Penal Code, Ss. 34 and 302—Four persons taking a woman out with the intention of murdering her—Death caused—All are guilty as principals.

Where four persons took a woman out with the knowledge and with the purpose that one of their number should murder her and one of their number did murder her, then that murder is done in furtherance of the common intention of all and all the four men are guilty of the crime as principals under S. 34. [P 87 C 2]

(c) Criminal P. C., S. 439 (2)—Appeal against convictions—Notice for enhancement is not necessary.

Where the accused have preferred an appeal and they have had an opportunity of being heard personally or by pleader, it is open to the appellate Court to change their conviction to one under a graver section, without further calling upon them or issuing to them a formal notice, when the Public Prosecutor asks to do so.

[P 88 C 1]

Gulabrai Nihalchand—for Appellants.

T. G. Elphinston—for the Crown.

Kincaid, J. C.—The facts of this case are simple although unhappily unusual. There were three brothers, Alibux, Bakshan and Huzuri the sons of Dadu. They lived together with their cousin Amiro in Gulbeg, Taluka Ratodero. Of these three brothers Alibux was married to Bakhtawar, the daughter of Dhanibux. Rightly or wrongly Bakhtawar was suspected of an intrigue with one Ganwar and owing to this suspicion she left her husband and went to reside with her father Dhanibux. On the 2nd of October 1925, Bakshan and Alibux went to Dhanibux and asked him to let them take Bakhtawar with them as they were going to change their camp in order to work at the harvest some way off. Dhanibux let them take Bakhtawar. And that night the three brothers and their cousin Amiro changed their camp to a spot three miles from Gulbeg.

The following day, that is to say, on the 3rd of October 1925, three persons Belo, Miandad and Sher Mahomed, caste-fellows of Dhanibux and his cousins, came to the neighbourhood in search of a she-camel. They met another caste-fellow by name Salleh and asked him about Dhanibux and Bakhtawar. Salleh told them that Alibux and Bakshan had taken away Bakhtawar the previous day. Now Sher Mahomed, Belo and Miandad knew that Bakhtawar had been charged with unchastity with Ganwar and had been declared unchaste or kari. They feared that she had been taken away to be murdered. They went to Gulbeg village to see whether Alibux's camp was still there but found it had gone. They followed the footprints up to Punhun village and there they found the camp again. In the lodo or portable hut they saw Alibux, Bakshan and Huzuri the three brothers and Amiro their cousin there. Bakhtawar was also there. The time was 6 p. m. It was getting dusk and they did not go back to their camp ; but fearing that Bakhtawar might be killed that night they went to Punhun Police outpost. They told the Head Constable Meharali Khan of their fears and asked him to take security from the three brothers.

Moharali Shah took a constable, two villagers and the three complainants and went back to the accused's camp. They reached it between 8 and 9 p. m. There they could neither find Alibux, Bakshan, Huzuri Amiro nor Bakhtawar. They only found four women and

two children, all huddled together as if frightened. Mehar Ali Khan asked the women where the men were. They said that Alibux and Bakhtawar had remained at Gulbeg while Bakshan and Huzuri and Amiro had gone in search of a she-camel. As this statement was obviously false, the suspicions of the party grew stronger. Just then Bakshan returned. He was wearing only a loin cloth and he was covered with fresh dust. Meharali Khan asked him where the other male members of the camp were. He made a similar reply, namely, that Huzuri and Amiro had gone to look for a camel, while Alibux and Bakhtawar had remained at Gulbeg. Meharali Khan waited for some time in the hope that the other missing men might return, but they did not. As it was dark he could do nothing that night, so he took Bakshan and the women of the camp to the police post at Punhun. From Punhun police thana Meharali Khan sent for Adho the Police tracker, and between 3 and 4 a. m. the party again returned to the camp.

When day broke they noticed the foot-prints of four men and one woman going west from the camp. They followed the tracks for 275 paces and came to a pit dug like a grave. It was 7 feet long, 3 feet deep and 2½ feet broad. From this point the three men's foot-prints only proceeded, the woman's prints wholly disappeared. But near the place there were marks as if a human being had been dragged. The fourth man's foot-prints went back towards the camp. The party followed the three tracks for three furlongs, until they came to a pit in a disused canal. In the pit was a dead body of a woman whom Belo, Sher Mahomed and Maindad identified as Bakhtawar. The police tracker, Adho, examined the footprints that led back to Lado and was satisfied that they were those of Bakshan. These prints had been made by Bakshan as he returned the previous evening to the camp. Meharali sent the first report to the Ratodero head-quarter station and made a mashirnama and an inquest report. He sent the dead body to the hospital and begged the Sub-Inspector to bring Gulsher, a more experienced tracker, and one unconnected with the supposed culprits.

On the 4th and 5th Meharali took the statements of the witnesses and on the 6th the Sub-Inspector arrived with Gulsher. That day also Amiro, who till then was missing, was arrested and the Sub-Inspector took charge of him and Bakshan. The Sub-Inspector further held a test of Bakshan and Amiro's footprints and Gulsher's identification of Bakshan's corresponded with that of Adho. Bakshan's tracks went up to the grave and then returned to the camp. Gulsher picked out Amiro's prints as one of those which went to the canal where the dead body lay. On the 7th the Deputy Superintendent of Police came. On the 8th the third brother Huzuri was arrested and his prints were also picked out by Gulsher as one of the three that went to the spot where Bakhtawar was found. On the 9th the police sent Bakshan, Huzuri and Amiro to the committing Magistrate. After the commitment Amiro hanged himself. Alibux has not as yet been arrested. On the 29th of March 1926 the learned Sessions Judge of Larkana found the accused Bakshan and Huzuri guilty under S. 364, Indian Peal Code, and sentenced them to undergo seven years rigorous imprisonment.

Against these convictions and sentences the two convicts have appealed. Mr. Gulabrai has appeared in support of the appeal and the learned Public Prosecutor has supported the lower Court's finding.

We have no doubt whatsoever in our minds that the finding of fact of the learned Sessions Judge is correct. The evidence is clear that Alibux and Bakshan took Bakhtawar away from her father's house on the 2nd of October. On the night of the 3rd of October they took her secretly away to another spot. She was still alive at 6 p. m. on the night of the 3rd of October, having been seen by the witnesses Belo, Maindad and Sher Mahommad. Nothing has been said against these three witnesses to make us doubt their evidence. They are abundantly supported, moreover, by their own conduct and by the evidence of Meharali. They were afraid that the woman might be murdered and they at once went and expressed their fears to Meharali Khan. An expression of these fears is to be found in the first report. Meharali Khan went back with them to the camp and from that point he has entirely corroborated their statements. He has no con-

nexion whatsoever with the accused or with the witnesses or the relations of Dhanibux and we fully believe him. This evidence establishes that tracks ran from the camp of Alibux and his brothers to a pit and from the pit to the place where the murdered woman was.

About Bakshan's tracks there can be no doubt whatsoever ; for he actually came to the camp when Meharali Khan was there all covered with dust. His tracks too have been identified by Gulsher, a person who has no connexion with the Punhun thana. Huzuri's tracks ran from the camp to the spot where the dead woman lay. The examination of his tracks and their identification took place in the presence of the Deputy Superintendent of Police and we have no doubt but that the identification was thoroughly and honestly made.

The gist of the evidence is that the woman Bakhtawar came into the possession of the four persons Alibux, Bakshan, Huzuri and Amiro on the 2nd of October. On the 3rd of October she was found dead in a pit in a canal. The tracks of these four men ran to and from this spot where the dead body was found. In these circumstances the onus is certainly on the accused to show what happened. They alone must have known what took place between 6 p. m. and 10 p. m. on the night of October the 3rd. If they do not discharge that burden then it is open to the Court to convict them. This view is consistent with S. 106, Evidence Act, and it has been expressed several times by Judges of this Court. The leading case on the subject is of *Isarsing Sawansing* v. *Emperor* (1). There Pratt, J. C., observed :

> If no prima facie case had been made against the accused it is open to the accused to rely safely on the presumption of innocence or on infirmity of the evidence for the prosecution. But when a prima facie case is made out and the presumption of innocence is displaced then as said by Wills, J., in his work of Circumstantial Evidence at page 97, the force of suspicious circumstances is augmented whenever the party attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain.

How far have the accused in this case discharged the burden that lay upon them? They have attempted to do so by giving false answers. When Bakshan was asked by the police where Bakhtawar and Alibux were, he falsely stated that they had remained behind at Gulbeg. He further stated falsely that Amiro and Huzuri had gone in search of a she-camel. Huzuri in the Court of the learned Sessions Judge gave a different explanation. He said that he had gone to Shahdadkote and when he returned to his village he learnt that the Police were after him. He has made no effort whatever to explain the circumstances connected with Bakhtawar's death. He has merely said that Bakhtawar used to live with her father but that he cannot say where she now is.

As regards Alibux and Amiro the former is still absconding and Amiro preferred to hang himself rather than to face his trial. In view of these circumstances I am of opinion that the two accused have in no way discharged the burden of proof which rested on them and that the finding of fact of the learned Sessions Judge that they abducted the woman Bakhtawar with intent to murder her is amply supported by the evidence.

Another point, however, arises. The learned Public Prosecutor has complained that the conviction by the learned Sessions Judge should not have been under S. 364 but under Ss. 364 and 302 of the Indian Penal Code and he has asked us to alter the conviction accordingly. The learned Sessions Judge, acting on the suggestion of the Assistant Public Prosecutor took the view that as it could not be certain who actually committed the crime of murder he should not convict them under S. 302, but these four persons took the woman out with the knowledge and with the purpose that one of their number should murder her and one of their number did murder her, then that murder was done in furtherance of the common intention of all. All the four men were guilty of the crime as principals under S. 34 of the Indian Penal Code. The learned Public Prosecutor has asked us, therefore, to change the conviction now to one under Ss. 364 and 302. Indian Penal Code. Section 439, Cl. (2), Criminal P. C., runs as follows :

> No order under this section shall be made to the prejudice of the accused, unless he has had an opportunity of being heard either personally or by pleader in his defence.

(1) [1916] 7 S. L. R. 159 = 21 I. C. 5 = 17 Cr. L. J. 67.

It is true that no notice was issued to the accused. But as they thought fit to make the appeal, they have had an opportunity of being heard personally or by pleader. It is, therefore, we think, open to this Court to change their conviction to one under a graver section, without further calling upon them or issuing to them a formal notice. In view, however, of the gravity of the charge and as a matter of prudence rather than of law, we think notice should issue to the accused to show cause why their conviction under S. 361 should not be changed into a conviction under Ss. 364 and 302, Indian Penal Code.

I would accordingly dismiss this appeal and direct the aforesaid notice to issue.

Rupchand Bilaram, A. J. C.—On the evidence the following points have been clearly established :

1. That the unfortunate woman Bakhtawar had been declared kari or marked for being murdered by her husband or her husband's relations. 2. That she had temporarily avoided her doom by going and living in the house of her father. 3. That on the very night she was taken back to her husband's lado or camp ; they all removed to a distance of three miles from the place where they were living. 4. At about 6 p. m. she was seen in the new camp by the witnesses Belo, Miandad Sher Mahomed and Salleh who suspected that she might be done to death. 5. That about 10 or 11 p. m that very night, when the witnesses brought the Policemen to the camp of the accused they discovered that all the male persons in the camp and the women had disappeared and that shortly thereafter Bakshan arrived at the place under peculiar circumstances. He was wearing only a loin cloth which covered his lower extremities, and his body was full of dust. The three other persons, namely Alibux, Amiro and the accused Huzuri did not return to their camp that night.

6. That the next morning footprints of four male persons and one woman were discovered leading from the camp to an empty pit which appeared to have been dug in order to serve as a grave and from there footprints of three persons and the marks of dragging resembling those of the dragging of the corpse of a woman were discovered leading on to another pit in the bed of a dry canal where the body of Bakhtawar was found buried. At the identification test the footprints leading from the camp to the first pit were identified by the pagi as those of the two accused and of two others, while the footprints leading from the first pit to the second pit as those of the accused Huzuri and two others.

These facts formed the substratum of the circumstantial evidence which the Crown relied on as creating a prima facie case that the accused were guilty of abduction and murder. Bakhtawar was seen in the camp of the accused at 6 p. m. on the 3rd October. She had presumbly left in their company and was done to death and buried that very night. Under the circumstances the burden was shifted on the accused to explain the cause of her disappearance between the hours of 6 and 10 p. m., and the circumstances under which she met her death and was buried. The explanation offered by them that Bakhtawar was living with Alibux in the house of her father, that she had disappeared from her father's house and not from the lado of the accused, is false and uncreditable and augments the presumption of their guilt instead of rebutting it.

Under these circumstances it was open to the learned Sessions Judge not only to convict the accused of abduction under S. 361, but of the more serious offence of murder. The reasons given by the learned Sessions Judge for acquitting the accused of the charge of murder are not convincing. I, therefore, concur in the proposed order.

Appeal dismissed.

A. I. R. 1927 Sind 89

KINCAID, J. C., AND LOBO, A. J. C.

Lakhmichand Gandamal—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 189 of 1925, Decided on 25th March 1926, from an order of Rupchand Bilaram, A. J. C., D/- 10th November 1925.

(a) Criminal P. C., S. 476—Order under, passed without giving reasons is not illegal.

Although it is desirable that the Court passing an order under S. 476 should state reasons for the order, still an order without reasons is not illegal. S. 476 merely states that the Judge should record a finding. It does not state that that finding should be supported by reasons or that it should contain issue for decision.

[P 90 C 1]

(b) Criminal P. C., S. 476—Order under—Court need not wait till completion of the main case.

Court need not wait till the proceedings in respect of which the offence is committed to pass an order under S. 476 : 26 *Bom.* 785 *Foll.*

[P 90 C 2]

Isardas Oodharam—for Appellant.

T. G. Elphinston—for the Crown.

Judgment.—The facts of this appeal have been stated by the learned pleader for the appellant as follows and have not been disputed: Issardas Assanmal and Lakhmichand Gandamal entered, it appears, into a partnership as commission agents in wheat and gram under the title of Jamnadas-Issardas. In 1917 the partnership was dissolved. The matters in dispute were referred to the arbitration of Mr. Kimatrai, a pleader of this Court. He passed an award on the 10th of November 1917. It was never filed in Court. Issardas died in 1919 and fresh disputes arose between Lakhmichand, the son of Issardas, and Lakhmichand Gandamal, one of the original two partners. These disputes were again referred to Mr. Kimatrai, the arbitrator and he passed a second award on 2nd October 1918. It was ordered that Lakhmichand Gandamal should receive all the outstandings of the firm but he was also liable to pay the firm's debts. He was in addition to receive a sum of Rs. 5,000. This award was filed.

In April 1919 a consent application was presented to the Court by which Mr. Kimatrai was appointed as a Receiver. He was to get $2\frac{1}{2}$ per cent. Receiver's commission. Some years passed and correspondence took place between Lakhmichand Gandamal and Mr. Kimatrai, and on the 25th of November 1924, Lakhmichand asked Mr. Kimatrai to file a suit against Messrs Rupchand Rewachand for Rs. 2,100. A quarrel, however, broke out at the payment of the expenses of this suit. Lakhmichand Gandamal asked the Receiver to pay the expenses of litigation out of certain moneys with him. Mr. Kimatrai refused. Lakhmichand then applied under O. 40, R. 3 of the Civil P. C., to the Court to call on the Receiver to file accounts. In January 1925, Mr. Kimatrai submitted an interim account to which Lakhmichand Gandamal objected. The latter claimed Rs. 35,000 as belonging to him. Mr. Rupchand, Additional Judicial Commissioner of Sind, took evidence in the proceedings in the interim report. In the course of these proceedings, Lakhmichand Gandamal was a witness and in the opinion of the learned Additional Judicial Commissioner he committed perjury.

On the 4th of November Mr. Rupchand, Additional Judicial Commissioner, called upon Lakhmichand Gandamal to show cause on the 6th of November 1925, why he should not be prosecuted for making three false statements on oath. These statements he detailed in the notice which he issued under S. 476. On the 6th Lakhmichand Gandamal appeared by pleader. He obtained an adjournment to the 10th of November. On the 10th of November Lakhmichand again appeared and again asked for an adjournment. But the rule was made absolute. Rupchand, Additional Judicial Commissioner, passed the following order :

Rule made absolute.

Complaint to be filed as provided in S. 476, Criminal P. C., before the City Magistrate of Karachi for perjury under S. 193, Indian Penal Code, or such other section as may be applicable for making the statements referred to.

The remaining part of the order dealt with the grant of bail to Lakhmichand. It is against this order that the present appeal has been filed.

The learned counsel who has argued this appeal has raised 4 points.

(1) He has complained that no reasonable opportunity was given to Lakhmichand Gandamal to show cause to Rupchand, Additional Judicial Commissioner, why a prosecution should not be started against him.

(2) The order under S. 476 passed by the learned Additional Judicial Commissioner does not comply with the requirements of the law.

(3) The learned Judge should not have during the pendency of the proceedings passed an order under S. 476 but should have awaited until their completion.

(4) On the merits also the learned counsel has argued that the case is not a fit one for setting the law in motion against his client.

I shall deal with these points seriatim.

1. We are of opinion that there is no substance in the objection of the learned counsel that this client had no reasonable opportunity to show cause. He was given one adjournment from the 6th of November to the 10th. On the 10th his pleader asked for a second adjournment. When it was refused the pleader informed the Court that he had no instructions to proceed. As a matter of fact, so we understand from the record, that the learned Judge offered him a further adjournment for 3 days, which he did not think fit to accept. It appears to us that Lakhmichand had ample opportunity of considering how he should bear himself in the inquiry which the learned Judge proposed to make under S. 476.

2. As regards the second point taken by the learned counsel, we think that the learned Judge would have been well advised to have given some reasons in his order of the 10th of November. Nevertheless we do not think that we should be justified in setting aside his order on that account. After all S. 476 merely states that the Judge should record a finding. It does not state that that finding should be supported by reasons or that it should contain issue for decision. Further, the learned Judge undoubtedly applied his mind to the question whether Lakhmichand committed perjury or not in the course of a long and detailed judgment which he wrote on the objections to the Receiver's account. This judgment he pronounced on the 6th November. The matter was, therefore, perfectly fresh in his mind at the time he passed the order complained of.

(3) As regards the plea that the learned Judge should not have ordered Lakhmichand's prosecution pending the proceedings, this matter, it appears to us, was set at rest by Crowe, J., in the well-known case of *In re Bal Gangadhar Tilak* (1). The passage to which I refer is to be found at page 791 (of 26 *Bom.*) runs as follows :

> We concur in the observations of Aikman, J., in *In re Mathura Das* (2) that when offences against public justice are committed, it would be well if Courts availed themselves more fully of the provisions of S. 476 instead of leaving the prosecution to private parties, who often use the sanction granted to them for gratification of private malice. The effect of such a course, however, would be entirely frustrated if the proceedings were invariably allowed to be delayed pending the disposal of the civil litigation, which might be indefinitely protracted even up to a final decision on appeal to the Privy Council.

(4) One point remains and that is whether on the merits the learned Additional Judicial Commissioner of Sind was justified in recording the finding before us. There is no doubt whatsoever that he applied his mind very carefully to the subject. The first item he has discussed in lines 104—128 of his judgment, the second item in lines 129—145 and the third item in lines 215—232. We wish carefully to abstain from saying anything that might prejudice Lakhmichand's trial before a Criminal Court. It is the Magistrate who will decide the question of Lakhmichand's guilt or innocence. That burden happily does not rest on us. We can, however, say this much, that we think on the facts stated by the learned Judge that he had grounds sufficient to justify his passing the order under S. 476.

We, therefore, confirm the learned Additional Judicial Commissioner's order and we dismiss this appeal.

Appeal dismissed.

(1) [1902] 26 Bom. 785=4 Bom. L. R. 618.
(2) [1894] 16 All. 80=(1894) A. W. N. 9.

A. I. R. 1927 Sind 90

LOBO, A. J. C.

Firm of Jetha Devji & Co.—Plaintiffs.

v.

Firm of Sriram Moolchand—Defendants.

Civil Suit No. 151 of 1926, Decided on 26th August 1926.

(a) Civil P. C., O. 37—Suit on negotiable instrument—Art. 5 Limitation Act, applies—Civil P. C., S. 128 (2) (f)—Lim. Act (amended 1925) Art. 5.

A suit on a negotiable instrument provided for under O. 37, falls under the category of suits of the nature referred to in S. 128 (2) (f), and Act 5 of the Limitation Act of 1908 applies to such suits : 52 *Cal.* 951=*A. I. R.* 1925 *Cal.* 781. *Diss from.* [P 92 C 1]

(b) *Civil P. C., O. 37—Shah jog hundi.*

Obiter.—Other conditions being fulfilled, a suit on a shah jog hundi will lie under O. 37. [P 92, C 2]

Kodumal Lekhraj—for Plaintiffs.

P. S. Shahani—for Defendants.

Order.—On 29th January 1926, the plaintiffs filed this suit under the provisions of O. 37 of the Civil P. C. on two hundis for Rs. 600 and 500 respectively dated 16th February 1922, and payable on 10th February 1923. The question as to the admission of the plaint as a plaint under O. 37, Civil P. C., was referred to the Judge in Chambers by the Additional Registrar with the following note :

Mr. Kimatrai, Pleader, contends that a suit under the Summary Chapter can now be filed within three years from the date of the cause of action, relying on *Robindra Nath Dutt* v. *Abdul Ahad and Co.* (1). In that a Single Judge has ordered ex parte that the plaint be admitted but the matter does not seem to have been decided. The question is whether this plaint may also be admitted.

The matter came before my learned brother Tyabji, A. J. C., who, on 9th February 1926, made the following order :

Take plaint on file and let defendant take the objection. If defendant does not appear the Court must consider the point before making the decree.

The plaint was, of course, admitted and the summonses were issued to the defendants in Form IV, Appendix B, Civil P. C. The Defendant No. 5 Mulchand has applied for leave to appear and defend and has raised the following preliminary points which are now before me for disposal.

I. That as the date on which the hundi in suit became due and payable was more than six months prior to the presentation of the plaint, a suit on these hundis under O. 57 is incompetent (Art. 5, Sch. I, Limitation Act.). II. That the hundis sued on are not negotiable instruments and for this reason as well, a suit drawn under the Summary Chapter does not lie.

The first of these points is, so far as this Court is concerned, novel. It has never so far been contended that a suit could be brought under the Summary O. 37, Civil P. C., more than six months after the debt due on the instrument sued on became payable. The plaintiff's contention in the present instance that a suit under O. 37, Civil P. C., can be brought within three years of the date when the debt due on the instruments sued on became payable, is based on a Chamber Order of Justice Ghose in the case of *Robindra Nath Dutt* v. *Abdul Ahad & Co.* (1). Apart from the fact that I do not agree with the reasoning of the learned Judge which appears at pp. 957-8 of the report, I do not think the case relied on can be regarded as an authority on the point. That the learned Judge himself did not desire that it should be so regarded, is clear from the language used by him. He states :

In my opinion, subject to what may be urged by the defendant when he appears in this suit, Art, 5 of the present Limitation Act cannot refer to suits under O. 37 of the Civil P. C.

The learned Judge further admits that it was the intention of the Legislature, when they amended Art. 5 of the Limitation Act to prescribe a limitation of six months for all summary suits, but that the intention of the Legislature has not been expressed in clear and appropriate words in Art. 5, with the result that, strictly speaking, suits under O. 37 are not now governed by Art. 5 of the Limitation Act.

All doubts on the point in question have, of course, been now set at rest by the amendment of Art. 5 of the First Schedule of the Limitatation Act by Act 10 of 1925, which came into force on 1st April 1926. I do no not think, however, that the position was ever really obscure.

Article 5 of the 2nd Schedule of the Limitation Act of 1877 covered suits on negotiable instruments under Ch. 39 of the then existing Civil P. C. which provided a summary procedure in regard to such suits. In the Civil P. C., of 1908, powers were given to High Courts and to certain other Courts in Ch. 10, S. 128 (2) (f) to extend the summary procedure to various classes of suits by framing rules. The classes of suits are referred to in S. 128 (2) (f) (i) and (ii). It is apparent from S. 121, Civil P. C., that the powers given included the power of making rules annulling or altering rules in the First Schedule of the Civil P. C. of 1908 ; for S. 121 states :

Rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this part.

Suits on negotiable instruments provided for in O. 37, Civil P.C., also fall under the category of suits of the nature referred

(1) A. I. R. 1925 Cal. 781=52 Cal 954.

to in S. 128 (2) (f) (i); and though the Legislature has already provided rules for summary procedure in suits on negotiable instruments, S. 128 read with S. 121 invests High Courts and certain other Courts with powers to annul or alter such rules.

In the Limitation Act of 1908, the Legislature, obviously with a view to extend the applicability of Art. 5 of the First Schedule, till then applicable only to suits on negotiable instruments under O. 39 of the Civil P. C. of 1882, to all suits for which summary procedure might be provided under the rule making powers given by S. 128 of the Civil P. C. of 1908, substituted for the existing words of Art. 5, the words "under the summary procedure referred to in S. 128 (f) of the Civil P. C. of 1908." The words "referred to in S. 128 (2) (f)" indicated the extended class of suits which the amended Art. 5 was intended to cover. A suit on a negotiable instrument provided for under O. 37, Civil P. C., also falls under the category of suits of the nature referred to in S. 128 (2) (f), and Art. 5 of the First Schedule of the Limitation Act of 1908, therefore, continues to apply to such suits.

With all respect for the learned Judge of the Calcutta High Court, I think the fallacy in his argument is that suits on negotiable instruments under O. 37, Civil P. C, are not covered by S. 128 (2) (f), Civil P. C. I would, therefore, hold in the present case, that this suit cannot be brought under O. 37 of the Civil P. C. The plaint will have to be formally amended and fresh summonses for final disposal in the usual form accompanied by copies of the amended plaint will have to be served on the defendants.

In this view of the case, it is unnecessary for me to deal at any length with the second of the two preliminary objections raised by the learned counsel for the Defendant No. 5.

I may, however, state that it appears to me that the objection is unsubstantial. In the heading of O. 37, Civil P. C., the words "negotiable instruments" are merely descriptive and are not to be construed in their strictly technical sense. This, I think, is sufficiently indicated by the wording of R. 2 of O. 37, which refers to "all suits upon bills of exchange, hundis or promissory-notes". Further I am not aware of any case in which it has been held that a suit on a shah jog hundi does not lie under O. 37, of the Civil P. C. I omitted to mention that the hundis sued on are admittedly shah jog hundis. Nor has any such case been cited before me in argument.

In my opinion, other conditions being fulfilled, a suit on a shah jog hundi will lie under O. 37 of Civil P. C.

Order accordingly.

A. I. R. 1927 Sind 92

KINCAID, J. C., AND RUPCHAND BILARAM, A. J. C.

Emperor—Prosecutor—Appellant.

v.

Sulleman Khan and *others*—Accused—Opposite Parties.

Criminal Appeal No 24/2 of 1926, Decided on 12th August 1926, from an order by acquittal of the Addl., S. J., Hyderabad (Sind), D/- 1st December 1925.

(a) Criminal trial—Appeal from acquittal—Appellate Court will not hesitate to convict if lower Court has taken erroneous view of the evidence as in appeal from conviction.

It is the practice of the Sind Judicial Commissioner's Court in all appeals, especially criminal appeals, to pay great deference to the opinion of the Judge presiding over the trial Court, but it will not hesitate to convict in an acquittal appeal more than it should hesitate to acquit in an appeal from a conviction, provided that there are valid grounds for reversing the decision of the learned Judge of the lower Court: 9 *S. L. R.* 17 and *A. I. R.* 1924 *Bom.* 335, *Foll.* [P. 94, C. 1,2]

(b) Penal Code, S. 97 Right of private defence of property—Person setting up must show that he was in peaceful possession—Mere right to possession is not sufficient.

Before an accused person can set up a right of private defence of property, he must show that the property was his property and that he actually was in peaceful possession of it: *A. I. R.* 1926 *Patna* 433, *Foll.* [P. 95, C. 2, P. 96, C. 1]

The mere right to have possession restored by a civil Court does not justify an individual in taking the law into his own hands: 10 *Bom. L. R.* 285, *Foll.* [P. 95, C. 2]

(c) Penal Code, S. 97—Private defence of body—Both sides determined to vindicate their rights by unlawful force—No right arises (obiter.)

Obiter: When a body of men are determined to vindicate their rights or supposed rights, by unlawful force, and when they engage in a fight with men who, on the other hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-

defence arises. Neither side is trying to protect itself, but each side is trying to get the better of the other : *A. I. R.* 1926 *Patna* 433 and 20 *All.* 459, *Foll.* [P. 96, C. 1]

T. G. Elphinston—for the Crown.

Partabrai D. Punwani—for Accused.

Judgment.—Although the hearing of this case lasted a day and and a half the facts which gave rise to it are not complicated. They have been stated carefully by the learned Judge of the lower Court and are shortly as follows :

The late Nawab Haji Ali Mardan Khan wedded a wife who was a blood relation of his own and by her he had a son by name Khair Mahomed Khan. After some time he took to himself a Negro mistress or wife and by her he had a large family. The Nawab appears to have been anxious to provide for his children by the Negress. In 1922, when his health was failing, he transferred a portion of his lands to the six sons of the Negress and obtained the sanction of the Collector to this act. He died on the 3rd of August 1923. Up to his death, since his sons were minors, he managed the transferred lands on their behalf. After his death, his eldest son, Khair Mahomed, took possession of the entire landed estate of his father. I shall confine myself in this judgment to the lands in Deh Bet Budho. All of these were given to the sons of the Negress and transferred to their names in the Record of Rights. They also had been taken possession of by Khair Mahomed, and for the year 1924-25 he cultivated them and paid the assessment. On the 15th of September 1924 the eldest son of the Negress, Sulleman Khan, applied for certain mohag or frontage land, and on the 10th of October Khair Mahomed made a similar request. On the 22nd of February 1925, the mohag land was granted to Sulleman Khan. Owing to the transfer of the lands by the late Nawab the adjoining fields stood in the Record of Rights in Sulleman Khan's name.

There seems to have been a good deal of ill-feeling between the two half brothers about the land in Deh Bet Budho. On the one hand Sulleman Khan claimed the lands in Deh Bet Budho as his, under his father's grant. On the other hand, Khair Mahomed seems to have alleged that the deed of gift was invalid : that his half-brothers were illegitimate, and that as his father's only legitimate son, he was the sole heir to the landed estate. Into the titles of the parties, we do not propose to enter. Nor is it necessary to do so. On the 14th of March 1925, Sulleman Khan went to the land in Deh Bet Budho with a number of men and ordered them to erect a shed in Survey No. 129. Now it happened that the Tapedar Tuljaram had gone on this very day to measure the lands in this village. He took with himself Fetch Khan, a Kamdar of Khair Mahomed and there seems to have been one or two men with him. Just about this time, the watchmen of Khair Mahomed, namely, Ghulam Mahomed, Sidik Machi, Sidik Khati, Khamiso and Razi went on their rounds. They noticed Sulleman Khan and his brother Idrus Ali Khan on a camel and four men whom they recognized as Khuda Bux, Din Mahomed, Ghulam Hyder and Urs. There were some others at a distance cutting wood from the jungle. These eight men had been brought by Sulleman Khan to build a shed in the Survey No. 129. Ghulam Mahomed asked Sulleman Khan what the men were doing. Sulleman Khan answered :

> We are cutting branches so as to make a shed for ourselves.

Ghulam Mahomed protested that the land was Khair Mahomed's. He demanded that Sulleman Khan should show him their permission to make a shed, otherwise they should go to the hut where Allah Bux, the head Kamdar of Khair Mahomed, was living.

This reply, which was obviously a taunt, annoyed Sulleman Khan. He and his younger brother Idrus Ali Khan, according to the Crown witnesses, called on their companions to attack Khair Mahomed's watchmen. Din Mahomed and Ghulam Hyder, each gave Ghulam Mahomed hatchet blows. He fell dead. Urs hit Razi with a bamboo lathi. Din Mahomed and Khuda Bux then struck Sidik Machi with hatchets and finally Ghulam Hyder rushed at Khamiso and struck him across the right eye with a hatchet. Sidik Khati who had not been injured and Razi who was not severely wounded called for help. Fateh Khan who was working with the Tapedar came up. He found Sidik Machi and Khamiso unconscious and Ghulam Mahomed dead. He ran off to tell Allah Bux, the head Kamdar of Khair Mahomed, and

Allah Bux went off at once to make a complaint at the Daulatpur police station after a cursory visit to the scene of the offence. At Daulatpur Sub-Inspector Faziz Mahomed took Allah Bux's First Report. It is Ex. 26. Allah Bux therein mentioned the names of Sulleman Khan, Idrus Ali Khan, his younger brother, and the man Din Mahomed. He mentioned that these men had a party of men with them and he charged them with having killed Ghulam Mahomed outright and injured severely Sidik and Khamiso.

Before, however, Allah Bux had reached Daulatpur Sulleman Khan had reached it. He also made report to the Sub-Inspector which the latter duly recorded. It is Ex. 29.

Fazir Mahomed took both men back to the scene of the offence, which he reached at about 6 p. m. on the same day. He found Ghulam Mahomed dead and Sidik and Khamiso lying severely injured. Sidik was unconscious and Khamiso conscious. Faiz Mahomed recorded the statement of Khamiso and made an inquest on the corpse of Ghulam Mahomed. The same evening he sent the body to the Sehwan Hospital. The following day he recorded the statements of a number of witnesses. On the 16th of March he sent all the accused to the Resident Magistrate of Naushahro Feroz. The Magistrate committed six persons, namely, Sulleman Khan, Idrus Ali Khan, Urs, Ghulam Hyder, Khuda Bux and Din Mahomed to take their trial before the Ssssions Judge of Hyderabad. Numbers 1 and 2 were charged under Ss. 149, 114, 302, 326 and 323, I. P C., and Nos. 3, 4, 5 and 6 under Ss. 149, 302, 326 and 323 of the I. P. C., On the 1st of December 1925 the learned Additional Sessions Judge, Mr. Dialmal, held that none of the accused were guilty and ordered them all to be acquitted and discharged.

Against this order of acquittal, the learned Public Prosecutor under orders from the Local Government has appealed to this Court.

It was argued in the course of the appeal by the learned pleaders for the defence that as this was an acquittal appeal we should be very slow to interfere with the decision of the learned Judge of the lower Court. It is the practice of this Court in all appeals, especially criminal appeals, to pay great deference to the opinion of the Judge presiding over the trial Court. But we do not think that we should hesitate to convict in an acquittal appeal more than we should hesitate to acquit in an appeal from a conviction, provided that there are valid grounds for reversing the decision of the learned Judge of the lower Court. This view has already been expressed by this Court in *Emperor* v. *Kadar Bux* (1). The learned Judicial Commissioner, Mr. Pratt, therein ob-served :

> The Code makes no distinction between an appeal from a conviction and an appeal from an acquittal. In the appeal from an acquittal, if this Court thinks the lower Court has taken an erroneous view of the evidence, it has no jurisdiction to refuse to convict. The power of appeal under S. 417 is one that should be exercised sparingly by Government. But the discretion to exercise that right of appeal appertains to Government, and is not subject to the control of the Court.

A similar view was expressed in *Emperor* v. *Moti Khoda* (2).

I now return to the consideration of the evidence. There can be no question but that Sulleman Khan was present when the fight took place. He has admitted his presence there, although he has alleged that he acted in self-defence.

The same must be said of Idrus Ali Khan. He has stated both to the Committing Magistrate and the learned Judge of the lower Court that he was with his brother and that he had nothing to add to what his brother has said. The accused Urs had admitted that he was cutting rafters for the shed and he has mentioned that Din Mahomed was also present. With Ghulam Hyder, we have not to deal. He has absconded and he is not before us. The accused Khuda Bux has similarily admitted that he was with Sulleman Khan about the time that the fight took place. Din Mahomed has stated that he was in the fight itself and that he received a hatchet blow from Ghulam Mahomed.

There can be no question, therefore, that the accused were present at the scene of the fight. This admission of theirs adds considerable weight to the story told by the Crown witnesses, Khamiso, Fateh Khan, Razi and Sidik. They have all sworn to the presence of the accused at the fight. Khamiso's evidence is particularly important, for

(1) [1915] 9 S. L. R. 17=30 I. C. 156=16 Cr. L. J. 604.
(2) A. I. R. 1924 Bom. 325.

he was himself injured. He has given in great detail the part that each person took. The learned Judge of the lower Court came to the conclusion that the injuries suffered by Khamiso, Ghulam Mahomed, Sidik and Urs were inflicted by men belonging to Sulleman Khan's party; but he took the view that they were not inflicted by the men before him, but by the four other persons who were cutting wood in the jungle. I cannot conceive why people who have been injured should inculpate individuals who did not harm them rather than the men who did strike them. It has been urged that they would do this because the four men, who the learned Judge thought to be the guilty ones, had received injuries. But their injuries were very slight and the most severely injured person was Din Mahomed. He is one of those whom the Crown witnesses have implicated. On the evidence I have no doubt but that the men who struck Khamiso, Ghulam Mahomed, Sidik and Razi were the men sworn to by the Crown witnesses.

The learned pleaders for the defence have contended in the alternative that in any case their clients were acting in the right of self defence. But it must be remembered, however, that the land was in the possession of Khair Mahomed, whatever the title of Sulleman Khan might be, Khair Mahomed had sown the crop and it was ready for harvesting. Since the land was in Khair Mahomed's possession and the crop was his, it was not open to Sulleman Khan to get an armed party to try and take forcible possession.

The learned pleader for Accused Nos. 1 and 2 has relied upon two cases, *Ahed Fakir* v. *Emperor* (3) and *Sorabdawan Singh* v. *Emperor* (4). In both those cases, however, there was a dispossession of the occupant by the accused and a definite period of occupation by the accused before the fight began. The latter was in actual peaceful enjoyment of the property and was entitled to defend it against trespassers. Here there was no prior dispossession by the accused or prior peaceful occupation. The learned pleader has relied upon the erection of the shed, but no shed had been erected. All Sulleman Khan's men had done was to cut a few rafters from neighbouring trees. Before they could do anything more, they were detected by Khair Mahomed's watchman. Sulleman Khan was never in exclusive enjoyment of the disputed lands. The crop on it, as I have said, was Khair Mahomed's. His head Kamdar, Allah Bux, was living in a neighbouring shed, while a Government tapedar aided by Khair Mahomed's man, Fateh Khan, was measuring it in order to assess Khair Mahomed's liability to pay Government revenue. In this connexion I shall refer to one or two cases. In *Muhammad Ata* v. *Emperor* (5), Stuart, J., observed:

> It is not of the least consequence whether the complainant has or has not good title to the cultivation of the fields in question. It is sufficient if she sowed the crop. Now there is good evidence that she sowed the crop and that the applicants cut the crop. I see no reason to disbelieve this evidence.

Applying this test to the present case the crop was undoubtedly sown by Khair Mahomed. This being so he was, to use the phrase of the learned Judge, "in the cultivatory possession" of the land and the accused had no right to try to oust him by armed force. In *Emperor* v. *Gopalrao Venkatesh* (6) it was laid down that the mere right to have possession restored by a civil Court does not justify an individual in taking the law into his own hands. As the learned Judges observed:

> And it may be contended on the authority of *Leigh* v. *Jack* (7) that he is entitled to have that possession restored to him in a civil Court. But nevertheless a person with a right is not justified in taking the law into his own hands and if he does he becomes liable for criminal trespass.

The whole matter was very fully dealt with in a recent case of *Farman Khan* v. *Emperor* (8). After reviewing the whole evidence in the case Ross, J., observed:

> On the plea of private defence of property the burden of proof is on the accused. If they assert that they injured the deceased in the defence of their property, they must show that it was their property. Learned counsel relied on the finding of the Sessions Judge that it was not proved that either side had peaceful possession; but this is a finding which is fatal to the defence.

In other words before an accused person can set up a right of private defence

(3) A. I. R. 1925 Cal. 1235.
(4) [1914] 17 O. C. 21=23 I. C. 184=1 O. L. J. 527.
(5) A. I. R. 1921 All. 158.
(6) [1908] 10 Bom. L.R. 285.
(7) [1880] 49 L.J. Ex. 220=28 W.R. 452=5 Ex. D. 246.
(8) A.I.R. 1926 Pat. 433=5 Pat. 520.

of property, he must show that the property was his property and that he actually was in peaceful possession of it. It has not been pressed on the Court in this case that the accused acted in private defence of their persons. But the learned Judge in the case just cited did consider the plea and it may well be here to quote the opinion of Sir John Edge cited with approval in *Farman Khan* v. *Emperor* (8) and in *Queen-Empress* v. *Prag Datt* (9). Sir John Edge's dictum is this :

> When a body of men are determined to vindicate their rights or supposed rights, by unlawful force, and when they engage in a fight with men who, on the other hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises. Neither side is trying to protect itself, but each side is trying to get the better of the other.

Having decided that the five accused before us were present at the scene and that they had no right of self-defence, we have next to consider what offences they committed.

We think that the Accused No. 2 Idrus Ali has committed no offence. He was, no doubt, present with his elder brother Sulleman Khan, but he was there as a spectator only. On the day of the crime he could hardly have been much if at all more than 14 years of age. It is unlikely that he incited his brother's party in the presence of his elder brother. It is equally unlikely that they would have paid any attention to him if he had done so.

The Accused No. 1, we think, was guilty of rioting. He was a member of an unlawful assembly of which the common object was by criminal force to enforce his rights or supposed rights over certain lands in the village of Deh Bet Budho. Violence was used by that assembly ; so he and every member of it was guilty of rioting. We do not think that he was guilty under S. 149, Indian Penal Code, for we do not think that it was the common object of the assembly to kill Ghulam Mahomed and Sidik Machi or cause grievous hurt to Khamiso. We convict him, therefore, under S. 147, Indian Penal Code, for some of the party carried hatchets. At the time of the offence the accused Sulleman Khan was certainly under 21 years of age. We think, therefore, that we might well apply the provisions of S. 562, Cl. (1) to his case. Instead of sentencing Accused No. 1 to any punishment, we direct that he be released on entering into a bond for Rs. 1,000 with two sureties for Rs. 1,000 each and to appear and receive sentence when called upon during a period of 3 years ; and in the meantime to keep the peace and be of good behaviour. Fifteen days' time is allowed to Sulleman Khan to furnish his securities in this Court. In the meantime he is to continue to remain on the same bail.

There remain Urs, Khuda Bux and Din Mahomed.

Urs was undoubtedly guilty of rioting. We convict him under S. 147, Indian Penal Code and sentence him to undergo two years' rigorous imprisonment.

Khudabux struck Sidik with a hatchet. He is guilty of murder under S. 302, Indian Penal Code, and we sentence him to undergo transportation for life. We do not impose the death penalty, as we do not think there was a deliberate intent to kill. We also convict Khudabux of rioting and sentence him to two years' rigorous imprisonment. This term of imprisonment should be concurrent with that already imposed upon him.

Lastly Din Mahomed struck Ghulam Mahomed with a hatchet and thereby committed murder under S. 302, Indian Penal Code. We sentence him to undergo transportation for life and for the same reason we have shown leniency to Khudabux we do not impose the death penalty. We also convict him of rioting under S. 147, Indian Penal Code, and sentence him to undergo two year's rigorous imprisonment the sentences to run concurrently.

Accused No. 2 Idrus Ali Khan is acquitted and discharged.

Appeal allowed.

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(9) [1898] 20 All. 459=(1898) A.W.N. 117.

* A. I. R. 1927 Sind 97

KINCAID, J. C., AND KENNEDY, A. J. C.

Pessumal—Accused—Appellant.

v.

Emperor—Opposite party.

Criminal Appeal No. 25 of 1924, Decided on 28th April 1924, from an order of the S. J., Sukkur, D/-19th January 1924.

* *Penal Code, S. 363—"Seduction" is not confined to first connexion with unmarried girl—Illicit intercourse held while girl was under parents' custody—Abduction with intent to commit illicit intercourse amounts to offence under S. 366.*

Per Kincaid, J. C. (Kennedy, A. J. C., doubting). Seduction is not to be confined to the first connexion with an unmarried girl.

It is not a correct proposition that because a man has induced a girl, while in the custody of her parents, to surrender her chastity, he does not commit further act of seduction to illicit intercourse, when he persuades her to live with him in a condition of concubinage not sanctioned by marriage: 10 *Bur. L. R* 196 and *Rex* v. *Moon*, (1910) 1 *K.B.* 818, *Foll.* [P 97, C 2]

T. G. Elphinistone—for the Crown.

Kincaid, J. C.—In this case a Hindu by the name of Pessumal was at one time in partnership with a certain Sahib a Mahomedan. Sahib had a minor daughter about 14 and it has been found by the learned Sessions Judge of Larkana that Pessumal became intimate with Muran, while she was still living in her father's house. On the 22nd of August 1922, Pessumal induced Muran to leave her father's house and to go off with him. They went off together to the house of two persons, called Minhon and Bhanbhen and there Pessumal had repeated intercourse with Muran. Fearing discovery Pessumal sent her in charge of Bhanbhen by train to Tando Adam. At Tando Adam station the Police Head-Constable Moulabux saw them together and feeling suspicious about them questioned first Bhanbhen and then Muran. As they gave conflicting answers as to their relationship Moulabux questioned Muran further and eventually obtained the full story from her. She was taken back to her parents and Pessumal was arrested. The learned Sessions Judge after considering very carefully the legal questions involved, found Pessumal guilty under S. 366 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for 18 months.

The convict has sent an appeal through the Jail and the appeal was admitted on the legal question as to whether the offence fell under S. 366 or S. 363. There are two possible views. One is that taken by Dr. Gour in his Commentary on the Penal Law of India at pages 1628 and 1629. His view is that once a girl has surrendered her chastity she can no longer be seduced to illicit intercourse by her lover. The other view is that which was enunciated by Adamson, J., in *King Emperor* v. *Nga Ni Ta* (1). To use his words, he considered

> it a monstrous proposition and one that would strike at the very roots of social and moral rectitude to hold that, because a man has induced a girl, while in the custody of her parents, to surrender her chastity, he committed no further act of seducing to illicit intercourse, when he persuaded her to live with him in a condition of concubinage not sanctioned by marriage.

This view enunciated by Adamson, J., corresponded with the view of Channell, J., when he summed up the jury in the case of *Rex* v. *Moon* (2). This case is reported at 1 *K. B.* 1910, page 818. The learned Judge there observed that

> the word 'seduction' is generally used, in popular language as meaning the first leading away of a woman from the paths of virtue, but it does not necessarily have that meaning.

And again at page 822 he observed:

> I have said, 'seduction' is not to be confined to the first connexion with an unmarried girl.

For my part I incline to the second view with Adamson, J., I think it far too narrow an interpretation of S. 366 to hold that a man is less guilty because he induced his victim to surrender her chastity before instead of after running away with him. I take it that the reason why the word 'seduction' has come to mean in the popular sense the first surrender of a woman's chastity is because when a woman has surrendered her chastity she rarely objects to the subsequent embraces of her lover. Nevertheless, this is not to my mind a true interpretation of the word 'seduction'. Every time a woman surrenders herself to a lover whether it is the first or the 20th time there is a seduction and for the purposes of S. 366 I hold that it is a matter of indifference whether in this case Muran was or was not Pessumal's mistress before she ran away with him.

(1) [1902] 10 Bur. L. R. 196.
(2) [1910] 1 K. B. 818 = 74 J. P. 231 = 79 L. J. K. B. 505.

I would, therefore, confirm the lower Court's finding and sentence and would dismiss the appeal.

Kennedy, A. J. C.—I am not altogether satisfied on the legal point. I do not wish to press my view because I regard the sentence passed on the prisoner appropriate whether the offence falls under S. 366 or S. 363. I do not, therefore, propose to develop the subject of the law. I just state my principal difficulty which is that S. 366 deals not only with kidnapping but also with abduction. It seems to me if 'seduction' is to be taken in the extended sense suggested, it might be the case that the punishment inflicted under S. 366 for an act of comparatively innocent deception would be excessive. Take the case of a man who has a mistress. His mistress has a slight quarrel with him and leaves him and refuses to see him again. Wishing to have an interview with her and knowing full well that after such an interview she will be reconciled with him he telegraphs to her falsely that her child is ill. On learning of the child's imaginary illness the woman visits him; relations are renewed. That is clearly abduction under S. 366 and the intention is that sexual intercourse should take place. It would seem an extremely severe penalty for that act of deception to inflict a sentence of ten years, whereas for a similar fraud perpetrated on a virtuous woman it would be well enough. As I have said that this question is purely academic I do not here press my view.

I concur in the order proposed.

G.B.J. *Appeal dismissed.*

A. I. R. 1927 Sind 98

RUPCHAND BILARAM, A. J. C.

Mohandas Joyramdas and *others*—Accused—Applicants.

v.

Emperor—Opponent.

Criminal Transfer Applications Nos. 269 and 270 of 1925, Decided on 19th January 1926, for transfer of the case from the Court of the Sub-Divl. Mag., of Larkhana.

Criminal P. C., S. 556—"A party or personally interested" imply direct personal pecuniary interest—The mere fact that a certain order of the Magistrate passed as Executive Officer is likely to be challenged is not sufficient ground for transfer—Criminal P. C., S. 526.

A Magistrate is not disqualified by S. 556 from trying a case based on a private complaint and which has not been filed under his direction or sanction merely and solely on the ground that the validity of certain orders passed by him in his capacity as an executive or as a Revenue Officer is directly put in issue in the case and that the innocence or the guilt of the accused considerably depends on the effect of such orders. [P 99 C 1]

This section is based on the maxim *nemo debet esse judex in propria cause.* The expression "a party or personally interested" implies that a direct personal pecuniary interest, however small in the result of the case, disqualifies a Judge, Magistrate or Justice from trying a case, but where such interest is not pecuniary the disqualifying interest should have substantially the same effect so as to create a reasonable suspicion of bias. The mere possibility of a bias is, however, not enough. [P 99 C 1 & 2]

Where the only interest in the result of a case tried by a Magistrate is that he is concerned in it in his public capacity it may fairly be presumed that his interest is not so substantial as to warrant the inference that he is likely to have a real bias in the matter. If in addition to his being so interested there are other circumstances to suggest the real likelihood of a bias, it is another matter. *English Case Law referred to.* [P 99 C 2]

Partaprai D. Panwani—for Applicants.

T. G. Elphinston—for the Crown.

Judgment. — Transfer applications Nos. 269 and 270 of 1925 are both connected and arise out of the same facts.

It appears that there is a dispute between Ghulam Haider, a zemindar, on the one hand and certain Chandias belonging to the cultivating class and one Mohandas, also a zemindar, on the other, over certain alluvial land which is liable to constant erosion and to its being thrown out by the river and made available for cultivation after the river has again receded. It is said that the Chandias removed by force certain quantity of raw produce recently from a certain part of this alluvial land which is claimed by Ghulam Haider as his own and within his boundaries. The removal of the raw crop is the subject-matter of the first complaint against Chandias.

During the pendency of the first complaint, Mohandas and some other persons are again said to have removed by force the whole crop after it had become ready from the same piece of land and this has been made the subject-matter of the second complaint.

The defence of the accused is inter alia the denial of the proprietary right of Ghulam Haider to the disputed land which is claimed to have been in their possession and to have been cultivated by them.

The grounds on which the transfer of the two cases is sought are :

1. That the learned trying Magistrate in his capacity as the Deputy Collector was concerned in the settlement of disputes between the two parties as to their respective claims over the disputed land and it is practically his own order or at any rate the order passed by the Collector on the recommendation of the learned Magistrate which forms the foundation of the prosecution case. The time when it was communicated to the parties, its effect and validity are all said to be important factors in the determination of the criminality or otherwise of the accused persons.

2. That the learned Magistrate has exhibited a certain amount of bias in the proceedings and especially in his orders refusing bail.

3. That he is an important witness for the defence.

As an abstract proposition, I am not prepared to hold that a Magistrate is disqualified by S. 556, Criminal P. C., from trying a case based on a private complaint and which has not been filed under his direction or sanction merely and solely on the ground that the validity of certain orders passed by him in his capacity as an executive or as a Revenue Officer is directly put in issue in the case and that the innocence or the guilt of the accused considerably depends on the effect of such orders.

This section is based on the maxim *nemo debet esse judex in propria causa* The expression " party or personally interested " used therein has been the subject of several English decisions. According to those decisions it is well established that a direct personal pecuniary interest, however small in the result of the case, disqualifies a Judge, Magistrate or Justice from trying a case : *Dimes* v. *Proprietors of Grand Junction Canal* (1) ; *R.* v. *Recorder of Cambridge* (2) ; *R.* v. *Rand* (3) ; *R.* v. *Hammond* (4) ; *R.* v. *Gaisford* (5), but where such interest is not pecuniary the disqualifying interest should have substantially the same effect so as to create a reasonable suspicion of bias. *R.* v. *Meyer* (6) ; *R.* v. *Handslay* (7) ; *R.* v. *Farrant* (8) ; *Allinson* v. *General Medical Council* (9) ; *R.* v. *Huggins* (10) and as pointed out in *R.* v. *Rand* (3) the mere possibility of a bias is, however, not enough. The same consideration should, in my opinion, apply in interpreting the expression " a party or personally interested " as used in S. 556 of the Code. Where the only interest in the result of a case tried by a Magistrate is that he is concerned in it in his public capacity it may fairly be presumed that his interest is not so susbstantial as to warrant the inference that he is likely to have a real bias in the matter.

This is clear from the explanation to S. 556 which in express terms provides that a Magistrate shall not be deemed to be " a party or personally interested " merely by the fact that he is concerned in the case in his public capacity. If in addition to his being so interested there are other circumstances to suggest the real likelihood of a bias it is another matter and this again has been sufficiently indicated by the illustration to the section which provides that a Collector who has directed a prosecution for a breach of the Excise Laws is disqualified and this would be so not merely on account of his being interested generally in the administration of the Excise Laws but by the further fact of his having directed the prosecution and being thereby deemed to be either a party or otherwise substantially interested in its result.

In my opinion, therefore, the fact that the validity and the effect of the orders, if any, passed by the learned Magistrate in his capacity as Deputy Collector is likely to be challenged before him would be no ground to oust his jurisdiction and further that it would not by itself be a sufficient ground under S. 526 of the Code to warrant a transfer of the proceedings from his file.

The second ground is more substantial. The order passed by the learned Magistrate refusing bail to some of the accused

(1) [1852] 3 H. L. C. 759 =17 Jur. 73.
(2) [1857] 8 El. & Bl. 637=6 W. R. 80 = 27 L. J. M. C. 160 =4 Jur. (N. S.) 334.
(3) [1866] 1 Q. B. 230 =35 L. J. M. C. 157.
(4) [1861] 9 L. T. 423=27 J. P. 793 =12 W.R. 208 =140 R. R. 824.
(5) [1892] 1 Q. B. 381=61 L. J. M. C. 50=56 J. P. 247=66 L. T. 21.
(6) [1876] 1 Q. B. D. 173=24 W. R. 392=34 L. T. 247.
(7) [1882] 8 Q. B. D. 381=51 L. J. M.C. 137= 46 J. P. 119 =30 W. R. 368.
(8) [1888] 57 L. J. M. C. 17=20 Q. B. D. 58= 52 J. P. 116=57 L. T. 880=36 W. R. 184.
(9) [1891] 1 Q. B. 750=63 L. J. Q. B. 534 =9 R. 217=58 J. P. 542=42 W. R. 289.
(10) [1895] 1 Q. B. 563=64 L. J. M. C. 149= 59 J. P. 101=43 W. R. 329=72 L. T. 193.

persons after this Court had granted bail to those who had applied for bail to this Court and the explanation submitted by the learned Magistrate to the District Magistrate on the application for transfer disclose a certain amount of apparent bias against the accused and are open to a reasonable suggestion that the learned Magistrate has prejudged the case. The expressions in the order refusing bail that the accused had " even defied the orders of the Revenue Authorities " and " that they committed another dacoity in defiance of the lawful orders of the Executive Authorities " exhibit a certain amount of anxiety on the part of the learned Magistrate to uphold the action of the Revenue Authorities he himself being the head of that Sub-Division. The explanation of the learned Magistrate again proceeds on the assumption that the main ground on which the guilt of the accused would depend is not the validity of the orders but on the question whether the complainant, Ghulam Haider had agreed to abide by the oath of Mohandas on the Gita as to the proper boundaries of his land and if that oath had been taken so as to work as estoppel in favour of the accused. In my opinion the observations made by the learned Magistrate coupled with the fact that he is also the Revenue Authority are such as to create a reasonable apprehension in the minds of the applicants that they would not have a fair trial at his hands.

I am also inclined to the view that the third ground urged is not without foundation and that the learned Magistrate's name has not been mentioned as a witness, only with the object of obtaining a transfer but in the bona fide belief that he is a proper witness in the case. Admittedly the learned Magistrate was present at what he has called the confirmation of the boundaries fixed by the mukhtiarkar and though he considers that if at all any evidence was required by the applicants of what happened then such evidence could be supplied by the Mukhtiarkar I do not think the applicants should be forced to content themselves with the evidence of the mukhtiarkar in preference to that of the learned Magistrate himself.

The learned Public Prosecutor has urged that as the offence with which the applicants are charged is one under S. 395 Indian Penal Code, the cases may be ordered to be committed to the Sessions. I am not prepared to accede to his request as it will place the applicants at a great disadvantage and cause a certain amount of hardship on them by being deprived of the knowledge of what the prosecution case is and the chance of satisfying the Committing Magistrate that there is no case for committal.

I think that it is a fit case in which I should order a transfer. I accordingly direct the District Magistrate, Larkhana, to try the case himself or to send it for trial to another Magistrate subordinate to him.

G.B.J. *Transfer ordered.*

A. I. R. 1927 Sind 100

KINCAID, J. C., AND RUPCHAND BILARAM, A. J. C.

Firm of Mahomed Rahmoo Mowji—Appellants.

v.

Ibrahim Ganqji—Respondent.

First Appeal No. 170 of 1925, Decided on 2nd September 1926, from the preliminary judgment of Wild, A. J. C., D/- 2nd October 1925, in Suit No. 900 of 1922.

Court-fees Act, S. 7 (4) (f)—Preliminary decree for accounts—Value of suit will be value for appeal unless subject-matter of appeal is not identical with that of suit.

Where the plaintiff has obtained a preliminary decree for an account and the defendant or the plaintiff appeals against the decree, the valuation once fixed by the plaintiff must be adhered to unless the subject-matter of the appeal is not identical with that of the suit in which case, of course, it is open to the appellant to value the subject-matter of the appeal differently and to pay Court-fees thereon ; 23 *Mad.* 490 ; 39 *Mad.* 725; and 13 *C. W. N.* 815, *Foll*; *A. I. R.* 1925 *All.* 787, *not Foll.* [P 101 C 1]

Isardas Oodharam—for Appellants.

Jhmatmal Valiram—for Respondent.

Pamanmal Valabdas—for the Crown

Rupchand Bilaram, A J C.— Two questions have been argued before us in this appeal. First whether in a suit coming under S. 7, Cl. iv, sub-Cl. (f) of the Court-fees Act, where the plaintiff has obtained a preliminary decree for an account and the defendant appeals against that decree whether he is bound to pay the same Court-fee as was paid on the plaint or whether he is at liberty to

make a fresh valuation in every case for the purpose of the appeal. And, secondly, whether in the circumstances of the present case, the defendants were justified in putting their own valuation on the relief sought in the appeal and paying Court fees thereon.

The answer to the first question depends on the interpretation to be put on S. 7, Cl. iv (f) of the Court-fees Act There is a divergence of opinion as to its effect between the Madras and the Allahabad High Courts. The Madras High Court has held that the valuation once fixed by the plaintiff must be adhered to in appeal unless the subject-matter of the appeal is not identical with that of the suit in which case, of course, it is open to the appellant to value the subject-matter of the appeal differently and to pay Court-fees thereon : *Samiya Mavali* v. *Minammal* (1), *Dhupati Srinivasacharlu* v. *Perindevamma* (2). This view was accepted by this Court in *Motiomal* v. *Molap Bai* (3). A similar view appears to have been entertained by the Calcutta High Court in *Banwari Lal* v. *Sheo Sankar Misser* (4) and by the Punjab High Court in *Kanji Mal* v. *Panna Lal* (5).

In the recent decision of the Allahabad High Court in *Chunni Lal* v. *Firm Sheo Charan Lal Lalman* (6) a more liberal interpretation has been put on Cl. iv (f) and it has been held that in every appeal whether the subject-matter of the appeal is identical with that of the suit or not, it is open to the appellant to value his relief in a different manner than that given by the plaintiff in the suit and to pay Court-fees on such valuation.

So far as this case is concerned, it offers no difficulties as will presently appear. The subject-matter of the appeal is not identical with that of the suit and that if either view was to prevail, it was open to the defendants to put their own value on the relief claimed by them in the appeal. Appeals from preliminary decrees, where the subject-matter in appeal and in suit is identical, are of frequent recurrence. It is, therefore, necessary for us to examine the decision of the Allahabad High Court and express our views on the point.

With all respect to their Lordships of the Allahabad High Court, I think the construction put by them on Cl. iv (f) is open to serious objections and is one which I am unable to follow. This clause is as under :

> In suits . . . . for accounts, according to the amount at which the relief . . . is valued in the plaint or the memorandum of appeal. In all such suits the plaintiff shall state the amount at which he values the relief sought.

The last part of the clause makes it obligatory on the plaintiff to value his relief and such value not only determines the Court-fees but also the jurisdiction of both the original and the appellate Courts.

It would also appear that in suits for accounts, there is an obligation on the plaintiff to value as approximately as possible the relief he claims. S. 50 of the Civil P. C. of 1882 in express terms required the plaintiff "to state approximately the amount sued for." The corresponding provisions of O. 7, R. 1 Cl. (1) of the Civil P. C. of 1908 likewise require him to state the value of the subject-matter for the purposes of jurisdiction and Court-fees "so far as the case admits." And in my opinion the effect of this rule is to all intents and purposes the same. If a plaintiff undervalues or over-values his relief from improper motives, it is open to the defendant to contest the value and if the plaintiff fails to properly value his relief when called upon by the Court to do so, the plaint is liable to be rejected.

Now, no doubt, the plaintiff has a certain amount of latitude given to him to value the relief and unless his valuation is grossly inadequate or improper, the Court does not interfere. It is all the same presumed to represent as fair a value of the subject-matter as the case admits. Can it then be said that it is open to the plaintiff who has been non-suited to contend that he should be allowed to put a different value on the same subject-matter when he is appearing from his non-suit and if not can it again be said that it is open to the unsuccessful defendant who fails to challenge the plaintiff's valuation at the proper time and who must, therefore,

(1) [1900] 23 Mad. 490=10 M. L. J. 249.
(2) [1916] 39 Mad. 725=33 I. C. 602 = 30 M. L. J. 402.
(3) [1920] 79 I. C. 923.
(4) [1909] 13 C. W. N. 815=1 I. C. 670.
(5) [1925] 7 P. R. 1915=28 I. C. 262=15 P. L. R. 1916.
(6) A. I. R. 1925 All. 787=47 All. 756.

be deemed to have acquiesced in its being not grossly inadequate or otherwise improper, to contend that he should be permitted to put a different valuation upon it when appearing?

It cannot also be contended with any show of reason that the Legislature ever intended to permit a defeated party whether he be the plaintiff or the defendant to value the same relief differently for the purpose of his appeal all other things being equal or that the Legislature could have ever intended to impose an unnecessary burden on the appellate Court to hold an inquiry into the propriety of the valuation of the plaintiff when no objection was raised in the Court of the first instance.

It has been urged that when the Court-fees Act of 1870 was passed there was no scope of an appeal against a preliminary decree which for the first time received a judicial recognition by the Code of 1882. But the Code of 1859 clearly contemplated an appeal by a defeated plaintiff who was non-suited in limine on the ground that he was not entitled to have the accounts taken. And it would appear that in an appeal filed by the defeated plaintiff claiming the right to have the accounts taken, it was consistently held for a number of years that he should not be permitted to amend his valuation at the time of the appeal. The same consideration should, in my opinion, equally apply to a defendant appealing against a preliminary decree passed for accounts when he demurs to the accounts being taken at all. In order to arrive at this result, it is not necessary, as has been suggested, to add to S. 7, Cl. iv (f) of the Court-fees Act,

> and the amount stated by the plaintiff shall be the amount for the purposes of the memorandum of the appeal,

or any other words to a like effect. The clause under consideration does not in my opinion, either expressly or by necessary implication permit an appellant to put any value he likes on the subject-matter of an appeal without regard to the pleadings or the proceedings in the suit. The clause is undoubtedly susceptible of the interpretation that the relief should be valued in a proper manner and subject to the provisions of the Civil P. C. Where, therefore, the relief in the appeal is identical with that in the suit it would appear that it is not open to the plaintiff to value it in a different way and thereby blow hot and cold at the same time in the same proceedings for, after all an appeal is but a continuation of the suit.

Unless this interpretation is accepted it would lead to certain anomalies which may well be illustrated by an example.

A suit for accounts filed in the mofussil Court and valued at Rs. 5,000 or less is triable as a second class suit and is appealable to the District Court. A suit for accounts valued at more than Rs. 5,000 is a first class suit and is appealable to this Court in its High Court jurisdiction. If the defendant is at liberty to put his own valuation in appeal without any reserve, it cannot be said that it is not open to him to value it at a figure in excess of that shown in the plaint and if in a suit valued at less than Rs. 5,000 the defendant estimates the relief for the purpose of the appeal at more than Rs. 5,000 on the plea that the plaintiff's valuation is either "arbitrary or haphazard" can it be said that he can thereby claim that the appeal should be tried by this Court in the exercise of the High Court jurisdiction and if not can he thereby confer jurisdiction on the District Court to try the appeal though the proper value of the suit should according to him, have been more than Rs. 5,000. And again if in event of his appeal failing are the proceedings in the suit to be treated as a second class suit according to the valuation of the plaintiff or as a first class suit according to the alleged proper valuation of the defendant?

The view taken by the Madras High Court has been consistently followed for a number of years by different High Courts including this Court and in the absence of any convincing grounds, I am not prepared to differ from that view and to hold that it is open to an appellant to alter the valuation in case where the reliefs in the appeal and in the suit are identical.

Now with regard to the facts of this case it is clear from the record that the plaintiff instituted this suit for accounts of a partnership which he stated had commenced in 1916 and had been reconstituted in 1918, his share having continued to remain the same viz., 8 annas in the rupee. He asked for accounts for

the period commencing from 1916 or in the alternative from 1918. He valued the whole relief at Rs. 1,000. Wild, A. J. C., disallowed his claim for accounts prior to 1918. The appeal is, therefore, confined only to a part of the period in suit. And again the ground on which the defendants have attacked the decision of the lower Court is not that no accounts should be taken at all but that the share of the plaintiff in the partnership formed in 1918 was not 8 annas but less and have only collaterally disputed the finding of the learned Additional Judicial Commissioner as to the possession by the defendants of certain account books of the firm. The identity of the subject-matter of the suit and the appeal is indubitably not the same and it would, therefore, follow that it is open to the defendants to value that part of their relief which is now in dispute.

I accordingly hold that a proper Court-fee has been paid by the appellant.

Kincaid, J. C.— I concur.

G.B.J.

A. I. R. 1927 Sind 103

KENNEDY, J. C., AND MADGAVKAR, A. J. C.

Ghulam Rasul—Appellant.

v.

Pamandas Dewandas—Respondent.

Second Appeal No. 2 of 1921, Decided on 1st November 1922, from the decree of the Dist. J., Larkana.

(a) *Civil P. C., Sch. 2, para. 1—Award.*

An application to file an award is not a suit. [P 101, C 2]

* (b) *Civil P. C., Sch. 2, para. 17—Mortgage decree in terms of award—O. 34, R. 5, does not apply—Civil P. C. O., 34, R. 5.*

Mortgage decree passed in terms of an award made under Sch. 2, para. 17 is not a decree under O. 34, R. 4, and therefore R. 5 has no application. [P 101, C 2]

(c) *Civil P. C., O. 34, R. 5—Parties can waive their rights under R. 5 by agreement—Compromise.*

There is nothing to prevent the parties to a litigation from waiving an advantage of a particular law or rule, if that law or rule is not based on a ground of public policy and is intended solely for the benefit and protection of an individual in his private capacity. [P 101, C 2]

Harchandrai Vishindas— for Appellant.

Tahilram Maniram—for Respondent.

Madgavkar, A. J. C.—The question in this appeal is whether the decree-holder can succeed in his application for execution without making the decree final. The decree was passed upon a private award without the intervention of the Court and filed in Court upon application under R. 17, Sch. 2, of the Code of Civil Procedure. Out of the decretal amount of Rs. 860 awarded, the decree-holder was asked to give credit for Rs. 160 which was apparently interest by enjoying the produce of the land, the balance Rs. 700 was payable in four yearly, instalments of Rs. 100 each commencing from January 1914 for four years the last instalment payable being Rs. 300. In default of any instalment it was to be paid along with the second but on default of two consecutive instalments the whole amount was payable at once.

It is argued for the appellant judgment-debtor that this was a mortgage decree and therefore O. 34, R. 5, applied and made it incumbent upon the decree-holder to apply and make the decree final before he could apply to execute it. It is admitted that no instalment was paid. In support of this proposition, reliance is placed on cases such as *Narsingrao* v. *Bhudu Krishna* (1), *Tara Prosad Roy* v. *Bhobodeb Roy* (2), *Bhagawan* v. *Ganu* (3), *Ajudhia Pershad* v. *Baldeo Sing* (4). For the respondents, it is urged that the decree was not a decree passed by the Court in a suit relating to a mortgage nor in the terms of O. 34, R. 4, nor in the Form No. 4 appertaining thereto in the Schedule (D) and therefore O. 34, R. 5, had no application. The decree was passed not in a suit but upon an award and by agreement between the parties. Therefore no application to make the decree final was necessary.

We are of the opinion that the arguments for the respondent must prevail. Under the provisions of the Second Schedule para. 17, the Court had no power to take accounts or to modify the award sought to be filed. The Code of Civil Procedure is not exhaustive. Its provi-

(1) [1918] 42 Bom. 309=46 I. C. 107=20 Bom. L. R. 481.
(2) [1895] 22 Cal. 931.
(3) [1899] 23 Bom. 644=1 Bom. L. R. 136.
(4) [1894] 21 Cal. 818.

sions including the provisions of O. 34, apply to suits relating to mortgages and lay down the procedure therein. It is only in suits relating to mortgages, that is, suits upon a mortgage direct without award or other agreement superseded, that Rr. 4 and 5 conferred certain rights upon the mortgagor particularly the right to obtain from the Court a period of six months after the mortgage amount has been ascertained by the Court, to pay it into Court before his right of redemption was lost and the mortgage property put up to sale. It does not, however, follow that like any other legal rights, this right cannot be waived by agreement between the parties concerned. And it is because of this period of grace given to the mortgagor that an application for a decree final becomes necessary. Until the expiry of these six months it is a preliminary decree incapable of execution and the application for a final decree at the end of six months gives the mortgagor an opportunity of postponing the sale of the property. All these considerations, however, do not hold when by agreement between the parties no such period exists; and in such cases, therefore, where by such an agreement the amount is at once recoverable by sale, the decree as it stands, is executable, there is no room for a further final decree and the necessity for such an application disappears.

The authorities relied upon for the appellant are almost entirely confined to the decision of two points. First, question of limitation, and second, the difference between an applicacion to make the decree final and an application to execute the decree, in decrees passed under O. 34. The insertion of old Ss. 88 and 89 in the Transfer of Property Act with certain alterations in the new Code of Civil Procedure was necessitated by difference of opinion between the High Courts upon the latter point as explained by Sir Lawrence Jenkins in *Amolak Chand* v. *Sirat Chunder Mukerjee* (5). Neither question, however, is the question directly at issue, and obiter dicta on the point now in question : see for instance the case of *Bhagwan* v. *Ganu* (3) cannot be treated as a binding authority.

On the other hand, if an application for final decree were insisted upon in a decree such as the present as has been pointed out by the learned District Judge, it would be difficult to fix the precise period at which such application should be made. It has been held that there is nothing to prevent the parties to a litigation from waiving an advantage of a particular law or rule, if that law or rule is not based on a ground of public policy and is intended solely for the benefit and protection of an individual in his private capacity. And consent decree directing payment by instalments, is perfectly valid in law, though it is not covered by S. 88 and though the provision of S. 89 of the Transfer of Property Act are consequently inapplicable to it: vide *Bechu Singh* v. *Bicharam Sahu* (6). In the present case, the Court was bound to pass the decree in terms of the award. This Court has held that an application to file an award is not a suit : *Seumal* v. *Mulomal* (7). The decree is not a decree under O. 34, R. 4, and therefore R. 5 has no application : *Arunbati* v. *Ram Nirajan* (8) ; *Mangar Sahu* v. *Bhatoo Sing* (9) ; *Sitalsing* v *Baijnath Prasad* (10).

We are therefore of opinion that the decree of the lower appellate Court is right and the respondents are entitled to execute the decree without application to make it final. The appeal fails and must be dismissed with costs.

R.D. *Appeal dismissed.*

(5) [1911] 38 Cal. 913=11 I.C. 943=16 C.W.N. 49.

(6) [1909] 10 C. L. J. 91=1 I. C. 677.
(7) [1914] 8 S. L. R. 260=28 I. C. 60.
(8) [1920] 58 I. C. 299.
(9) [1920] 1 Pat. L. T. 416=57 I. C. 473.
(10) A. I. R. 1922 All. 383=44 All. 668.

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* A. I. R. 1927 Sind 104

KINCAID J. C., AND BARLEE, A. J. C.

Emperor—Appellant.

v.

Saran—Accused—Respondent.

Criminal Appeal No. 128/4 of 1926, Decided on 4th October 1926, from an order of acquittal of Tyabji, A.J.C.

(a) *Penal Code, S. 366—Although girl has lost her chastity she can be seduced.*

It is not a correct proposition that once a girl has lost her chastity, she cannot be seduced since she has no chastity to lose. On each occasion that a women is persuaded to indulge in illicit intercourse, she is being tempted into

sin and so seduced within the meaning of S. 366. [P 106 C 2, P 107 C 1]

(b) *Criminal trial—Evidence—Crown witnesses must get opportunity to deny allegations against them by defence.*

Crown witnesses must be given opportunities of denying any allegations against them which form a part of the defence. [P 107 C 1]

* (c) *Criminal P. C., S. 423—Appeal from acquittal in a jury case—High Court can dispose of the case instead of remanding it for new trial.*

Where there is an appeal against an acquittal in a case tried by the jury, High Court has jurisdiction to decide the case itself instead of ordering a new trial ; (1894) *A. C.* 57, *not Foll.* ; 19 *Bom.* 749 ; 6 *B. H. C. R. Cr.* 47 and *A. I. R.* 1925 *Sind* 116, *Rel. on.* [P 108 C 1]

T. G. Elphinston—for the Crown.

Gopal Das N. Lalla—for Accused.

Judgment.—The respondent, Saran, was tried by a judge and jury of this Court on a charge under S. 366A, Indian Penal Code, and acquitted. Under instructions from the Local Government the Public Prosecutor for Sind has appealed on the ground that by reason of a misdirection or of a misunderstanding of the law on the part of the jury the charge of the learned Judge led to an erroneous verdict within the meaning of S. 423 (2), Criminal P. C., such as to warrant the reversal of the verdict and the conviction of the accused.

The facts of the case are simple. The accused was admittedly a procuress by profession. She became acquainted with a minor girl named Roshan Jan, who had come to Karachi from Peshawar with a woman named Meraj. On the 25th January last she sent word to a Bania, named Govind that she had a nice girl for him. They went together in a carriage to the house of Meraj. Roshan Jan entered the carriage and they drove her to the accused's house. When they arrived there they were stopped by police officers, who had been waiting for the accused. It had been reported that the accused was procuring minor girls, and they had gone to her house to investigate. The accused was put on her trial before the City Magistrate, Karachi, for an offence under S. 372, Indian Penal Code. Roshan Jan deposed that the accused had called her out to go for a drive, that she had obtained the permission of Meraj, and had gone with her; that Bania had been sitting in the carriage; that the accused had told her to let him have sexual intercourse with her and that she would be paid Rs. 5. In addition she said that once before the accused had asked her to go for a drive, and that on arriving at the accused's house a Mussalman had paid her Rs. 10 for sexual intercourse.

Roshan gave this evidence on the 1st of February and on the same day the City Magistrate recorded the evidence of the Bania Govind, and of the Sub-Medical Officer Civil Hospital. The former corroborated the girl ; the latter proved that she was under 15. The only question asked in cross-examination was as to the fee which Govind had agreed to pay. The accused was questioned the same day, and she admitted

(1) that she had sent to tell Govind that she had a girl for him ;

(2) that she had taken Govind to the house of Meraj and had asked Roshan Jan to accompany her and Govind in the carriage ;

(3) that she had arranged with Roshan Jan that she should have sexual intercourse in her house with Govind, and be paid Rs. 5 ;

(4) that she had arranged with Govind to let him have intercourse with Roshan Jan for Rs. 5 in her house.

When asked had she any more to say she said "I have nothing to say."

That ended the proceedings for the 1st February. But the Magistrate recalled Roshan and examined her again on February 15. On February the 23rd she was cross-examined at some length as to her past history. Her evidence shows that an attempt was being made to prove that she was a prostitute and Meraj a brothel keeper. The accused was again examined and on that occasion she stated that Meraj and Roshan had come to her and had lived for a month with her and that Roshan had gone out daily to earn money as a prostitute.

The Magistrate then framed a charge under S. 366A to the effect that the accused had induced Roshan to go from the house of Meraj with the intention that she might be seduced to have illicit intercourse with Govind. She was placed on her trial on May 12th and pleaded not guilty. The trial went on up to the 15th. Roshan Jan and Meraj were cross-examined at length and the answers given by them show that it was the defence case that the latter kept the former as a prostitute. On the 14th the accused was questioned by the Court. She then

said that she had told the Magistrate that

the Rs. 5 which were being arranged for with the Bania were arranged with Meraj and not with Roshan Jan though Roshan Jan was present.

She admitted that what she had said to the City Magistrate was correct. Presumably she meant to include the statement about Meraj which in fact she did not make.

It is noteworthy that in the course of the cross-examination of Roshan and Meraj in the Sessions Court not a single question was asked to show that it was the defence that it was Meraj and not the accused who had induced Roshan Jan to go from the former's house with the accused. The only passage on this subject is in the cross-examination of Meraj before the City Magistrate on the 15th February, when she said

Roshan Jan's mother left her with me....I do not know that the accused had taken Roshan away. She never asked me permission to do so.

It is doubtful whether she was referring to accused or to Roshan Jan.

On the 15th May the learned Judge charged the jury. The learned Public Prosecutor criticizes the charge on the following grounds :—

1. That the learned Judge misdirected the jury in that he repeatedly told them that what they had to decide was whether the accused induced Roshan to indulge in illicit intercourse, whereas S. 366A only required the prosecution to prove that the girl was induced to go from any place, the other ingredients of the offence being facts which were admitted by the accused.

2. That 75 per cent of the charge dealt with the question of deciding the intention of the accused which was wholly irrelevant in view of her admission of necessary knowledge.

3. That there was also non-direction which amounted to misdirection on three material points :

(*a*) That nowhere did the learned Judge refer to the question of knowledge:

(*b*) that the learned Judge never referred to the evidence or to the admission of the accused :

(*c*) that he did not charge the jury that consent in the case of a minor girl is immaterial.

Lastly the learned Public Prosecutor has complained that the learned Judge allowed cross-examination to show that the girl was not being seduced from the path of virtue for the first time, which was irrelevant. He has contended that these errors of commission and omission caused a failure of justice.

In my opinion the only objections which are of practical importance are the license allowed to the defence pleader in cross-examination and the omission of the learned Judge to put the facts of the case clearly before the jury. The rest seem to us to be unimportant and I shall deal with them briefly. It is true that at line 110 of the charge the learned Judge told the jury that the gist of the law was that no one should induce a minor girl to have illicit intercourse and at line 250 he said :

if you accept the evidence that Roshan Jan was a respectable woman you can have no hesitation in coming to the conclusion that Saran did induce her to this act of illicit intercourse.

There are several such passages. But at the beginning and end of the charge and at other places the learned Judge stated the law correctly that the prosecution had to prove merely an inducement to leave the house of Meraj with the intention that she should be seduced ; and I do not think that the jury can have made a mistake about the ingredients of the offence charged. It was never alleged that there had been any actual intercourse. Similarly the insistence in intention and the omission to refer to knowledge were in the circumstances of this case immaterial. It was never denied that Saran's intention was to submit Roshan Jan to intercourse.

Before coming to the main point I must speak of the cross-examination to character. It was, as is now admitted, the defence throughout that no offence under S. 366A could have been committed because Roshan Jan was a prostitute. The learned pleader for the accused submitted the proposition that once a girl has lost her chastity she cannot be seduced since she has no chastity to lose. That question was decided against him by the learned Judge, and in our opinion correctly. It is true that seduction means to persuade a woman to surrender her chastity, and it has been held in a case quoted by Ratanlal (page 76) that once a woman has lost her chastity and become a prostitute she cannot be seduced again. But we think that the Legislature cannot have intended to restrict the meaning of the word so narrowly. In-

terpreted in this way the section can afford little protection to children, and yet obviously the Legislature intended to protect children. Their intention can be given effect to by the adoption of the alternative definition from the Oxford Dictionary "to tempt into sin." We think that on each occasion that a woman is persuaded to indulge in illicit intercourse she is being tempted into sin and so seduced in this wider sense; and we find authority for this view in the case of *King-Emperor* v. *Nga Ni Ta* (1) referred to by Mr. Ratanlal in his commentary under S. 366.

Prima facie, then, the cross-examination to character was irrelevant, and the learned Judge would have been well advised to make the defence pleader show the relevancy of his questions before allowing him to ask them. Had he done so the Public Prosecutor would not have been taken by surprise by the second line of defence that it was Meraj and not the accused who had asked the girl to go with the Bania. It is true that considerable latitude is given to accused persons and that they are not bound to plead in detail until called on to enter on their defence. But they reserve their defence at their own risk; as there is a well-known equitable rule that Crown witnesses must be given opportunities of denying any allegations against them which form a part of the defence. This rule was not obeyed in this case, and, in consequence of this the accused was not entitled, after the case for the Crown was closed, to set up a defence which had not been indicated by the cross-examination. We think, then, that much of the cross-examination was totally irrelevant.

The last and most important objection is that the learned Judge did not clearly explain the case to the jury, and did not attempt to disabuse their minds of the idea that the character of Meraj and Roshan Jan were relevant facts. It is true that he was at pains to make it clear that

> because a girl is leading a bad life it would be absurd to hold that, therefore, she cannot be seduced to illicit intercourse.

Nevertheless he told the jury to pay attention to the antecedents of the persons concerned and clearly he included Meraj amongst them. It seems to us then, that he accepted and allowed the jury to accept the second defence as genuine and worthy of their consideration. But, in our opinion, it was a defence which was not open to the accused, and the jury should have been so directed; at the best the learned Judge should have taken them through the evidence, and pointed out that this particular defence was not set up till the end of the case, was not supported by evidence, but rested on one bare statement of the accused and was entirely contradictory to the first statement made by her. Instead he dwelt on the character of the girl and practically told the jury that, if they thought that Roshan Jan was not an innocent girl, they were at liberty to find that she had not been tempted but "had gone of her own accord and owing to her own bad impulse or her lust for money or otherwise." That was, of course, the question for decision. The accused had pleaded not guilty, and it had to be left to the jury. But to prevent a failure of justice it was of the utmost importance to impress on the jury that on the 1st February, after hearing the evidence of Roshan Jan, the accused had admitted that she had gone to the house of Meraj to obtain Roshan Jan for illicit intercourse, had asked her to go with her in the carriage, and had told her that she would be paid Rs. 5.

These admissions, in our opinion, amounted to a plea of guilty, and the jury should have been so directed. The omission of the learned Judge to do so was, in our opinion, a misdirection, which has caused a miscarriage of justice.

The next question is whether we are bound to order a fresh trial or have power to find the accused guilty and to pass sentence. It has been argued by the learned pleader for the defence that the only course open to us is to order a new trial. He has diligently collected a number of authorities on the point, principally the judgment of the Privy Council in *Makin* v. *Attorney-General for New South Wales* (2), referred to and relied on by a Bench of the High Court of Calcutta in *Wafadar Khan* v. *Queen-Empress* (3). The decision was to the effect that if a person is entitled to be

(1) [1902-03] 10 Bur. L. R. 106=1 U. B. R. (1902-03) Penal Code 15.

(2) [1894] A. C. 57=63 L. J. P. C. 41=69 L. T. 778=6 R. 373=58 J. P. 148=17 Cox. C. C. 701.

(3) [1894] 21 Cal. 955.

tried by jury, a Bench of Judges cannot substitute their own verdict for a jury verdict. But this view has not been consistently held even by the Calcutta High Court and has not been adopted in Bombay. It was considered in *Queen-Empress* v. *Ramchandra Govind* (4), where it was decided that, when part of the evidence which has been allowed to go to the jury is found to be irrelevant and inadmissible it is open to the High Court in appeal either to uphold the verdict upon the remaining evidence on the record under S. 167, Indian Evidence Act, or to quash the verdict and order retrial. Referring to *Makin's* case (2) their Lordships remarked :

> The present decided inclination of our opinion . . . is that the language used by the Judicial Committee in the case from New South Wales does not apply to the Codes of India. In *Reg.* v. *Ramaswami Mudaliar* (5) this Court ordered a new trial, as the evidence was of such a character as to render it difficult to pronounce on its character without hearing the witnesses. It has been conceded . . . that the present case differs ; the evidence is one sided and practically undisputed ; the result depends on the inference from that evidence. . . . . we see no reason . . . . for ordering a fresh trial.

In the case of the *Emperor* v. *Murid* (6) the Bombay practice was followed, and we have been referred to another Sind case, *Topandas* v. *Emperor* (7). There is, therefore, ample authority to support the view that a High Court in these circumstances has jurisdiction to decide the case instead of ordering a new trial.

Moreover, apart from authority it is the view which we are inclined to take. Section 423 (i) (a) seems to us to be quite clear, and we do not think that we need look any further. This question is one which has been before the High Courts for many years, and the presumption is that had the Legislature thought that the Courts were claiming too extensive powers, they would have altered the section at the last revision of the Code. Mr. Gopaldas has argued that no appeal Court has ever substituted its decision for a verdict unless the accused has waived his right to a fresh trial. In no case, he says, has a High Court set aside an acquittal and convicted an accused. But we are unable to accept his distinction. Trial by jury is not in India the birthright of the individual but is the creation of statute ; and the Crown has as much right to a jury as an accused. If then, this Court has jurisdiction to acquit a person who has been convicted by a jury, it may convict him. Whether it should convict or order a new trial is a matter for consideration in each case ; and when a case is complicated a fresh trial may be advisable, But in a simple case such as that of the *Crown* v. *Murid* (6) a fresh trial can only cause unnecessary trouble and expense.

The present case is certainly one which ought to be disposed of at once. Mr. Gopaldas has taken us through the evidence with great care to show that Roshan Jan was unworthy of credit and that her uncorroborated word should not be accepted in preference to the accused's. But unfortunately for the accused her own version was identical with that of the girl. She admitted that she had asked Roshan Jan to accompany her intending her for illicit intercourse and that she told her as an inducement that she would be given Rs. 5. Thus all the ingredients of the section were admitted except the girl's age, and that has been proved to be less than 18. It seems to us that it would be absurd to order a fresh trial. We set aside the acquittal and convict the accused of an offence under S. 366-A, and sentence her to undergo rigorous imprisonment for one year.

G.B.J. *Appeal allowed.*

(4) [1895] 19 Bom. 749.
(5) 6 B. H. C. R. Cr. 47.
(6) [1909] 3 S. L. R. 125=4 I. C. 608=11 Cr. L. J. 15.
(7) A. I. R. 1925 Sind 116.

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* A. I. R. 1927 Sind 108

KINCAID, J. C. AND BARLEE, A. J. C.

Ahmed and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Confirmation Case No. 8 of 1926 and Criminal Appeal No. 88 of 1926, Decided on the 1st October 1926, from the judgment of the S. J., Hyderabad, D/- 4th June 1926.

(a) *Penal Code, S. 149—Section must be strictly construed—Prosecution of common object—Meaning.*

Section 149 ought to be strictly construed. The prosecution of the common object must

mean something immediately connected with the common object. [P 111 C 1]

(b) *Penal Code, S. 300—Accused giving a violent blow on neck severing spinal cord—Intention to cause death must be presumed.*

A person giving such a violent a blow on the neck as to sever the spinal cord must be presumed to have the intention of killing his assailant. [P 110 C 2]

✲ (c) *Penal Code, S. 149—Principal offender convicted for murder—Other members can be convicted of grievous hurt.*

It is not necessary that all the members of the unlawful assembly should be convicted of the same offence as that of which the principal offender has been convicted. Where, for example, the principal offender has been found guilty of grievous hurt as well as murder and is convicted for the latter offence, other members can legally be convicted of grievous hurt and it is not necessary that they should either be convicted of murder or acquitted : *A. I. R.* 1923 *Patna* 50, *Diss. from* ; 7 *O.L.J.* 671 and *A. I. R.* 1924 *All.* 670, *Rel. on.* [P 111 C 2]

Partabrai D. Punwani—for Appellants.

T. G. Elphinston—for the Crown.

Judgment.—The facts of this interesting case are shortly as follows :

A certain girl called Amnat aged about 17 had beed married to one Ghulam Mahomed. She was the sister of the complainant Abdulla and her sister Fatma was married to one Haji Hashim the brother of Ahmed, the present Appellant No. 1. Ahmed wanted to marry Amnat himself, but as it often happens in Sind, her family refused to allow her marriage to Ahmed because they wished to secure the daughter of Ghulam Mahomed for Abdulla's own son Mahomed. Ahmed, however, would not give up his purpose of marrying the girl Amnat. About 2 a. m., on the 15th of December 1925, he and 7 or 8 other men came to the house of Abdulla, Amnat's brother. Four of these went inside and dragged out the girl, four remained outside in the shed. Amnat cried out and the members of her household came to her help, but were beaten off. Ahmed and his friends then dragged the girl towards where the two mares were standing, one of which was his own and one of which he had borrowed from the witness Mewo. The noise of the scuffle and the cries of Amnat roused the neighbourhood. A man called Dino Sheikh who was sleeping in the neighbouring shed, rushed off to the scene and tried to rescue Amnat. As he rushed up Ahmed struck him a violent blow with his axe that killed him on the spot. The girl Amnat was put on one of the mares and Ahmed led it. Allahwarayo, his cow-herd, rode the other mare. They rode all night and about midday on the 15th of December they reached the village of Ghulam Mahomed Nizamani. Their companions scattered in other directions. All these three persons stayed there for a night and two days.

In the meantime, however, events had taken place elsewhere. Abdulla and Ghulam, brother and husband of the ravished girl, went to the zemindar Allah Baksh about 4 a. m. on the night of the 15th of December. They complained to the zemindar that Amnat had been forcibly carried away and that a murder had been committed. They mentioned the names of Ahmed, his cow-herd Allahwarayo and of Sultan, a servant of the zemindar Allah Baksh. The zemindar asks him how they had identified Sultan and they said that he had received injuries and had fallen down and got up again. They said that there were other men with him but that they could not identify them. The zemindar bade them go and report the matter to the police. They went off to do so. After they had left, Allah Baksh wrote letters to the neighbouring zemindars including Ghulam Mahomed Nizamani warning them to keep watch and arrest, if they could, the fugitives. Abdulla went to make his report at Kario Ganwhar. He reached it on the 15th of December at 5 a. m. It was still dark but the Head Constable who was in charge took down his report and in it he recorded the names of Ahmed, Allahwarayo and Sultan all of which were given to him by the complainant. The Head Constable went to the scene of crime which he reached at 6-30 a. m. He collected mashirs and trackers. He held an inquest and sent the deceased's body with one Muso Khan the constable to the Hospital. The body reached the Hospital on the 16th of December 1925, and the Medical Officer, Mr. Jaikishindas, held a post mortem at 11-55 a. m. on the morning of the 16th of December. He found two incised wounds on the body of which the first was a serious one. It severed the spinal cord on the left side of the neck. It was the cause of deceased Dino's death.

After sending the deceased's body to the Hospital, Mahomed, the Head Constable, sent for Allah Baksh and with

him went to track the foot-prints. In the meantime, however, Ghulam Mahomed Nizamani had received the letter of Allah Baksh. Indeed he had already suspected Ahmed and Allahwarayo and had induced them to wait in the neighbourhood of his village until he decided what he should do with them. On receiving Allah Baksh's letter he wrote back to Allah Baksh and when the latter received it he left for Ghulam Mahomed Nizamani's village at once. On meeting Ghulam Mahomed Nizamani the two zemindars went to the place where Ahmed and Amnat were and brought them to Satiani in the Mirpur Bathoro taluka where he handed them over to the police. Ghulam Mahomed Nizamani being anxious that Ahmed and Amnat should not ride away without his knowledge had taken the precaution to send Allahwarayo and the mare to the village called Ghunghada. After the handing over of Ahmed and Amnat to the police, Abdualla went to Ghunghada and took Allahwarayo back with him to Khathar, where he handed him over to the police. At first the Sub-Inspector and then the Inspector took up the inquiry. In the end some eight persons were arrested and were sent to trial before Mr. Sanders, the Sessions Judge, Hyderabad. After recording a careful judgment, the learned Sessions Judge acquitted five of the accused and convicted the three appellants Ahmed, Allahwarayo and Sultan. They have appealed here. The learned Judge convicted Ahmed of rioting, abduction with intention to compel marriage with causing simple hurt to Haji Majid and two others and with the murder of Dino Sheikh. Ahmed he sentenced to be hanged by the neck until he was dead under S.302, to two years' rigorous imprisonment under S. 147, to four years' rigorous imprisonment under S. 366 and to three months' rigorous imprisonment under S. 323.

He found Allahwarayo guilty under the same sections but sentenced him to transportation for life under S. 302 read with S. 149 and to one year's rigorous imprisonment under S. 147 to three months rigorous imprisonment under S. 323 and to two years' rigorous imprisonment under S. 366.

He found Sultan guilty under the same sections as Allahwarayo and inflicted the same sentences on him.

Mr. Partabrai who appears for all the three appellants has very fairly said that he would not question the correctness of the Sessions Judge's finding as to the participation of the crime committed by Ahmed and Allahwarayo. We think that their presence at the crime and their participation in it is the only possible conclusion to which we can come. Ahmed was found in the possession of the girl Amnat. Allahwarayo was in charge of the two mares one mare has been identified, as Ahmed's, the other mare as Mewo's, the man from whom Ahmed borrowed it Amnat herself has implicated both the men.

The learned pleader, however, has maintained that the evidence upon which Sultan has been convicted was not sufficient. Sultan has, however, been identified by all the eye-witnesses. His name was given to Allah Baksh zemindar at the earliest possible moment. His name was entered in the first report and his foot-prints were identified on the spot. The learned pleader has relied upon the statement made by the complainant to Allah Baksh that in the fight Sultan received injuries. Whereas actually when he was arrested no injuries were found on him. We do not, however, attach the same importance to this discrepancy as the learned pleader. We think it quite possible that in the struggle, that occurred during that night the eye-witnesses might well have identified Sultan yet may have wrongly thought that he received a more serious injury than the one he actually did.

The next question that demands our consideration is the offence which these three appellants have committed.

As regards Ahmed there is no doubt in our minds that Dino rushed up to rescue the girl. He struck Dino so violent a blow on the neck that he severed the spinal cord. The man who strikes a blow like that must have the intention of killing his assailant. We, therefore, find that Ahmed was guilty of murder. As regards the sentence, it must be remembered that he had no right whatever over Amnat. She was not an unmarried girl. She was admittedly the wife of Ghulam Mahomed. Whatever feelings towards her he may have borne he was not justified in raiding her brother's house carrying her off and in killing a man who was trying to rescue her. We, therefore,

confirm the sentence passed on Ahmed by the learned Sessions Judge and dismiss his appeal.

The cases of Allahwarayo and Sultan present more difficulty, The learned Sessions Judge has found that under S. 149 read with S. 302 they were guilty of murder. We think, however, that this was an unduly severe view to take of their offences. S. 149 we think, ought to be strictly construed. It runs as follows:

> If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

We do not think that it can be said that Ahmed struck Dino a fatal blow strictly in prosecution of the common object of the assembly. We take it that the prosecution of the common object must mean something immediately connected with the common object. If some act committed by Ahmed while actually dragging the girl off had led to the death of some body, that offence, no doubt, has been committed in prosecution of the common object of that assembly. But here the girl had actually been taken away and the violent blow struck by Ahmed was something outside the prosecution of the common object of the assembly.

Next we doubt whether the members of this assembly knew that murder was likely to be committed in the prosecution of the common object. After all, it is not every gun-shot or every hatchet blow that caused death. I think it will be fairer for us to hold that whilst the members of this assembly knew that grievous hurt was likely to be committed in prosecution of their common object, they did not know that murder was likely to be committed in prosecution of that object. We are fortified in this view by the case of *Queen v. Saiid Ali* (1). In that case a body of armed men had gone out to eject the party of one Fukeer Baksh from a field in dispute. In the course of the riot that followed one of them fired a gun and caused the death of one of Fukeer Baksh's party. (Here a passage from the judgment of Phear, J. was quoted)

The next question arises whether the accused can be found guilty under S. 326 read with S. 149. It is certain that persons who go out armed as the party of the accused went out in this case, must know that grievous hurt is likely to be committed in prosecution of their common object when that common object is the abduction of another man's wife. The learned Public Prosecutor to whom we are much obliged for the assistance given in this matter has pointed out the case of *Ram Prasad Singh v. Emperor* (2) where the Patna High Court took the view that the other members of the unlawful assembly would only be convicted of the same offence as that of which the principal had been convicted. In other words it is only open to us either to convict Allahwarayo and Sultan under S. 302 read with S. 149 or to acquit them. With all deference to the learned Judges, we find ourselves, unable to accept their reasoning. The offence of murder includes the offence of grievous hurt. In this particular case Ahmed was guilty of grievous hurt as well as of murder and he could have been convicted quite lawfully either of an offence under S. 302 or of an offence under S. 326 in relation to the death of Dino.

Thus the offence of grievous hurt was committed by a member of the assembly and it was the offence which the members of the assembly knew was likely to be committed in prosecution of the common object of that assembly, every person who was a member of the same assembly was guilty of that offence. The learned Judges of the Patna High Court observed that they could find no authority for this view. The learned Public Prosecutor, has, however, drawn our attention to two cases where Judges of other Courts have regarded the section from the same point of view as ours. In the case of *Barkat Singh v. Emperor* (3) the principal was found guilty of culpable homicide not amounting to murder andthe other members of the unlawful assembly were found guilty under S. 325 and S. 149. In the case of *Behari v. Emperor* (4) a case from Allahabad High Court the principal was convicted under S. 302 and the other members of the unlawful assembly under S. 326 read with S. 149.

(1) 11 B. L. R. 347=20 W. R. Cr. 5 (F.B.).

(2) A. I. R. 1923 Patna 50 =1 Pat. 753.

(3) [1921] 7 O. L. J. 671=60 I. C. 679=22 Cr. L. J. 279.

(4) A. I. R 1924 All. 670.

There is thus the authority of two Courts in this country in support of our view and we think that it is a reasonable one. It enables the Court to temper justice with mercy on the one hand and on the other hand to avoid the acquittal of persons clearly guilty.

We, therefore, change the conviction in the case of Allahwarayo and Sultan from the conviction under S. 302 to conviction under S. 326 read with S. 149 of the Indian Penal Code. We alter the sentence inflicted on them from transportation for life into a sentence of five years' rigorous imprisonment. These sentences shall run concurrently with the other sentences inflicted on them by the learned Sessions Judge of Hyderabad.

G.B.J. *Order accordingly.*

A. I. R. 1927 Sind 112

KINCAID, J. C., AND BARLEE, A. J. C.

Emperor—Prosecutor.

v.

Budho—Accused.

Criminal Ref. No. 149 of 1926, Decided on 21st September 1926, from a reference made by Dist. Mag., Nawabshah.

(a) *Evidence Act, S. 25—Excise officer is not a police officer—Confession made to him is good evidence.*

An excise officer is not a police officer within the meaning of the Evidence Act and hence a confession of guilt made to him is good evidence against the accused; 46 *Cal.* 411 and *A. I. R.* 1925 *Sind* 70, *Foll.* [P. 112, C. 2]

(b) *Bombay Abkbari Act* (V *of* 1878), *S.* 43 (*i*)—*Cultivation of bhang—Deterrent punishment is called for as such offences are difficult for detection.*

The offences like cultivating bhang are difficult to detect and when discovered should be dealt with in such a manner as to deter other persons from committing similar breaches of law. A fine of Rs. 25 was held to be entirely inadequate. [P. 112, C. 2]

Elphinstone—for the Crown.

Hashmat Rai—for Accused.

Judgment.—The facts of this reference are very simple. The Abkari Inspector, Mr. Ahmed Ali, of Naushahro taluk learnt from a spy that bhang had been cultivated in a place callad the makan of Hussan Mahmudan near Sihra. Acting on this information Mr. Ahmed Ali went to the spot and found that bhang had really been cultivated. He called certain mashirs and rooted out 153 bhang plants. At the time two persons, Budho, the present accused, and his uncle, Imambux, were present. Budho confessed to the Abkari Inspector that he had cultivated the bhang. His confession was not only heard by the Abkari Inspector but also by the mashirs. When put on his trial Budho confessed to the Second Class Magistrate of Moro that bhang was growing in the makan. He, however, added that it was sprouting along with brinjal and other vegetables. The learned Magistrate found Budho guilty under S. 43 (1) of the Abkari Act and sentenced him to pay a fine of Rs. 25 or to undergo rigorous imprisonment for a month.

The learned District Magistrate of Nawabshah has approached this Court and has moved the Judges to consider the advisability of enhancing the sentence.

The learned pleader for the accused has contended that there was no proper conviction. The confession to the learned Magistrate was not a complete admission of guilt and the confession to the Abkari Inspector was inadmissible under the Evidence Act. It is true that the confession of the accused Budho to the learned Magistrate is hardly a complete confession of guilt. But it forms a substantial piece of evidence against the accused. As regards the confession made to the Abkari Inspector it is good evidence. It is now settled law that an excise officer is not a police officer within the meaning of the Evidence Act: *Ah Foong* v. *Emperor* (1) and *Tillibhai* v. *Emperor* (2). These two confessions leave no doubt in our minds that the accused is guilty of cultivating bhang in his uncle's plot of land.

The only point for our consideration, therefore, is whether we should enhance the sentence passed on the accused by the learned Second Class Magistrate. We agree with the learned District Magistrate that a fine of Rs. 25 is entirely inadequate. Such offences are difficult to detect, and when discovered should be dealt with in such a manner as to deter other persons from committing similar breaches of the law.

We accordingly direct that the accused in addition to the fine of Rs. 25 imposed upon him should undergo two months' rigorous imprisonment.

The papers to be returned to the learned District Magistrate.

J.V.J. *Order accordingly.*

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(1) [1919] 46 Cal. 411=28 C. L. J. 105=48 I. C. 504=22 C. W. N. 834.

(2) A. I. R. 1925 Sind 70=18 S. L. R. 75.

A. I. R. 1927 Sind 113

TYABJI, A. J. C.

Sanwal and *another*—Accused—Applicants.

v.

Emperor—Opponent.

Criminal Transfer Application No. 143 of 1926, Decided on 8th October 1926.

Criminal P. C., S. 526 (4)—*Application for transfer—False statement in affidavit under Cl.* (4)—*Person making statement is guilty under Penal Code, S.* 191.

A person making an affidavit containing a false statement made in support of an application for transfer of a case pending in one Criminal Court to another under S. 526, is guilty under S. 191, Penal Code : 20 *Cal.* 724 ; 5 *S.L. R.* 102; and 10 *S. L. R.* 64, *Dist.* [P 113 C 2]

Rewachand Vasanmal—for Applicants.

T. G. Elphinston—for the Crown.

Order.—This matter comes before me on a notice issued by the learned Judicial Commissioner that

an enquiry should be made into what appears to be an offence referred to in S. 195, sub-S. (1). Cl. (b), Criminal P. C., which appears to have been committed in an affidavit filed by Rupo, son of Sajandas, in respect of para. 4.

The learned Judicial Commissioner, therefore, called upon the said Rupo to show cause why a complaint should not be made to a Magistrate to try the said offence. The offence referred to is that of giving false evidence which is defined in S. 191 and rendered punishable under S. 193. S. 191, so far as relevant, is as follows :

Whoever, being legally bound by an oath...to state the truth...makes any statement which is false, and which he either knows or believes to be false or does not believe to be true is said to give false evidence.

A person intentionally giving false evidence is punishable whether (1) the false evidence is given in any stage of a judicial proceeding or (2) "in any other case ;" although in the latter case the maximum punishment is less than in the former S. 193. It has, therefore, to be proved that false evidence has intentionally been given ; and in order that the state of facts referred to as giving false evidence may arise, the person must be legally bound by an oath to state the truth, and must have failed to do so.

The false evidence is alleged in the present case to have been given by the said Rupo making an affidavit containing a statement, which he either knew or believed to be false, or did not believe to be true. The affidavit was made in support of an application for transfer of a case pending in one criminal Court to another under S. 526 of the Criminal P. C.

It is argued that Rupo was not legally bound by an oath to state the truth ; that there was no necessity for any affidavit being filed in the proceedings before the Court by Rupo, and that therefore, it must be taken to have been a statement which the deponent was not legally bound to make. It seems to me that this argument is fallacious. A person may or may not be under a necessity to make any statement at all, and logically speaking he may or may not be legally bound (when he does make the statement whether voluntarily or involuntarily) to state the truth ; though it is difficult to conceive a situation in which the law should bind a person to make a statement, and yet not bind him to state the truth. The present position, however, is one where the law did not bind Rupo to make any statement at all ; and the question is, whether not being bound to make any statement, yet having voluntarily undertaken to make an affidavit he voluntarily placed himself in such a position that he was by law bound to state the truth in the affidavit.

The duty to state the truth is laid down in S. 14 of the Oaths Act 10 of 1873. It arises when a person is giving evidence before any Court or person authorized by the said Act to administer oaths and affirmations. The question then is whether Rupo when he made the affidavit in question was giving evidence and if so whether he was giving evidence before any Court or person authorized to administer oaths and affirmations.

The effect of the law becomes clear on an examination of the authorities that were cited. In *Abdul Majid* v. *Krishna Lal Nag* (1) the Court held that the District Judge having made an order and instituted a proceeding which he was not by law authorized to make, he was not by law authorized to examine the applicant, nor to administer an oath. Moreover they held that the affidavit would not have been evidence in the proceeding. The proceeding being without authority in its origin and inception, and the form in which the evidence was purported to be taken (viz., by affidavit) being unautho-

(1) [1893] 20 Cal. 724.

rized, the oath was not administered by a person
in discharge of the duties or in exercise of the powers imposed or conferred on him by law
(Oaths Act, S. 4). Hence no duty arose to state the truth.

Similarly in the case reported in *Emperor* v. *Dital Safar* (2) the statements were by persons who were not witnesses in any proceedings pending in any Court; and moreover the Magistrate was not authorized to administer the oath he purported to administer as there was no provision for evidence being taken on affidavit. In *Allahwarayo* v. *Emperor* (3) the Magistrate had no authority to hold such a proceeding as he purported to hold: and he was, therefore, not authorized to administer oaths under S. 14 of the Oaths Act.

In the present case the proceedings consisted of a criminal transfer application made to this Court in its High Court jurisdiction, as to the regularity of which no question could be raised. That the person by whom the oath was administered was authorized to do so also admits of no doubt: S. 539 of the Criminal P. C., provides for swearing of affidavits to be used before any High Court before any Commissioner appointed by such Court. The further question whether in the course of such applications evidence may be given on affidavit is answered by S. 526 (4) of the Criminal P. C. which requires applications for transfer to be supported by affidavit or affirmation. Moreover, the facts alleged in the affidavit are that one of the applicants was sent for by the Magistrate that
he was abused, his turban was pulled down and was spat on the face by
the Magistrate. These are certainly allegations coming under S. 539-A of the Criminal P. C., and, if so under that section also evidence of the facts alleged may be given by affidavit.

It seems to me, therefore, that the deponent was legally bound to state the truth and that there is no formal objection to the complaint being made to the Magistrate. A proper complaint must be drafted by the Public Prosecutor so that it may be filed before the proper Magistrate.

R.D. *Order accordingly.*

(2) [1911] 5 S. L. R. 102=12 I. C. 651=12 Cr. L. J. 563.
(3) [1916] 10 S. L. R. 64=35 I. C. 672=17 Cr. L. J. 368.

A. I. R. 1927 Sind 114

LOBO, A. J. C.

Osman Saleh Mahomed—Plaintiff.

v.

Khanoomal Satramdas—Defendants.

Original Civil Suit No. 508 of 1926, Decided on 24th September 1926.

Civil P. C., O. 21, Rr. 58 to 63—Court can enquire into a plain question of fact though it involves an enquiry into title to some extent—Civil P. C., O. 38, R. 8.

Though it is certainly objectionable in summary proceedings such as are contemplated in Rr. 58 to 62 of O. 21 to decide intricate questions of law, there is nothing to prevent the Court from deciding a plain question of fact even though the decision thereof involves to some extent an enquiry into the title of the applicant: *A. I. R. 1924 Cal. 744, Rel. on.* [P 115, C 1]

Pahlajsing B. Advani—for Plaintiffs.
Kodumal Lekhraj—for Defendants.
Dhingomal Narainsing—for Applicant.

Judgment.—On an application under O. 38, R. 5, Civil P. C., by the plaintiffs in this case, motor-car No. 1383, taxi No. 27, lying with a firm of coach-builders, Karimji Ghulam Hussein & Co., has been attached before judgment.

This is an application under O. 38, R. 8, Civil P. C., by Mulchand Tikamdas to raise the said attachment on the ground that he had purchased the motor-car in question from the defendants on 14th June 1926, and that at the time of the attachment the motor-car was in the hands of the coach-builders in trust for him.

The application is opposed by the plaintiffs in the suit.

Under O. 38, R. 8, Civil P. C.:
Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner . . . . provided for the investigation of claims to property attached in execution of a decree for the payment of money.

The procedure, therefore, applicable in this matter is that laid down in O. 21, Rr. 58 to 62.

Now the limits of an enquiry under O. 21, R. 58 are those laid down by their Lordships of the Privy Council in the case of *Sardhari Lal* v. *Ambika Pershad* (1).

The Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the

(1) [1888] 15 Cal. 521=15 I. A. 123=5 Sar. 172 (P. C.).

question, in other cases, it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Court at the time, leaving the aggrieved party to bring the suit which the law allows to him.

Though it is certainly objectionable in summary proceedings such as are contemplated in Rr. 58 to 62 of O. 21 to decide intricate questions of law, there is nothing to prevent the Court from deciding a plain question of fact even though the decision thereof involves to some extent an enquiry into the title of the applicant: *Najimunnessa Bibi* v. *Nacharuddin Sardar* (2).

In the present matter there arises a plain question of fact. It involves to some extent the question of the applicant's title to the motor-car in question. I am of opinion that I shall not be exceeding the limits of an enquiry under Rr. 58 to 62 of O. 21, Civil P. C., as laid down by the authorities by discussing at some length and deciding this plain question of fact. (The judgment then examined the evidence and concluded.) Considering the evidence as a whole I am of opinion that it fails to establish the applicant's claim even in a summary inquiry such as I have held. To my mind the coach-builders Karimji Ghulam Hussein & Co. are in possession of the motor-car in question on behalf of the defendants.

The claim of the applicant is dismissed with costs.

G.B. *Application dismissed.*

(2) A. I. R. 1924 Cal. 711=51 Cal. 518.

A. I. R. 1927 Sind 115

KINCAID, J. C., AND LOBO, A. J. C.

Bulchand and *another*—Plaintiffs—Appellants.

v.

Assudamal—Defendant—Respondent.

Second Appeals Nos. 20 and 21 of 1924, Decided on 17th November 1925, from an order of the Jt. J., Sukkur D - 9th May 1924, in Civil Appeal No. 60 of 1923.

Easement—Light and air—A person cannot claim stoppage of all neighbouring building for the sake of extremely small amount of light.

Light, like air, is the common property of all, or, to speak more accurately, it is the common right of all to enjoy it, but it is the exclusive property of none, and it is impossible that a person should be allowed to claim the stoppage of all buildings in the neighbourhood for the sake of the extremely small amount of light and air that he must at the best of times, have enjoyed through his windows: *Colls* v. *Home and Colonial Stores*, (1904) *A. C.* 179, *Rel. on.*

[P. 116, C. 1]

Kimatrai Bhojraj—for Appellants.

Tahilram Maniram—for Respondent.

Judgment.—We have for the purpose of convenience and with the consent of the learned pleaders engaged on both sides, heard Second Appeals Nos. 20 and 21 together. The facts of the case are shortly these:

The plaintiff had a house in Shaikarpur. The defendant had a one-storeyed building alongside. The defendant proposed to raise his ground floor apparently by two storeys with the result that the erection of the new building would have completely closed two of the plaintiff's windows. One of these windows was in the plaintiff's hall and another in a bed-room. The plaintiff sued for an injunction, restraining the defendant from blocking his windows. The first Court refused an injunction as regards the window in the hall, but gave it as regards the window in the bed-room. Both parties appealed and on the 20th of April 1921, the appellate Court confirmed the first Court's judgment. The plaintiff had in the meantime applied for and obtained an interim injunction. The Judge of the first Court went to the place and gave the defendant permission so to build, as not to block the window in the plaintiff's hall. During the following vacation, the defendant built two storeys, but left a space 3 foot by 6, so as not to close the window in the plaintiff's bed-room. When the Court re-opened, the plaintiff asked the first Court under O. 21, R. 32 to take action against the defendant.

The first Court held that so far as the window in the hall was concerned, the defendant had not acted improperly but that he had acted improperly as regards the window in the bed-room. He, therefore, ordered the defendant to remove a certain amount of his building six feet to the west from his eastern wall, seven feet 9½ inches towards the south and 21 feet in height. The defendant appealed to the District Court and on the 9th May 1924, the Joint Judge, (Mr. Chandiram) allowed the appeal, holding that in the absence of any clear terms in the original decree and in the absence of proof of any material damage to the

plaintiff's property, he would not interfere with the construction raised by the appellant after the decree. Against this decision, the two appeals before us have been made to this Court.

It must be remembered that the windows about which the plaintiff has complained are extremely small only a few inches in breadth and a few inches in length ; and it is impossible that the plaintiff should claim the stoppage of all building in the neighbourhood for the sake of the extremely small amount of light abd air that he must at the best of times, have enjoyed through his windows. The whole question of easements such as these has been elaborately discussed and with immense learning by Lord Halsbury in the leading case of *Colls* v. *Home and Colonial Stores* (1). The learned Lord Chancellor therein at page 182 observed :

> Light, like air, is the common property of all, or, to speak more accurately, it is the common right of all to enjoy it, but it is the exclusive property of none. If the same proposition against which I am protesting could be maintained in respect of air the progressive building of any town would be impossible. The access of air is undoubtedly interfered with by the buildings which are being built every day round London. The difference between the town and country is very appreciable to the dweller in cities when he goes to the open country, or to the top of a mountain, or even a small hill in the country ; but would the possessor for twenty years of a house on the edge of a town be at liberty to restrain his neighbour from building near him because he had enjoyed the free access of air without building near him for twenty years ?

The learned pleader for the appellant has contended that it does not lie within our power to vary the decree of the first Court which was confirmed by the District Judge, and which we are now merely called upon to execute. According to the learned pleader, he asked for an injunction that the light and air which he has hitherto enjoyed should be preserved to him in permanence and that the said injunction was granted to him, that decree, therefore, whether right or wrong must be executed by us. We have clearly examined the prayer made by the plaintiff to the Sub-Judge of Shikarpur and we do not find that the wording of the prayer bears out the learned pleader's contention. The plaintiff asked for an injunction restraining the defendant from closing the windows mentioned in the plaint by raising the building of his house or in any other way. He then asked that the defendant should allow the same "to remain open as usual for easement of light and air." There was no demand that the amount of light and air which he had hitherto enjoyed should be perpetually awarded to him. All he asked for was that the windows should be allowed to remain open as usual. It is not in dispute that the building erected does not close the window in the plaintiff's bed-room and we agree with the Joint Judge (Mr. Chandiram) in thinking that there is no certainty that the Sub-Judge, when granting the original decree meant to continue for ever the amount of light and air which the plaintiff had enjoyed in the past.

We think that the decision of the learned Joint Judge was a perfectly correct one and we do not consider it proper to interfere with it. The respondent has said that he still considers himself bound, if the appellant wishes it, to increase the size of the appellant's window to 12 inches by 12 inches at his expense ; and this offer it is still open to the appellant to accept.

We confirm the findings and decree of the lower Court and we dismiss these two appeals with costs.

One set of costs allowed.

R.D. *Appeals dismissed.*

(1) [1904] A. C. 179=73 L. J. Ch. 484=90 L. T. 687=20 T. L. R. 475=53 W. R. 30.

A. I. R. 1927 Sind 116

MADGAVKAR, A. J. C.

F. O. Chotirmal Hiranand—Plaintiffs.

v.

Clive Insurance Co.—Defendants.

Suit No. 788 of 1922, Decided on 13th March 1923.

Insurance—Power of cancellation reserved in the policy is not void.

The principle that a party cannot take advantage of his own wrong, and cancel a contract without a good and reasonable cause, even where he is empowered to do so under the contract, is not applicable to insurance policies. A condition in a policy of insurance reserving the power of cancellation by Insurance Company at any time before the expiry of its period is not necessarily void or subject to a condition of good cause shown for cancellation : *Sun Fire Office* v. *Hart*, (1889) 14 *A. C.* 98, *Rel. on.* ; *New Zealand Spinning Co. Ltd.* v. *Societe des Altiers et Chantiers de France*, (1919) *A. C.* 1 ; *A. I. R.* 1923 *Bom.* 75 and *A. I. R.* 1922 *Bom.* 44, *Dist.* [P. 118, C. 1, 2]

Kewalram Jethanand—for Plaintiffs.

Tolasing Khushalsing—for Defendants.

Madgavkar, A. J. C.—Plaintiff sues for Rs. 849 as damages due from the defendant on account of damage, caused by an accident, to his motor-car which he had insured with the defendants, under a policy Ex. 5. The main defence of the defendant was that they had, under Condition 8 of the policy, cancelled the policy prior to the date of the accident. The trial has proceeded on Issue No. 3, which runs as follows:

Were the defendants entitled, with or without good cause, to cancel the policy, and if so from what date did the cancellation take place?

The plaintiff's letter of cancellation is dated the 21st March and they have produced the postal receipt of registration of that date. From the acknowledgment it appears that the letter did not actually reach the plaintiff till the 2nd April. For the purposes of this issue it is agreed that the defendants posted the letter on the 21st March and that it did not reach till the 2nd April. The accident on which the plaint is based occurred on the 31st March 1922.

It is argued for the defendants that under Condition 8 of the printed conditions of the policy, the cancellation took effect from the 24th or the 25th March at the latest, and that the plaintiff's claim founded on an accident which occurred on the 31st March fails. For the plaintiffs it is argued that the defendants had, under the conditions of the policy no right to cancel the policy for a period in respect of which the premium had already been paid, and that they could only cancel in respect of a period of unpaid premium; secondly, that the cancellation could not, as against the plaintiffs take effect before the 2nd April when he received it; and thirdly that there was an implied condition in the policy that the cancellation should be for some good and substantial cause stated, which the defendants had not done. Therefore on all these grounds the plaintiff is not bound by the alleged cancellation.

Reading the conditions including the 7th and 8th conditions as a whole, the first question is whether the defendants had any power to cancel the policy on the 21st March. The plaintiff had paid the whole premium upto 31st December 1922. Condition 8 runs as follows:

Condition 8—The company shall not be bound to give notice that any renewal is due, and the company may at any time by notice to the insured cancel the policy as from three days after the date when the insured should receive such notice in the ordinary course of post, subject and without prejudice to any rights, either of the company or the insured arising under the policy prior to that date, and the insured shall be entitled to a return of any premium paid by him after deducting a proprotionate part thereof for the part of the year during which the policy has been in force.

Whatever support the first sentence of Condition 8 might give to the contention that the power of Cancellation is meant to be exercised in respect of renewals due, such a construction is inconsistent with the concluding words of the clause that the insured is entitled to a return of any premium paid by him in respect of that period. Reading Conditions 7 and 8 together, it appears that after the expiry of the period of the premium, the policy had nevertheless to be in force for four days. In default of payment within these four days of grace it lapses from the fifth day onwards. Therefore there could be no question of the return of any premium paid, if Condition 8 and the power of cancellation thereunder were limited to cases of renewal, and of unpaid premiums. Further, in the policy, now in question, on which these conditions were endorsed, there was no question of periodical payment, during the period contracted for insurance. The insurance was for one year and the whole premium of Rs. 130 for that year had been paid in advance.

In regard to punctuation, it is clear that Condition 8 is not very accurate, commas being employed throughout, where, possibly, on the strict rules of grammar, semi-colons and full-stops were due. I conclude therefore that Condition 8 in the policy in suit gives the defendant power to cancel the policy at any time during its currency subject to notice on their part, and refund to the plaintiff of a proportionate part of the premium already paid by him.

On the second question the words of Condition 8 are clear. Cancellation has effect as from three days after the date when the insured would receive such notice in the ordinary course of post. I am unable to agree with the contention on behalf of the plaintiff that this contention would only hold good in cases where the insured fails to receive the notice, but that where he actually does receive it, the actual date of such

receipt should be the date of cancellation and not three days from the date when he should have received it. The condition itself makes no such distinction and no such limitation by insertion of words such as "in case of non-receipt." Failing such express limitation, the defendant is entitled, even in cases of late receipt, to calculate the date of cancellation according to the words actually contained in Condition 8. It follows that cancellation in suit would take effect as from three days after the date when the plaintiff should have received the letter and not from the actual date of receipt by the plaintiff. In the present case the letter was posted by the defendant in Karachi to the plaintiff who resides and carries on business at Karachi. Ordinarily therefore it should have reached the plaintiff the day following the day of posting; or if a Sunday intervened at the least on the second day at the latest, i. e., the 23rd March 1922. It follows that as against the plaintiff the defendant is entitled to cause the letter of cancellation to take effect from the 26th March onwards, i. e., prior to the accident in suit.

With regard to the question of good cause, there is no such condition expressed either in the policy or its conditions. It is argued by the plaintiffs on the authority of *New Zealand Spinning Co. Ltd.* v. *Societe des Altiers et Chantiers de France* (1); *Choonilal* v. *Ahmadabad Fine Spinning and Weaving Co.* (2); *Chotalal* v. *Chapsi* (3) that the power of cancellation must be employed subject to an implied condition of good and reasonable cause. These cases however hardly go to the extent necessary for the plaintiff's case. They are merely applications of the general principle that a party cannot take advantage of his own wrong, and that a party which has contracted to deliver goods and who himself is responsible for the breach cannot escape damages under a general power of avoiding the contract, without showing reasonable cause for non-delivery, since such cause is implied in the general power. That principle, however, has no application in the present case, as is pointed out by Lord Watson in *Sun Fire Office* v. *Hart* (4) a general condition reserving the power of cancellation by Insurance Company is not necessarily void or subject to a condition of good cause shown, the reason being as follows:

> There may be many circumstances calculated to beget the mind of a fair and reasonable insurer, a strong desire to terminate the policy, which it would be inconvenient to state and difficult to prove; and it must not be forgotten that the whole business of fire insurance companies consists in the issue of policies, and that they have no inducement and are not likely to curtail their business without sufficient cause. On the other hand the insurer gets all the protection which he pays for, and when the policy is determined, can protect his own interests by effecting another insurance.

In the present case of insurance of motor-cars it is obvious that the general conduct of owners and drivers of motor cars in Karachi, or the particular reputation of the plaintiff or his driver might be respectively legitimate motive in the defendant's mind to reserve to themselves and acting upon power to terminate the policy without exposing themselves to the difficulty and risks of proving it, or continuing it. Such a power is not unknown in the case of insurance policies and the Courts have given effect to it without implying or adding to it, legal liability of stating and proving good and reasonable cause. That ground of the plaintiff therefore also fails.

It follows therefore that except the refund of insurance money, Rs. 97-3-0, the plaintiff is not entitled to the other reliefs claimed. Decree for the plaintiffs for Rs. 97-3-0. The rest of the plaintiff's claim is dismissed with costs.

R.D. *Suit partly decreed.*

(1) [1919] A. C. 1.
(2) A. I. R. 1922 Bom. 44=46 Bom. 806.
(3) A. I. R. 1923 Bom. 75.
(4) [1889] 14 A. C. 98=58 L. J. P. C. 69=60 L. T. 337=37 W. R. 561=53 J. P. 548.

A. I. R. 1927 Sind 118

MADGAVKAR, A. J. C.

Dharamdas Premchand—Plaintiff.

v.

Ramoomal and *another*—Defendants.

Suit No. 479 of 1922, Decided on 29th November 1922.

Transfer of Property Act, S. 59—Scribe seeing the executant and the other witness sign and attaching his signature—He is the second witness within S. 59 though he adds "written at the request of parties."

The scribe can be a competent attesting witness provided that he has not confined his func-

tion to writing the deed or signing for an illiterate executant, but has further authenticated the mark of the illiterate or the signature of the literate executant; but when the executant has made no mark or impression or signature, but the only signature for the executant is that of the scribe, then the latter being executant cannot be attesting witness also. Nor can the mere signature of the scribe at the end of the document be treated as attestation unless he actually and clearly signed as an attesting witness.

Where the scribe actually saw the execution and the signature of the executant and the other attesting witness and made his own signature below the latter :

Held : that the object of his putting his signature below that of the other attesting witness at the time of execution was that the executant and he meant that the scribe was to be the second attesting witness, although he added the words written at the request of the parties.

[P. 119, C. 2 P. 120, C, 1]

Kewalram Jethanand—for Plaintiff.

Hiranand Bulchand—for Defendants.

Madgavkar, A. J. C. — Suit by the plaintiff on a mortgage for five hundred rupees, purporting to be executed in his favour on the 30th November 1920 by the defendant Ramoomal, who died subsequent to the institution of the suit and is now represented by his minor son Roopo by his guardian ad litem Gopal. The deed of mortgage is sought to be proved on the evidence of the plaintiff and the attesting witness Thakumal and of the writer Chatomal, who below the signature of the executant and of Thakumal has endorsed as follows :

Written at the request of the parties by Chatomal bond writer.

The only substantial question therefore is whether this endorsement of Chatomal can be treated as an attestation by Chatomal in compliance with S. 59 of the Transfer of Property Act, which requires that the instrument in question should be attested by at least two attesting witnesses.

In India the difficulties in the way of carrying out the provisions of law are emphasized by the ignorance or the illiteracy of the executants which is so common and of purda among women of a certain class. To this must be added a third circumstance, viz., that the instruments in question are, more often than not, in the mofussil and even in cities like Karachi, drawn up not by lawyers, but by clerks and scribes, who enjoy greater credit among the public for a proficiency in English and in Law, which they are, however far from possessing. In the present case, for instance (where the executant was literate and has, along with another attesting witness, made his own signature in Sindhi), if the bond writer had signed below 'Thakumal' expressly as an attesting witness, the present difficulty might not have arisen. He has, however, expressly made the endorsement as above. He has explained in his evidence that he did so because of the absence of other attesting witnesses and that it was his practice to make such an endorsement in token of attestation where, besides writing the bond, he had to attest it as a second attesting witness.

The three witnesses agree, and the evidence appears to be true that they all signed at one and the same time in the office of the bond writer, at the time of execution. The question is whether on these facts, as is argued for the plaintiffs, Chatomal's signature can be taken as that of the second attesting witness necessary in law, or whether, as is argued for the defendant, it is insufficient for the purpose, and must be considered merely as the endorsement of the writer of the instrument. The doubt as to the meaning of the word "attested" in S. 59 of the Transfer of Property Act, existing at the time of the decision in *Shamu* v. *Abdul Kadir* (1) has been set at rest by the Privy Council decision in *Shamu Pathar* v. *Abdul Kadir* (2) following *Burdett* v. *Spilsbury* (3) that

the party who sees the document executed is in fact a witness to it : if he subscribes as a witness, he is then an attesting witness.

But a mere acknowledgment to the witness of his signature by the executant or by someone on his behalf, even at the time, is not enough : *Gangaprasad Singh* v. *Ishriprasad Singh* (4). The attesting witness must, knowing the executant, actually see him signing : *Padarath* v. *Ram Narain* (5).

The scribe can be a competent attesting witness, *Jagannath Khan* v. *Bajrang Das* (6), provided that he has not confined his function to writing the deed or singing for an illiterate executant : *Ranoo* v. *Lurmanrao* (7), *Badriprasad* v. *Abdul*

(1) [1908] 31 Mad. 215=18 M. L. J. 219.
(2) [1912] 35 Mad. 607=16 I. C. 250=39 I. A. 218 (P. C.).
(3) [1843] 10 Cl. & Fin. 340.
(4) [1918] 45 Cal. 748=45 I. C. 1=45 I. A. 94 (P. C.).
(5) [1915] 37 All. 474=30 I. C. 366=42 I. A. 163 (P. C.).
(6) A. I. R. 1921 Cal. 208=48 Cal. 61.
(7) [1908] 33 Bom. 14=10 Bom. L. R. 943.

arim (8), but has further authenticated the mark of the illiterate or the signature of the literate executant: *Govind* v. *Bhau Gopal* (9). When the executant has made no mark or impression or signature, but the only signature for the executant is that of the scribe, then the latter being executant cannot be attesting witness also; *Upendrachandra* v. *Hukumchand* (10), *Sristidhar Ghose* v. *Rakshakali Dasi* (11). Nor can the mere signature of the scribe at the end of the document be treated as attestation unless he actually and clearly signed as an attesting witness: *Dalichand* v. *Lotu* (12) distinguishing *Govind* v. *Bhau* (9).

In the present case I hold that the bond writer actually saw the execution and the signature of the deceased defendant and the other attesting witness and made his own signature below the latter. I see no reason to doubt his evidence that the object of his putting his signature below that of the other attesting witness at the time of execution was that the executant and he meant that the scribe was to be the second attesting witness. As I have said above it is unfortunate that the bond writer, not being content with signing like Thakumal, has added the words "written at the request of the parties." That need not, however, in my opinion derogate, (particularly in a case, where, as here, a person of the class of the bond writer is not of very great proficiency in English) from the fact that he saw the instrument executed and subscribed to it as an attesting witness.

Though the case is very near the time, it is on the facts nearer to the case *Govind* v. *Bhau* (9) than to the case *Dalichand* v. *Lotu* (12).

I would, therefore, hold on the whole that the signature of the bond writer was intended and was made, and can be treated in law as that of an attesting witness, despite the unfortunate addition of the words above the signature. It ollows therefore that the deed is valid in aw.

(8) [1913] 35 All. 254=19 I. C. 451=11 A. L. J. 260.
(9) [1917] 41 Bom. 384=39 I. C. 61=19 Bom. L. R. 147.
(10) [1919] 46 Cal. 522=48 I. C. 720=23 C. W. N. 290.
(11) A. I. R. 1922 Cal. 168=49 Cal. 438.
(12) [1920] 44 Bom. 405=55 I. C. 616=22 Bom. L. R. 136.

There is no other contention raised in the case. There will be a declaration that Rs. 610 are due to the plaintiff from the deceased defendant on the mortgage and there will be a decree in the form laid down in O. 34, R. 4, Civil Procedure Code, for this amount against the estate of the deceased Ramoomal and the mortgage-property, the plaintiff being at liberty to apply to make the decree final after six months if the amount is not paid. Interest at 21 per cent. per annum up to the expiry of the six months and thereafter at 6 per cent. till payment. Costs on the estate of the deceased Ramoomal.

In a suit by the mortgagee, such as the present, the mortgagor is estopped from disputing his own title to the property, or from contending as the defendant here sought to do, that on the 27th April 1915 prior to the mortgage in suit the deceased mortgagor had already sold the property by a registered deed to one Rochiram Menghraj. A mention of this allegation should however be made in the sale proclamation, if any, that might issue in execution proceedings.

R.D. *Suit decreed.*

A. I. R. 1927 Sind 120

MADGAVKAR, A. J. C.

Ramsing Kundansingh & Sons—Plaintiffs.

v.

Sajan Damji—Defendant.

Suit No. 590 of 1919, Decided on 4th December 1922.

(a) Contract Act, S. 73—S. 73 applies also to contracts in respect of land—Foreign law modifying express terms of Indian Statute is not to be applied.

The Indian Contract Act in general, including S. 73, applies in terms, to all contracts, those in respect of lands not excepted. It is not therefore open to the Indian Courts even where the result might appear hard, to apply to the latter foreign rules of law or equity English or American, modifying the express terms of the Indian Statute: 37 *Bom.* 198 and 45 *Cal.* 878, *Ref. to.* [P. 122, C. 2]

(b) Vendor and purchaser—Contract executed—Possession given—Vendor guaranteeing title—On eviction purchaser is entitled to recover value of land at the date of eviction.

Where the contract has been executed and possession given, and the contracting purchaser evicted, the contracting [illegible]

recover from the vendor, who has guaranteed his title, the value of the land at the date of the eviction : 21 *Bom.* 175 ; 32 *Bom.* 165 ; 38 *Cal.* 458 ; 40 *Mad.* 338 and 1 *Lah.* 380, *Foll.*

[P. 122, C. 2 & P. 123, C. 1]

Issardas Oodharam—for Plaintiffs.

Kalumal Pahlumal—for Defendant.

Madgavkar, A. J. C.—Suit by the plaintiff for compensation. On the 6th August 1915, the defendant sold to the plaintiff 4840 sq. yds. out of Survey No. 281 Deh Thana (Malir) under a sale-deed with the usual covenants. The plaintiff alleges that in 1918 he was evicted by Government from 757 sq. yds. out of the area sold to him by the defendant. The plaintiff purchased from the defendant at Re. 1-8-0 per sq. yd. He now claims compensation in respect of the area (of which he alleges he has been dispossessed by the Government) at Rs. 16 per sq. yd. which he states to be the value on the date of his eviction by Government. He also claims eight hundred rupees as damages for the building erected by him, which he had to demolish.

The defendant admitted the conveyance and the covenants contained therein, but denied the right of Government to evict him or the fact of eviction as well as the right of the plaintiff to claim compensation from him (defendant) on various legal grounds. He denied breach of any covenants. A commissioner was appointed to survey the plot and make a report on the area if any, of which the plaintiff had been dispossessed of. His report has been confirmed after hearing objections. The conveyance itself stipulates that the plaintiff was to leave out two strips 15 feet wide towards the west and 10 feet wide towards the east along the entire breadth of the plot for roadways, that is a total area of 525½ sq. yds. According to the Commissioner, after making allowance for this lost area, the plaintiffs are in possession of 635 sq. yds. less than the area sold to them under the sale-deed.

As regards the area in the south shown in the Commissioner's plan, it is conceded for the defendant that Government resumed possession of that on the ground that it did not form part of the defendant's Survey No., but belonged to the Government, and in respect of this area, the defendant cannot legally dispute the plaintiff's right to compensation. In regard to the area exceeding 10 feet in width, far to the east, the parties are not agreed. According to the plaintiffs this additional area is on a par with the area on the south and he has been equally dispossessed of it. According to the defendant the plaintiff has not been actually dispossessed of the area leased, but has only been ordered to leave it open in accordance with the town planning scheme and rules thereunder, to which the lessees from Government and their successors in title such as both the parties concerned, were bound under the sanad. This area is 103 sq. yds. On this point the parties have not led any evidence and the question is whether the defendant should or should not be allowed to do so. On this question I reserve my opinion. The sole point on which the parties have addressed me is whether in respect of the area from which Government has evicted the plaintiff, and to what compensation if any, he is entitled.

The substantial question therefore is whether in respect of this area the compensation or the damages should be calculated at the rate prevailing at the time of the sale by the defendant or at the time of eviction of the plaintiff by the Government.

It is argued for the plaintiff that S. 73 of the Indian Contract Act applies to the present case and reliance is placed on his behalf on the case of *Nagardas* v. *Ahmedkhan* (1) ; *Jai Kishandas* v. *The Arya Priti Nidhi Sabha* (2). For the defendant it is argued that the suit is based on a breach of covenant for title not of quiet enjoyment. No actual possession was given by the defendant to the plaintiff. The contract was one and indivisible. The plaintiff has failed to exercise his rights if any of rescinding it and cannot claim damages but if at all and at the most, return of a proportionate amount of the price paid. In support of this contention reliance is placed on the English cases and American principles set forth in Sedgwick on Damages, 18th Edition, p. 407.

The relief and the cause of action are clear and it can hardly be said that the absence of express mention of quiet enjoyment has misled the defendant or the Court. The defendant has never denied making over possession to the plaintiff nor has he sought any issue on

(1) [1895] 21 Bom. 175.
(2) [1920] 1 Lah. 380=58 I. C. 757.

the question of possession or limitation. On the evidence before the Court, for the purposes of the present question, I would assume that both parties acted in good faith and that Government evicted the plaintiffs in 1918 under a title which had accrued before the conveyance.

In the gunny bags Suit No. 521 of 1918, I have already referred to the dangers and limitations of the application of foreign law to cases to which in the first instance the Indian Statutory Law applies. I may refer to the observations of their Lordships of the Privy Council in *Moolraj* v. *Vishwanath* (3) as follows:

> The decision of the Court below was erroneous. The error arose from the learned Judges not having appreciated that the positive language of the section [S. 130 of the Transfer of Property Act] precluded the application, in India, of the principles of English Law on which they based their decision.

Again in *Imambandi* v. *Mutsaaddi* (4) they observed:

> Their Lordships cannot help deprecating the practice, which seems to be growing in some of the Indian Courts, of referring largely to foreign decisions. However useful in the scientific study of comparative jurisprudence, judgments of foreign Courts to which Indian practitioners cannot be expected to have access, based often on considerations and conditions, totally different from those applicable or prevailing in India, are only likely to confuse the administration of justice.

The present suit is based on the eviction of the plaintiff from the lands sold to him by the defendant by an instrument of sale Ex. 9. There is no clause therein by which the vendor-defendant has contracted himself out of the covenants of good title in himself to which the plaintiff-purchaser is entitled under Cl. 2, of S. 55 of the Transfer of Property Act. On the contract, there are express covenants as follows:

> The vendor doth hereby covenant with the vendees that two pieces hereby assigned are at the date of these presents, free from all claims and burdens whatsoever, that he hath not done and committed or suffered and caused to be done and committed any sort of bad faith in respect thereto or any portion thereof charged or incumbered in any way and that he is the sole owner in possession thereof, and hath full right and lawful authority to so grant and assign the same that he shall at all times keep the said vendees harmless and indemnified against all claims, actions, suits and demands whatsoever made or preferred against the said property or any portion thereof by any one claiming or entitled to claim by under and in trust for him, or his predecessors in title.

The defendant has been selling an area which formed no part of his Survey number but which belonged to Government. He therefore clearly committed breach of the covenants both in respect of good title and quiet enjoyment. Prima facie therefore the plaintiff is entitled under the covenant for indemnity, to compensation.

There has therefore been breach of the contract through no fault of the plaintiff. The plaintiff has however suffered by such breach on the part of the defendant who failed to except the areas in question as he had excepted the strips of ten feet and fifteen feet respectively. The plaintiff is therefore clearly entitled under S. 73 of the Indian Contract Act to receive from the defendant compensation for the loss caused to him, which naturally arose in the usual course of things and was caused by the breach.

The Indian Contract Act in general, including S. 73, applies in terms, to all contracts those in respect of lands (such as the one in suit) not excepted. It is not therefore open to the Indian Courts, even where the result might appear hard to apply to the latter foreign rule of law or equity, English or American, modifying the express terms of the Indian statute, and usurping in effect the functions of the Legislature. There is undoubtedly a single case thirty years old of the application of these principles in *Pitamber Sunderji* v. *Kassibai* (5) by a single judge. But even that was a suit for specific performance of an unexecuted contract and damages in the alternative. No reference was made to the Contract Act or the Specific Relief Act. It appears to have been assumed that the case was governed by equity and the question was whether the case fell within the equitable principles laid down in the case of *Flureau* v. *Thornhill* (6) and *John Bain* v. *Richard Fothergill* (7) or whether *Engell* v. *Fitch* (8) applied.

Later decisions of the same High Court are however clear that where, as in the present suit, the contract has been executed and possession given, and the contracting purchaser evicted, the con-

(3) [1913] 37 Bom. 198=17 I. C. 627=40 I. A. 24 (P. C.).
(4) [1918] 45 Cal. 878=47 I. C. 513=45 I. A. 73 (P. C.).
(5) [1887] 11 Bom. 272.
(6) [1776] 2 W. Bl. 1078.
(7) [1874] 7 H. L. 158.
(8) [1869] 4 Q. B. 659=10 B. & S. 738=38 L. J., Q. B. 304=17 W. R. 894.

tracting purchaser is entitled to recover from the vendor, who has guaranteed his title, the value of the land at the date of the eviction. *Nagardas* v. *Ahmadkhan* (1) where the Divisional Bench observed as follows :

> The Legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities.

referring presumably to S. 73 of the Indian Contract Act though they further pointed out that in cases of dispossession, as opposed to cases of unexecuted contracts of land, the English rule would be the same as in India.

In the subsequent case of *Ranchod* v. *Manmohandas* (9), Macleod J., as he then was, declined (even in the case of an unexecuted contract by the vendor, through inability to make a good title) to assess damages on the rule in *Flureau* v. *Thornhill* (6) or to follow *Pitambar* v. *Kassibai* (5), but held that damages must be assessed under S. 73 of the Indian Contract Act. The same view was taken by the Calcutta High Court in *Nabinchandra Saha* v. *Krishna Barana Dasi* (10) by the Madras High Court by a Full Bench in *Adikeravan* v. *Gurunatha* (11) and recently by the Lahore High Court in *Jaikishandas* v. *The Arya Pritinidhi Sabha* (2).

I agree with these decisions and hold that the compensation due to the plaintiff must be assessed as laid down in S. 73 of the Contract Act, and not under English or American principles. It is not therefore necessary for me to refer in detail to the authorities relied upon for the defendant. Nor on the facts of the present case need I enter into the question of damages, in cases either when the contract has not been executed or possession has not been given or where there is no express covenant for quiet enjoyment. The essential distinction, however, is pointed out by Lord Ellenbrought, C. J., in *Howell* v. *Richards* (12) as follows :

> The covenant for title is an assurance to the purchaser that the grantor has the very estate in quality and quantity which he purports to convey. The covenant for quiet enjoyment is an assurance against the consequences of a defective title and of any disturbances thereupon.

(9) [1908] 32 Bom. 165=9 Bom. L. R. 1087.
(10) [1911] 38 Cal. 458=9 I. C. 525=15 C. W. N. 420.
(11) [1915] 40 Mad. 338=32 M.L.J. 180=(1917) M. W. N. 171=39 I. C. 358=5 L. W. 425.
(12) [1869] 11 East 633=11 R. R. 287.

The breach of the former occurs on the date of the contract and damages in England are recoverable on the basis of the value at the same date, that is in the agreement : *John Bain* v. *Richard Fothergill* (7). But in the case of a breach of a covenant for quiet enjoyment the date of breach is the date of the eviction and not of the contract, and damages are assessed on the ordinary rule of Common Law laid down by Parke, B., in *Robinson* v. *Harman* (13).

> Where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed. See also the judgments of Martin B., and Chanell, B., and in *Lock* v. *Furze* (14);

The result therefore even under the English principles is the same in this case as under S. 73 of the Indian Contract Act. The only doubt if any, if this case is decided under the English Law, might be whether the action of Government was or was not an eviction under a title paramount to that of the covenantor himself. See Halsbury's Laws of England, Vol. 25, para. 841 (b), and the recent case of *Mathey* v. *Curling* (1). For these reasons I hold that as the land from which the plaintiff has been dispossessed by Government did not fail in the survey number belonging to the defendant which he purported to convey, the plaintiff is entitled to compensation on the basis of the value of the land on the date of the eviction, and not on the value as assessed at the time of the sale to the plaintiff. The case to be set down for evidence on the other issues.

R.D. *Order accordingly.*

(13) [1848] 1 Ex. 855.
(14) [1866] 1 C. P. 441=1 H. & R. 397=35 L. J. C. P. 141=15 L. T. 161=14 W. R. 403.

* A. I. R. 1927 Sind 123

KINCAID, J. C., AND BARLEE, A. J. C.

Ghanshamdas Khatumal—Petitioner.

v.

Manager, Encumbered Estates—Opponent.

Criminal Misc. Application No. 217 of 1926, Decided on 27th September 1926.

(a) *Provincial Insolvency Act, S. 23—Person arrested under order of Manager, Encumbered Estates under S. 10 with S. 157, Bombay Land Revenue Act—Insolvency Court cannot grant him interim order of protection.*

Where a person is arrested under the orders of the Manager, Encumbered Estates, under

the provisions of S. 10 of the Sind Encumbered Estates Act read with S. 157 of the Bombay Land Revenue Code, the insolvency Court has no jurisdiction to grant him an interim order of protection as he is not under arrest in execution of a decree of any Court for payment of money. [P 124, C 2]

* (*b*) *Criminal P. C., S.* 491—*Special tribunal exercising powers under the Act creating it —High Court has no jurisdiction to issue writ of habeas corpus.*

Where a Special Tribuual, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then except so far as otherwise expressly provided or necessarily implied, that Tribunal's jurisdiction to determine those questions is exclusive, (31 *Bom.* 604, *Foll.*), and the High Court has no jurisdiction to issue a writ of habeas corpus in respect of such matter.

[P 125, C 1]

Partabrai D. Punwani — for Petitioner.

T. G. Elphinston—for Opponent.

Judgment.—The facts of this interesting application are not materially in dispute. A certain Ghanshamdas took a lease of some lands from the Manager, Encumbered Estates, in Sind. This land in question was known as Jagirs Kak and Dambula and Khairpur Juso. Ghanshamdas's rent fell into arrears. In addition to the rent owed by him to the Manager he also took a loan from him of Rs. 6,000 to start an oil engine. In April 1926, Ghanshamdas gave up the lease of Jagir Kak. The Manager re-sold the lease of this property with the result that Ghanshamdas's total debt reached Rs. 14,000. As Ghanshamdas also owed about a lac of rupees in Hyderabad, where he carried on his business, he filed an application for insolvency in the Court of the First Class Sub-Judge, Sukkur. Thereafter he obtained on the 7th of June 1926, an interim protection order from the learned First Class Sub-Judge. On the 23rd of June 1926, however, the Manager of Encumbered Estates issued a warrant of arrest under S. 10 of the Sind Encumbered Estates Act and had Ghanshamdas arrested and put in jail, where he remained until released by an interim order of this Court. Ghanshamdas on the 5th of July 1926, by his pleader, Mr. Naraindas applied to the District Court of Sukkur for his release under S. 5 of Act 5 of 1920 and S. 151 of the Criminal P. C. The learned District Judge was at this time doing the insolvency work of the First Class Sub-Judge who was away on vacation. The learned District Judge came to the conclusion that he had no power to revise the order of the Manager, Encumbered Estates, and he directed the applicant to move the proper authorities.

Thereafter Ghanshamdas lodged an appeal against the Manager's order to the Commissioner in Sind. This appeal was rejected. Ghanshamdas has now approached this Court and has moved it under S. 491 of the Criminal P. C., to issue a writ of habeas corpus for his appearance whenever called upon.

Section 491 empowers any High Court, whenever it thinks fit, to direct that a person illegally or improperly detained in public or private custody within such limits be set at liberty. We have, therefore, to see whether Ghanshamdas is now illegally or improperly detained in the Civil jail under the order of the Manager of the Encumbered Estates.

To ascertain this, we must turn first of all to S. 10 of the Sind Encumbered Estates Act (20 of 1896) of the Bombay Code. The section runs as follows :

> The Manager shall, during the management of the property, have all powers which the owner thereof might, as such, have legally exercised, and shall receive and recover all rents, profits and other sums due in respect of the property under management, and for the purpose of recovering such rents, profits and other sums shall have, in addition to any powers possessed by a jagirdar or zemindar, as the case may be, all the powers possessed by a Collector under the law for the time being in force for the recovery of land revenue due to Government, including the power conferred by S. 176 of the Bombay Land Revenue Code, 1879.

Now if we turn to S. 157 of the Land Revenue Code, we find that amongst the powers possessed by the Collector are the arrest and detention of the defaulter. The section runs as follows :

> At any time after an arrear becomes due, the defaulter may be arrested and detained in custody for ten days in the office of the Collector or of a Mamlatdar or Mahalkari, unless the revenue due, together with the penalty or interest and the costs of arrest and of notice of demand, if any, have issued, and the cost of his subsistence during detention is sooner paid.
>
> If, on the expiry of ten days, the amount due by the defaulter is not paid, then if the Collector deems fit or on any earlier day, he may be sent by the Collector with a warrant, in the form of Schedule C, for imprisonment in the civil jail of the district.

It is thus clear that the powers exercised by the Manager of the Encum-

bered Estates were vested in him by law. We must assume that he has exercised them with a just discretion because the appeal against his order was rejected by the Commissioner in Sind, the Court of appeal appointed by the Legislature against the Manager's orders. Nor does it lie in our power to question the acts of a Special Tribunal acting within its jurisdiction as was laid down in the leading case of *Bhaishanker* v. *Municipal Corporation of Bombay* (1). The learned Chief Justice of Bombay, Sir Lawrence Jenkins, therein observed :

> Where a Special Tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then except so far as otherwise expressly provided or necessarily implied, that Tribunal's jurisdiction to determine those questions is exclusive.

Mr. Partabrai who has argued the case on behalf of Ghanshamdas with great ability, has contended that in view of the interim order passed by the learned First Class Sub-Judge of Sukkur, the jurisdiction of the Manager was ousted. The learned pleader specially relied upon S. 4, Cl. (2) of the Provincial Insolvency Act (5 of 1920). It runs as follows :

> Subject to the provisions of this Act and notwithstanding anything contained in any other law for the time being in force, every such decision shall be final and binding for all purposes as between, on the one hand, the debtor and the debtor's estate and, on the other hand, all claimants against him or it and all persons claiming through or under them or any of them.

The learned pleader has contended that the First Class Sub-Judge of Sukkur's interim order was binding as much against the Manager of the Encumbered Estates as against the humblest creditor of the estate. Before we can decide this point, we must see under what section of the insolvency Act, the learned Sub-Judge's decision was passed. S. 4, Cl. (2) specially lays down that the decision of the Insolvency Court shall be final and binding subject to the provisions of this Act to pass any interim protection order, it is clear that the decision would be neither final nor binding against the Manager of the Encumbered Estates nor against anyone else.

Under S. 31 of the Provincial Insolvency Act there is no doubt that a Court can pass a general protection order. But S. 31 is limited to insolvents in respect of whom an order of adjudication has been made. In this particular case, it is common ground that no order of adjudication has been made against Ghanshamdas. He has merely applied to be adjudicated an insolvent. We must, therefore, leave S. 31 and turn to S. 23. That section runs as follows :

> At the time of making an order admitting the petition or at any subsequent time before adjudication, the Court may, if the debtor is under arrest or imprisonment in execution of the decree of any Court for the payment of money, order his release on such terms as to security as may be reasonable and necessary.

Now it is clear that the condition precedent to an order under S. 23 is that the debtor must be under arrest or detention in excution of the decree of any Court for payment of money. Here, however, the arrest is not by an order of any Court in execution of a decree, but by the order of the Manager, Encumbered Estates in Sind acting under the special provisions of the Sind Encumbered Estates Act. Again, it must be borne in mind that this section does not authorize a Court to pass a general interim order, but merely to release a debtor who is already under arrest in execution of a decree. I am fortified in this interpretation of the section by the decision of a Bench of this Court in Miscellaneous Appeal No. 10 of 1923, *Sanijram Rewasing* v. *Emperor*. The learned Judges of that Bench observed :

> The insolvent applied for his insolvency and at the same time he applied for a protection order. The protection order was refused by the learnad Judicial Commissioner at the same time and on the same day, as the insolvent was adjudicated. Clearly, therefore, the application for a protection order was made before the adjudication. Under these circumstances, the appeal can be disposed of very simply. The only section which applies to such an application is S. 23. Turning to S. 23 of the Provincial Insolvency Act, it appears that there are two conditions precedent to the grant of the protection order under that section. Firstly, the debtor must be under arrest or imprisonment and secondly, the arrest or imprisonment must be in execution of the decree of a Court for the payment of money.

The learned pleader has next argued that be the order of the learned Sub-Judge right or wrong, yet since the learned Judge had jurisdiction both to pass a wrong order as well as a right order it must be deemed to be valid and binding against all parties until set aside. The course open to the Manager,

(1) [1907] 31 Bom. 604=9 Bom. L. R. 417.

according to the learned pleader, was not to disobey the order of the insolvency Court, but to have it set aside on appeal. The fallacy, as it seems to us, underlying the learned pleader's argument is his assumption that the Sub-Judge had jurisdiction. Had the lower Court jurisdiction to pass the order attacked, it would have been binding until set aside. But our examination of S. 23 shows that he had no jurisdiction to pass that order. And if he had no jurisdiction to pass the order he had no jurisdiction to pass either a right or a wrong order.

The learned pleader has further relied on S. 55 of the Civil P. C. S. 55 of the Civil P. C. only refers to judgment-debtors arrested in execution of a decree. It has, therefore, no application to the matter before us. Nor does S. 151 take it any further. We are not satisfied that the order that we are asked to pass is either necessary for the ends of justice or to prevent the abuse of the process of the Court.

After examining all the pleas advanced by the learned pleader for the applicant, we do not think that he has made out any case for an order under S. 491 of the Criminal P. C.

We, therefore, dismiss this application.

We cancel the interim order of release passed in the applicant's favour on the 27th of August and we direct him to present himself within a week before the Manager of the Encumbered Estates. Intimation of this has been given to his pleader, Mr. Partabrai.

G.P. *Application dismissed.*

A. I. R. 1927 Sind 126

LOBO, A. J. C.

MacDonald & Co. — Respondents No. 1—Applicants.

v.

Naraindas Pokerdas — Respondents No. 2—Opposite Party.

Judicial Misc. Application No. 139 of 1926, Decided on 3rd November 1926.

(a) *Arbitration—Submission clause in contract allowing so many days for appointing arbitrator—So many clear days commencing from midnight to midnight are to be allowed.*

When a period of time allowed in a submission clause for the nomination of an arbitrator is as so many days it is to be construed as so many clear days commencing from midnight to midnight : 3 *S. L. R.* 237 and 7 *S. L. R.* 1, *Foll.* [P 127 C, 2]

(b) *Arbitration — Submission clause — Submission to 2 arbitrators by one party alone instead of each party nominating his own arbitrator according to submission clause in contract —Reference is complete when arbitrators are nominated — Drawing up of reference and acceptance by arbitrators may be subsequent.*

A submission clause in a contract followed by the nomination of an arbitrator by the parties, whether each of the parties to a contract nominates his own arbitrator or whether one party nominates both arbitrators on failure by the other party to nominate his arbitrator having been called upon to do so renders the reference complete when the arbitrators have been nominated in terms of the submission clause, and the appointment of an arbitrator is complete even when a reference is drawn up and has been accepted by the arbitrator subsequently : 8 *S. L. R.* 302, *Dist* ; *A. I. R.* 1924 *Sind* 91, *Expl.* [P 128 C 2]

Dipchand Chandumal — for Applicants.

Srikishendas H. Lulla — for Opposite Party.

Order. — This is an application to take off the file an award obtained by the Respondents No.I Messrs. MacDonald and Co, against Respondents No. II Messrs. Naraindas Pokerdas, for a sum of Rs. 6,300 odd. Though the application contains a number of paragraphs there is one real ground upon which the Respondents No. 2 seek to have the award taken off the file and that is that the appointment of an arbitrator by Respondents No. 1 on behalf of Respondents No. 2 was by reason of the terms of the submission clause contained in the contracts between the parties, illegal and improper ; that the arbitrators appointed by Respondents No. I had no jurisdiction and that their award is, therefore, a nullity.

There were several contracts between the parties for the sale and purchase of piecegoods. Each of these contracts contained a submission clause in identical terms. The relevant portion of the clause runs as follows :

In the event of the purchaser failing to nominate an arbitrator within 7 days after he shall have been requested to do so by Messrs. MacDonald and Co., the dispute shall be referred to two arbitrators nominated by Messrs. MacDonald and Co., and the decision of such arbitrators or their umpire shall be final and binding upon both parties.

There has been no dispute with regard to the facts. It is admitted that the

Respondents No. 1 on January 20, 1926, called upon Respondents No. II to pay them the amount of Rs. 6,300 odd and stated that if they received no reply they had decided to hold an arbitration and appointed Mr. W. D. Young as their arbitrator. In the same letter they called upon Respondents No. 2 to nominate their arbitrator within 7 days failing which they stated they would appoint an arbitrator on behalf of Respondents No '2 and proceed with the arbitration as provided in the contract. It is also admitted that this letter was received by Respondents No. 2 on the same day, viz., the 20th January 1926. It is further admitted that the Respondents No. 2 failed to appoint an arbitrator and that on 27th January 1926 the Respondents No. 1 wrote to the Respondents No. 2 a letter in the following terms which was received by the Respondents No. 2 on the same day :

> With refereence to our letter of 20th instant calling upon you to nominate your arbitrator within seven days we have received no reply. We hereby nominate Mr. A. P. Darlow of Messrs. Gill and Co. to act as an arbitrator on your behalf of which please take note.

It is lastly admitted that owing to Respondents No 2 failing to nominate an arbitrator the Respondent No. 1 on 29th January 1926, drew up and executed a formal reference in favour of Messrs, W. D. Young and A. P. Darlow which was accepted by the arbitrators on the same date, 29th January 1926.

It is argued for the Respondents No. 2 that under the submission clause contained in the contracts between the parties they had 7 days that is to say, 7 clear days, to nominate their arbitrator. Those 7 clear days from 20th January would expire with midnight on 27th January 1926, that the Respondents No. 1 having nominated an arbitrator on behalf of Respondents No. II on 27th January had done so before the expiry of the 7 days allowed to the Respondents No. 2 by the submission clause and that such an appointment was illegal and improper. As to how a period of time allowed in a submission clause for the nomination of an arbitrator is to be construed there are authorities of this Court, the correctness of which has never been challenged. In *Louis Dreufus & Co.* v. *Mehrchand Fatehchand* (1), Crouch, A. J. C., held that 6 days referred to in a submission clause contained in the indent meant 6 clear days commencing from midnight to midnight. The same proposition was laid down by Crouch, A. J. C., in the case of *Sawyer* v. *Louis Dreyfus & Co.* (2), the period in this case being 7 days.

It would appear, therefore, prima facie that the argument for the Respondents No. 2 is sound and well supported by authority.

For the Respondents No 1, however, two points have been taken by the learned pleader who appeared for them. The first turns upon the construction of the submission clause to which I have referred above. The argument is that the clause in question is not the ordinary clause requiring the appointment of an arbitrator within a certain number of days and authorizing the other party to nominate an arbitrator if the party called upon fails to nominate one but that the clause is a peculiar one in so far that on failure by the party called upon to nominate an arbitrator to so nominate an arbitrator the dispute is to be referred to the arbitration of two arbitrators nominated by the party first above referred to. It appears to me the argument though ingenious is unsound. It attempts to create a difference where there is really no distinction. Further, the acceptance of such an argument would nullify the first part of the submission clause which gives a valuable right to the Respondents No. 2 to appoint an arbitrator on their own behalf within 7 clear days. That the Respondents No. 1 themselves construed the submission clause in the manner contended for by the Respondents No. 2 is clear from their letter dated 20th January in which they state as follows :

> We hereby call upon you to name your arbitrator within 7 days from the receipt hereof failing which we shall appoint on your behalf and proceed with the arbitration as provided in the contract.

For those reasons, I do not think there is any substance is this argument on behalf of the Respondents No. 1.

The second point taken on their behalf was that the appointment of an arbitrator is not complete till a reference is drawn up and has been accepted by the arbitrator. In support of this proposition the learned pleader for Respondents No. 1 relied on the case of *Shamdas* v.

(1) [1910] 3 S. L. R. 237=6 I. C. 886.
(2) [1913] 7 S. L. R. 1=20 I. C. 501.

Khimanmal (3). This case is, however, entirely distinguishable. It was not a case of an arbitration in terms of a submission clause contained in an indent or contract between two parties but related to disputes which had arisen between two partners in a business concern and a reference to arbitration drawn up and executed by the partners. Reliance was also placed on the case of *James Finlay & Co.* v. *Gurdayal Pahlajrai* (4), a judgment of Raymond, A. J. C. The headnote in this report reads as follows :

> The appointment of a person as arbitrator is not complete till such person has accepted the reference and consented to act and till such acceptance there is nothing more than an agreement to refer to him."

Now if this proposition of law is correct then the reference in this case having been drawn up on 29th January and having been accepted on that date by the arbitrators it might well be argued that the appointment of an arbitrator by the Respondents No. 1 on behalf of Respondents No. 2 did not take place till 29th of January and that it was more than 7 days after the Respondents No. 2 had been called upon to nominate their arbitrator. A closer reading, however, of the judgment of Raymond, A. J. C., in the case to which I have referred above makes it positively clear that the headnote which I have quoted above is not only misleading but wrong. At page 98 of 17 *S. L. R.* of the report Raymond, A. J. C. after discussing the facts, the relevant sections of the Indian Arbitration Act and making reference to the passages in Russell on Arbitration thus sums up the situation :

> Now in the present case the indent contained a distinct agreement between the parties to refer disputes of whatever nature arising out of the contract to the arbitration of two merchants whose decision is agreed to be accepted as final and binding. This is a submission in terms of the Arbitration Act and in pursuance of it, either party appointed his arbitrator. In my opinion the reference to arbitration is complete and it was unnecessary to follow it up with a formal reference to the arbitrators named.

The learned Judge has clearly held that a submission clause in a contract followed by the nomination of an arbitrator by the parties, to the contract makes a complete reference to the arbitration. To my mind it makes no difference whether each of the parties to a contract nominates his own arbitrator or whether one party nominates both arbitrators on failure by the other party to nominate his arbitrator after having been called upon to do so. In either case the reference is complete when the arbitrators have been nominated in terms of the submission clause. In the present case, therefore, the argument on behalf of Respondents No. 2 that the arbitrator has not been appointed in terms of the submission clause is to my opinion sound. It follows that the arbitrators acted without jurisdiction and that the award which has been filed by them is a nullity.

The Respondents No. 2 are, in my opinion, entitled to succeed in the application and I order accordingly that the award filed by the arbitrators be set aside. The Respondents No. 1 will bear the costs of the application.

R.D. *Award set aside.*

(3) [1915] 8 S. L. R. 302=29 I. C. 602.
(4) A. I. R. 1924 Sind 91=17 S. L. R. 93.

A. I. R. 1927 Sind 128

KINCAID, J. C., AND BARLEE, A. J. C.

Emperor—Prosecutor.

v.

Kundan and *another*—Accused—Opponents.

Criminal Revision Application No. 151 of 1926, Decided on 23rd September 1926.

(a) *Criminal P. C., S. 539 A and S. 439—False statements in affidavits—Penal Code, S. 193.*

A person renders himself liable to prosecution for false statements made in an affidavit in support of an application under S.439 as required by S. 539 A. 20 *Cal.* 724 and 5 *S. L. R.* 102, *Dist.*

(b) *Criminal P. C., S. 539—Affidavit before a Bench Magistrate is valid—Sind Judical Commissioner's Court Rules.*

An affidavit sworn before a Bench Magistrate in Sind is one sworn before a proper person under S. 539 according to the rules of the Sind Judical Commissioner's Court.

T. G. Elphinston—for the Crown.
Partabrai D. Punwani—for Opponents.

Judgment.—The facts underlying the present application have been given in some detail in the previous judgment of this Court in Criminal Revision Application No. 57 of 1926. That application was made by two persons Mahomed Amin and Taj Mahomed to this Court to have certain proceedings against them quashed

on the ground that the learned Sub-Divisional Magistrate of Rohri, Mr. Vyas, had been influenced by tales told him by Mt. Wadhi, a woman said then to be nurse-maid in the learned Sub-Divisional Magistrate's establishment. A Bench of the High Court rejected the application on the ground that the Sub-Divisional Magistrate against whom bias was attributed was not trying the applicants. The trial was to be held by the learned First Class Magistrate and this Court directed the trial to proceed. Subsequent to that order the Public Prosecutor for Sind, under instructions from the District Magistrate of Sukkur, moved this Court, under S. 476 of the Criminal P.C., to order the prosecution of Kundan, son of Ranjho and Loung, son of Ramzan, for perjury. The learned Public Prosecutor indicated that perjury was committed in respect of false affidavits filed by these two persons to support the application of Mahomed Amin and Taj Mahomed already referred to. The following statements were specially pointed out as false:

(1) Mt. Wadhi, wife of Wadero Mohomet Hayat, works at the residence of Mr. Vyas, Assistant Collector of Rohri.

(2) Mt. Wadhi, wife of Wadero Mahomed Hayat, takes out his (Mr. Vyas) child for a walk.

(3) The said Mt. Wadhi visits the bungalow of Mr. Vyas at Rohri very freely.

In support of the learned Public Prosecutor's application Mr. Vyas made an affidavit denying absolutely the statements quoted above. According to him Mt. Wadhi has never worked in his house in any capacity; she has never taken his child for a walk, nor has acted as his child's nurse-maid; she has never visited his bungalow at all, although she had presented petitions in his office.

Mr. Partabrai has appeared for the applicants and taken several objections to the order asked for.

He first relied on the cases reported as *Abdul Majid* v. *Krishna Lal Nag* (1) and *Emperor* v. *Dital Safar* (2). So far as I understand his argument, it was this. In a case like the application made by Taj Mahomed no affidavit was required and S. 539 of the Criminal P. C., nowhere lays down that the application under S. 439 should be accompanied by affidavits. S. 539 A in the new Criminal P.C. runs as follows:

> When an application is made to any Court in the course of any enquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servant, the applicant may give evidence of the facts alleged in the application by affidavit, and the Court may, if it thinks fit, order that evidence relating to such facts be so given.

The present case is, therefore, to be distinguished from *Abdul Majid* v. *Krishna Lal Nag* (1). The facts there were that the District Judge had appointed a common manager under S. 95 of the Bengal Tenancy Act. The manager reported that a certain person would not furnish him with accounts and papers as ordered by the District Judge and the District Judge instituted a Miscellaneous proceeding in respect of the order. In that proceeding the aforesaid person filed two affidavits and made a certain statement alleging that he had not the accounts and papers called for. The District Judge believing the statement and the allegations made in the affidavits to be false sanctioned the prosecution of the said person under S. 193 and S. 199. The learned Judges of the Calcutta High Court found that the Bengal Tenancy Act contained no provisions authorizing the District Judge to make any such enquiry and to order any individual to deliver up any such papers and above all no provision authorizing the District Judge to examine the applicant on oath in such proceedings. They, therefore, not unnaturally held that the applicant could not be said to be legally bound by oath when examined by the District Judge.

In the other case quoted by the learned pleader, *Emperor* v. *Dital Safar* (2), the learned Judicial Commissioner refused the sanction granted by the Sub-Divissional Magistrate for the prosecution of three persons who had sworn affidavits before a Subordinate Magistrate. The chief ground taken by the learned Judicial Commissioner was that the Crminal P.C., except in special circumstances of S. 74 made no provision for any matter being proved before a Magistrate by affidavits. S. 539, the learned Judge went on to say, only referred to affidavits to be used before the High Court; as the affidavits were here used before the High Court,

(1) [1893] 20 Cal. 721.
(2) [1911] 5 S. L. R. 102=12 I. C. 651=12 Cr. L. J. 563.

it is clear that the judgment of Mr. Pratt, J. C., has no application.

In addition to S. 539A the rule of our own Court at page 148 of the Constitution of the civil and criminal Courts in Sind and Rules of the Court of the Judicial Commissioner of Sind runs as follows: —

> Any statements of facts contained therein and not appearing in such decisions shall be verified by affidavit, unless the Court in any particular case shall see fit to dispense with the affidavit.

In the course of arguments a difficulty arose whether the affidavits complained of had been sworn and affirmed before the Court empowered to do so. S. 539 of the Criminal P. C requires that the affidavits and affirmations to be used before any High Court or any officer of such Court should be sworn or affirmed before such Court or the Clerk of the Crown, or any Commissioner for taking affidavits in any Court of Record in British India, or any Commissioner to administer oaths in England or Ireland or any Magistrate authorized to take affidavits or affirmations in Scotland. The affidavits here have been sworn before a Bench Magistrate of Sukkur. The question arose whether the Bench Magistrate of Sukkur came within any of the classes of the persons mentioned in S. 539. An affidavit could not be sworn or affirmed before him unless he was also a person appointed by the High Court for that purpose. In Ch. V, R. 5 at page 51 of the Sind Courts Criminal Circulars, we find that this High Court has laid down that affidavits may be sworn or affirmed before any Magistrate. The rule was made under S. 539 of the Criminal P.C., and was, therefore, perfectly in order. The difficulty therefore, which seemed at one time formidable as to the validity of the affidavits objected to does not exist.

The learned pleader then argued that the affidavits really made an allegation against Mr. Vyas : but this is not correct. They insinuated that the learned Magistrate was inclined to listen to tales told him by Wadhi and that Wadhi was in a position that enabled her to tell such tales. She was, so the deponents swore, a nurse-maid in Mr. Vyas's house. Such an allegation was calculated to lower the credit of Mr. Vyas both as a public servant and as a Magistrate.

We do not, however, wish to prejudice the case by any further remarks. We shall pass an order to prosecute Kundan' son of Ranjho Sheikh, and Loung, son of Ramzan Sheikh, for perjury in respect of a statement alluded in the learned in Public Prosecutor's application. That prosecution will be ordered to proceed the Court of the City Magistrate of Sukkur.

We shall hereafter file a complaint. We direct that the complaint may be now drafted by the learned Public Prosecutor.

R.D. *Order accordingly.*

** A. I. R. 1927 Sind 130

Full Bench

KINCAID, J. C., AND RUPCHAND BILARAM, TYABJI, LOBO AND BARLEE, A. J. Cs.

Firm of Gokaldas Khataoo—Applicants.

v.

Lachmandas—Opponent.

Civil Revision Application No. 98 of 1924, Decided on 8th October 1926, from the judgment of Rupchand Bilaram, A. J. C., reported in *A. I. R.* 1925 *Sind* 298.

**(a) *Civil P. C., O.* 21, *R.* 50—*Decree against firm — Representatives of a partner dying before institution of suit can be proceeded against in execution of such decree. (By Full Bench, Rupchand Bilaram and Lobo, A. J. Cs. dissenting.).*

Where a decree is obtained against the firm in a suit brought against the firm, the legal representatives of a person who was a partner in such firm at the time when the cause of action arose but who died before the institution of the suit, can be proceeded against in execution of such decree under O. 21, R. 50 (2); *Case law discaussd.* [P 131 C 1]

(b) *Practice—Precedents—Partnership suits.*

Per Kincaid, J. C.; Lobo, A. J. C., Contra.—It is per not always profitable, especially in partnership suits, to take English cases for guidance in India. [P 131 C 2]

Tahilram Maniram—for Applicants.

Kimatrai Bhojraj—for Opponent.

Order of Reference.

Kincaid, J. C.—The facts of this interesting appeal are as follows:

The firm of Visumal-Wadhumal was started by Visumal some years ago. He was then manager of a joint family numbering two persons, himself and his brother Goumal, six or seven years old. Unfortunately at the time of the boom Visumal entered into forward contracts

in bajri for the Magh 1974 Vaida. They were disastrous to the firm, and in October 1918 Visumal died leaving a minor son Lachmandas. After Visumal's death the creditors of the firm filed a number of suits against it, which Goumal, the surviving brother, defended pleading that the contracts had been wagering contracts. His pleas were overruled and the creditors were granted decrees by Raymond, A. J. C.

On the 14th November 1920, Goumal and Lachmandas, represented by his mother Tejibai separated, and such disputes as arose were referred by them to arbitration. On the 12th January 1921, the arbitration passed an award dividing the property. By this award the joint family business with its debts was allotted to Goumal. A quantity of cash, however, was allotted to the minor and deposited in certain banks in the names of three persons as managers for Lachmandas. Goumal objected to the award and it was set aside by Aston, A. J. C., but against the learned Judge's order a revision application has been filed by the minor's guardian. In the meantime, however, the judgment-creditors, the firm of Gokaldas Khatao, learnt of the deposit of the minor's cash and obtained an attachment order in respect of a sum of Rs. 21,118 in the Central Bank of India and another sum of Rs. 26,630 in the Mercantile Bank of India. These sums had been deposited in the names of Jethanand, Pribhdas and Ghanshamdas. Jethanand applied to the Court of the Judicial Commissioner under O. 21, R. 58, Civil P. C., to raise the attachment. He contended that the money in the two banks did not belong to the firm of Visumal-Wadhumal but was the private property of the minor Lachman-Das. The judgment-creditors retaliated by applying that they should be given leave under O. 21, R. 50, Civil P. C., to execute the decree against Lachmandas as the legal representative of Visumal, a partner of the firm. After exhaustively examining the law on the subject, Rupchand, A. J. C., on the 30th June 1924, held that as Lachmandas had not been joined in the suit as Visumal's legal representative, the decree could not be executed against Lachmandas' estate. He raised the order of attachment and dismissed the execution application with costs and also dismissed the application under O. 21, R. 50, Civil P. C., but made no separate order as to costs.

Against this order the firm of Gokaldas Khatao, the judgmeat-creditors, have filed the present appeal.

Mr. Tahilram argued the case for the appellants. Mr. Kimatrai appeared for the respondents.

The appeal is one in which the learned pleaders have displayed great industry and much forensic ability and the question involved is one of considerable difficulty. The learned Judge of the lower Court differed from the case of *Jivraj Laloobhai Patel* v. *Bhagwandas Gordhandas* (1) and preferred to follow the ruling of Romer, L. J., in *Ellis* v. *Wadeson* (2). The learned Lord Justice therein held that where a partner died before action brought or between service of writ and judgment, judgment could only be obtained against the surviving partners, and be enforced against them and the partnership assets, unless the legal personal representatives of the deceased partner were added as parties. Where all the partners died after service but before judgment, judgment could not be entered at all. Mr. Tahilram was at great pains to show why the law in England should be different from that in India; but for my part I think that it is not always profitable, especially in partnership suits, to take English cases for our guidance. The conditions of English business are so different from those of Indian business. The amazing ingenuity with which the firm property suddenly becomes separate property; the skill with which joint members disappear from the co-parcenary taking the family property with them; the thousand and one devices by which the Indian judgment-debtor renders the decree against him void are unknown in England.

There, a partner's property is always his own separate property. There are no joint family members; there is no such thing as a joint family business. If a partner dies there is no difficulty in locating his property or in ascertaining who his legal representatives are. Such a case as the present, for instance, could not arise there. In fact, although I am not concerned with this aspect of

(1) A. I. R. 1923 Bom. 66.
(2) [1899] 1 Q. B. 714=68 L. J. Q. B. 604=80 L. T. 508=15 T. L. R. 274=47 W. R. 420.

the case, it seems likely that the elaborate partition, arbitration proceedings and revision application that have been transacted and made are all intended to safeguard the property of Visumal and Goumal and that their alleged disputes are mock disputes. In these circumstances, therefore, it is idle, as it seems to me, to talk of the equities of the case as in favour of the minor. We must turn aside from the equities of the case and the pronouncements of English Judges and turn to the law as it is in India and as it has been interpreted by high judicial authority.

Order 30, R. 4 (1) runs as follows:

> Notwitstanding anything contained in S. 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

The learned pleader for the appellant has interpreted this clause to mean that the suit shall not be bad because the legal representative of the deceased has not been joined, but the decree cannot be executed against him. I think, however, that had the Legislature meant so to restrict the meaning of this clause, it would have expressed itself in less ambiguous terms. As I read the section it means that not only will the suit not be bad for nonjoinder of the legal representative of the deceased, but that it will be possible to execute the decree against the said legal representative, even although he has not been joined.

The learned Judge of the lower Court held that O. 21, R. 50, Cl. (2), was limited in its operation to a partner living at the date of the decree. But there is nothing in the wording of that clause that, with all deference to the learned Judge, bears out, as it seems to me, his interpretation. O. 21, R. 50, Cl. (2), runs as follows:

> Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub R. (1), Cls. (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

I am fortified in my interpretation of this clause by the weighty words of Sir Lallubhai Shah, Acting C. J., in the case of *Jivraj Laloobhai Patel* v. *Bhagwandas Gordhandas* (1):

> It seems to me that the wording of the rule is wide enough to cover the case of a deceased partner, and leave could be given as against the legal representatives of a deceased partner.

The learned pleader for the respondent has brought to our notice the case of *Rampratab Brijmohandas* v. *Gaurishankar Kashiram* (3) where Mulla, J., took a somewhat contrary view. But the matter was not before the learned Judge and the remarks that he let fall were obiter dicta uttered evidently without a consideration of the case of *Jivraj Laloobhai Patel* v. *Bhagwandas Gordhandas* (1).

For these reasons I would allow the appeal with costs and allow the execution application against the money in the Central Bank and the Mercantile Bank of India.

Lobo, A. J. C.—This is a miscellaneous appeal wrongly styled an application in revision. As I have the misfortune in this matter to disagree with the learned Judical Commissioner it has become necessary for me to deliver a separate judgment. (After reiterating facts the judgment proceeded.) By an order dated 30th June 1924 Rupchand, A. J. C., raised the attachments on the moneys in the Central and Mercantile Banks, and also dismissed the application under O. 21, R. 50, Civil Procedure Code. The lower Court held that Visumal having died before the institution of the suit against the firm of Visumal-Wadhumal, the decree wherein was being sought to be executed, leave to execute the decree against Lachmandas as the legal representative of the deceased Visumal could not be granted and that the application under O. 21, R. 50, Civil Procedure Code, was incompetent. Whether or not the lower Court was right in its decision is the point before us in appeal.

Order 21, R. 50, Civil Procedure Code, relates to the execution of a decree passed against a firm. To ascertain against whom such a decree can legally be executed it is necessary to be clear in the first place as to the position in law of a firm, and secondly, as to the nature of the proceedings in the form of a suit

(3) A. I. R. 1924 Bom. 109.

instituted by or against a firm and the effect of a decree obtained in such proceedings.

"There is no such thing as a firm known to the law," was stated by L. J. James in the case of *Ex parte Corbett*; *In re Shand* (4). The subject is briefly but very clearly dealt with by the well-known commentator on the Civil Procedure Code, Mulla, J., in the case of *Rampratab Brijmohundas* v. *Gurishankar Kashiram* (3) and I can do no better than quote what he there says:

> The law of England as well as of British India knows nothing of a firm as a body or artificial person distinct from the members composing it. In this respect a firm differs from a company incorporated under the Companies Act, such a Company being a corporate entity separate from its share holders, though the latter can control its action by passing resolutions in general meetings. The word 'firm' is a short, collective name for the individuals who constitute the partners.

In the case of *Seodoyal Khemka* v. *Joharmull Manmull* (5) Mr. Justice Page defines a partnership firm as not being a person, but merely a collective name of the individuals who are members of the partnership.

This, therefore, is the position of a firm in law.

The procedure relating to suits by or against firms is regulated by the provisions of O. 30 of the Civil Procedure Code. O. 30 has been modelled entirely on O. 48 A of the Rules of the Supreme Court, 1883. In the course of argument attention has been drawn to R. 4 of O. 30 and it has been argued that as no similar provision exists under O. 48 A of the Rule of the Supreme Court, 1883, reference to English cases relating to proceedings against a firm and the effect of a decree obtained in such proceedings is out of place. The argument is, however, unsound as it ignores the fact that the introduction of R. 4 in O. 30 of the Civil Procedure Code was necessitated by S. 45 of the Indian Contract Act which embodies a principle of law different to that prevailing in England. Whereas in England a surviving partner may sue alone, under S. 45 of the Indian Contract Act one of joint promisees cannot sue without joining the representative of a deceased promisee. There was a conflict between the various High Courts in India as to whether the English Law or S. 45 of of the Indian Contract Act was applicable in this respect to a trading partnership and O. 30, R. 4, Civil Procedure Code, was introduced to adopt the view of the majority of the High Courts declaring that the legal representatives of a deceased partner are not necessary parties to a suit brought in the name of the firm: vide *Mool Chand* v. *Mool Chand* (6). In my opinion, therefore, on the question of the nature of the proceedings in the form of a suit instituted against a firm, and the effect of a decree obtained in such proceedings, rulings under English Law would be a safe guide.

Now what must be regarded as the leading case on this subject is the decision of the Court of appeal in the case of *Ellis* v. *Wadeson* (2). The judgment of the Court of appeal was delivered by Romer, L. J., who says:

> Suppose a partner dies before action brought and an action is brought against the firm in the firm's name, the dead man is not a party to the action so far as his private estate is concerned, for a dead man cannot be sued, though the legal personal representatives of a deadman can be sued in a proper case. In that case the action would be an action solely against the surviving partners . . . . . If the legal personal representatives of a deceased partner are not added expressly as defendants, and the action is brought against the firm in the firm's name, then judgment can only be obtained as against the surviving partners and be enforced against them and against the partnership assets . . . . Now, what happens if a partner dies between a service of writ and the trial of the action and judgment? In that case equally the dead man's estate is not bound. Judgment can only be obtained against the surviving partners and enforced against them and against the partnership assets.

Bearing in mind that whether under O. 30 of the Civil Procedure Code or under O. 48 A of the Rules of the Supreme Court, a suit against a firm is essentially a suit against the individuals constituting that firm, and bearing in mind further that a suit cannot be instituted or a decree ordinarily obtained against a dead man, vide *Topanram Nathuram* v. *Tekchand* (7) and *Anwar-ul-Haq* v. *Nazar Abbas* (8), the argument of Romer, L. J., and the conclusion drawn by him and quoted above are to my mind both logical and irresistible.

In the case I have previously referred to in *Rampratab Brijmohandas* v. *Gauri*

(4) [1880] 14 Ch. D. 124=28 W. R. 369=42 L. T. 164=49 L. J. K. B. 74.
(5) A. I. R. 1924 Cal. 74=50 Cal. 519.
(6) A. I. R. 1923 Lah. 197=4 Lah. 142.
(7) [1912] 5 S. L. R. 260=15 I. C. 832.
(8) A. I. R. 1925 Lah. 491=6 Lah. 318.

shankar Kashiram (3), *Ellis* v. *Wadeson* (2) has been adopted with approval by Mulla, J. He states :

It follows that a suit against a firm is essentially a suit against the partners constituting the firm. If a suit is brought against a firm in the firm's name and a decree is passed for the plaintiff, it is a decree against all the partners constituting the firm assuming that they were all alive at the date of the suit and decree. If a partner dies before suit, and the suit is against the firm in the firm's name the suit is one solely against the surviving partners, and judgment can only be obtained as against the surviving partners and be enforced against them and against the partnership assets. The judgment cannot be enforced against the private estate of the deceased partner unless his legal representative is added expressly as a defendant, for a dead man cannot be sued though his legal representative can be sued in a proper case. If a partner dies between service of the writ and the trial of the suit and judgment, in that case equally the dead man's estate is not bound, and judgment can only be obtained against the surviving partners and enforced against them and against the partnership assests. But if his legal representative is brought on the record, judgment may be obtained against him also as such, and execution enforced against his private estate.

Now in the case before us, the application under O. 21, R. 50, Civil Procedure Code, is to execute the decree against the estate of the deceased Visumal in the hands of his minor son Lachmandas. The suit in which this decree was passed was a suit against the Firm of Visumal-Wadhumal. The decree obtained is also a decree against a firm. Visumal having died before the institution of the suit, the suit was essentially one against the surviving partner in the firm. Lachmandas the legal representative of Visumal, not having been impleaded in the suit, the decree is a decree against the surviving partner and is enforceable against the property of the firm and the surviving partner. It is not enforceable against the private property of Visumal in the hands of Lachmandas. These are the logical conclusions to be drawn from the application to the facts of this case of the principles laid down in *Ellis* v. *Wadeson* (2) which have been followed in *Rampratab Brijmohandas* v. *Gaurishankar Kashiram* (3) by Mulla, J.

I should have had no hesitation at all in adopting these conclusions were it not for the fact that there is a ruling of a Divisional Bench of the High Court of Bombay exactly to the contrary reported in *Jivraj Laloobhai Patel* v. *Bhagwandas Gordhandas* (1). In that case [*Jivraj Laloobhai Patel* v. *Bhagvandas Gordhandas* (1),] the facts were very similar. In a suit against a firm one of the partners was dead at the date of its institution. The summons was served on one of the surviving partners, but there was a decree against the firm ex parte. The judgment-creditor's assignee applied for leave under O. 21, R. 50, Civil Procedure Code, to execute the decree against the estate of the deceased partner in the hands of his executor. The application was allowed. Shah, Acting, C. J., holding that sub-R. 2 of R. 50 of O. 21, Civil Procedure Code, was "wide enough to cover the case of a deceased partner."

The lower Court has dissented from this judgment and I cannot but feel rightly so. The grounds on which Shah, Acting, C. J., overruled the argument of Mr. Desai that sub-R. 2 of O. 21, R. 50 applied only to the case of a living partner, and that the provisions of that sub-rule could have no application when the partner was dead are, first, the inequity and injustice involved in such an interpretation of sub-R. 2, and, secondly, the wording of the sub-rule in question. With all respect for the learned Acting Chief Justice the wording of sub-R. 2 of R. 50, if anything, assists the argument that the sub-clause applies to a living partner only. The application therein contemplated is an application to cause the decree to be executed against any person, "as being a partner in the firm." To my mind this was not the language that the Legislature would have used if it was contemplated that sub-R. 2 should cover the case of a deceased partner.

Again, with all respect to the Acting Chief Justice I do not see that the construction confining the application of sub-R. 2 to a living partner would, regard being had to the provisions of O. 30, Civil Procedure Code, work an injustice on the judgment-creditor. A litigant is always expected to be vigilant about his interests. Visumal had died in 1918, the Bajri suits against the firm of Visumal-Wadhumal were decided in 1921. The judgment-creditors must undoubtedly have been aware of Visumal's death and it was open to them to have joined the legal representative of Visumal so as to enable them to obtain a judgment and a decree binding upon the private property of Visumal. They did not choose to do so, and it does not lie in their mouths

now to complain of injustice. On the contrary, in my humble opinion, it would be unjust in the circumstances of this case, and even generally to allow a decree obtained against a firm to be executed against the estate of a partner who had died before the institution of the suit in which the decree had been obtained without joining in the suit the legal representative of the deceased partner for the simple reason that, whereas if the said legal representative had been impleaded in the suit he would have had an opportunity of contesting the suit on its merits, the failure to implead him and at the same time to attempt to execute the decree against him would entirely deprive him of his opportunity to contest the suit on its merits.

One may well imagine a case of a suit filed against a firm in the firm's name after the death of the capitalist partner of the firm allowed to go ex parte by an impecunious or insolvent gumashta, and the decree obtained sought to be executed against the estate of the capitalist partner whose legal representative was entirely ignorant of the institution of the suit and suddenly found himself confronted with an application under O. 21, R. 50, Civil Procedure Code for leave to execute the decree against him. He would be entirely deprived of every opportunity of defending the suit on its merits. The case becomes more aggravated if that legal representative happens to be a minor whose guardian is a pardanashin lady. The judgment of the learned Acting Chief Justice dealing with the point in question is somewhat meagre and contains no reference to any authority in support of his grounds, and in my opinion the lower Court was justified in differing from the view of the learned Acting Chief Justice.

For the above reasons I am of opinion that the application under O. 21, R. 50, Civil Procedure Code, for leave to execute the decree of Gokaldas Khataoo against the estate of Visumal in the hands of his minor son Lachmandas, was rightly rejected by Rupchand, A. J. C. I would, therefore, uphold the order of the lower Court and dismiss this appeal with costs. (On 3-12-1925 Kincaid, J. C., directed the appeal to be heard by a Bench of five Judges under S. 9 B, Sind Court Rules, and the following is the judgment of the Full Bench.)

Opinion

Tyabji, A. J. C.—This is an application in revision arising out of an application under O. 21, R. 50 (2) of the Civil Procedure Code for execution of a decree obtained under O. 30 against a firm.

Order 21, R. 50 provides, inter alia, that when a decree has been passed against a firm the Court may, on application being made to it, grant leave for its execution against any person (other than those specified in an earlier part of the rule) as being a partner in the firm. Under the rule where the liability is disputed, the Court cannot grant leave without first trying and determining the question whether there is any liability. But a preliminary objection was taken by the opponent to the present application, that in this case the Court cannot proceed to determine the said question and that leave can in no circumstances be granted, because the party against whom execution is sought is not a partner in the firm, that the application is not for leave to execute against any person as being a partner in the firm, but against the legal representative of an alleged partner who was dead at the time of the suit; and it is argued that unless the deceased partner was a defendant and himself a judgment-debtor (so that S. 50 of the Civil Procedure Code applies) or the legal representative of a deceased partner who has been a party to the suit (so that S. 52 of the Civil Procedure Code applies), the Court has no power in execution proceedings to order that his liability be tried and determined, with the object of giving leave to execute the decree against him.

Order 30 deals with suits both by and against firms. In referring to its first three rules I shall omit reference to irrelevant provisions, in particular to provisions where firms are plaintiffs.

The order commences by providing that two or more persons being liable as partners, and carrying on business in British India [which must mean "who have carried on business in partnership for the purpose of the liability which is sought to be enforced," *In re Wenham Ex parte Battams* (9)], may be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action

(9) [1900] 2 Q. B. 698=59 L. J. Q. B. 803=7 Manson 309=48 W.R. 627=83 L. T. 91.

When persons are sued as partners in the name of their firm, it suffices if their written statement is signed and verified by any one of such persons.

Rule 2 deals with firms as plaintiffs. R. 3 provides for service of the summons; if served upon anyone of the partners or a person having control or management of the firm's principal place of business, then the "service shall be deemed to be good service upon the firm so served," and it is particularized: "Whether all or any of the partners are within or without British India." And then there is a proviso to which I shall refer later. The rules speak of "persons suing or being sued as partners in the name of the firm" (Rr. 1, 2, 3, 4, 6); as well as "the firm suing or being sued" [Rr. 2 (1), 3, 5, 8, 9] and in R. 3 a sentence begins with the former expression and ends with the latter.

Finally R. 4 deals with a case where (1) two or more persons may be sued in the name of a firm; and (2) any of such persons dies whether before the institution or during the pendency of the suit. For such a case it is provided that notwithstanding anything contained in S. 45 of the Indian Contract Act, it shall be necessary to join the legal representative of the deceased as a party to the suit.

Shortly stated, a suit on a cause of action which has accrued against two or more persons who were at the time, carrying on business in partnership in British India, and who became liable as partners, may be brought against the said persons in the firm name: the summons in such a suit, if served upon any one of the partners, or on a manager will be good service upon the firm so sued, and though any of such persons dies before the institution or during the pendency of the suit it shall not be necessary to join the legal representative of the deceased as a party to the suit.

The effect of a decree obtained in such a suit will in part depend (R. 3, proviso) upon the circumstance whether the firm was dissolved to the knowledge of the plaintiff before the institution of the suit; if it is so dissolved then the summons shall be served upon every person in British India whom it is sought to make liable. Thus, though it is stated who shall be liable in the exceptional case last mentioned, it is not stated what will happen in other cases.

In the present case, at its present stage, reliance cannot be placed on the proviso—the stage is not reached when the merits of the application can be considered; as the preliminary objection set out above was taken and allowed.

It is clear that under O. 30 the decree, if any, will be against the firm. As said by Brett, L. J.: "The writ (summons) being against the firm the judgment must be against the firm" *Jackson* v. *Litchfield* (10). No individuals will be mentioned as judgment-debtors. But R. 1 provides for ascertaining what individuals are intended to be sued under the firm name and who therefore, will be the judgment-debtors. They are "the persons who were at the time of the accruing of the cause of action partners in such firm" (R. 1) and it is also provided by R. 4 that if any such person dies whether before the institution or during the pendency of any suit, "it shall not be necessary to join the legal representative of the deceased as a party to the suit."

It follows, therefore, from Rr. 1 and 4, I am using the words of the rules "that a person who at the time of the accruing of the cause of action was a partner in the firm, may be sued in the firm name and if he so sued and he dies before the institution or during the pendency of the suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit. If all the partners were dead still the suit could be brought against the firm in the firm name, but there would be difficulty in serving the summons and in executing the decree except against the partnership property. The statement to which the plaintiff would be entitled under O. 30, R. (1) would not assist him on the point as to whether any of the partners had died at the time of the suit. The opponent's contention is, in effect, that in spite of the rules the deceased partner cannot be sued in the firm name if he dies before the institution of the suit.

If the words are read literally, it seems to me that where a decree is passed against a firm, the deceased partner comes within the terms of S. 50 of

(10) [1882] 8 Q. B. D. 474=51 L. J. Q. B. 327=30 W. R. 531=46 L. T. 518.

the Code; he is a judgment-debtor who dies before the decree has been fully satisfied; though this is subject to any effect that the proviso in O. 30, R. 3, may have on any partnership that has been dissolved to the knowledge of the plaintiff. I do not overlook that S. 50 was probably intended primarily to cover cases where the judgment-debtor was alive at the date of the decree. Still it seems to me that reliance may well be placed upon S. 50 in this connexion for the reason that O. 30 has created a situation altogether different from that in ordinary suits. With a few exceptions which need not now be considered, the general rule is that each individual sought to be bound by the decree must be served with the summons. It is consequently absurd to contemplate a case in regard to the generality of suits where the plaintiff does not know who the individuals are against whom the suit is brought. But this last situation is perfectly normal in regard to the suits brought under O. 30. An unthinkable situation is thus turned into a normal situation.

If a living partner without being served with the summons is bound by the decree whether he is within British India or without why should not the legal representative of a dead partner be bound in the same manner and to the same extent? Being made a party without being served is at best a formality. It is not denied that the legal representative is bound by the decree to the extent mentioned in O. 21, R. 50, sub-R. (1), Cl. (a), viz., as regards the share of the deceased in the partnership property a point to which I shall refer again. But if it is said that though the deceased partner would have been amenable to sub-R. (2) of the said rule had he been living, his legal representative cannot be subjected to it unless he is made a party to the suit.

The question resolves itself into whether the rules intend the firm name to include only the partners living at the date of the suit, or them and the legal representative of the partner against whom the cause of action accrued, but who died prior to or pending the suit. That the latter was intended to be included seems to me to be indicated by the combined effect of Rr. 1 and 4. As R. 1 already includes all the partners at the time of the accrual of the cause of action there is strictly no room for the legal representative to be added in addition to him that is sought to be represented by the legal representative. The seat that Macbeth would occupy has already been filled by the ghost of Banquo.

Would the legal representatives have to be served individually? And if so would not the object of R. 3 and the whole scheme of O. 30, that a single person need alone be served be defeated?

The argument that the word 'partner in O. 21, R. 50 (2) cannot be taken to include "the legal representative of a partner" is attractive, but it proves too much. If the argument were sound what would the result be where a partner who was living at the time of the decree, and who could not be brought under O. 21, R. 50 (1), Cls. (b) and (c) had died prior to execution? His legal representative could not (according to the argument) come under R. 50 (2), therefore, either the decree could not be executed against the legal representative at all, or if S. 50 were taken to govern the case, the legal representative would be deprived of the benefit of R. 50 (2), to which the partner himself would have been entitled. Such anomalies are avoided by reading the rule as follows: "As being, or representing, a partner in the firm" and this is surely not putting any strain on the words of the rule. It is rather reading them in their natural sense when the whole context is borne in mind. On the other hand the canons of construction are, it seems to me, disregarded when the words of O. 30, R. 1, "the persons who were at the time of the cause of action partners in such firm" are read as meaning only such of the said persons as are living at the time of the suit, or rather at the time of the decree for a partner dying during the pendency of the suit, is placed in no different position from one dying prior to its institution.

But I must not allow these considerations to draw me away from a more careful examination of R. 4. That rule expressly refers to one of the persons sued in the firm name dying before the institution of the suit and to there being no necessity for joining his legal representative as a party to the suit. It would

prima facie seem, therefore, that this rule must govern the question before us.

On behalf of the opponent it is urged that R. 4 does not throw any light on the question, as it merely counteracts the situation created by the Indian Contract Act, S. 45, nnder which the suit would be defective without the presence of the legal representative.

Rule 4 deals with firms as plaintiffs as well as defendants. S. 45 of the Indian Contract Act refers to matters which can only affect the firm as plaintiff. That section lays down that the right to claim performance of a promise made to two or more persons, jointly, rests with the representative of the deceased promisee jointly with the surviving promisees. It is, therefore, arguable that R. 4 was necessary to prevent the suit by a firm as plaintiff being defective, unless the legal representative was joined; though it does not follow that the rule was to mean no more.

But R. 4 deals with suits against firms, (who are joined promisors). In regard to them an argument similar to that last considered cannot hold. For under S. 43 of the Indian Contract Act the representative of a deceased joint promisor need not be made a defendant in the suit. O. 30, R. 4 (2), Cl. (b), in so far as it is applicable to the legal representative of a partner in the defendant firm, seems to refer to the right of contribution mentioned in the second paragraph of S. 43 of the Contract Act.

One other argument was urged on behalf of the opponent that the effect of R. 4 is to bind the share of the deceased partner in the partnership assets though the legal representative may not be joined as a defendant. But this argument overlooks S. 263 of the Indian Contract Act. The share of the deceased partner can only be determined in the surplus after the debts of the firm are paid: Ss. 249, 253(2), 262, 265. The surviving partners have the right to pay the firm's debts out of the partnership assets; and a decree-holder can compel them to exercise that right. Thus the partnership assets would be bound by decrees against the surviving partners without calling R. 4 in aid. It follows, therefore, that R. 4 cannot be interpreted as the opponent would have it.

Much reliance was placed on a ruling of the Court of appeal in England. *Ellis* v. *Wadeson* (2), where the actual decision was that one of the two surviving partners, when the suit was against the firm, was not entitled to put in a personal defence, but only a statement of defence for and in the names of the firm. The actual decision, therefore, so far as it goes, shows that the firm (as defined in R. 1) is bound or not bound as a whole. In the course of the judgment, however, other questions are dealt with expressly for future guidance.

The judgment lays down that each partner in the defendant firm appears and puts in a defence on behalf of the firm as a whole; "he has to defend for the firm and in the firm name" (page 720). If the defences taken by the various partners are different, even if inconsistent, the plaintiff must

> beat all the defences; that is to say, he must show and satisfy the Judge that not one of the defences prevents a judgment being entered against the partnership (page 717);

so, on the other hand, if only one partner appears his defence binds the firm, even if the defence is improper.

The judgment then goes on to deal with the case of a partner dying before action is brought. Here the result is said to be that a dead man cannot be a party to the suit. Therefore, Romer, L. J., says that the action would be an action solely against the surviving partners. In England, under the Common Law, the survivors only could be sued, since the passing of the Judicature Act, in the case of a partnership liability, the surviving partners and the legal representatives of the deceased partner may be joined; "but the latter would have expressly to be added as defendants:" *Ellis* v. *Wadeson* (2).

It will thus be seen that the rule laid down in *Ellis* v. *Wadeson* (2) is on the basis that being permitted to join the surviving partners and the legal representatives of the deceased partner is itself an innovation, and that it is an innovation of such a character that it is not possible to indulge in it in a suit against the firm in the firm name. The language used by Lord Justice Romer is significant. He says:

> the creditor might now join in one action the 'surviving partner' and the legal personal representatives of the deceased partner.

In the next sentence he speaks by way of contrast of the action being brought against "the firm in the firm name."

In England (subject to the Judicature Act) the substantive law is that the liability of the partners devolves only on the surviving partners. The suit based on that liability is, therefore, prima facie to be against the survivors on whom the liability rests. In India the joint liability devolves not only on the survivors but on them and the representatives of the deceased partners jointly (S. 42 of the Indian Contract Act). The decision in *Ellis* v. *Wadeson* (2) therefore, read in the light of the substantive law, shows to what extent rules of procedure are made to subserve the substantive law. It would be violating the real principles underlying *Ellis* v. *Wadeson* (2) for us in India (our substantive law being as it is) to adopt bodily the result arrived at in *Ellis's* decison; for that would make the adjective law not the servant of the substantive law but a tyrannical master.

This result seems to me to be guarded against by the enactment of O. 30, R. 4 by the Indian Legislature. That rule is an addition to those taken from the Rules of the Supreme Court prevailing in England. Under our rules, it seems to me when a firm is sued in the firm name the decree must be against the firm, that expression being in effect explained in O. 30, R. 1, as referring to persons, who were at the time of the accruing of the cause of action partners in the firm notwithstanding that any of such persons dies before the institution or during the pendency of the suit and his legal representative has not been made a party to the suit.

The result at which I have arrived is, that which the Bombay High Court adopted in *Jivraj Laloobhai Patel* v. *Bhagwandas Gordhandas* (1) and what seems to me of no slight importance, the result is in conformity with the substantive law. For, it is clear that the estate of a deceased partner is liable for his partnership debts. But if this liability is disputed O. 21, R. 50 gives the legal representative an opportunity of having that question tried and determined. At the earlier stage of the suit, when the Court is considering whether the partnership as a partnership is liable it is as unnecessary to bring the legal representative before the Court, as it would have been to bring the deceased partner himself had he been living. At the earlierstage, any single partner may be served on behalf of all the partners: the legal representative is represented by the partner actually served, as much as the deceased partner would have been, had he been alive. But, at the latter stage of the suit contemplated by O. 21, R. 50, when each partner has to be specifically served and severally brought before the Court, the legal representative has to be so served, as much as the deceased partner would have had to be. At the earlier stage the presence of the legal representative would ordinarily only encumber the proceedings for the question before the Court is whether the firm is liable. At the later stage his presence is as necessary as the specific presence of the deceased would have been necessary, since the question refers to the specific liability of each individual member of the firm. There is no question of suing a dead man but only of determining the extent of liability against a number of persons jointly, and the question is at what stage the individual joint promissors (or the legal representative of a deceased joint promissor) should be brought before the Court.

For these reasons in my opinion the decision of the learned Additional Judicial Commissioner who first dealt with the application was erroneous and it should be referred back in order that the liability of the opponent may be tried and determind in accordance with O. 21, R. 50. The costs of this application both before the Divisional Bench and this Bench must be borne by that opponent.

Barlee, A. J. C.—This application has been made against the decision of Rupchand, A. J. C., in Execution Application No. 172 of 1923, which was an application made under O. 21, R. 50 (2), Civil Procedure Code by the judgment-creditor in Suit No. 492 of 1921 against the firm of Visumal-Wadhumal, for leave to execute his decree against the heirs of Visumal-Wadhumal who, it was said, had been a partner and a member of the joint family Firm of Visumal-Wadhumal. The heir was Lachiram son of Visumal. The application was dismissed, and an appeal was made, which was heard by a Bench of Court consisting of Kincaid, J. C., and Lobo, A. J. C. The learned Judges differed and the appeal has been referred to this Full Bench. (The judgment proceeded after stating facts.) The only other question of fact which is or may turn out to be

important is whether at the date of the institution of Suit No. 492 (that is now under consideration), the plaintiff knew that Visumal was dead, and whether his death dissolved the family partnership. Its importance lies in the fact that if he had knowledge of the dissolution of the partnership, he ought, on filing his plaint, to have served summonses on all persons whom he wished to make liable (O. 30, R. 3) proviso; and it is probable, that, as he did not do so at that time, he cannot now be allowed the benefit of O. 21, R. 50 (2). But these questions were not considered by the trying Judge and have, therefore, not been considered by this Bench. For the purposes of this reference I shall assume, therefore, that the plaintiff did not know that the partnership had been dissolved.

The suit, as I have said, was against the firm of Visumal-Wadhumal, and the plaintiff made use of the procedure first introduced by O. 30 of the Civil Procedure Code of 1908. The object of this order is to simplify procedure. Up to 1908 a plaintiff had to join by name as defendants all persons connected with the firm. O. 30, R. 1 permits a plaintiff to sue the members of a partnership firm under the firm name; and R. 3 provides that the service of summons on any one partner shall be deemed good service on the other partners. The partner sued represents the rest and O. 21, R. 50 shows that all the partnership property is liable to be sold in execution of any decree obtained by the plaintiff. But such a decree does not affect the private property of partners who have not been served, or have not joined in the suit. To make it liable a plaintiff must serve such partners with summonses, and he can do so under R. 50 (2) of O. 21 even after decree. They are then given an opportunity of defending themselves personally. In other words, though any partner who is served is the representative of the rest so far as the partnership property is concerned, he cannot represent them in what I may call their private capacities.

This equitable and useful rule is that which the decree-holder in the present case wants to use against the legal representative of the deceased Visumal. He wants the Court to allow him to proceed against the estate of Visumal, and prima facie his request appears to be just. Visumal was a partner, and after his death his estate remained liable for the debts contracted by his firm during his lifetime and is still liable in the hands of his legal representative, unless it can be shown that by some rule of law it is no longer liable. It is the opponent Lachiram's case that the plaintiff (applicant) has lost his right to proceed against Visumal's estate by not joining him, Lachiram, as a party on the institution of the suit, that is by not serving him with a summons and giving him an opportunity of defending himself before the decree was made.

I must at once say that what is asked for the opponent Lachiram is a privilege which would not have been given to his father had he been alive to-day. It was, therefore, incumbent on him to show why he, a legal representative, should be a privileged person, or rather why the property, which in father's hands would have been liable, should be exempt in his hands. He relies partly on the actual words of the rule but mainly on general principles; and, as these principles have been stated as clearly as possible in the judgments of the learned trying Judge and Lobo, A. J. C., I shall now proceed to an analysis of their reasoning. The learned trying Judge first stated the following legal principles:

(1) that a firm is not a legal entity;

(2) that a suit against a firm is a suit against the individual partners;

(3) that a dead man cannot be a party to a suit;

and he drew the conclusion that the decree in suit did not bind the estate of the deceased.

Lobo, A. J. C., adopted this reasoning and reinforced his conclusion by the authority of Romer, L. J., in *Ellis* v. *Wadeson* (2), and Mulla, J., in *Rampratab Brijmohandas* v. *Gaurishankar Kashiram* (3). He emphasized the injustice of allowing a plaintiff to have recourse to property in the hands of Lachiram who has had no opportunity of contesting his claim.

The only remark which I need make about the principles which I have stated is that the second is not exhaustive. A suit against a firm is not a suit against the living partners only. This appears to me to be clear from R. 50, sub-R. (1) of O. 21. That shows that in execution of a decree against a firm the decree-holder is entitled

to proceed against the property of the firm, and that includes the shares to which the legal representatives of deceased partners are entitled, even if those legal representatives have not been personally served with summonses and have not appeared to contest the suit. It follows, as I have said, that the living partners represent part of the estate of the deceased. The correct position must then be that a suit against a firm is at the least a suit both against the individual partners, and also against a part of the estate of the deceased partners, the interest of the deceased in the partnership property. This necessitates a restatement of the third principle. A dead partner cannot be a party to a suit, but his estate can be made liable to satisfy partnership debts, provided that it is represented; and what may be called his partnership property is considered to be represented by any partner who has been served with summons.

The conclusion at which both learned Judges arrived is, however, correct. The decree obtained by the plaintiff, as it now stands, does not entitled him to the private estate of the deceased, but only to the partnership property of the deceased. But with the greatest respect I must say that this is not enough to dispose of the case. The decree does not bind Visumal's private estate in the hands of his minor son. But it would not bind that property in his own hands, were he now alive, unless he had been summoned in the suit. Nevertheless undoubtedly the plaintiff could not make him a party after decree under O. 21, R. 50(2) and it could have been made binding on his private estate. I am, therefore, still unable to understand why the private property in his son's hands should be exempt. I am also unable to understand the argument based on justice. It would, of course, be unjust to allow the plaintiff to seize the property without giving Lachiram an opportunity of defending the suit on the merits. But that is not contemplated by sub-R. (2). The procedure contemplated is clear. A decree-holder claims to be entitled to execute his decree against the private property of partners who have not been, summoned; the Court issues notice and if the liability is not disputed, grants leave. In effect it decrees the claim on the admission of the partner, who is by this time a party in his personal capacity, and is no longer represented by the partners already served. But if the liability be denied, the Court orders that it 'be tried and determined in any manner in which any issue in a suit may be tried and determined.' In other words the partner who is served under this sub-rule, has the same right and opportunity of defence as his ex-partners. In the same way Lachiram, as legal representative, will have an opportunity of defending himself, and no injustice will be done.

The case *Ellis* v. *Wadeson* (2) does not appear to touch the question which we have to decide. Romer, L. J., held that a deceased partner is not a party to an action against a firm "so far as his private property is concerned," but that the personal property can be made liable by joining the legal personal representatives expressly as partners. If they are not joined the creditor can enforce his judgment against the surviving partners (those joined as parties) and the partnership assets. His Lordship explained that the interests of the deceased partner in a firm can be made liable, though the personal representatives are not personally on record, because, for certain purposes, surviving partners who are served, represent their interests. They represent, also, it may be added, the interests of the unserved living partners. But there is nothing in this judgment to show at what stage it is necessary to put the legal personal representative of a deceased partner on the record, or to show that the private estate of a deceased partner is distinguishable from that of a living partner, so that one can be attached after the decree and not the other; and I am unable to differentiate on principle between the rights and liabilities of Lachiram and those which his father would have had, had he been alive. The private estate has not been touched and will not be touched (unless there be an attachment before the judgment) unless and until the proceedings under O. 21, R. 50 (2) end in an order adverse to Lachiram.

It has been urged, however, that the Legislature had made it clear that a plaintiff must summon the legal representative of a deceased partner at the commencement of the suit against the firm, or lose his right to have recourse to the private estate of the deceased. I

shall first take O. 30, R. 1. It had been suggested, though not with any show of conviction that the use of the present participles in the first two lines shows that the procedure provided by O. 30, can be employed only by or against such persons as are partners at the date of suit. To refute this argument I need only refer to O. 30, R. 4, which by implication contemplates the joining of the legal representatives of partners who have died before suit ; and to the proviso to R. 3 which states that persons sued in the name of a firm after its dissolution must be served personally at the commencement of the suit proceedings, if the plaintiff seeks to make their personal estates liable.

The second argument is that the use of the words 'being liable as partners' in R. 1 of O. 30, and 'as being a partner' in O. 21, R. 50 (2) necessarily excludes legal representatives, who cannot be liable as partners. A sufficient answer is supplied by O. 30, R. 4 to which I have just referred, Sub-R. (2) of that rule is very clear.

> Nothing in sub-R. (1) shall limit or affect any right which the legal representative of the deceased may have (a) to apply to be made a party.

The deceased referred to is the deceased mentioned in sub-R. (1) : "any person who dies before the institution or during the pendency of the suit."

If the legal representative of a partner, dead before suit may himself apply to be made a party, it is an obvious corollary that he may be joined as a party on the application of the plaintiff. It follows that the words in O. 21, R. 50 (2) mean 'as being a partner or the legal representative of a deceased partner.'

Lastly it has been contended that the plaintiff cannot seize the estate under O. 21, R. 50 (2) since that rule does not show how the decree can be executed. But he will not execute the existing decree. He will obtain an order which will be executable in the ordinary way as a decree.

To sum up the personal estate is liable in the hands of Lachiram because it would have been liable in the hands of his father had he died after the decree. It was clearly the policy of the framers of the Code to relax the general rule that liability can only to enforced against the property of those who are parties before decree. The argument that Visumal if alive, would have been liable because he would have been a party before decree is, I respectfully contend, a mere quibble. Lachiram has been a party to an equal extent. There is then no apparent reason why the usual rule should not now be adopted, and a creditor allowed to attack the estate of a deceased debtor in the hands of his legal representative. It was not necessary to include any special rule in O. 21, to safeguard so obvious a right. It is enough then to say that as there is no rule which takes that right away directly or by implication the plaintiff can now exercise it.

For these reasons I agree with the order proposed by my learned brother Tyabji, A. J. C.

Kincad, J. C.—I have not thought it necessary to write a second judgment in this case. I would allow the appeal and would remand the case as proposed by Tyabji, A. J. C. The costs of the revision applications both before the Division Bench and the Full Bench to be borne by the opponents.

Rupchand Bilaram, A. J. C.—With all due respect for the learned Judicial Commissioner and for my learned brothers Tyabji and Barlee I regret I am unable to subscribe to their view as to the effect of O. 21, R. 50, Civil P. C.

So far as the ordinary procedure of Courts both in England and in India is concerned the law contemplates an action being instituted in the name of a living plaintiff and against a living defendant. This rule of laws is so rigid that though the Court have been expressly empowered to substitute one person as plaintiff for another where the suit has been instituted in the name of a wrong plaintiff, it has been held that this statutory power cannot be exercised whether the suit is instituted in the name of a dead plaintiff *Tetlow* v. *Orela Ltd.* (11).

The law equally contemplates a decree being passed in favour of a living person as a plaintiff and against a living person as a defendant. As observed by Farewell, L.J., in *Brydges* v. *Brydges* (12) the Court has no jurisdiction inherent or otherwise

(11) [1920] 2 Ch. 24=89 L. J. Ch. 465=123 L. T. 388.
(12) [1909] P. 187=78 L. J. P. 97=25 T. L. R. 505=100 L. T. 744.

over any person other than those properly brought before it as parties or as persons treated as if they were parties under statutory jurisdiction. With the death of a party to the suit the jurisdiction of the Court as against him ends. And the Court must stay its hands unless some one else is brought in the place of the deceased as his legal representative.

The only statutory exception to the rule that a decree may not be passed for or against a dead man is contained in O. 22, R. 6, Civil Procedure Code, corresponding to O. 17, R. 1, R. S. C. which provides that where death of a party has taken place between the conclusion of the arguments (or under the English Law between the verdict or finding or issues of fact), and judgment, the judgment may be pronounced notwithstanding such death, and has the same effect as a judgment pronounced before such death took place.

As a matter of fact there is no provision in the Code which could enable the Court, to execute a decree passed in favour of a dead plaintiff or against a dead defendant unless it comes within the above exception. O. 21, R. 16, Civil Procedure Code, contemplates execution issuing on the application of a transferee, by an act inter vivos or by operation of a living plaintiff. And likewise S. 50, Civil Procedure Code, provides for enforcement of a decree against the legal representative of a judgment-debtor who was living at the date of the decree, and who had subsequently died without fully satisfying the decree passed against him.

In *Girendronath Tagore* v. *Huronath Roy* (13), while dealing with the effect of S. 210 of Act VIII of 1859, which corresponds to S. 50 of the present Code, Macpherson, J., observed as follows:

> These words do not embrace a case like the present, because they evidently contemplate only the case of a person who, being alive at the time when a decree is passed against him, dies before execution is fully had of that decree. The section does not include or provide for the case of a person against whom a decree is made, having died before the decree is made. And it is little to be wondered at that the Code does not provide for such contingency, for it would not readily occur to ordinary minds that decrees would ever be asked for or made against dead men. There is no section in the Code of the Civil Procedure, excepting S. 210, under which a decree-holder is empowered to apply for execution against the legal representatives of a deceased judgment-debtor.

(13) 10 W. R. 155.

These observations equally apply at the present day, and it has been consistently held that unless the case falls within the purview of O. 22, R. 6, Civil Procedure Code, a decree against a dead person is a nullity and cannot be enforced against his legal representatives: *Janardhan* v. *Ramchandra* (14), *Vishvanath* v. *Lallu Kabla* (15), *Topanram Nathuram* v. *Tekchand* (7), *American Baptist Foreign Mission Society* v. *Ammalanadhuni Pattabhiramayya* (16), *Sripat Narain Rai* v. *Tirbeni Misra* (17), *Anwar-ul-Haq* v *Nazir Abbas* (8).

It is, however, contended that in providing the alternative and expeditious procedure for suits being instituted by and against persons in their firm name the Legislature intended to depart from this rule, and in the first place to empower a decree being passed in favour of or against a firm, though all its partners were dead at the date of the decree, and in the second place to empower a decree passed against a firm being executed against the legal representative of a partner in that firm, whether such partner had died before or during the pendency of the suit, and that this intention can be gathered from Cls. 1 and 2 of O. 21, R. 50, Civil Procedure Code, read in conjunction with the provisions of O. 30, Civil Procedure Code, and particularly those of O. 30, Rr. 1 and 4, Civil Procedure Code.

Clauses 1 and 2 of R. 50, Civil Procedure Code are as follows:

> 50. (1) Where a decree has been passed against a firm, execution may be granted:
>
> (*a*) against any property of the partnership;
>
> (*b*) against any person who has appeared in his own name under R. 6 or R. 7 of O. 30, or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;
>
> (*c*) against any person who has been individually served as a partner with a summons and has failed to appear:
>
> Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of S. 247 of the Indian Contract Act, 1872.
>
> (2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-R. (1), Cls. (*b*) and (*c*), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may

(14) [1902] 26 Bom. 317=4 Bom. L. R. 23.
(15) [1909] 11 Bom. L. R. 1070=4 I. C. 137.
(16) [1918] 48 I. C. 859.
(17) [1918] 40 All. 423=45 I. C. 21=16 A.L.J. 327.

grant such leave, or, where liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

Clause 2 is the one which applies in the circumstances of this case. Visumal was admittedly dead at the date of the suit. The present application is for leave to execute the decree not against Visumal as being a partner in the firm of Visumal-Wadhumal but against the legal representative of Visumal. A person in popular language means a person himself and not his legal representative. And, therefore, the plain answer of the legal representative to the present application is that 'he is not the person contemplated under Cl. 2.' The onus, if any, is, in my opinion, not on him to prove the negative, but on the execution creditor to show that "a person" in Cl. 2 denotes something different from what prima facie it means.

There is also nothing in the expression "where a decree has been passed against a firm" to warrant by itself the inference that the decree has been passed not only against the partners of the firm living at the date of the decree but also against the legal representative of a partner who had died either before the institution of the suit or after the date of the institution but before the decree.

Section 239, Indian Contract Act, provides that persons who have entered into a partnership with another are called collectively a "firm." A decree against the firm, therefore, means primarily a decree against the persons who have entered into the partnership and not against the legal representatives of any deceased partner. It is also to be remembered that both under the English Common Law and the Indian Law a firm is not recognized as a legal entity [per Farewell, L. J., in *Sadler* v. *Whitman* (18)] but only as a compendious name or as it has been sometimes described as a convenient symbol or shorthand form for collectively designating all the partners regarded as judgment-creditors or as judgment-debtors: cf. Underhill on Law of Partnership: *Ram Prosad Chimanlal* v. *Anundji & Co.* (19), *Seodayal Khemka* v. *Joharmull Monmull* (5), *Rampartab Brijmohandas* v. *Gaurishankar Kashiram* (3) and that it, therefore, means nothing more than a decree against the partners in the firm.

But it is said that this expression must be read in the light of O. 30, Rr. 1 and 4. Now, no doubt, O. 30, R. 1, Civil Procedure Code, provides for a suit being instituted in a firm name by or against persons who were partners in the firm not at the date of the suit but at the date of the accrual of the cause of action, it does not necessarily follow that this rule empowers the filing of such a suit either on behalf of or against persons who were all dead at the date on which it is filed. In my opinion it only permits of such a suit being filed in the event of at least one of the partners of the firm which sues or is sued being alive at such date. And this is clear from sub-R. 2 of the rule which is as follows:

Order 30, R. 1, sub-R. (2):

Where persons sue or are sued as partners in the name of their firm under sub-R. (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified, or certified by any such persons.

Now if a firm consisted of only two partners and both of them were dead at the time of the institution of the suit, whether such firm is made the plaintiff or the defendant, there is no such person who can sign, verify or certify the pleadings or other documents filed in the proceedings.

This is further clear from the provisions of O. 30, R. 3, Civil P. C., where both partners in the firm which is sued are dead, there is no partner under Cl. (a) of the rule and no manager of a subsisting business under Cl. (b) of the rule who could be served with the summons. Where, therefore, all the partners of either the plaintiff-firm or the defendant firm are dead at the date of the institution of the suit, it must necessarily be filed under the ordinary procedure by or against living persons who represent all or some of the deceased partners of the firm. If this be so, then it would appear that to a suit instituted under O. 30 at least one of the living partners of the firm suing or being sued must be a party.

Now, O. 30, R. 4, Civil P. C., is as follows:

Notwithstanding anything contained in S. 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the

(18) [1910] 1 K. B. 868.
(19) A. I. R. 1922 Cal. 408=49 Cal. 524.

name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-R. (1) shall limit or otherwise affect any right which the legal representative of the deceased may have

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

As I read this rule it contemplates in the first place a suit instituted under the foregoing provisions of O. 30, and, therefore, a suit to which one of the living partners of the firm is a party ; in the second place it dispenses with the necessity of the joinder of the legal representative of any partner in the firm who had died before or pending the suit but does not go further and declare that if every one of the partners is dead even then there is no necessity of joining the legal representatives of all or at least one of the partners of the firm, and thirdly, it does not declare that the legal representatives though not joined in the suit are deemed to be parties to the suit, and this is clear both from sub-R. 1 which declares that it shall not be necessary to join the legal representative as a party to the suit and from sub-R. 2 (a) which enables a legal representative to apply to be made a party to the suit if he so wishes, and lastly, it does not declare how and against whom a decree passed in a suit under O. 30, Civil P. C., is to be executed.

With great respect, I am unable to accept the view that R. 4 is an authority for the proposition that the legal representative of a dead partner is a party to the suit or for the proposition that the decree passed against a firm may be executed either with or without leave of the Court against the legal representative of a dead partner who has not been brought on the record before the passing of the decree. I do not, however, wish to be understood that in a fit case where the Court is moved within the period of limitation or on proper cause being shown a decree may not be vacated so as to afford an opportunity to the plaintiff to join the legal representative of a dead partner and to make his estate liable.

The fact that a decree paseed against the firm may be executed under O. 21, R. 50 sub-R. 1 against the partnership property is again no ground for assuming that the decree is against the legal representative of a dead partner or that he is deemed to be a party to the record. The reason why such a decree may be executed against the partnership property has been lucidly expounded by Romer, L. J., in *Ellis* v. *Wadeson* (2) in the following words :

I may mention that the reason why the partnership assets can be reached is because, notwithstanding the dissolution by death, the surviving partners for many purposes have authority continued to them to bind the dead partner'e interest in the partnership assets, for the authority of partnership extends to enable the surviving partners, in case of dissolution by death, to wind up the affairs of the partnership, to pay the partnership debts, to defend claims against the partnership, and so forth : see, for example, Lindley on Partnership (5th Edition) at pages 217, 218 and 587.

Section 263, Indian Contract Act, is to the same effect, and provides for the rights and obligations of the partners continuing in all things necessary for the winding up of the business after the dissolution of the partnership whether such partnership is dissolved by death or otherwise.

Again, with every respect I am not prepared to hold that because sub-R. (2) of O. 21, R. 50, Civil P. C., permits the execution of a decree with leave of the Court against a living partner, the same rule should apply in the case of the legal representative of a dead partner and the property of the dead man in the hands of his legal representative may be held liable. It may be unjust in the extreme to allow the legal representative to avoid his liability in this manner, but the duty of the Judge is *jus dicere* and not *jus dare*. He is not at liberty to declare what the law is according to his notion of public policy, *Queen* v. *Khyroollah* (20), but to construe the Act of the Legislature as he finds it, and not to make the law better or more reasonable. *Hiriomal* v. *Hazarisingh* (21), *Balkaran Rai* v. *Gobind Nath Tiwari* (22).

Both in sub-R. (1) and sub-R. (2) of O. 21, R. 50 the Legislature has clearly referred to the decree being executed against partners and not against their legal representatives. There is nothing

(20) 6 W. R. Cr. 21=B. L. R. Sup. Vol. App. 11.

(21) A. I. R. 1925 Sind 49=18 S. L. R. 19 (F. B.).

(22) [1890] 12 All. 129=(1890) A. W. N. 39 (F. B.).

in this rule to suggest that the inquiry under R. 2 is a new or separate proceeding on which a fresh decree is to follow, but it only contemplates leave being granted to execute the same old decree against a person who had not appeared or been served in the suit, but who was liable as a partner and as such was a party to the suit. If sub-R. (2) is interpreted so as to afford an opportunity to the judgment-creditor to proceed against the legal representatives of a partner who has died before suit, it would lead to a further anomaly and that is this: where a partner has appeared in the proceedings executions may issue against his legal representative without opportunity being afforded to him either of contesting that the claim against the dead partner did not survive after his death or of preventing execution to issue before it is decided if he is the legal representative.

Sub-Rr. (1) and (2) of O. 21, R, 50, Civil P. C., are a reproduction *ipsissimis verbis* of O. 48A, R. 8, R. S. C., except to the proviso to sub-R. 1 which defines and clears up the position of a minor who is admitted to the benefits of a partnership but who, according to the Indian Law, is not a partner.

The effect of O. 48A, particularly as to the liability of dead partners, has received a judicial interpretation in the Court of appeal in England in the case of *Ellis* v. *Wadeson* (2). Though the point involved in that case, so far as the immediate case was concerned, was not very important and referred to the form in which the statement of the defence should have been put in Romer, L. J., in delivering the judgment of the Court, observed that several other questions which had arisen in the course of argument required to be dealt with as a guide in future and has expounded the law on the point at pages 718 and 719 as follows;

> Now consider the question of death. Suppose a partner dies before action brought and an action is brought against the firm in the firm's name. The dead man is not a party to the action so far as his private estate is concerned, for a dead man cannot be sued, though the legal personal representatives of a dead man can be sued in a proper case. In that case the action would be an action solely against the surviving partners. At Common Law, if a creditor sued joint debtors and one died, the survivors only could be sued. Since the Judicature Act, undoubtedly, in the case of a partnership liability, the creditor might now join in one action the surviving partners, and the legal personal representatives of tha deceased partner, but the latter would have expressly to be added as defendants. If the legal personal representatives of a deceased partner are not added expressly as defendants, and the action is brought against the firm in the firm's name, then judgment can only be obtained as against the surviving partners and be enforced against them and against the partnership assets .... I have so far dealt with the case of the death of a partner before action. Now what happens if a partner dies between service of writ and the trial of the action and judgment? In that case equally the dead man's estate is not bound. Judgment can only be obtained against the surviving partners and enforced against them and against the partnership assets. With reference to this...this is clear...that the partner who dies between writ and judgment is not before the Court, and, therefore, judgment could not be obtained against the deceased partner, or execution enforced against him or his assets. Supposing there were two partners, both living at the date of writ, and both were served, and both died before the action came on for trial, no judgment could be obtained.

These observations are not mere obiter dicta, and have up to this day served as a guide in the English Courts. According to this decision a decree passed against a firm may not be executed against the legal representative of a deceased partner whether he had died before or pending the suit. It is a well recognized rule of construction that if a statute upon which a particular construction has been put is re-enacted *ipsissimis verbis* that construction must be considersd to have the sanction of the Legislature: *Mansell* v. *Reg* (23), and this rule applies with greater force when the provisions of an English statute have been reproduced by the Indian Legislature. In *Trimble* v. *Hill* (24), their Lordships of the Privy Council have observed as follows:

> Their Lordships think the Court in the Colony might well have taken this decision, *Diggle* v. *Higgs* (25), as an authoritative construction of the statute. It is the judgment of the Court of appeal, by which all the Courts in England are bound, until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in Colonies where a like enactment has been passed by the Legislature, the Colonial Courts should also govern themselves by it . . . .it is of the utmost importance that in all parts of the Empire where English Law prevails, the interpretation of that law by the Courts should be as nearly as possible the same.

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(23) [1857] E. & B. 54=120 E. R. 20.
(24) [1880] 5 A. C. 342=49 L. J. P. C. 49=23 W. R. 479=42 L. T. 103.
(25) [1877] 2 En. D. 422=25 W. R. 777=46 L. J. En. 721=37 L. T. 27.

Reference may also be made to *Vasudeva Mudaliar* v. *Srinivasa Pillai* (26), and *in re Baba Yeshwant Desai* (27). Unless, therefore, there is a clear intention to the contrary, the Court is bound to give the same effect to O. 21, R. 50, Civil P. C., as O. 48-A, R. 8 has in England.

In *Jivraj Laloobbai Patel* v. *Bhagvandas Gordhandas* (1), which is the only decided case to the contrary there is no reference to the case of *Ellis* v. *Wadeson* (2), and it is doubtful if the attention of their Lordships of the Bombay High Court was drawn to it. The judgment of his Lordship the Acting Chief Justice on this point is very brief and is as follows:

> I am, however, unable to accept this contention. It really means that in a case where the decree is passed against a firm the estate of a deceased partner other than the partnership assets would practically remain entirely exempt from the liability to satisfy the decretal debt unless, of course, the partner has been served with a summons of the suit. That is a position which does not appear to me to be just nor does it appear to have been contemplated by sub-R. (2). I am slow to accept the construction suggested on behalf of the appellant which involves such a result. Further, I do not think that on the wording of sub-R. (2) that construction is proper. That sub-rule provides that where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-R. (1), Cls. (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave to execute it. It seems to me that the wording of the rule is wide enough to cover the case of a deceased partner, and leave could be given as against the legal representatives of a deceased partner.

There is no indication in this judgment why the Legislature should have intended to depart from the English rule which had been judicially recognized and if so why appropriate words were not used in O. 21, R. 50, Civil P. C., to express such intention.

Rule 4 of O. 30, which has been made so much of in the arguments before the Court has also not been referred to or relied on in this judgment. I have already dealt with the meaning to be attached to this rule, and I have attempted to show that this rule has not the effect of making the legal representative of a dead partner ipso facto a party to the suit. On the contrary the rule suggests that the legal representative is not a party to the suit though he may, if he so wishes, apply to be made a party. I can find nothing in this rule to lead to the inference that it was enacted for the purpose of departing from the English Law. The only object which appears to me as the probable object with which this rule was enacted was to make the procedure under O. 30 conform to that in England except with regard to partners living outside the jurisdiction of the British Courts, and to remove any doubts or difficulties which had arisen and may arise in consequence of the interpretation put upon S. 45, Indian Contract Act. The rule commences with the words "notwithstanding anything contained in S. 45 of the Indian Contract Act...." Though under S. 263, Indian Contract Act, a partner may recover a debt due to the firm and give a valid discharge for it, at least one High Court had held that in view of S. 45, Indian Contract Act, not only all the living partners in the firm, but also the legal representative, of a deceased partner should join in a suit for recovery of the debt due to the firm and all the High Courts had further unanimously held that though a suit may, in the first instance, be instituted by the partners living at the date of the suit alone, the legal representative of any partner who died pending the suit was, however, necessary party to the suit.

The same objection or difficulty was likely to arise in a suit filed on behalf of the firm. If it was a suit on behalf of the partners of the firm, it was open to argument that the legal representatives of at least all such partners who had died pending the suit should be made parties to it. In like manner though a partner of a dissolved firm has the right to apply partnership funds on payment of the debts of the firm, if in a suit against the firm, the living partners whether known or unknown are deemed to be parties to the suit. The same difficulty might have been raised as to the joinder of the legal representative of a partner who died pending the suit in order to render the partnership property liable for the debt and had to be prevented. And R. 4, in my opinion, goes no further than to declare that the legal representative of a dead partner is not a necessary party to the suit provided, of course, the parties are otherwise properly represented.

(26) [1907] 30 Mad. 426=34 I. A. 186=17 M.L. J. 444 (P.C.)

(27) [1911] 35 Bom. 401=11 I. C. 614=13 Bom. L. R. 505.

In this connexion an argument was advanced at the Bar and which I should have referred to earlier and that is this that sub-R. (2) of R. 4 throws an obligation on a legal representative to apply to be made a party to the suit if such legal representative wishes to protect his interests and that if he fails to do so, he may be proceeded with in execution. This again is, in my opinion doing violence to the language used. It is the plaintiff who comes to Court for relief and the obligation is on him to see that proper persons are on the record as defendants. Any option given to a legal representative to apply to be made a party to the suit cannot shift this obligation from the shoulders of the plaintiffs to those of the defendant, and more so, when the defendant is not the person primarily liable but one who may not know either about the liability or of the suit to enforce it. If the plaintiff is content with enforcing the decretal claim against the partnership property or against living partners, he need not join the legal representative of a deceased partner. If, on the other hand, he considers that he may not be able to realize the decretal amount by either means, he has the machinery given to him under O. 30, R. 1, Civil P. C., to call for the names of the partners and if so advised to join the legal representative of a partner who may have died before or pending suit. If he lies on his oars he has to thank himself.

With all respect I see no reason why the words used by the Legislature in O. 21, R. 50, should not according to the well recognised canon of construction emphasized in the leading case of the *Bank of England* v. *Vagliano* (28), receive in this case their natural meaning, and more so, when such meaning is consistent with that put upon similar provisions of English Statute by the Court of Appeal in England long before they were adopted by the Indian Legislature.

For these reasons I respectfully disagree with the view that the legal representative of a deceased partner who was not made a party to the suit may be proceeded against under O. 21, R. 50, Civil P. C.

Lobo, A. J. C.—I agree with the dissenting judgment just pronounced by my learned brother Rupchand. The grounds on which I do so are elaborated in my dissenting judgment in Revision Application No. 98 of 1924 which has occasioned this reference to the Full Bench. To what I have there said, I do not think I could usefully add. With the greatest respect for my learned brothers Tyabji and Barlee, JJ., whose judgments I have carefully read I am unable to agree with their conclusions. It seems to me that these conclusions involve an interpretation of the plain language of O. 21, R. 50 and O. 30, R. 1, Civil P. C., unwarranted by the recognised canons of construction.

R.D. *Reference answered.*

(28) [1891] A. C. 107=55 J. P. 676=60 L. J. Q. B. 145=39 W. R. 657=64 L. T. 353.

A. I. R. 1927 Sind 148

KINCAID, J. C., AND BARLEE, A. J. C.

Sahib Dino and *others*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revision Application No. 203 of 1926, Decided on 29th September 1926, from an order of the Sub-Divl. Mag., Rohri, dated 19th July 1926.

(a) *Criminal P. C., S.* 526 (8)—*Application under sub-S.* (8) *for adjournment—Trial Court can pass ancillary orders such as an order under Criminal P. C., S.* 117 (3).

After an application is made to a Court under S. 526 for adjournment to enable an accused person to apply for transfer of the case, the Court does not become incompetent to make ancillary orders not affecting the merits of the case, such as requiring an accused to execute a bond under S. 117 (3) : 3 *S. L. R.* 155 and 1 *S. L. R. Cr.* 35, *Diss. from*; 31 *Cal.* 715 *Rel. on.*

[P 150 C 1]

(b) *Criminal P. C., S.* 117 (3)—*Order under—Court must record reasons.*

Barlee, A. J. C.—It is incumbent on a Court to state reasons in writing for an order under S. 117 (3). Merely stating that it is passed "on account of emergency" is not sufficient.

[P 150 C 2]

Motiram Idanmal—for Applicants,

T. G. Elphinston—for the Crown.

Kincaid, J. C.—Although the application has been argued at some length, the facts underlying it are quite simple.

Early in December last year four zemindars appear to have made statements to the learned Sub-Divisional Magistrate of Rohri with the result that on the 14th of December 1925, the learned Magistrate issued non-bailable warrants and arrested two men Sahibdino and Khanan, now the Applicants Nos. 1 and 2. At a latter date the applicant

No. 3 Motan, the brother of Applicant No. 1, was arrested. In February, 1925, the applicants applied to have an adjournment from the learned Sub-Divisional Magistrate on the ground that they were about to make a transfer application to a higher tribunal. They did not seem to have made the application until May 1926. It was made to this Court and was rejected. The case thereafter proceeded before the learned Magistrate.

On the 16th July 1926, the applicants made a fresh application to the District Magistrate of Sukhur for the transfer of the case. Finally they approached this Court for the transfer and this application is still pending. After the application for transfer to the Judicial Commissioner's Court, the learned Sub-Divisional Magistrate adjourned the case. He, however, issued an order on the 19th of July 1926, under S. 117 (3) of the Criminal P. C. By that order he directed the three applicants to execute a bond in the sum of Rs. 1,000 to be of good behaviour durthe course of the enquiry pending against them and also to give each two sureties jointly and severally responsible for the like sum and for the like period. The sureties were to be respectable landholders of means, able to control the applicants during the course of the enquiry against them. As the applicants were unable to furnish the securities required they were sent to jail. They were, however, released afterwards by this Court when the transfer application came before it.

As we understand it the learned pleader's argument is this: The learned Sub-Divisional Magistrate was bound to postpone the case directly the accused notified to the Court their intention to make an application for transfer under S. 526, sub-Cl. (8). The subsequent proceedings after the accused had notified their intention to make such an application were invalid and were made without jurisdiction. Since the order under S. 117, Criminal P.C., was made after the accused had notified their intention, it was invalid.

The first question then which needs our consideration is whether after the notification of an intention to apply for a transfer by the accused to the Court, all subsequent proceedings are invalid. This proposition is not based upon any section of the Criminal P. C. It finds support in two judgments of this Court, namely, *Crown* v. *Naoo* (1) and *Emperor* v. *Shewa Uka* (2). The decisions, however, of the learned Judges of this Court were based upon the ruling reported as *Queen-Empress* v. *Gayitri Prosunno Ghosal* (3), but that decision has been expressly differed from in the case of *Joharuddin Sarkar* v. *Emperor* (4). There the learned Judges observed as follows:

> If in laying down that owing to a refusal to grant an application for postponement purporting to be made under S. 526 all the subsequent proceedings are necessarily illegal, it was intended by Stevens and Harington, JJ, that such a dictum should be of general application, then we must respectfully beg to differ from them. It seems to us that such an interpretation of the law might have disastrous effects on the administration of justice as it would lie in the power of every accused person to delay and thereby possibly defeat justice by intimating to the Court that he intended to move the High Court for a transfer, no matter how frivolous, groundless or illusory the application might be. In the cases of *Kishori Gir* v. *Ram Narayan Gir* (5) and *Queen-Empress* v. *Virasami* (6) it seems to have been held that an application for transfer should be made with due diligence or at the earliest possible time. We think that unreasonable delay or total abstention from moving the High Court might well be taken account in considering the bona fides of the accused in notifying his intention to the trying Court.

The learned Judges then took the view that where the application was not a bona fide one under S. 526 of the Criminal P.C., but merely a pretence, there was no real intention to make an application under this section. With the greatest deference for the Judges who decided the case in *Crown* v. *Naoo* (1) and *Emperor* v. *Shewa Uka* (2) I consider this to be the correct view of the law. I think that if the transfer application is rejected by a higher tribunal, and if in the interval the learned Magistrate has taken evidence, it would be anomalous to hold that he had no jurisdiction to take it.

We are, however, not compelled to refer this matter to the Full Bench as suggested to us by the learned pleader for the applicants, because in our judgment the applicants' contention fails on other grounds. When the accused had notified his intention to make the transfer application to this Court, the learned

(1) [1907] 1 S. L. R. Cr. 35=9 Cr. L. J. 274.
(2) [1909] 3 S. L. R. 155=4 I. C. 379=10 Cr L. J. 570.
(3) [1888] 15 Cal. 445.
(4) [1904] 31 Cal. 715=8 C. W. N. 910.
(5) [1904] 8 C. W. N. 77.
(6) [1896] 19 Mad. 375=6 M. L. J. 195.

Magistrate did postpone the case. He took no further. evidence and therefore, he complied with the provisions of S. 526 sub-Cl. (8). It is true that under S. 117 sub Cl. (3) he directed that the accused should execute a bond pending the completion of the enquiry. That, however, was not an order in the course of the enquiry itself. It was merely an ancillary direction as to the custody of the accused pending its completion. To clarify the argument we would put it in other way. Let us assume that the accused were in Jail at the time their intention to apply for the transfer application was notified it would hardly be contended that the learned Magistrate had no power to release them on bail while they were making their application for transfer in the higher Court. Yet if the learned pleader's argument be correct, the learned Magistrate having ceased to have any jurisdiction would be as incompetent to order their release from Jail as to order their commitment there. I think, therefore, that the contention of the learned pleader that the learned Magistrate had no jurisdiction to pass an order under S. 117 (3) is not a sound one.

We must next consider the order on the merits, and we must see whether the learned Magistrate had sufficient grounds on which to order the accused to execute the bond under S. 117 (3). The only evidence or information that the learned Magistrate had before him was his report from the Sub-Inspector of Police. It was hardly a deposition, for its substance was not recorded in English by the learned Magistrate himself. It was taken down in the vernacular by his serishtadar and we only have the translation of its contents before us supplied by the learned pleader for the applicants. In that report the Sub-Inspector Mr. Jassgram said that the applicants were badmashes and reputed thieves. They formed a gang of whom Sahib Dino was the head..... They did no other work but that of committing thefts. So far it is quite clear that there is nothing in the report which would justify an order under S. 112 (3): for those facts were really the grounds upon which the learned Magistrate was proceeding when he took measures under S. 112 of the Cr. P. C. The Sub-Inspector went on to say that after the applicants had been released on bail, there was a report against them of having committed a theft. If they were allowed to continue on bail during the pendency of the proceedings against them there was a probability of a breach of the peace being committed as they were great thieves. Upon this information the learned Magistrate passed the order at page 7 of the paper-book. He wrote:

> It becomes now necessary that an order uuder S. 117 (3) should be passed against the accused on account of emergency.

There is, however, no emergency indicated in Jessaram's report. All that he said was that the accused were habibitual theives and that there was a probability of their committing thefts and a report that they had done so when on bail.

In another part of the learned Magistrate's order he observed that Mr. Jessaram had stated on oath that the applicants were likely to cause an imminent breach of the peace and were likely to commit offences immediately. But Mr. Jessaram did not say anything quite like that. He said nothing about the imminent breach of the peace and he said nothing about likelihood of the accused to commit offences immediately. We think that the learned Magistrate has taken an extreme view of the evidence before him and we, therefore, set aside the order passed under S. 117 (3). We direct that the accused should continue to be on bail until the disposal of the enqiry under S. 112.

The bonds executed by the applicants and by the sureties under S. 117 (3) should be cancelled.

Barlee, A. J. C.—It appears to me that the order made by the learned Sub-Divisional Magistrate does not really fulfil the requirements of S. 117, sub-Cl (3). That sub-clause made it incumbent on him to state his reasons in writing for his opinion that there was likely to be a breach of the preace or the commission of an offence. It was necessary for him to show that he had given proper consideration to the evidence but he merely stated his conclusion without stating the reasons on which it was based. All that he has said is that he passed the order "on account of emergency." For the reasons we have to go to the statement of the Sub-Inspector and we do not think that it is enough to support the conclusion that there was in fact a a state of emergency.

As to the point of law I am not prepared to admit that a Magistrate has no jurisdiction to pass any order, after an application has been made to him for an adjournment, to enable an accused person to file an application for transfer. The words used in S. 526 Cl. (8) are "the Court shall adjourn the case." It is clearly necessary for the Magistrate to make an order for that purpose; and any other orders which he thinks necessary, provided that he does not continue hearing evidence on the merits, or does not pass any decision on merits of the case before him.

An order under S. 117, Cl. (3) does not appear to me to be an order on the merits of the case. Mr. Motiram relied on the decision of Kennedy J. C., in *Nathoomal* v. *Emperor* (7). He contended that a Magistrate is not entitled to make any order prejudicial to the accused person after the application for transfer has been made. But what the learned Judicial Commissioner said was this, that a Magistrate must take care that he passed no final or penal order against an applicant until the applicant has had a reasonable opportunity of demonstrating, by making an application for actual transfer, that his intention did really exist. The learned Judicial Commissioner was obviously referring to an order on the merits of the case. The actual question which is now before us was not before him. If the learned pleader's interpretation of the section be correct, a Magistrate can have no more jurisdiction to make an order in an accused's favour than any order prejudicial to him.

On the merits, I agree with the order proposed by the learned Judicial Commissioner.

R.D. *Order accordingly.*

(7) A. I. R. 1926 Sind 137=20 S. L. R. 54.

A. I. R. 1927 Sind 151

LOBO, A. J. C.

Official Receiver and *another*—Plaintiffs.

v.

Hussain Lal Mahomed—Defendant.

Original Civil Suit No. 43 of 1926, Decided on 25th October 1926.

Limitation Act, Art. 75 — Mortgage bond — Principal to be repaid in two years—Interest to be paid monthly—Default in payment of interest entitling mortgagee to recover whole amount on demand — Limitation starts when demand is made.

Where a deed of mortgage provided: "I shall repay the principal amount within two years and the creditor shall receive the same when I do so. If after the expiry of two years the creditor allows me to retain the money of his own accord or at my request, then too I shall pay interest at the same rate of 12 annas per cent per month and return the above principal amount whenever the creditor will demand it. But if I fail to pay the fixed interest in any month punctually at the stipulated time as above, then there will be a breach of this promise and in that event I shall pay back all the money together with interest in respect of which default is made when he demands even before the expiry of the above period.

Held: that in case of default of payment of interest every month the mortgagor was under an obligation to repay the principal amount with interest only when the mortgagee demanded such repayment: 9 *S. L. R.* 90, *Rel. on.* [P 154 C 2]

Kodumal Lekhraj—for Plaintiffs.

Isardas Udharam—for Defendant.

Judgment.—On 3rd October 1919, corresponding with 8th Asoo, 1976, the defendant in this suit executed in favour of one Amanmal Ladhomal a duly registered mortgage bond (Ex. 9) for a sum of Rs. 6,000 bearing interest at 12 annas per cent. The bond recites that the consideration therefor is re-payable within two years and that the interest is payable at Rs. 45 per month. The security for the bond was a plot of land with building thereon bearing Survey No. 46, Survey-Sheet C/1 Machi Miani Quarter.

Amanmal Ladhomal was in 1919 doing a flourishing business in piecegoods in the name and style of Tulsidas Amanmal. He was also guarantee broker of Messrs. Lyon Lord & Co. With the fall in exchange towards the end of 1919 and during the year 1920 Amanmal Ladhomal got into severe financial difficulties, his liability to Messrs. Lyon Lord & Co. alone amounting to several lacs of rupees. To ease the situation between himself and his principals Amanmal pledged by way of equitable mortgage with Messrs. Lyon Lord & Co. various properties and mortgage bonds inter alia the mortgage bond in suit.

On 3rd September 1921 Messrs. Harchandrai & Co., on behalf of Messrs. Lyon Lord & Co., addressed a letter, Ex. 13, to the defendant informing him that the mortgage bond in suit had been deposited with their clients by the mortgagee by

way of equitable mortgage and that payments in respect of principal and interest should, therefore, be made only to their clients. On 6th January 1922, Amanmal Ladhomal, through his pleaders, Messrs. Rupchand & Co., addressed a notice to the defendant disputing the equitable mortgage of the bond in suit with Messrs. Lyon Lord & Co., and stating that any payments made to them against the mortgage bond would be at the defendant's risk, Ex. 54. Later Amanmal Ladhomal was adjudicated an insolvent and a dispute arose between the Official Receiver, as representing the estate of Amanmal Ladhomal, and Messrs. Lyon Lord & Co., regarding the equitable mortgage of the insolvent's properties referred to above. An application under S. 4 of the Provincial Insolvency Act was filed before the Insolvency Court by the Official Receiver.

There was ultimately a compromise into the details of which it is not necessary for me to enter. It is sufficient to state for the purposes of this case that Messrs. Lyon Lord & Co.'s lien over the mortgage-deed in suit and certain other properties was confirmed. On 9th October 1925 the Official Receiver executed in favour of the Manager of Messrs. Lyon Lord & Co. a general irrevocable power-of-attorney (Ex. 10), authorizing them to realize the said properties and bonds on terms contained in the said document.

On 26th October 1925, Messrs. Harchandrai & Co., on behalf of Messrs. Lyon Lord & Co., called upon the defendant to pay the amount due by him under the mortgage-bond with interest and threatened that on failure to do so Messrs. Lyon Lord & Co. would proceed at once to sell the property to realize the amount due under the power of sale without the intervention of the Court reserved in the mortgage-bond (Ex. 5).

On 10th November 1925 Messrs. Wadhumal & Co., on behalf of the defendant, replied (Ex. 6) that the mortgage claim had been paid up long ago to Amanmal Ladhomal and that the defendant did not owe any amount. They stated that the bond had remained with Amanmal Ladhomal "through an oversight."

On 14th November 1925 Messrs. Harchandrai and Co. informed Messrs. Wadhumal & Co. that Messrs. Lyon Lord & Co. were taking steps to sell the mortgaged property (Ex. 7). On 23rd November 1925 Messrs. Wadhumal & Co. replied by their letter Ex. 8 contending that Messrs. Lyon Lord & Co. had no right to sell the property and that they would do so at their risk. They also pressed for a copy of the mortgage-bond. On 2nd December 1925 an auction-sale of the mortgaged property was advertised by a firm of auctioneers under instructions from Messrs. Lyon Lord & Co. for 12th December 1925 (Ex. 48.)

Messrs. Wadhumal & Co., on behalf of the defendant thereupon issued handbills informing the public, inter alia, that the mortgage claim had ceased to exist, the money having been paid long ago (Ex. 17). The property was auctioned on 12th December 1925, and realized a net amount of Rs. 3,432-8-0 (Ex. 49). The amount due on the mortgage-bond, inclusive of interest less a sum of Rs. 300 alleged to have been paid towards interest, was Rs. 9,163-4-0. After giving credit for Rs. 3,432-8-0 realized by the sale of the property Messrs. Lyon Lord & Co., through their Manager Mr. Greenfield, filed, on 9th January 1926, the present suit against the defendant for recovery of Rs. 5,730-12-0, the balance due on the mortgage-bond. The Official Receiver was joined as a co-plaintiff.

Various defences to the claim were raised by the defendant and were on 20th April 1926 embodied in the following issues :

1. What was the consideration of the alleged mortgage-bond ? (covers para. 3 of the written statement).
2. Was the said mortgage-bond duly attested ?
3. What interest has the defendant in the mortgaged property ?
4. Was the sale authorized and properly conducted ? (covers para. 7 of the written statement).
5. Can the defendant raise the above pleas in this suit ?
6. Has the Plaintiff No. 2 any right to file this suit ?
7. What amount, if any, is now due from the defendant under the said bond ?
8. Is the claim or any part thereof barred by limitation ?
9. General.

The defendant was required to supply particulars in regard to Issues Nos. 6, and 8 and in obedience to the order filed the following particulars on 12th August 1926.

Re Issue No. 6 : Plaintiff No. 2 is not the recognized agent within the meaning of O. 3, R. 2, Civil P. C., and R. 4, ch. VI, Rule Book, page 93.

Re Issue No. 8: The suit is time-barred under Arts. 75 and 116 of the Limitation Act.

I will first dispose of Issue No. 5. It has been contended for the plaintiffs that the pleas embodied in Issues Nos. 2 to 4, cannot be raised by the defendant in the present proceedings; that the defendant if he desires to contest the validity of the mortgage-bond and the legality and propriety of the sale of the mortgaged property effected under the power of sale reserved to the mortgagee by the mortgage-deed must file a regular and separate suit to do so.

The argument appears to be sound. Mr. Issardas who appeared for the defendant did not cross-examine the witness called by the plaintiffs to prove the execution and attestation of the bond or the validity and bona fide of the sale by Plaintiff No. 2 of the mortgaged property. In his closing arguments Mr. Issardas explained that he had not done so because he conceded Mr. Kimatrai's proposition that the pleas involved in Issues Nos. 2 to 4 did not really arise in this suit.

I must, therefore, hold on Issue No. 5 that the defendant cannot in this suit raise the pleas involved in Issues No. 2 to 4. No finding is, therefore, necessary on these issues.

I now next proceed to deal with Issue No. 1 as to the consideration for the mortgage-bond. (After discussing the evidence the judgment proceeded). My answer to Issue No. 1, therefore, is that the consideration for the mortgage-bond was Rs. 6,000.

With regard to Issue No. 7 it follows from what I have said above that the amount now due from the defendant under Ex. 9 after giving him credit for Rs. 300 paid as interest and Rs. 3,432-8-0 realized by the sale of the mortgaged property is Rs. 5,730-12-0 as claimed by the plaintiffs in the suit.

As regards Issue No. 6 it is contended that if there is any decree against the defendant it should be in favour of the Plaintiff No. 1, the Official Receiver, and not in favour of Plaintiff No. 2.

On a consideration of Ex. 57, the terms of the compromise between the Plaintiff No. 1 and the Plaintiff No. 2, a compromise sanctioned by the Court, and considering, too, that both the plaintiffs are actually before the Court, I am of opinion that any decree passed against the defendant should be in favour of Plaintiff No. 2.

There remains for consideration the issue of limitation.

The defendant's position is that according to the evidence of Amanmal and the plaintiff's case, default under the bond was made by him (the defendant) in November 1919, when he failed to pay Rs. 45 the interest payable for the first month after the date of Ex. 9. According to the defendant limitation then began to run and this suit to recover from the defendant personally the balance due on the mortgage-bond Ex. 9 should have been filed, in order to be within time within six years from November 1919. Having been filed in January 1926, the suit is time-barred.

For the plaintiffs it is argued that the question of limitation depends on the terms of the mortgage-bond Ex. 9. That Ex. 9 clearly provides that in case of default of payment of interest every month the mortgagor is under an obligation to repay the principal amount with interest only when the mortgagee demands such re-payment. That no demand having been made by the mortgagee the six years' period of limitation began to run from 3rd October 1921, when the principal amount became payable under the bond and that, therefore, the suit filed in January 1926, is quite within time.

The relevant Clause in Ex. 9 reads as follows:

> I shall re-pay the principal amount within two years and the creditor shall receive the same when I do so. If after the expiry of two years the creditor allows me to retain the money of his own accord or at my request then too I shall pay interest at the same rate of 12 annas per cent. per month and return the above principal amount whenever the creditor will demand it. But if I fail to pay the fixed interest in any month punctually at the stipulated time as above, then there will be a breach of this promise and in that event I shall pay back all the money together with interest in respect of which default is made when he demands even before the expiry of the above period.

Now in the first place on my findings of fact in this case the question of limitation does not really arise. I have found as a fact that the defendant paid Amanmal a sum of Rs. 300 as interest on the principal amount due under the mortgage-bond on 27th Nahri 1977/2nd January 1921. Under S. 20 of the Limitation Act a fresh period of limitation

began to run from that date ; and as it is common ground that the period of limitation applicable to this case is 6 years, the suit filed in January 1926 is within time.

Apart from this, however, I am convinced on a perusal of the authorities that in this case the period of limitation did not commence to run till 3rd October 1921, when the principal amount payable under the bond became due.

That a sharp conflict of authority exists between the High Courts of Allahabad and Madras on this point is apparent on a perusal of a series of cases decided by these two High Courts : *Gaya Din* v. *Jhuman Lal* (1), *Pancham* v. *Ansar Husain* (2), *Nathi* v. *Tursi* (3), *Shib Dayal* v. *Meharban* (4) and *Kanhai* v. *Amrit* (5), support the contention of Mr. Isardas who appeared for the defendant. On the other hand, *Narna* v. *Ammani Amma* (6) and *Muthia Chettiar* v. *Venkatasubbarazulu Naidu* (7) are cases which are entirely in favour of the contention put forward by the plaintiffs.

Referring to this conflict of decisions their Lordships of the Privy Council in the case of *Pancham* v. *Ansar Husain* (2), referred to above, which came before them on appeal state as follows :

> Their Lordships are fully alive to the seriousness of the view so taken by the High Court, emphasized and perhaps extended as it has been by a later Full Bench decision to the same effect [*Shib Dayal* v. *Meharban* (4)]. Moreover, upon the correctness of it there has been in different High Courts of India a sharp conflict of judicial opinion. It is accordingly manifestly desirable that, as soon as may be, this Board should finally pronounce not only upon the question whether the principle of the two decisions above referred to is correct but also upon the further question whether, even if it is, these decisions gave any application to a proviso framed as is that now in suit.

So far as this Court is concerned I have been unable to find any reported case which relates to a mortgage-bond and the question of limitation which arises in consequence of the insertion in a mortgage-bond of a clause such as we have in Ex. 9 and to which I have referred above. The reported decisions to which I have been referred relate either to instalment bonds or instalment decrees and turn largely on the language of Art. 75 of the First Schedule of the Limitation Act, e. g. *Kimatrai Kashiram* v. *Wadero Sher Mahomed Khan* (8), *Vishindas Wadhuram* v. *Hotomal Ditomal* (9), *Bhawandas Ferromal* v. *Menghraj* (10) and *Bahadur* v. *Gelomal* (11).

I feel, however, that a true solution of this difficult question of law so far as it arises in this case is to be found in two passages in the judgments of Crouch, A. J. C., and Pratt, J. C., who decided the case of *Vishindas Wadhuram* v. *Hotomal Ditomal* (9). In the case in question Crouch, A. J. C., states as follows :

> It would, of course, be quite easy to draw a bond in such a form that the creditor would not get an immediate right to sue for the principal unless he elected to do so.

He proceeds to illustrate his meaning by an example. In the same case Mr. Pratt, J. C., stated :

> In *Kashiram* v. *Pandu* (12) Jenkins, C. J., pointed out that instalment decrees should be so drawn up as to make it clear that the rights consequent in default depend upon a positive election by those in whose interests they are intended to be created. A similar provision could be made by appropriate words in bonds creating an obligation to pay successive sums of money. If the stipulation as to default does not come into operation unless and until the obligee elects to enforce it then there is, as pointed out in *Kimatrai* v. *Wadero Sher Mahomed Khan* (8), an alternative contract.

The clause contained in the bond Ex. 9, and which I have set out above in extenso is to my mind just such a clause as is contemplated in the two passages from the judgment in *Vishindas Wadhuram* v. *Hotomal Ditomal* (9) which I have quoted. The mortgagee had to make a positive election before he could proceed to enforce by suit the default clause in the bond. The words are :

> I shall pay back all the money together with interest in respect of which default is made when he demands.

I hold, therefore, on Issue No. 8 that the suit is within time.

The result is that there will be a decree in favour of Plaintiff No. 2 against the defendant for Rs. 5,730-4-0 with

(1) [1915] 37 All. 400 = 28 I. C. 910 = 13 A. L. J. 510.
(2) A. I. R. 1921 All. 296=43 All. 596 on appeal A. I. R. 1926 P. C. 85=48 All. 457.
(3) A. I. R. 1921 All. 192=43 All. 671.
(4) A. I. R. 1923 All. 1=45 All. 27 (F. B.).
(5) A. I. R. 1925 All. 499=47 All. 552.
(6) [1916] 39 Mad. 981=4 L. W. 77=31 M.L.J. 865=35 I. C. 480=(1916) 2 M. W. N. 125.
(7) A. I. R. 1926 Mad. 160=49 Mad. 403.
(8) [1914] 8 S. L. R. 63=25 I. C. 938.
(9) [1915] 9 S. L. R. 90=31 I. C. 479.
(10) [1918] 11 S. L. R. 120=45 I. C. 324.
(11) [1920] 14 S. L. R. 128=59 I. C. 607.
(12) [1903] 27 Bom. 1=4 Bom. L. R. 688.

interest at six per cent thereon from date of suit till payment and costs.

G.B. *Suit decreed.*

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* * A. I. R. 1927 Sind 155

RUPCHAND BILARAM, A. J. C.

David Sassoon & Co. Ltd, In the matter of.

Insolvency Petition No. 122 of 1925, Decided on 24th November 1926.

* * *(a) Contract Act, S. 264—S. 264 applies both to old and new customers but does not apply to the case of dormant partner.*

The expression "persons dealing with a firm" equally applies to old and to new customers of the firm but only to such of them as have dealt with the firm on the assumption that the person whom they wish to hold liable was a partner in that firm. [P 156, C 2]

Before the applicability of S. 264 is attracted in any particular case, the onus is on the claimant to prove that a person whom he wishes to hold liable, as a partner was ostensibly a partner in the defendant firm at the date of the cause of action, but when such person was only a dormant partner in the defendant firm or in other words was not known to the public to have been a partner therein before his retirement, it is not possible for the claimant to lead evidence to prove that such a person was ostensibly a partner of the defendant's firm at the date of the cause of action and therefore S. 264 does not apply to the case of dormant partners: 17 *Bom. L. R.* 762, *not Foll.*, 9 *Mad.* 492 and 5 *Bom. L.R.* 366, *Foll.* [P 156, C 2, P 157, C 1]

S. 264 applies in favour of both old and new customers of a defendant firm provided, of course, that in the case of new customers they knew of the existence of the firm by repute and acted on such repute. [P 157, C 1]

The expression "persons dealing with the firm" equally applies to persons dealing with it for the first time after its dissolution. [P 157, C 1]

So far as new customers, who rely merely on the evidence of repute, are concerned, the requirements of the section would be sufficiently complied with if the ostensible or the retiring partner, as the case may be, gives public notice, of the revocation of his authority to be represented by the other members of the firm, but in the case of old customers a more specific notice is necessary and so far as they are concerned, S. 264 is not intended to be an exhaustive exposition on the question of notice. [P 157, C 1]

(b) Provincial Insolvency Act (1920), *S.* 6—*Adjudication of two or more persons—Act of insolvency by each must be alleged—The act may be joint.*

In order to sustain a joint adjudication against two or more persons it is necessary that some act of insolvency shall have been committed by each of them. But the act of insolvency may be a joint act committed by one partner on behalf of himself and as agent of others or as a matter of fact it may be committed by a person who is not a partner but a mere agent and his authority need not be special or explicit. [P 158, C 1]

The act of a partner who gives notice that his firm has suspended or is about to suspend business is prima facie a joint act on behalf of all persons who are liable as partners in that firm unless they can show that they were solvent and able to pay the debts of the firm for which they were liable. The petitioning creditors should in that case be required to prove express authority of a partner on behalf of others to give notice of suspension. [P 158, C 1, 2]

Khanchand Gopaldas—for Petitioning creditors.

T. G. Elphinston and *Kalumal Pahlumal*—for Insolvents.

Order.—On March 26, 1926, I passed an order adjudicating as insolvents the firm of Javermal Harkishenlal and the individual Harkishenlal, son of Javermal, who was admittedly either the sole proprietor or one of the proprietors of that firm. The question now for consideration is, whether Dwarkadas Javermal and his son Doulatram or either of them should also be adjudicated as insolvents.

Dwarkadas has admitted that he was a partner in the Karachi firm of Javermal Harkishenlal up to 16th August 1924 or Bhadava 2nd, 1984 but he has denied that he or his father Javermal formed members of a joint Hindu family with Harkishenlal at the time this business was being carried on or that it was a joint Hindu family business.

His case is, that Javermal and his two sons separated about 20 years ago and worked as ordinary partners with equal shares: Javermal having a 4-annas share, Dawarkadas a 5 annas share and Harkishenlal a 7 annas share, both in the business carried on by them at Amritsar, in the name of Javermal-Doulatram, and at Karachi, in the name of Javermal-Harkishenlal; that he was in charge of the Amritsar business and Harkishenlal of the Karachi business; that Javermal died in June 1924, and on 16th August 1924 Dwarkadas retired from the Karachi business when Harkishenlal likewise retired from the Amritsar business, and that after that date each was the exclusive proprietor of the business under his management. He has, therefore, denied his liability for the debts of the Karachi firm and has urged that he is not bound by any act of insolvency committed by Harkishenlal.

The petitioning creditors and other creditors who have appeared in support of this application have stoutly contended that the brothers were joint, that there was no dissolution of partnership between them as alleged, and that in any case Dwarkadas having failed to give any notice of dissolution, must be deemed to have continued as a partner in the Karachi firm and is liable for its debts and bound by the act of insolvency committed by Harkishenlal.

For the purposes of the present enquiry it is not necessary either to go into the question whether the brothers were joint or not or into the further question whether their shares were unequal.

The burden of proving that there was a dissolution of partnership between the brothers in August 1924, was clearly on Dwarkadas, *cf.* S. 109, Indian Evidence Act. He has failed to discharge that burden. All the circumstances point to the conclusion that both he and his brother Harkishenlal have conspired to defraud the Karachi creditors by setting up the alleged dissolution of partnership between them and have attempted to support their case by forging certain entries in their books. This evidence does not help them in the least as it will presently appear for even if the evidence was believed, Dwarkadas is estopped by S. 264, Indian Contract Act, from contending that he had ceased to be a partner of Harkishenlal. (The judgment then discussed the evidence relating to the above and proceeded). The learned Counsel for Dwarkadas has raised certain interesting points as to the effect of S. 264, Indian Contract Act. He has contended that this section has no application whatsoever to creditors who dealt with the firm for the first time after its dissolution and that in any case it has no application to a dormant partner who has dissolved partnership but has failed to give the required notice.

There has been a slight divergence of Judicial opinion as to the effect of this section. It is not necessary for me to enter upon an elaborate discussion on this point or to give any definite finding as to its effect, as whatever view may be adopted, it appears to me that Dwarkadas cannot avoid his liability as an ostensible partner of the Karachi firm. As at present advised I am inclined to the view that this section in no way deviates from the English rule of estoppel applicable to such cases. The expression "persons dealing with a firm" equally applies to old and to new customers of the firm but only to such of them as have dealt with the firm on the assumption that the person whom they wish to hold liable was a partner in that firm.

The English rule has been lucidly stated in the following passage in Lindley on Partnership, Book II, Chap. 2, S. 3, page 291, 9th edition:

> It has been already seen that when a dormant partner retires, he need give no notice of his retirment in order to free himself from liability in respect of acts done after his retirement. The reason is that, as he was never known to be a partner, no one can have relied on his connexion with the firm, or, truly allege that when dealing with the firm, he continued to rely on the fact that the dormant partner was still connected therewith.
>
> But when an apparent partner retires, or when a partnership between several known partners is dissolved, the case is very different; for then those who dealt with the firm before a change took place are entitled to assume that no change has occurred until they have notice to the contrary. And even those who never had dealings with the firm, and who only knew of its existence by repute, are entitled to assume that it still exists until something is done to notify publicly that it exists no longer. An old customer, however, is entitled to a more specific notice than a person who never dealt with the firm at all.

The principle on which this rule is based is that of the estoppel of a person who has accredited another as his known agent from denying that agency, at a subsequent time, as against the persons to whom he has accredited him, by reason of any secret provocation [*Scarf* v. *Jardine* (1)].

I can see no reason why S. 264, Indian Contract Act, which is based on the same principle should not be so interpreted as to lay down the same rule as in England.

Before the applicability of S. 264 is attracted in any particular case the onus is on the claimant to prove that a person whom he wishes to hold liable as a partner was ostensibly a partner in the defendant firm at the date of the cause of action. When such person was only a dormant partner in the defendant firm or in other words was not known to the public to have been a partner therein before his retirement, it is difficult to see how the claimant can lead evidence to prove that such a person was ostensibly

(1) [1882] 51 L. J. Q. B. 612=30 W. R. 893=7 A. C. 350=47 L. T. 258.

a partner of the defendant's firm at the date of the cause of action.

With all respect I am, therefore, unable to accept the view of Beaman, J., in *Giovani Goria* v. *Vallabhdas Kalianji* (2) that S. 246 applies equally to dorment partner and agree with the contrary view taken in *Ramasami* v. *Kadar Bibi* (3) and in *Greaves* v. *Purshotam* (4).

It is again clear to me that S. 264 applies in favour of both old and new customers of a defendant firm provided, of course, that in the case of new customers, such customers knew of the existence of the firm by repute and acted on such repute.

The expression "persons dealing with the firm" equally applies to persons dealing with it for the first time after its dissolution. As pointed out by Sanderson, C. J., in *Jagat Chandra Bhattacharyya* v. *Gunny Hajee Ahmed* (5) there is no reason why the words "before its dissolution" should be interpolated in the section.

So far then as new customers, who rely merely on the evidence of repute, are concerned, the requirements of the section would be sufficiently complied with if the ostensible or the retiring partner, as the case may be, gives public notice of the revocation of his authority to be represented by the other members of the firm.

It is not possible to expect him to do more than to give such public notice of revocation of his authority to persons who are not customers of the firm but who become customers for the first time after revocation.

The case of old customers is, however, different. It is possible for the retiring partner to ascertain their names and to inform them that he had ceased to be a partner. As pointed out in *Chundee Churn Dutt* v. *Edulee Cowasjee Bijnee* (6) a more specific notice is necessary in their case and that so far as they are concerned S. 264 is not intended to be an exhaustive exposition on the question of notice.

My attention has been drawn to the differing judgment of Kincaid, J. C., in the case of *Ghanshamdas Parmanand* v. *E. D. Sassoon & Co.* (7). But the judgment does not, in my opinion, touch the points at issue. In that case the learned Judicial Commissioner refused to go into the question whether the retiring partner was a dormant partner or not; as that point had not been raised at the proper time. The only material point which had been appealed against was whether the application for the issue of commission to examine certain witnesses had been rightly refused by the lower Courts. This evidence was not intended to prove that the retiring partner had given notice to the petitioning creditors of his retirement from the business but that he had given information of his retirement to third persons who had dealings with his firm 300 miles away from Karachi. This evidence was only corroborative proof of the fact of his having retired from the firm and as such irrelevant. It was rightly excluded from consideration in the same way as the evidence of the partners themselves that they had dissolved partnership.

In the present case, however, it is abundantly clear that Dwarkadas was not a dormant partner in the firm and that it was generally known in the Bazaar and to the importing offices that both of them were proprietors of the two firms at Amritsar and at Karachi. Harkishenlal signed for the Amritsar firm as its proprietor both before and after the alleged dissolution to the admitted knowledge and with the consent of Dwarkadas and continued to do so up to the date of the insolvency.

It has been proved beyond doubt that both the petitioning creditors and Messrs. Shaw Wallace & Co., who have appeared in support of it had dealings with the brothers before the alleged dissolution. (Bhanji Ex. 18 and Kanyalal Ex. 39). The claim of these two firms exceeds Rs. 60,000. There is no allegation much less proof, that any specific notice was given to them. I hold, therefore, that both these firms are not affected by the alleged dissolution of the firm.

It is not disputed that Dwarkadas is not in a position to discharge their claims in full and as he is indubitably liable for their claims he is an insolvent It is, therefore, not necessary for me to consider the further question if some of the other creditors of the Karachi firm were old or new customers and if the latter whether they relied on the inform

(2) [1915] 17 Bom. L. R. 762=30 I. C. 861.
(3) [1886] 9 Mad. 492.
(4) [1903] 5 Bom. L. R. 366.
(5) A. I. R. 1926 Cal. 271=53 Cal. 214.
(6) [1882] 8 Cal. 678=11 C. L. R. 225.
(7) A. I. R. 1926 Sind 90.

mation given to them that Dwarkadas was a partner though it may fairly be assumed that it will not be difficult for them to assert without any fear of contradictions that they had so acted and that Dwarkadas was liable for their claims.

The learned counsel has urged that the mere fact that Dwarkadas is an insolvent is not sufficient and that there should be proof of an act of insolvency committed by him and not by his brother. Now it is, no doubt, true that in order to sustain a joint adjudication against two or more persons it is necessary that some act of insolvency shall have been committed by each of them. *Mills* v. *Bennett* (8), *Allen* v. *Hartley* (9), *Dutton* v. *Morrison* (10) and *Hay* v. *Bridges* (11). But the act of insolvency may be a joint act committed by one partner on behalf of himself and as agent of others or as a matter of fact it may be committed by a person who is not a partner but a mere agent (Explanation to S. 6, of the Provincial Insolvency Act) and his authority need not be special or explicit; *Kastur Chand Rai* v. *Dhanpat Singh* (12). Whether the act of such an agent is one which binds others is necessarily a question of fact to be decided on the facts of each particular case. *In re Mahomed Hasham and Co.* (13) and *Gopal Naidu* v. *Mohanlal Kanyalal* (14).

Whatever may be said of the effect of one partner absenting himself from the place of business as against other partners who have either never lived in that place or who for other valid reasons have temporarily withdrawn from there, as in the case of ill-health the act as in the present case of a partner who gives notice that his firm has suspended or is about to suspend business stands on a different footing. It is prima facie a joint act on behalf of all persons who are liable as partners in that firm unless they can show that they were solvent and able to pay the debts of the firm and for which they were liable. I see no reason why the petitioning creditors should in that case be required to prove express authority of a partner on behalf of others to give notice of suspension. When a managing partner knows that he and his partners are not in a position to pay the debts of their firm as they become due or in full, it is, in my opinion, his duty to suspend the business and to give notice thereof. If he fails to give such notice or makes payment in full to some of his creditors after full knowledge of the state of the affairs of his firm, he runs a serious risk of being charged with having given undue preference to them. His authority to give notice of such suspension on behalf of others may fairly be implied, unless it is rebutted by evidence that the other partners or any of them were not insolvents.

I also see no reason why the same rule should not apply to the case of actual and ostensible partners alike.

I have held that Dwarkadas has failed to prove the alleged dissolution of partnership. There is also evidence to show thal the acts done by Harkishenlal in inducing his creditors to accept 3-annas in the rupee were persumably done with the consent and knowledge of Dwarkadas. He had not only visited Karachi twice when the firm was in a tottering condition but had sent remittances to enable Harkishenlal to settle. I hold, therefore, that the acts of Harkishenlal in inducing creditors of the Karachi firm to settle were done on behalf of Dwarkadas as well and were binding on him, whether he be held to be an actual or an ostensible partner. I, therefore, adjudicate Dwarkadas as a partner.

The case of Doulatram is simple Though an attempt has been made to prove that he was a paid servant of his father by production of certain entries which are said to be forged, it has been proved that he was a minor when the business was being carried on and that he is now about 18 or 19 years of age. He is not, therefore, liable as a partner of the firm and not liable to be adjudicated as an insolvent. I dismiss this application as against him.

In the end I must express my thanks to the learned pleader for the petitioning creditors who has taken great pains in the conduct of this application and has helped the Court in detecting the forgeries committed by the two brothers.

D.D. *Order accordingly.*

(8) [1814] 2 M. & S. 556=105 E. R. 488=2 Rose 269.
(9) [1784] 4 Doug. 20.
(10) [1810] 17 Ves. Jur. 193=1 Rose. 213.
(11) [1818] 8 Taunt. 200=129 E. R. 360=2 Moore. 122.
(12) [1896] 23 Cal. 26=22 I. A. 162=6 Sar. 617 (P.C.).
(13) A. I. R. 1923 Bom. 107.
(14) A. I. R. 1926 Mad. 206=49 Mad. 189.

A. I. R. 1927 Sind 159

PERCIVAL, J. C. AND RUPCHAND BILARAM, A. J. C.

Khursetji Nanabhoy—Applicant.

v.

Emperor—Opposite Party.

Criminal Revision Application No. 240 of 1926, Decided on 26th November 1926, against the judgment of the Addl. City Mag., Karachi, D/- 9th August 1926.

Penal Code, S. 441—Tenant at will refusing to vacate property—Requisite intent must be proved to make his wrongful stay punishable under S. 441.

Where the accused was a tenant on sufferance who had come upon the property by right but had continued to remain by wrong,

Held: that this would not, without proof of intent, required to constitute the offence under S. 441, make his wrongful stay punishable as criminal trespass. Mere knowledge on his part that he was likely to cause annoyance would not by itself be sufficient. [P. 160, C. 1]

Rewachand Vasanmal—for Applicant.

T. G. Elphinston—for Opposite Party.

Judgment.—The accused was put on his trial before the learned Additional City Magistrate, Karachi, under Ss. 506 and 448, Indian Penal Code, for criminal intimidation of the manager or custodian of certain buildings called Sohrab Quarters and for criminal trespass by staying in one of those quarters after he had been served with a notice to vacate. He was acquitted on the first charge but convicted on the second charge and ordered to pay a fine of Rs. 25. He was also warned that if he continued to stay in those quarters he would render himself liable for further prosecution.

It appears from the judgment of the learned Magistrate that these quarters are attached to a Parsi Club building and were primarily intended for outside relatives and guests of the members of the Club visiting Karachi, who were permitted to stay therein for a period of 8 days on payment of 8 annas per day as rent for use and occupation of each quarter. The period of their stay could be increased for 8 days more by the Secretary of the Club and at the end of that period they were required to vacate.

During recent years another trust building known as Jehangir Bagh has been reconstructed and affords greater facilities for Parsi travellers than the quarters in question and, therefore, these quarters are seldom requisitioned by the members of the Club for their guests. They are, however, let out to Parsi residents of Karachi probably subject to the restriction that occupants are bound to vacate at any time, the Secretary wishes them to do so. The accused is an old Parsi resident of Karachi and has been staying with the permission of the Secretary of the Club in one of these quarters from December, 1925. For the 15 days of December he paid Rs. 2-8-0 only to the responsible authorities of the Club, for 31 days of January he paid Rs. 5-0-0 and likewise for the month of February and March he paid Rs. 5 a month. The entries in the books show that the amounts were paid by him as rent for each month.

In March 1926 a report was made by the then custodian of the quarters to the Secretary that the accused was a nuisance to the other residents and that he should, therefore, be removed. Nothing definite seems to have been decided at that time. On 8th April, 1926, the complainant who had assumed duties of the custodian in place of the former custodian, went over to the quarters and informed all the occupants including the accused that they would have to vacate unless they obtained recommendatory notes from the members of the Club. It is alleged that on this, the accused got annoyed and used threats to the custodian which formed the subject-matter of the first charge and on which he has been acquitted for want of reliable evidence. It also appears that in consequence of what transpired at that time, the accused was served with a notice by the Secretary requiring him to vacate the quarter but he declined to do so claiming to be a monthly tenant and, therefore, not liable to be ejected, in view of the provisions of Bombay Rent Act or at any rate without a month's notice. It is this refusal on his part to vacate the premises which has been made the foundation of the second charge.

The learned Magistrate came to the conclusion that the accused was not a monthly tenant but a permissive occupant whose occupation was terminable at once and that on such termination he became a trespasser. The learned Magistrate also was of the opinion that the accused was a nuisance to the other occupants.

Now unlike several sections of the Code where *mens rea* consists in intention or knowledge S. 441 requires that the accused should either unlawfully enter upon property of another or having lawfully entered thereon continue to remain unlawfully with intent thereby to intimidate, insult or annoy the person in possession of such property or with intent to commit an offence. The onus, therefore, lies on the prosecution to prove the requisite intent. Assuming for the moment that the accused was a tenant on sufferance who had come in the quarter by right and had continued to remain by wrong this would not without proof of the requisite intent make his wrongful stay punishable as criminal traspass. Mere knowledge on his part that he was likely to cause annoyance would not by itself be sufficient, unless the evidence of such knowledge coupled with the other facts was such as to lead the Court to infer therefrom the requisite intent. The learned Magistrate does not seem to have applied his mind to this aspect of the case and has given no findings as to the intent with which the accused had continued to stay on the premises. The finding that the accused was a nuisance to the co-occupants was by itself of no consequence whatsoever.

Now on the one hand, there seems to be no evidence in the case to show that the accused had stayed there with the requisite intent, on the other, all the circumstances point to the fact that his intention in staying on was either that he bona fide believed that he had a right to stay and that he could not be ejected without process of law or because he found it impossible to get other lodgings and could not, therefore, shift.

We think, under the circumstances, the conviction cannot possibly be maintained. We accordingly set it aside and order that the fine, if paid, should be refunded.

J.V. *Conviction set aside.*

A. I. R. 1927 Sind 160

RUPCHAND BILARAM, A. J. C.

Doongersi Avchar—Plaintiff.

v.

Haribhoy Pragji and *others*—Defendants.

Original Civil Suit No. 9 of 1925, Decided on 16th February 1927.

(a) Hindu Law—Joint family—Partition—Son can sue for partition in life time of father.

A Hindu son has an unrestricted right to institute a suit for partition of coparcenary property during the lifetime of his father: 5 *All.* 430; 31 *Cal.* 111; *A. I. R.* 1922 *Pat.* 96 and 16 *Bom.* 39 *Foll.* [P 160, C 2]

(b) International Law—Court cannot pass a decree against a person, subject of foreign Government, which cannot be enforced against him.

It is a fundamental principle of international jurisprudence that a sovereign of a country acting through the Courts thereof has no jurisdiction over any matters with regard to which he cannot give effective judgment or which he can render effective only by interfering with the authority of a foreign sovereign or the jurisdiction of a foreign Court. Effective judgment means a decree which the sovereign under whose authority it is delivered, has, in fact, the power to enforce against the person bound by it, and which, therefore, his Courts can, if he chooses to give them the necessary means, enforce against such person. [P 161, C 1]

Dipchand Chandumal—for Plaintiff.

Kalumal Pahlumal—for Defendants.

Order.—This is a suit by a Hindu governed by the Mitakshara Law against his father, uncles and cousins for partition of property alleged to be joint Hindu family property partly situated within the jurisdiction of this Court and partly in a Native State.

Two preliminary issues have been raised as to the maintainability of the suit as framed.

The first issue is as to the right of the plaintiff to sue in the lifetime of his father. It is not disputed that according to the view of the Allahabad, Madras, Calcutta and Patna High Courts a Hindu son has an unrestricted right to institute a suit during the lifetime of his father. *Jogul Kishore* v. *Shib Sahai* (1), *Subba Ayyar* v. *Ganasa Ayyar* (2), *Rameshwar Prosad Singh* v. *Lachmi Prosad Singh* (3) and *Digambar Mahton* v. *Dhanraj Mahton* (4). The only restriction imposed by the Bombay High Court on the son's right to maintain such a suit is that he should do so with the consent of his father [*Apaji Narhar Kulkarni* v. *Ramchandra Raoji Kulkarni* (5)]. This was a Full Bench decision to which Sir Charles Sergeant, C. J., Barley, Candy and Ranade, JJ., were parties. Ranade, J., however, dissented

(1) [1883] 5 All. 430=(1883) A. W. N. 102 (F. B.).
(2) [1895] 18 Mad. 179.
(3) [1904] 31 Cal. 111=7 C. W. N. 688.
(4) A. I. R. 1922 Patna 96=1 Pat. 361.
(5) [1892] 16 Bom. 29 (F. B.).

from the view of the majority and took the same view as that of the other High Courts. In the present case the father is a consenting party and the first point does not, therefore, arise.

The second issue is as to the right of the plaintiff to include in this suit property situated in the Kathiawar State, and in the possession of Defendant No. 2. He has denied that he is a coparcener with the plaintiff or his father and his other uncle, viz., Defendant No. 1 in the case. He has claimed the Kathiawar property as exclusively his own and has disowned his interest, if any, in the rest of the property. He is himself a foreigner and is in no way amenable to the jurisdiction of this Court.

It is a fundamental principle of international jurisprudence that a sovereign of a country acting through the Courts thereof has no jurisdiction over any matters with regard to which he cannot give effective judgment or which he can render effective only by interfering with the authority of a foreign sovereign or the jurisdiction of a foreign Court. (Dicey on Conflict of Laws, Edition III, page 40) and an "effective judgment" has been defined to mean a decree which the sovereign under whose authority it is delivered, has, in fact, the power to enforce against the person bound by it, and which, therefore, his Courts can, if he chooses to give them the necessary means, enforce against such person. (Dicey page 42).

In the present case, it is not seriously contended that the decree, if any passed by this Court will not be effective either as a judgment in rem or as a judgment in personam as both the property and the person possessing it are in no way amenable to the jurisdiction of the King-Emperor. Under the circumstances, this Court has no jurisdiction to entertain the plaintiff's claim against the property in the Kathiawar State and such property must, therefore, be excluded from the suit.

I would, however, allow Defendant No. 2 to remain on the record as a proper though not a necessary party to the suit, but in no case will he be permitted to claim a share in the property within British India having expressly disowned his right, if any therein. The case should now be set down for hearing on the other issues in the case.

G.B.

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* A. I. R. 1927 Sind 161

PERCIVAL, J. C., AND RUPCHAND BILARAM, A. J. C.

Haji Samo—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 44 of 1926, Decided on 17th November 1926, from the judgment of the Addl. S. J., Hyderabad, Sind.

* (a) *Penal Code, S. 120B —Conspiracy may be established by direct evidence or presumed from circumstances proved—Specifying unlawful act is sufficient—Means adopted by conspirators need not be specified.*

A charge for conspiracy may be established either by direct evidence of an agreement between the conspirators, or it may be established by evidence of circumstances from which the Court may raise a presumption of a common concerted plan to carry out the unlawful design : 9 *Bom. L. R.* 347 ; 37 *Cal.* 467 ; 20 *C. W. N.* 292 ; 42 *Cal.* 1153 and *A. I. R.* 1926 *Sind* 171, *Rel. on.* [P 163, C 2]

The gist of the offence of criminal conspiracy is the agreement itself, and where the object of the agreement is to do an unlawful act by an unlawful means it is sufficient to specify the unlawful object without specifying the means adopted by all or any of the conspirators to gain that object : *R.* v. *Gill*, (1818) 2 *B. & Ald.* 204. *Rel. on.* [P 163, C 2]

The offence of conspiracy may be complete, although the particular means are not settled and resolved on at the time of the conspiracy. [P 164, C 1]

* (b) *Penal Code, S. 420—Deception may be practised through innocent agent—Deception need not be by express words.*

Deception may be practised by representation made through an innocent agent, and so more through a conspirator. [P 164, C 2]

It is not necessary that deception should be by express words and it may be by conduct or implied in the nature of the transaction itself. [P 164, C 2]

(c) *Penal Code, S. 120 B—Omission to mention parties to the conspiracy in the charge is a curable irregularity—Criminal P. C., S. 537.*

Omission to specify in the charge the persons who were parties to the conspiracy is an irregularity curable by S. 537, Criminal P. C. [P 165, C 2 ; P 166, C 1]

Motiram Idanmal—for Appellant.

T. C. Elphinston—for the Crown.

Judgment.—In this case the accused Haji Samo was put on his trial before

the Additional Sessions Judge, Hyderabad on the following two charges :

Firstly, that he along with others on or about 17th day of February, 1925, at Palla village, cheated Dodo Kakepoto of Rs. 750 by making a false representation that the woman Mt. Virbai was unmarried, and thereby committed an offence punishable under S. 420, Indian Penal Code.

Secondly, that between the 12th and 17th February, 1925, he joined in the conspiracy to cheat Dodo and thereby committed an offence punishable under S. 120 B, Indian Penal Code.

He was convicted of the second charge and sentenced to two years' rigorous imprisonment and a fine of Rs. 1,000 of which, if recovered Rs. 750 were ordered to be paid to Dodo.

The case as disclosed by the prosecution evidence was somewhat as follows : One Manohar, a young Hindu woman of Ahmedabad, who had lost her husband about 4 years ago was living at Bombay in the Vanita Visram Ashram or the Hindu widow's home. There she came to know one Karo Kutchi and his so-called wife Bachi who were both Mahammadans. These two persons appear to have been members of a professional gang who decoy young women for sale and appear to have taken up their lodging near the Ashram for the purpose of carrying on their nefarious trade. In January 1925, they managed to induce Manohar to leave the Ashram and accompany them to Karachi where the whole party lodged in the Bhatia Ashram, Karo and Bachi pretending to be Hindus. Though there is no reliable evidence, it is likely that at Bombay also they had personated themselves as Hindus. At Karachi Manohar got ill and wished to go back to Bombay. On the pretext that she was being taken back home, she was taken by train to Hyderabad where the party was joined by one Wali Mahomed, another member of their gang. From Hyderabad she was taken to Mirpurkhas, a Railway Station on the Bombay line, where she was first lodged in the Kanji Katchi, probably a Hindu, for 2 or 3 days and thence shifted to the house of one Jurio Mussalman.

It is said that at the house of Jurio the present accused joined Kanji's party and arranged for the sale of the woman to Dodo, a Mahammadan rustic, living in the interior. She was then drugged and taken by cart to Mirpurkhas Station and therefrom, by train to Khadro a side way Railway Station on the Sind Light Railway and thence taken to Palla village where Dodo resided and where on the 17th of February she was sold for Rs. 750 representing to him that she was an unmarried Mahammadan girl and the sister of Karo. At that time two deeds were purported to have been executed. One of them is executed by Karo himself. It contains recitals that the girl was one Virbai, daughter of Bhuro Samo Mussalman by caste resident of Manro in Bhuj Territory ; that she had not been married before and was being given in marriage by her brother Karo. This deed was attested inter alia by the accused. The other deed purports to have been executed by the girl herself and bears the attestation of some of the witnesses to the first deed but not the attestation of the accused.

For about three months Manohar lived a miserable life in the house of Dodo. She is said to have been kept under strict surveillance .and her movements were controlled. On the 29th of April, while returning from the well where she had gone to fetch water, she casually met a Hindu named Dewan and attempted to inform him of what had happened to her but as she did not know Sindhi she could not make herself understood and therefore, wrote and handed over to him a slip of paper (Ex. 5) in Guzeratti which is as follows :

> Manohar Lalchand I was living in Vanita Visram at Bombay. Brokers have brought me from there. Help me. If you take me with you, I shall come. So much.

This slip led to the Police investigation and to her rescue. On being questioned, Dodo stated to the Police that he had bought the girl for Rs. 750 on the representations, made to him by Karo and the accused that she was an unmarried Mahammadan girl and that he had paid Rs. 750 for her on such representations, that he did not know Karo but knew the accused whose assurance he had accepted. Karo and Bachi are absconding and have not been traced so far. The accused alone has been put on his trial and has been convicted by the Sessions Court. It might be stated here that the girl though considerably over 18 years of age looked so young in

outward appearance that she was taken by the Police to be under 18 years and the proceedings were, therefore, launched by them in the first instance under S. 366, Indian Penal Code, which were subsequently altered to those under the present section. The accused has denied that he was a party to the removal of Manohar from Khadro to Palla village and that he negotiated for her sale to Dodo. He has attempted to explain his presence at the time of the alleged sale or marriage and his attestation to the deed by stating that on that day he had been to that village for the sale of his own mare and as he happened to be at Dodo's house when the girl was being sold he attested the deed like other witnessess at the request of Dodo.

This defence has no foundation in fact. It appears from the evidence of Dodo that the accused had proposed the sale of the girl 2 or 3 days before she was brought to his village and that he was one of the party who brought the girl to the village. This finds ample support with evidence of Manohar who likewise speaks of her being drugged and removed from Mirpurkhas after the accused had informed Karo that he had arranged for the sale. It is again hardly unlikely that Dodo should have parted with such a large sum of money for marrying a stranger girl alleged to be a Samo by caste without the assurance of a person known to him that he was not being deceived. The accused is a Samo by caste. He was known to Dodo and he is the first and the only attesting witness to the deed who is not related to Dodo. We think that the learned Sessions Judge was right in holding that the accused was one of the party who passed off the girl to Dodo by representing her to be unmarried and a Mussalman.

The learned pleader for the accused has raised several objections against the validity of the conviction. He has urged that the proof of the negotiations for sale of the girl by the accused and his presence at the barter were insufficient to prove the charge of conspiracy, that there should have been express evidence of the agreement to cheat, that the means used by the conspirators in inducing Dodo to part with the money and the persons who had conspired to gain should have been specified in the charge. He has further strenuously contended that the means specified in the first charge was the representation made to Dodo that the girl was unmarried and assuming that this was also the representation alleged against the accused as part of the 2nd charge, there was no proof that the accused had made any such representation.

We think that there is no substance in any of these pleas.

It has been repeatedly laid down that a charge for conspiracy may be established either by direct evidence of an agreement between the conspirators, which, as observed by Earle, J., in *R.* v. *Duffield* (1) is hardly ever adduced, or it may be established by evidence of circumstances from which the Court may raise a presumption of a common concerted plan to carry out the unlawful design. *R.* v. *Parsons* (2), *R.* v. *Murdhy* (3), *R.* v. *Brisac* (4), *Mulcahy* v. *Queen* (5), *Emperor* v. *Annappa Bharamgauda* (6), *Birendra Kumar Ghose* v. *Emperor* (7), *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Mon Mohan Roy* (8), *Harsha Nath Chatterjee* v. *Emperor* (9), *Jumo Allarakhio* v. *Emperor* (10) and *Kishanchand* v. *Emperor* (11). The circumstances in which the girl was brought down to Mirpurkhas and the conduct of the accused were more than ample to draw a presumption of conspiracy against him. It is equally clear that there was no obligation on the Crown to specify in the charge the means used by the conspirators for gaining their unlawful object. The gist of the offence of criminal conspiracy is the agreement itself, and where the object of the agreement is to do an unlawful act, and not to do a lawful act, by an unlawful means it is is sufficient to specify the unlawful object without specifying the means adopted by all or any of the cons-

(1) [1851] 5 Cox C. C. 404.
(2) [1762] 1 Bl. & W. 392=96 E. R. 222.
(3) [1833] 8 C. & P. 297.
(4) [1803] 4 East 164=102 E. R. 792.
(5) [1868] 3 H. L. 306.
(6) [1907] 9 Bom. L. R. 347.
(7) [1909] 37 Cal. 467=7 I. C. 359=14 C. W. N. 1114.
(8) [1916] 20 C. W. N. 292=35 I. C. 999=17 Cr. L. J. 430.
(9) [1915] 42 Cal. 1153=21 C. L. J. 201=26 I. C. 313=19 C. W. N. 706.
(10) [1916] 9 S. L. R. 223=34 I. C. 619=17 Cr. L. J. 233.
(11) A. I. R. 1923 Sind 171=20 S. L. R. 13.

pirators to gain that object. In *R.* v. *Gill* (12) the defendants were found guilty upon an indictment charging them with conspiracy "by diverse false pretences and subtle means and devices" to obtain money, and it was held, on motion in arrest of judgment, that, the gist of the offence being conspiracy, it was sufficient to state that fact and its object and not necessary to set out the specific pretences. Abbott, C. J., said :

> The indictment appears to me sufficient. The gist of the offence is the conspiracy and although the nature of every offence must be laid with reasonable certainty so as to apprise the defendant of the charge, yet I think that it is sufficiently done by the present indictment. It is objected that the particular means and devices are not stated. It is, however, possible to conceive that persons might meet together, and might determine and resolve, that they would by some trick and device cheat and defraud another, without having at that time fixed and settled what the particular means and devices should be. Such a meeting and resolution would nevertheless constitute an offence. If, therefore, a case may be reasonably suggested in which the matters here charged would, if there were nothing more, be an offence against the law, it is impossible, as it seems to me, to conclude that the law should require the particular means to be set forth. The offence of conspiracy may be complete, although the particular means are not settled and resolved on at the time of the conspiracy. I think, therefore, that no sufficient ground has been stated for arresting the judgment.

Bayley, J., said :

> I am of the same opinion. When parties have once agreed to cheat a particular person of his moneys, although they may not then have fixed on any means for that purpose, the offence of conspiracy is complete.....It is, therefore, not necessary to state the means at all in the indictment, it being quite sufficient to charge the defendants with the illegal conspiracy, which is of itself an indictable offence.

The judgment of Halroyd, J., was to the same effect.

These observations have been referred to with approval in *Taylor* v. *Rey* (13), and, in my opinion, equally apply to a charge of conspiracy to cheat under S. 120-B, Indian Penal Code.

In the present case, however, the accused had clear notice of at least one of the false pretences which was said to have been employed in furtherance of the conspiracy to cheat Dodo. The two charges cannot but be read together and it was clearly stated in the first charge that the girl had been represented to be unmarried. This representation was indubitably an important factor which operated on the mind of Dodo in parting with such a large sum of money. It may fairly be presumed that Dodo would not have been prepared to go through the form of marriage with an unknown girl and to run the risk of losing his money and being prosecuted for bigamy unless he was given the assurance that she was unmarried.

The learned pleader has relied on certain answers given by the prosecution witnesses in their cross-examination which go to show that it was Karo who expressly made that representation to the accused. We have no doubt that these answers were given by the prosecution witnesses from a desire to save the accused. Most of the witnesses were cross-examined after Dodo and the accused had requested for the permission to compound the case and their request had been rejected. Apart from this, there was no obligation on the Crown to prove that the accused had made the representation either expressly or by himself.

Deception may be practised by representation made through an innocent agent [*R.* v. *Butcher* (14)] and so more through a co-conspirator. It is also not necessary that deception should be by express words and it may be by conduct or implied in the nature of the transaction itself.

In *R.* v. *Copeland* (15) where the defendant had obtained money from a woman under the threat of an action for breach of promise of marriage, he being in fact a married man already, an indictment laying as the false pretence that he was entitled to maintain an action against her for breach of promise of marriage was held to be good, the threat conveyed by him of the action for breach of promise of marriage being suggestive of the fact that he was not a married man. In *R.* v. *Kerrigan* (16) where in presence of *P*, *K* represented to *B* that he had a quantity of good tobacco and induced *B* to buy some, and *P* afterwards delivered to *B* two bales purporting to be tobacco but containing rubbish, and recovered

(12) [1818] 2 B. & Ald. 204=106 E. R. 341.
(13) [1895] 1 Q. B. 25=64 L. J. M. C. 11=18 Cox C. C. 45=43 W. R. 24=15 R. 66=71 L. T. 571.
(14) [1858] 8 Cox C. C. 77=7 W. R. 38=4 Jur. (N.S.) 1155=28 L. J. M. C. 14.
(15) [1842] Cor. & M. 516.
(16) [1854] 9 Cox C. C. 441=12 W. R. 416=9 L. T. 843=33 L. J. N. C. 71.

the price, *K* was held to have been rightly convicted on an indictment charging him with obtaining money from *B* by deceit.

In *Khoda Bux* v. *Bakeya Mundari* (17) the complainant intending to discharge a zerpeshgi mortgage for Rs. 60 paid to the accused Rs. 59 in full settlement of that particular claim, so informed him at the time of payment and asked for the return of the relative document. The accused received the money and instead of handing over to the complainant the relative document duly discharged offered to return to him another document which was executed by the complainant and 8 others in respect of a simple money debt. Pargiter and Woodroffe, JJ., held that the accused had by his conduct in accepting the money with full knowledge of the purpose for which it was being paid, led the complainant to believe that he would accept it on the terms on which it was offered and that this amounted to a false representation. In the present case the accused had permitted Karo to make the representation in his presence that tha girl was unmarried, and which representation he knew or must have known if he had applied his mind to it to be untrue. He not only failed to disabuse Dodo on that point though he knew that Dodo was relying upon his assurance and not on that of Karo whom he did not know before, but he went further and attested the deed. The conduct of the accused was not only evidence of the agreement between the two conspirators to cheat but evidence against the accused of cheating under the first count and for which he could as well have been convicted.

Again the criticism by the learned pleader of the evidence of the girl is hardly relevant to the issue.

It is, no doubt, true that the version given by Manohar in the Sessions Court of her being in a state of semi-unconsciousness at the time of her barter is an improvement upon her first statement to the Police which shows that she was drugged when she was being transported from Mirpurkhas to Khadro we are inclined to believe that the statement made by her to the Police is more probable than her subsequent statement made in the Sessions Court. Though according to the Medical evidence she was considerably over 18 years of age, she was young and inexperienced and had fallen into the clutches of evil persons. Very probably she was induced to leave Bombay in the hope that she would be married to a Hindu. However depraved she may have got in the company of Karo it is not likely that she could have been a consenting party to be taken off to the interior and to be sold to a Mahammadan rustic, that she may lead a life of misery with him. And it is highly probable that she was drugged before she was taken into the interior and once when she was there, she was silenced by threats that her life will be put an end to, if she went counter to the wishes of her custodian. Her silence at the time of the barter is, in our opinion, due more to her fears than to any conspiracy on her part to cheat Dodo. The fact that she did not sign the deed purporting to be her deed is more due to the ignorance of her custodians that she knew how to read and write and to her being asked to put her thumb mark than to any preconcerted act of hers in collusion with the others. Her being a co-conspirator with others assuming it to be true again does not help the accused out of his guilt which relates to the deception practised on Dodo and not on the girl herself.

It has been urged that the fact that Manohar could not speak Sindhi should have put Dodo on guard and that it may, therefore, be presumed that Dodo knew that the girl was not a Mussalman and that she was not unmarried. But this plea is sufficiently met by the fact that in the deed executed by Karo she is described as a Mahammadan of Bhuj and not of Sind. This recital was sufficient to put Dodo off his guard who was made to believe that the girl was a Kutchi Mussalman and not a Sindhi. There is also the further fact that if Dodo suspected the girl to have been decoyed by the accused or that Karo was not her brother it is not likely that he would have parted with such a large sum of money as Rs. 750. Yet we have it clearly proved by evidence even from the admission of the accused himself that Dodo did give Rs. 750 and nothing less.

With regard to the plea that the charge was defective in so far as it did not specify the persons who were parties to the conspiracy; this plea is again

(17) [1905] 32 Cal. 911=9 C. W. N. 1006.

sufficiently cured by the provisions of S. 537, Criminal P. C. Throughout the proceedings the accused had clear notice that at least one of the co-conspirators was the absconding Karo. The accused has in no way been prejudiced by the alleged defect, if any, in the charge. Notwithstanding the very able argument of the learned pleader for the accused we are not convinced that the accused has not been rightly convicted of the charge under S. 120-B, Indian Penal Code. The appeal, therefore, fails.

With regard to the question of sentence, we are inclined to accept the learned pleader's arguments that the sentence of fine of Rs. 1,000-0-0 in addition to the two years' rigorous imprisonment is much too severe and that as the accused cannot pay such a heavy fine it means his detention in prison for a further period of 12 months. Of the fine if recovered Rs. 750 have been ordered to be paid to Dodo. We are not aware if Dodo received any money from the accused preliminary to his agreeing to compound the case with the accused or not. If he did he cannot get the amount twice over. Under any circumstances he has his ordinary remedy against the accused. We, therefore, think that the fine may well be reduced by the amount which, if recovered, is payable to Dodo.

We accordingly confirm the sentence of imprisonment but reduce the fine to Rs. 250 only and direct that in default of payment of fine he should undergo further rigorous imprisonment of six months.

In the end we wish to draw the attention of the Committing Magistrate to the extreme desirability of dating the deposition of witnesses as they are recorded. A good deal of the time of this Court was wasted in ascertaining whether the examination-in-chief and the cross-examination of each of the witnesses had been recorded on the same day or on different dates and in finding out if the answers given by the prosecution witnesses in cross-examination were due to anything having transpired between the time, which had intervened. It was only after a fortuitous reference to the diary of the case that it was discovered that the examination-in-chief of most of the witnesses had been recorded some days before their cross-examination and that in the interval the parties had attempted to compromise the case. This to a certain extent accounted for favourable answers being given in cross-examination. The dating by the learned Magistrate of parts of the depositions only was misleading. We trust that the learned Magistrate will be more careful in future and will see that the depositions recorded by him on different dates are properly dated.

G.B. *Sentence reduced.*

A. I. R. 1927 Sind 166

RUPCHAND BILARAM AND LOBO, A. J. Cs.

Emperor—Prosecutor.

v.

Saidu and *others*—Accused.

Criminal References Nos. 265, 268 and 270 of 1926, Decided on 14th December 1926, made by the Dist. Mag., Karachi.

Criminal P. C., Ss. 118, 120 and 123—Suspect undergoing imprisonment on the date of order under S. 118—S. 120 (1) comes into operation and no order for his detention can be passed till his release—On the date of order under S. 118 suspect undergoing trial for substantive offence—Time granted for furnishing security but before expiry of such time suspect convicted—Order under S. 123 should be passed—Time of detention runs concurrently with imprisonment for substantive offence.

If on the date of the order passed under S. 118 the suspect is undergoing imprisonment for a substantive offence, the provisions of Cl. (1) of S. 120 come into operation and the period of security does not commence till the suspect has served out his substantive sentence of imprisonment. He has time to furnish the required security up to the date on which the period of the security would commence and, therefore, till the expiry of such period no order for his detention in prison for failure to comply with the order under S. 118 can legitimately be passed. The proper procedure under the circumstances would be not to pass the order for detention of the suspect under S. 123 at once but postpone further proceedings under that section till the suspect has served out the period of sentence for the substantive offence: *A. I. R.* 1926 *Bom.* 545, *Rel. on.* [P. 167, C. 1]

If on the date of order under S. 118 the suspect is not undergoing imprisonment for a substantive offence his case does not fall within the purview of Cl. (1) of S. 120. If on that date the suspect asks for time to furnish the required security, it is open to the Magistrate to inquire whether the suspect is undergoing a trial for a substantive offence, and if so, it is open to him to refuse to grant any time for furnishing the required security and to take immediate action under S. 123. If, however, the Magistrate does

not make the necessary enquiry, or on making the necessary enquiry he does not get any definite information, and in the exercise of his discretion he grants time to the suspect to furnish security, and before the expiry of that time the suspect is convicted of a substantive offence and sentenced to imprisonment, then neither Cl. (1) nor Cl. (2) of S. 120 applies. In that case, the Magistrate should proceed to pass an order under S. 123 which provides for immediate detention in prison of the suspect till he furnishes the required security, This detention would ipso facto run concurrently with the substantive sentences which the suspect is undergoing: *A. I. R.* 1926 *Snd* 273, *Foll.* [P. 167, C. 2]

T. G. Elphinston—for the Crown.

Judgment.—We are afraid the effect of the provisions of Ss. 120 and 123, Criminal Procedure Code, is being often misconceived by the lower Magistracy resulting in constant references being made to us.

We have three such references on board to-day. The procedure which a Magistrate should adopt before ordering the detention of a suspect for failing to furnish the required security is simple enough. If on the date of the order passed under S. 118 of the Code the suspect is undergoing imprisonment for a substantive offence, the provisions of Cl. (1) of S. 120 come into operation and the period of security does not commence till the suspect has served out his substantive sentence of imprisonment. He has time to furnish the required security up to the date on which the period of the security would commence and, therefore, till the expiry of such period no order for his detention in prison for failure to comply with the order under S. 118 can legitimately be passed. The proper procedure under the circumstances would be that indicated in *Emperor* v. *Nana Ramji Shinde* (1). The Magistrate should not pass the order for detention of the suspect under S. 123 at once but postpone further proceedings under that section till the suspect has served out the period of sentence for the substantive offence. And in order to secure the attendance of the suspect in Court on the date of his release the Magistrate should request the Jail authorities to inform of the probable date on which the suspect is to be released after serving his substantive sentence and to intimate to them that the suspect is to be produced before the Court on that day in connexion with the further proceedings under S. 123, Criminal Procedure Code, unless before that date he has furnished the required security. The Magistrate should take such further precautions as he considers desirable to secure the attendance of the suspect before him on that or such other date on which he may fix the hearing.

If on the date of order under S. 118 the suspect is not undergoing imprisonment for a substantive offence his case does not fall within the purview of Cl. (1) of S. 120. If on that date the suspect asks for time to furnish the required security, it is open to the Magistrate to inquire from the Police authorities whether the suspect is undergoing a trial for a substantive offence, and if so, it is open to him to refuse to grant any time for furnishing the required security and to take immediate action under S. 123 of the Code. If, however, the Magistrate does not make the necessary inquiry, or on making the necessary enquiry he does not get any definite information, and in the exercise of his discretion he grants time to the suspect to furnish security, and before the expiry of that time the suspect is convicted of a substantive offence and sentenced to imprisonment, then in view of the recent Full Bench ruling of our Court in *Emperor* v. *Ahmed* (2) neither Cl. (1) nor Cl. (2) of S. 120 applies. In that case the Magistrate should proceed to pass an order under S. 123 which provides for immediate detention in prison of the suspect till he furnishes the required security. This detention would ipso facto run concurrently with the substantive sentence which the suspect is undergoing. In order to avoid any doubt being raised as to the question whether the two sentences are to run concurrently the Magistrate will be well advised to give express direction on that point which he is even otherwise competent to do under the provisions of S. 397 of the Code which, as now recently amended, treats the detention of a suspect under S. 123 as sentence of imprisonment. If these instructions are followed there will be no occasion for such constant references to this Court.

In view of the above remarks, we allow Reference No. 265 of 1926, *Crown* v. *Saidu*, as in this case the order under

(1) A. I. R. 1926 Bom. 545.

(2) A. I. R. 1926 Sind 273=20 S. L. R. 163 (F. B.).

S. 118 was made on the 24th of July 1926, and time was granted to the suspect to furnish security up to 26th of August 1926. It was during that interval that the suspect was convicted of a substantive offence and sentenced to rigorous imprisonment for 12 months. The proper order in this case is that the period of his detention under S. 123 is to run concurrently with the period of his substantive sentence and we order accordingly.

In Criminal Reference No. 268 of 1926, the suspect Lashkaran and Ali Murad had both been convicted of substantive offences and sentenced to imprisonment before the order passed under S. 118. And we accordingly set aside the order passed by the learned Magistrate under S. 123 and order that he should communicate with the Jail authorities to intimate to him when Lashkaran and Ali Murad are likely to be released from prison, and that he should make proper arrangements for the attendance of the suspect in Court on that date or such other subsequent date which he may fix for further proceedings under S. 123 unless before such date the two suspects furnish the required security.

In Criminal Reference No. 270 of 1926 again we find that the order under S. 118 is dated the 4th of February 1926. The suspect was convicted of a substantive offence and sentenced to imprisonment on the 26th of February 1926. The time allowed to him for furnishing security expired on the 2nd of March 1926. Under the circumstances the period of his detention under S. 123 will run concurrently with his sentence for the substantive offence. We accordingly allow the reference and order that the suspect be detained in Jail for that period unless he gives the required security before that date.

G.B. *Reference accepted.*

✻ A. I. R. 1927 Sind 168

DE SOUZA, A. J. C.

N. H. Mirchandani—Applicant.

v.

Special Land Acquisition Officer, Karachi—Opponent.

Civil Reference No. 206 of 1925, Decided on 23rd December 1926.

✻ (a) *Land Acquisition Act, S. 23—Residential quarters—Basing value on hypothetical rent merely, is not enough—Opinion of experts, price paid for adjacent lands and prospects of profits are things to be considered.*

The methods of valuation of land acquired under Act 1 of 1894 may be classified under three heads: (1) the opinion of valuators or experts, (2) the price paid within a reasonable time in bona fide transactions of purchase of the lands acquired or the lands adjacent to the land acquired and possessing similar advantages, and (3) a number of years' purchase of the actual or immediately prospective profits from the lands acquired. It is generally necessary to take two or all of these methods of valuation in order to arrive at a fairly correct valuation. Exact valuation is practically impossible, the approximate market value is all that can be aimed at. [P. 169, C. 2]

In the case of residential property to arrive at the market value solely on the basis of hypothetical rent may work grave injustice to the owner. An attempt should be made to arrive at an approximate value with reference to each of the three methods above indicated: 11 *C. W. N.* 875 and 34 *Bom.* 486, *Rel. on.* [P. 170, C. 1]

Evidence as to the rents actually paid by bona fide tenants about the period of the notification should not be excluded, nor should the rent be calculated as a mere multiple of the carpet area without reference to the amenities of the tenements. [P. 170, C. 1]

(b) *Evidence Act, S. 115—Land acquisition—Claimant is not estopped from showing proper value though he had shown less value in former proceedings of other nature.*

Claimants are not precluded, in land acquisition proceedings, from proving by evidence of sales and purchases that their land was worth considerably more than that given by them in some other proceedings, or that their valuation was in fact an under-estimate. [P. 171, C. 1]

(c) *Land Acquisition Act* (1894), *S. 23—Price paid by claimant should be considered—Depreciation, if any, should be shown by Government.*

The price paid by the claimant within a few years of the acquisition should be taken into consideration while awarding compensation and if the Government relied on a depreciation, it is for them to prove the extent of depreciation: 18 *Bom.* 184; *A. I. R.* 1922 *Bom.* 399 and *A.I.R.* 1924 *Bom.* 362, *Ref.* [P. 172, C. 1, 2]

(d) *Land Acquisition Act, S. 23—Advantage to be gained by scheme for which the land is acquired is not to be considered.*

Upon a compulsory acquisition of property the seller is entitled to the value to him of the property in its actual condition at the time of expropriation with all its advantages and with all its possibilities excluding any advantage due to the carrying out of the scheme for the purpose for which the property is compulsorily acquired: *A. I. R.* 1925 *P. C.* 91, *Foll.* [P. 172, C. 2]

Kimatrai and *Tolasing*—for Applicant.

T. G. Elphinston and *Dipchand Chandumal*—for Opponent.

Judgment.—This is a reference by the Special Land Acquisition Officer, Karachi of proceedings held before him in connexion with the acquisition of a certain plot of land Survey No. 40-A, Survey Sheet B 7, Rambagh Quarter, Karachi, with buildings thereon as the claimant objected to the amount of compensation awarded by the Land Acquistion Officer.

The property acquired consists of the entire plot of land Survey No. 40 A, Sheet B 7, Rambagh Quarter, with buildings standing thereon (1) the main bungalow ground floor and first floor (2) out-houses attached to the main bungalow at the south-west corner ground floor and first floor and (3) out houses ground floor only in the north west corner of the plot and detached from the main bungalow. There are two motor garages one occupying a portion of the ground floor of out houses in (2) and the other in (3).

The property is Municipal lease-hold property granted to the original holder on a 99 years lease as from August 1894 in consideration of an yearly ground rent of Rs. 4-12-2-the lease being renewable in perpetuity at the option of the lessee with no restriction as to buildings. It was purchased by one Premsing in 1898 who built a structure thereon with a ground floor and an upper floor and sold it in 1918 to Mr. Achalsing, pleader, under the sale deed (Ex. 74) for Rs. 27,000. Mr. Achalsing is said to have made additions and alterations at a cost of approximately Rs. 12,000 and on his death his widow being in embarrassed circumstances sold it to one Mr. Mangharam for Rs. 50,000 in 1917 under a deed Ex. 73. It was purchased by the claimant from the heirs of Mangharam, his son Khanchand and the widow of his deceased son Gopaldas on behalf of herself and as guardian of her minor sons Parmanand and Tekchand under two sale-deeds, Exs. 95 and 96 dated 30th November 1920, for a price of Rs. 89,745 the sale-deeds referring to a previous kabala or agreement for sale, dated 2nd March 1920.

The claimant is a rising medical practitioner and after his purchase he occupied the ground floor as his residence and opened a dispensary. He let the first floor and a portion of the out houses. His idea in purchasing the premises was to establish his practice in a respectable quarter occupied mainly by well-to-do-persons of his own community with the further intention to develop the premises by acquiring from the Municipality sole alignment land on the west and building a hospital and a maternity home on it. He accordingly made an application to the Municipality on the 3rd March 1922, for altering and enlarging the premises for this purpose but on 23rd March 1922, the Municipality sent him a reply stating that no permission could be granted as the plot would come under acquisition for constructing a road through Rambagh Tank to Burns Road. The formal notification for acquiring the land, however, was not published till the 11th June 1924.

The Land Acquisition Officer has awarded the claimant total compensation Rs. 45,542. In arriving at this computation he adopted as the basis of valuation the capitalization of the net income which he calculated as accruing from the property. He discarded in express terms the two other alternative methods of valuation, viz., a comparison with recent sales of the particular property or of similar property and the opinion of experts; the former because owing to extreme fluctuation in the prices at this period in consequence of the boom and the slump that followed there was no reliable evidence as to the proper market value and the latter because in his opinion there was hardly any expert evidence of value led by the claimant. It seems to me that the Land Acquisition Officer should not have so summarily discarded two of the three alternative methods of valuation. In the case of *Harish Chunder Neogy* v. *Secretary of State for India* (1) the Calcutta High Court indicated the principles of valuation as follows:

> The methods of valuation of land acquired under Act 1 of 1894 may be classified under three heads (1) the opinion of valuators or experts, (2) the price paid within a reasonable time in bona fide transactions of purchase of the lands acquired or the lands adjacent to the land acquired and possessing similar advantages; and (3) a number of years' purchase of the actual or immediately prospective profits from the lands acquired.
>
> It is generally necessary to take two or all of these methods of valuation in order to arrive at a fairly correct valuation. Exact valuation is practically impossible, the approximate market value is all that can be aimed at.

(1) (1907) 11 C. W. N. 875.

To the same effect are the observations of Macleod, J., in *In re Sukhanand Gurumukhrai* (2). His Lordship said :

> The income of a property whether actual or imaginary is, no doubt one of the recognized starting points for a valuation. But it is not the only element to be taken into consideration. In the case of residential property ..... to arrive at the market value solely on the basis of hypothetical rent may work grave injustice to the owner.

It seems, therefore, that an attempt should be made to arrive at an approximate value with reference to each of the three methods above indicated so far as the recorded evidence permits.

I shall first deal with the method adopted by the Land Acquisition Officer of valuing the property on a rental basis with special reference to his method of estimating the rent. He has not taken into account the rents actually received by the claimant about the period of the notification. He has preferred to calculate what he calls the normal letting value of this property on the basis of rents paid by tenants in some of the adjoining properties in this quarter and arriving at a hypothetical rent of this property with reference to its carpet area as compared with the carpet area of the several tenements shown in the schedule.

With regard to this mode of estimating the normal rents two observations may be made : (1) there is no reason to exclude evidence as to the rents actually paid by bona fide tenants about the period of the notification because presumably that would represent the actual market rents at that period ; and, secondly, it would not be correct to say that rent is a mere multiple of the carpet area without reference to the amenities of the tenements ; nor do I think that carpet area by which is meant the area of living rooms be confined in the case of Indian household to drawing rooms, dining rooms and bed rooms to the exclusion of other portions of the house if as a matter of fact they are occupied as living rooms. What is the evidence as to the rents actually received by the claimant after his purchase of the property ? It appears that the vendor Khanchand Mangharam occupied the upper storey of the building and the garage from January to May 1921 at rental of Rs. 150 per mensem for the upper storey and Rs. 25 for the garage. This is proved by the evidence of Khanchand himself Ex. 91 and the receipts and cheques (Exs. 92-94). From June 1921, to August 1922 the upper storey and the tenement on the first floor over the out-houses was occupied by Wadhumal Lekhraj Ex. 80 who paid rent of Rs. 150 for the upper storey and Rs. 37-8-0 for the tenement as is shown by the tenancy agreement Ex. 69. From May 1923, to September 1924, the main upper storey was occupied by one Kundanmal (Ex. 85) who paid rent of Rs. 110 by way, it is said, of a friendly arrangement. Then from October 1924, to December, 1925, the main upper storey was let to one Hashmatrai (Ex. 81) at a rental of Rs. 150 as is proved by the agreement of tenancy (Ex. 67) and the counter-folio of the cheques (Ex. 82) and the garage was let to one Ishwardas Mallik at a rental of Rs. 22-8 per month as would appear from Exs. 88 and 89. Subsequently additions and alterations were made to the garage so as to render it habitable and it was let to one Sukhramdas (Ex. 84) at a rental of Rs. 35 per mensem.

It is, I think, rightly claimed for the claimant that the average should be taken of the rents actually received during three years prior to the date of notification. The rent actually received in 1922-23 for the main upper storey and for the tenement on the first floor over the out-houses and the garage is approximately Rs. 210 per mensem. Add to this the ground floor including one garage which was in the occupation of the claimant for which a rental of Rs. 175 seems by no means excessive in comparison with the rents for the first floor and I think the claimant's estimate of a monthly rental of Rs. 400 seems by no means extravagant. As against this Mr. Elphinston argued that the claimant is precluded from showing that the rental value of his property was in excess of Rs. 2,100 per annum because on 23rd March 1923, and 8th March 1924, he had lodged regular protests with the Municipality against the assessment of the letting value of Rs. 4,200 and then at Rs. 2,400 by the Municipality (vide

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(2) [1910] 34 Bom. 486=4 I. C. 278=11 Bom. L. R. 1176.

Ex. 76) and the Municipality eventually assessed the letting value at Rs. 2,100 per annum. Mr. Elphinston relied on the dictum of Bachelor, J., in *Government of Bombay* v. *Merwanji Muncherji Cama* (3) that in the analogous case of applications for Probate the claimants should be held to the valuations placed by them in the schedules to their petitions for Probate of their father's Will and this must be taken as evidence of what the claimants thought at that time this land was worth at its lowest reasonable estimate. This general observation, however, is qualified by the remark that it will not preclude the claimants from proving by evidence of sales and purchases that their land was worth considerably more than that given in the schedule or that their valuation was in fact an under-estimate. It is argued on behalf of the claimant that his estimate of the rent in the protests he made was based on a misconception natural enough in a layman that the rental for purpose of Municipal assessment is calculated on the rent of premises actually let to tenants and not in the occupation of the owner.

Turning next to the estimate of hypothetical rent by reference to the carpet area the Land Acquisition Officer has calculated the carpet area at 2315 square feet. To this calculation the claimant has objected that certain verandahs provided with trellis work and fitted up with electric lights and used as sleeping rooms for the ladies of the household have been improperly excluded. Similarly objections have been taken to the exclusion of certain rooms which he contended were also used as living rooms by the claimant and his family. It was urged that the verandahs on the west measuring 748 square feet, the two first floor verandahs measuring 252 square feet, two rooms measuring 103 square feet, the south-west corner room measuring 185 square feet, a small room measuring 38 square feet and a verandah attached to the garage measuring 90 square feet—an area 1416 square feet in all—has been improperly excluded and the proper carpet area should, therefore, have been 3731 square feet. Allowing Rs. 10 per square foot for the carpet area thus calculated and Rs. 20 per mensem for the garage as has been done by the Land Acquisition Officer the gross rent even on this basis would be in the neighbourhood of Rs. 400 a month.

To arrive at the net rent the Land Acquisition Officer had made a deduction of 13 per cent for Municipal rates and taxes, 4 per cent for vacancies, cost of collection, bad debts etc., 10 per cent for repairs and ¼ per cent on 9/10ths of costs for insurance—in all a little over 27 per cent I venture to think that a deduction of 10 per cent for repairs and 4 per cent for vacancies is somewhat excessive. I consider that 5 per cent for repairs and 2 per cent for vacancies etc., would be adequate and that to arrive at the net rental a deduction of 20 per cent is all that need be made.

On this basis capitalising the net rent at 20 years' purchase which is the general rate usually adopted for this purpose it seems to me that Rs. 76,800 is the fair valuation of this property on a rental basis.

Turning next to comparison of prices paid within a reasonable time in bona fide transactions of purchase of the lands acquired of the lands adjacent to the lands acquired, Mr. Elphinston has strenuously contended that the price paid by the claimant should not in this case be treated as any guide to the market value at the time of the notification because the claimant purchased at the height of the boom in land values and the notification was made at the depth of the slump. To prove the violent fluctuation in the land market during the years 1920-1924 a statement (Ex. 126) of purchases and sales of land in the Rambagh Quarter prepared from the index of sales in the Sub-Registrar's office has been put in on behalf of the Municipality and to illustrate the statement by diagram a graph (Ex. 127) has been prepared. The statement merely gives the surface area of plots sold in Rambagh Quarter and the price paid without any clue to the nature of the buildings standing on the plots. It embraces a very large area with varying amenities and different standards of value for lands and houses. From this statement the average of prices per square yard of lands and sold in the entire quarter is calculated at Rs. 138 per square yard in 1920, Rs. 135 per square yard in 1921, Rs. 77 per square yard

(3) [1908] 10 Bom. L. R. 907.

in 1922, Rs. 72 per square yard in 1923 and Rs. 50 per square yard in 1924 and it is urged that the valuation of the claimant's property at the date of notification in 1924 with reference to the price he paid in 1920 should be made at this proportion. It is pointed out that the claimant purchased at Rs. 155 per square yard and he has been awarded compensation at the rate of Rs. 61-8-0 per square yard which in view of the above proportions, it is contended, is a very fair valuation.

It seems to me that this method of valuing the property is not fair to the claimant. It may be assumed that there was a boom in the prices of land in Karachi generally in 1920 and that there was a serious decline in 1924. But the fluctuation was not equally violent in every quarter of the city. It was most violent in quarters where there were speculative sales and purchases. The quarter where the claimant't house is situated was peculiarly free from speculative sales as it was mainly inhabited by well-to do residents who owned the property they occupied and did not care to take advantage of the boom. It cannot for a moment be contended that the claimant bought this property as a speculation. He required it for his bona fide use and paid what he considered a fair market value. To show that the land boom and the subsequent slump scarcely affected this quarter reliance is placed on behalf of the claimant on two sales in 1921, one sale in 1923 and one sale in 1924 in the statement (Ex. 126), the sales referred to are the 1st and the 5th sale for the year 1921 where a price has been paid of Rs. 170-8 and Rs. 172-14-0 per square yard respectively the third sale for the year 1923 where the price paid is Rs. 132 per square yard and the 3rd sale for 1924 where the price paid is Rs. 156 per square yard, the value in the case of the last sale of the land alone situated in Free Road close to the claimant's property according to the witness Nandumal (Ex. 114) being Rs. 100 per square yard.

In *Municipal Commissioner for the City of Bombay* v. *Sayed Abdul Hak Kurmulker* (4) it was indicated that the price paid by the claimant within a few years of the acquisition should be taken into consideration while awarding compensation and in *Frenchman* v. *Assistant Collector, Haveli* (5) as well as in *Government of Bombay* v. *Ismail Ahmad Hafiz Moosa* (6) it was held that if the Government relied on a depreciation it is for them to prove the extent of depreciation. I am of opinion that the evidence on the record does not prove the depreciation to the extent for which Mr. Elphinston contends.

On behalf of the claimant enhanced compensation is claimed in view of the improved value of the Quarter by reason of Government deciding to construct the Secretariat and High Court Buildings on the Artillery Maidan in consequence of which the quarter would be the centre of future activities of Karachi. I do not think that the claimant is entitled to ask for enhanced compensation on this account because the demolition of his bungalow is a necessary portion of the development of Artillery Maidan. It was laid down by their Lordships of the Privy Council in *Narsingh Das* v. *Secy. of State* (7) following *Fraser* v. *City of Fraserville* (8) that upon a compulsory acquisition of property the seller is entitled to the value to him of the property in its actual condition at the time of expropriation with all its advantages and with all its possibilities excluding any advantage due to the carrying out of the scheme for the purpose for which the property is compulsorily acquired.

As regards loss of practice, expenses of removal, etc., the compensation awarded by the Land Acquisition Officer seems to me to be adequate.

I do not consider that the claimant is entitled to claim compensation for alleged improvement which he estimates at Rs. 8,000 because there is very little evidence to prove the extent of the improvement and such evidence as has been adduced merely shows that the improvements were in the nature of repairs to electric fittings, water and drainage connexions and a small verandah attached to the out-houses.

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(4) [1884] 13 Bom. 184.

(5) A. I. R. 1922 Bom. 399.
(6) A. I. R. 1924 Bom. 362.
(7) A. I. R. 1925 P. C. 91=6 Lah. 69=52 I.A. 133 (P. C.).
(8) [1917] A. C. 187=86 L. J. P. C. 91=33 T. L. R. 179=116 L. T. 258.

Taking the evidence as a whole I estimate the value of the property at Rs. 76,800, add to this 15 per cent, for compulsory acquisition Rs. 11,520, Rs. 2,000-0-0 for loss of practice, Rs. 500 for expenses of removal etc., Rs. 10 for trees, the total compensation which should be, and deducting Rs. 95 for capitalized assessment should be awarded is Rs. 90,725. The balance should be paid to the claimant by the Municipality. The claimant states that he is entitled to interest on the excess compensation from 6th January 1926, the date he handed over possession? Mr. Elphinston argues that the Municipality is entitled to a set-off from 13th May 1925, when the money was paid to 6th January 1926, when possession was given. I think there is force in this argument and I disallow interest on the balance of compensation from 6th January 1926.

Costs of this reference to be borne by the opponents Municipality.

D.D. *Order accordingly.*

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* A. I. R. 1927 Sind 173

PERCIVAL, J. C., AND RUPCHAND BILARAM, A. J. C.

Mahomed Abdul Majid — Accused — Applicant.

v.

Emperor—Opposite Party.

Criminal Bail Application No. 273 of 1926, Decided on 1st November 1926, from the order of the Asst. S. J., Hyderabad, Sind.

* (a) *Criminal P. C., Ss. 337 (3) and 498—S. 337 does not control S. 498 (Percival, J. C., contra Rupchand Bilaram, A. J. C.)*

Percival, J. C.—Section 337, which is a special section dealing with approvers controls the general S. 498. [P 173 C 2]

Rupchand Bilaram, A. J. C.—Cl. (3) of S. 337 should be interpreted as obligatory only on the Magistrate granting the pardon requiring him to detain the accomplice in custody and as in no way affecting the powers of the superior Courts. But the discretionary powers of superior Court to grant bail to approvers should be sparingly exercised. [P 174 C 2, P 175 C 1]

(b) *Interpretation of statutes — Construction producing greatest harmony between different provisions of the Act should be adopted.*

It is one of the cardinal principles of interpretation of Statutes that the construction which produces the greatest harmony and the least inconsistency between different parts of the same Statute should prevail: *Attorney-General v. Sillem.* (1863) 33 *L. J. Ex.* 92, *Rel. on.* [P 173 C 2]

(c) *Interpretation of statutes — Jurisdiction vested in superior Courts is not to be taken away except by express words.*

The jurisdiction vested in a superior Court is not to be ousted except by express language or obvious inference from the provisions of a Statute. [P 175 C 1]

Nadirbeg Mirza—for Applicant.

T. G. Elphinston—for the Crown.

Percival, J. C.—This is an application against the order of the Additional Sessions Judge refusing bail to one Mahomed who was an approver in a case against certain persons under S. 489 A, B, C and D of the Indian Penal Code.

The learned Additional Sessions Judge rejected the application on two grounds that he has no power to grant bail in view of S. 337 of the Criminal P. C., and that, apart from the question of his power, he did not consider that bail should be granted in this case.

My own view is that the opinion expressed by the Additional Sessions Judge is correct, and that S. 337 of the Criminal P. C. which is a special section dealing with approvers controls the general S. 498. But, apart from the question of the power of releasing the approver on bail in such a case, on the merits also I agree with the Additional Sessions Judge in thinking that there is no sufficient reason to release the approver on bail in this case. I would, therefore, dismiss this application.

Rupchand Bilaram, A. J. C.—Cl. 3 of S. 337, Criminal P. C., reads as follows:

Such person, unless he is already on bail, shall be detained in custody until the termination of the trial.

I think I shall not be doing violence to the language used in this clause if I say that it provides that the approver shall be detained by the Magistrate granting the pardon, and that it only controls the powers of such Magistrate to grant bail and not those of a superior Court.

It is one of the cardinal principles of interpretation of Statutes that the construction which produces the greatest harmony and the least inconsistency between different parts of the same Statute should prevail: *Attorney-General v. Sillem* (1). This rule equally applies where the Court is called upon to

(1) [1863] 33 L. J. Ex. 92=159 E. R. 178=2 H. & C. 431.

examine if the general words employed in any one part of the Statute were not intended to be applied without some limitation : *Cox* v. *Hakes* (2). If Cl. 3 is interpreted in the manner suggested by me it is consistent with the provisions not only of S. 498 but also of Cl. (5) of S. 497 of the Code which provide for granting and cancellation of bail by superior Courts. At the same time it appears to me to be more consistent with the avowed intention of the Legislature than otherwise. The object with which Cl. 3 is enacted is not far to seek. According to the English practice an accomplice is permitted to give evidence in the hope of a pardon and, therefore, so long as he has not given his evidence he continues to be an accused person. According to the Code as provided in Cls. 1 and 2 of this section the accomplice gets his pardon as a condition precedent to his giving evidence which is, however, liable to subsequent forfeiture if the accomplice misbehaves and fails to give true evidence. Therefore, so long as he has not misbehaved he ceases to be an accused person. It follows that in the absence of any express provision in that behalf an accomplice is entitled to his immediate release as soon as he has got his pardon.

Now it is indisputable that the unconditional release of an accomplice before the termination of a trial is attended with serious risks, and is such as is likely to frustrate the very object of his being pardoned. Not only is he likely to abscond and not appear when he is wanted, but there is every fear of his being tampered with and of his tampering with other prosecution evidence. Unless, therefore, special circumstances exist for his being released on bail or his continuing to remain on bail if he has already been released, it is but just and proper that he should remain in custody. It is with that object in view and not with the express purpose of overriding the provisions of granting bail contained in Ch. 39 of the Code, that Cl. 3 has, in my opinion, been enacted. It is a corollary to Cls. 1 and 2 of S. 337, and purports to enable the Magistrate granting a pardon to detain the accomplice in custody notwithstanding his pardon.

(2) [1890] 15 A. C. 506=60 L. J. Q. B. 89=39 W. R. 145=17 Cox. C. C. 158=63 L. T. 392.

It, however, expressly provides that the fact that the accomplice has turned an approver shall not ipso facto mean the cancellation of his bail-bond if he is on bail. Whether such bail should be subsequently cancelled or not has been left untouched. And in my opinion, this clause goes no further and does not deal either with the question whether the accomplice may not be released on bail by a superior Court subsequent to the grant of pardon under S. 498 or that if he is on bail that he may not be detained by order of the superior Court under S. 497, Cl. (5). Cl. (3) is an affirmative clause and though the use of the word "shall" is primarily obligatory, it is less significantly imperative than the expression "must." And I am not prepared to hold that this clause means that an accomplice who is in custody when he obtains his pardon must be detained in prison or that it implies the negative that he shall not be released from custody. If that was the intention of the Legislature, it should have been so expressed.

I can also find nothing in this clause or in any other provisions of the Code to suggest that the Legislature wished to favour accomplices who were on bail before their pardon or to place them on a better footing than those who had not got such pardon. If the admission of guilt puts an end to the privilege of being permitted to remain on bail it equally applies to both, and if special circumstances exist which make it highly improbable that an accomplice will not abscond or be tampered with and entitle one who was released on bail before his pardon to continue on bail, there is no reason why the same circumstances should not enure for the benefit of another who has unfortunately remained in custody up to the time of his pardon. If an extreme example is taken of an approver who is so dangerously ill that the only chance of his getting better is his being entrusted to the care of his near and dear relations, I can see no reason why he should be detained in custody resulting in the serious loss to the Crown of his evidence by death.

It is, therefore, more consistent than not that Cl. (3) should be interpreted as obligatory only on the Magistrate granting the pardon requiring him to detain the accomplice in custody and as in no

way affecting the powers of the superior Courts.

This interpretation has this further advantage of being in conformity with the rule of interpretation that the jurisdiction vested in a superior Court is not to be ousted except by express language in or obvious inference from the provisions of a Statute: *Jacobs* v. *Brett* (3), *Oram* v. *Brearey* (4), *Chadwick* v. *Ball* (5). If the alternative interpretation be accepted and it be held that Cl. (3) is a special provision providing for bail in the case of approvers and, therefore, overrides the general provisions of bail contained in Ch. 39 then in that case it may fairly be argued that S. 497, Cl. (5) has also likewise no application and an approver, therefore, who was on bail before he got the pardon cannot be re-arrested or detained in custody though it be found that there was every risk of his absconding and the security given by him was either insufficient or had been withdrawn.

For these reasons I respectfully disagree with the learned Judicial Commissioner as to the legal effect of Cl. (3) of S. 337 though on the merits of this application I entirely agree. The discretionary powers of this Court to grant bail to approvers cannot but be sparingly exercised. Approvers should, as far as possible, be kept out of temptation either of absconding or of being induced to resile from their admissions. Though by admission of their guilt they escape punishment, it is no unbearable hardship on them if they are detained in custody pending the trial of their co-accomplices. The approver in the present case has made out no grounds whatsoever for his release.

I, therefore, concur that this application should be dismissed.

G.B. *Application dismissed.*

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(3) [1875] 20 Eq. 1=44 L. J. Ch. 377=23 W. R. 556=32 L. T. 522.
(4) [1877] 2 Ex. D. 346=46 L. J. Ex. 481=25 W. R. 695=36 L. T. 475.
(5) [1885] 14 Q. B. D. 855=52 L. T. 919=54 L. J. Q. B. 396.

A. I. R. 1927 Sind 175

TYABJI, A. J. C.

Motankhan and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 198 of 1926, Decided on 12th October 1926.

Criminal P. C., S. 342—Provisions are mandatory—Accused must be examined after cross-examination and re-examination of prosecution witnesses.

Section 342 is mandatory, and a breach of its provisions cannot be condoned and the accused should be examined after the prosecution witnesses have been cross-examined and re-examined and not before that stage: *A. I. R.* 1923 *Cal.* 470; *A. I. R.* 1924 *Pat.* 376; *A. I. R.* 1923 *Cal.* 727 and *A. I. R.* 1925 *Bom.* 170, *Rel. on.* [P. 175, C. 2, 176, C. 1]

Motiram Idanmal—for appellants.

Partabai D. Punwani—for the Crown.

Order.—The appellants were convicted under Ss. 411, 215, Indian Penal Code. In the view that I have taken of the facts and of the trial before the lower Court I consider it undersirable to give expression to any opinion on the evidence that has been adduced before the learned Magistrate. It is clear to me that the provisions of S. 342, Criminal P. C. have not been given effect to.

The authorities are now agreed that S. 342 is mandatory, and a breach of its provisions cannot be condoned under the Code.

The only matter on which the Courts are not in entire agreement is the stage at which the examination of the accused is to be made by the Court. It was argued before me that the examination of the accused may be held after the witnesses for the prosecution have been examined in chief. Two arguments in support of this contention were addressed to me.

(1) That the expression in S. 342, Criminal Procedure Code, is after the witnesses for the prosecution have been examined" and that the word "examined" excludes cross-examination and re-examination. I cannot accept this argument. S. 137 of the Indian Evidence Act refers to the examination of a witness by the party who calls him as his examination-in-chief, and if it had been the intention of the Legislature, that the examination-in-chief should be differentiated from the cross-examination and the re-examination, it seems to me

that the expression "examination-in-chief" would have been used and not barely "examination".

The second argument addressed to me with reference to the interpretation of S. 342, Criminal Procedure Code, is based on the words " before he is called on for his defence." It is said that this expression must mean " before he is asked whether he is guilty or has any defence to offer " under S. 255 of the Code. It seems to me to be clear, however, that the words " he is called on for his defence " in S. 342, Criminal Procedure Code, refer to the same stage in the trial as the words " the accused shall then be called upon to enter upon his defence and produce his evidence " in S. 256, sub-S. (i) of the Code. This view was expressed by the Judges of the Calcutta High Court in three judgments which are reported in *Promotha Nath Mukhopadhya* v. *Emperor* (1), *Baldeo Dubey* v. *Emperor* (2) and *Dibakanta Chatterjee* v. *Gour Gopal Mukerjee* (3) and the same view was adopted on the same reasoning in the Bombay High Court in *Emperor* v. *Nathu Kasturchand Marwadi* (4). The reasoning shortly is that the examination of the accused under S. 342, Criminal P. C, has to be at a particular stage of the trial ; and that the various sections of the Code indicate this stage to be the stage at which the cross-examination and re-examination of the prosecution witnesses had already been held. I agree with the decisions to which I have referred.

I have already stated that the authorities are agreed that S. 342, Criminal P. C. is mandatory, and it is, therefore, quite unnecessary for me to explain the purpose of S. 342, Criminal P. C. But there is an exposition of this purpose by Mr. Justice Rankin which, if I may say so, seems worthy of consideration. It is in the following terms :

> In this country it often happens that the prisoner is tried in a language, which for one reason or another, he understands but indifferently well, and for that reason as well as for other equally grave reasons, the intention of the Statute is that at a certain stage in the case the Court itself shall put aside all counsel, all pleaders, all witnesses, all representatives and shall call upon each individual accused, with the authority of the Court's own voice to take advantage of the opportunity which then arises to state in his own way anything which he may be desirous of stating. In the case of an accused, who is in no difficulty in understanding the proceedings, a question addressed to his counsel in his hearing and answered by his counsel in his hearing, may perhaps be taken in certain circumstances as a compliance with the section. It is not a full compliance with the section, but I say nothing whatever to create any more trouble than is absolutely necessary in any case of that character. What is necessary is that the accused shall be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defence, if he is willing to make one with his own lips. Now, I cannot think that the fact that there was a discussion with counsel about the number and the nature of the witnesses is the same thing at all as what the section requires.

It is admitted that in the present case the Magistrate has not examined the accused under S. 342, Criminal P. C., after the prosecution witnesses had been cross-examined and re-examined but before that stage. I must, therefore, hold that the trial was vitiated from the stage at which the accused ought to have been examined by the Magistrate. It will, therefore, be resumed from the stage.

The learned pleader for the appellants desires me to direct that the Magistrate should permit the accused further to cross-examine the witnesses for the prosecution. This application should, I think, be made to the Magistrate. As the trial is to recommence from the stage when the prosecution closed their case he may feel himself able to grant the request of the accused. I have no doubt that whether he grants or refuses the request he will do so for good reasons, which he will be in a better position to judge than I.

For the reasons given, I set aside all the proceedings as from the stage when the accused was called upon to enter upon his defence, including the conviction and sentence. I direct the Magistrate to resume the trial from the said stage and to proceed in accordance with law. The accused were on bail while the trial before the learned Magistrate was proceeding. In this Court they have been granted bail afresh. They may continue to be on the same bail as they were during trial by the Magistrate unless the Magistrate sees any reason to alter his first decision.

G.B. *Re-trial ordered.*

(1) A. I. R. 1923 Cal 470=50 Cal. 518.
(2) A. I. R. 1924 Patna 376.
(3) A. I. R. 1923 Cal. 727=50 Cal. 939.
(4) A. I. R. 1925 Bom. 170=50 Bom. 42.

A. I. R. 1927 Sind 177

TYABJI, A. J. C.

S. L. Balmokand—Respondent I.

v.

Uttamchand Brijlal—Respondent II.

Misc. Jurisdiction No. 210 of 1925, Decided on 13th August 1926.

(a) *Arbitration Act, S. 9—Applicability.*

Where the submission provides that the reference shall be to two arbitrators and an arbitrator appointed by one of the parties is duly declared to be the sole arbitrator and, he thereafter, refuses to act the then vacancy has to be supplied in accordance with S. 9. [P 178 C 1]

(b) *Arbitration Act, Ss. 8 and 9—Applicability does not depend upon whether ultimately a single arbitrator or two are appointed.*

The applicability of Ss. 8 and 9 depends on the provisions in the submission whether it contemplates the appointment of a single arbitrator or two arbitrators and does not depend on the question whether ultimately two arbitrators become empowered to conduct the arbitration proceedings or one. [P 179 C 1]

(c) *Arbitration—Claim time barred at the time of reference can form subject-matter of reference.*

A claim time-barred according to the Limitation Act at the time of making the reference can validly form the subject-matter of a reference, to arbitration : *A.I.R.1926 Sind 209, Diss.* [P 181 C 2]

E. V. Castollino—for Respondent I.

Kundanmal Dayaram—for Respondent II.

Judgment.—This is an application by the 1st respondents that an award should be filed in this Court. The 2nd respondents object to the award and in effect submit that it should be set aside. Both respondents are firms. For convenience I will speak of them as though they were individuals. Two rather important questions arise one having reference to the construction of the Arbitration Act ; and the other to the Law of Limitation.

The first point that arises is whether in the circumstances that have taken place it was in the power of the 1st respondents to appoint the arbitrator who has made the award or whether an application should have been made to the Court for the appointment of an arbitrator. The decision depends upon the construction of Ss. 8 and 9 of the Indian Arbitration Act, 1899 (Act 9 of 1899).

The facts that I am about to state have either been admitted or proved before me. The witness who was called by the 1st respondent gave his evidence in a very satisfactory manner and I accept it.

In 1921 the first and the second respondents entered into a contract, the main purpose of which was the sale and purchase of piece goods. The contract contained a clause (the 28th) for reference to arbitration in the following terms :

All disputes regarding this contract must unless amicably settled be referred to the arbitration of two European merchants to be approved by you (respondent I) at Karachi or in Amritsar at your (respondent I's) option one to be nominated by each party. Should the arbitrators not agree they will nominate an umpire and the award of the arbitrators, surveyors or their umpire shall be final and binding on us (respondent II). and you (respondent I) so much so that this shall be considered a rule of Court of Justice. All expenses of survey to be borne by the party in default.

The 1st respondent alleged that there was a breach of the main contract on the part of the 2nd respondent and brought a suit for compensation. After the suit had proceeded for two years the 2nd respondent relied on the arbitration clause and had the suit stayed. I am informed that the suit is still pending.

The 1st respondent then proceeded to give effect to the arbitration clause. He gave notice to the 2nd respondent that he had appointed one Statham as his arbitrator and called upon the 2nd respondent to appoint his arbitrator. As the 2nd respondent failed to appoint his arbitrator the 1st respondent in accordance with the provisions of S. 9, Cl. (b) of the Arbitration Act, served the 2nd respondent with a written notice to appoint his own arbitrator, and on the expiry of the seven days the 1st respondent appointed the arbitrator appointed by himself, viz., Statham, to act as sole arbitrator in the reference.

On this occasion Statham refused to act as arbitrator. Then the 1st respondent purported to appoint one Penn Simpkins as arbitrator and invited the 2nd respondent in the same manner as before to appoint an arbitrator. The same course was followed and on the failure of the 2nd respondent to nominate his arbitrator Penn Simpkins was nominated sole arbitrator by the 1st respondent. There was some error as regards the appointment of Penn Simpkins, because the reference to him gave a wrong name instead of the name of the

2nd respondent. In any case Penn Simpkins also refused to act; whatever may have been the cause of his refusal whether the mistake as to the name of the 2nd respondent or the fact that the arbitrator was leaving India or both.

Thus for the second time the arbitrator's office became vacant. The 1st respondent then for the third time made his appointment selecting Statham as his arbitrator for the second time, and for the third time called upon the 2nd respondent to appoint an arbitrator. He again failed to do so upon which Statham was duly apointed by the 1st respondent to act as sole arbitrator under Cl. (b) of S. 9. The validity of the first appointment of Statham as the arbitrator by the 1st respondent is not questioned; nor of the steps leading up to his becoming the sole arbitrator on that occasion. But what is objected to, is the subsequent procedure by which at first Penn Simpkins and finally Statham (for the second time) was appointed arbitrator by way of substitution and declared to be sole arbitrator.

The argument that the procedure followed by the 1st respondent was not open to him was put before me under many different forms and aspects, but I think they are all included in the consideration of the question whether where the submission provides that the reference shall be to two arbitrators and an arbitrator appointed by one of the parties is duly declared to be the sole arbitrator and he, thereafter, refuses to act—whether the then vacancy has to be supplied in accordance with S. 8 of the Arbitration Act, or in accordance with S. 9. Under S. 8 an application has to be made to the Court, and the Court appoints the arbitrator; under S. 9 the appointment may be made by a party whether originally or by way of substitution.

It seems to me that when Ss. 8 and 9 are read together it becomes clear that S. 8 is meant to be applied to a case where the reference provides for a single arbitrator or where the question is with reference to the appointment of an umpire or a third arbitrator. What is important to note is that the question whether S. 8 or S. 9 applies, depends not upon whether one arbitrator ultimately acts or two, but whether the submission provides for the appointment of one arbitrator (by the concurrence of both parties) or of two arbitrators (one by each party independently of the other). Most of the arguments on behalf of the 2nd respondent disregard this decisive consideration. The 1st respondent did not contend that on the arbitrator appointed by him having become sole arbitrator, and on his subsequently refusing to act or becoming incapable of acting he (the 1st respondent) acquired the right of substituting another person as sole arbitrator without again calling upon the 2nd respondent to nominate his arbitrator. The 1st respondent took the whole proceedings as having been nullified by the fact that the arbitrator did not act after he was appointed sole arbitrator. In my opinion the fact that Statham became the sole arbitrator did not prevent him from retaining (for the purposes of Ss. 8 and 9) his character as one of the two arbitrators nominated by one of the two sets of respondents. Nor for the said purposes did that fact alter the provision of the submission that the reference was to be to two arbitrators (which circumstance attracts S. 9 of the Arbitration Act, and precludes the operation of S. 8). It seems to me therefore that the procedure adopted by the 1st respondent was correct, and that the final appointment of Statham as arbitrator originally on behalf of the 1st respondent and subsequently as sole arbitrator was valid and proper.

Against the view that S. 8 applies only to cases where the submission provides that the reference shall be to a single arbitrator, Cl. (b) sub-S. (1) of S. 8 has been relied upon. The argument addressed to me is that Cl. (b) must apply to the present case even if the clause applies only to the appointment of a single-arbitrator inasmuch as cases such as the present deal with the appointment of a single arbitrator for the arbitrator appointed by one of the parties is here made the sole arbitrator; that (whatever may be the case with the rest of S. 8) there is nothing in this clause which shows that an appointed arbitrator may not be one of the two arbitrators provided for in the reference and if Cl. (b) of S. 8 is applied to the facts of this case it appears that the appointment of the arbitrator could have been made (if at all) only by the Court and that in no case had the 1st respondent any power to appoint but

that in the events that have happened the conditions required for appointment by the Court were not fulfilled; so that in the present case neither the 1st respondent nor the Court could have appointed.

As I have already stated, the argument overlooks that the applicability of Ss. 8 and 9 depends on the provisions in the submission whether it contemplates the appointment of a single arbitrator or two arbitrators. Their applicability does not depend on the question whether ultimately two arbitrators become empowered to conduct the arbitration proceedings or one.

But since the argument was pressed upon my consideration I shall attempt to apply the provisions of Cl. (b) of S. 8 to such a case as the present, viz., where though the submission initially provides that the reference shall be to two arbitrators yet ultimately only one arbitrator becomes empowered to act and the question arises how an arbitrator has to be appointed by way of substitution of such sole arbitrator.

Clause (b) of S. 8 contains three conditions:

1. That an appointed arbitrator neglects or refuses to act or is incapable of acting or dies or is removed—this condition is ex hypothesi fulfilled in the present case.

2. The submission must "not show that it was intended that the vacancy should not be supplied." It is admitted that in this case the submission does not show that the vacancy should not be supplied.

3. The third condition is that "the parties do not supply the vacancy." The 2nd respondent contends that the whole procedure adopted by the 1st respondent is void because this condition has not been fulfilled. It is argued that in this case it is not the fact that both the parties did not supply vacancy that the only person who failed was the 2nd respondent. The futility of this argument becomes evident as soon as it is definitely formulated. The truth is that here "the parties" were never intended initially to appoint. The provision for supplying a vacancy is introduced by the Arbitration Act. It is only by straining words of the Act that they can be interpreted as meaning that the parties had to concur in supplying the vacancy of either of the two arbitrators for which the submission provides. The natural meaning is that each party had individually to supply the vacancy. If his own arbitrator neglected or refused to act—and it follows that the vacancy had to be so supplied notwithstanding that the arbitrator appointed by one of the parties may acquire an additional character by becoming entitled to act as sole arbitrator. But if the words of the Act have to be strained to mean that both parties have to supply the vacancy then by parity of interpretation it is the parties that have supplied the vacancy for in one sense it was both the parties whose volition supplied the vacancy caused by the arbitrator's refusal or failure to act the volition of the 2nd respondent having been exercised by his refusal to take the steps which he was entitled to take refusing to take any steps in one way in which volition can be exercised.

In the result if we assume that S. 8, Cl. (b) applies still Statham's final appointment was valid and the Court did not become empowered to appoint under S. 8 (2). For on the assumption in question, I must hold that here the "parties" did supply the vacancy and the Court becomes empowered to appoint only if the parties do not supply the vacancy. The objection, therefore, on the ground of the invalidity of the appointment of the arbitrator must, in my opinion, be disallowed.

I come now to deal with the second point raised before me, viz., that the award in the present case is of no effect inasmuch as it purports to deal with a claim which at the time when the arbitration proceedings were held was more than three years old.

I asked the learned pleader, who argued before me for the 2nd respondent (Mr. Kundanmal), which particular provision of the law relating to limitation he said was applicable to the case. He was unable to refer to any rule or enactment except Art. 115 of the Indian Limitation Act. That Article read with S. 3 of the Act provides that every suit instituted, appeal preferred and application made for compensation for the breach of any contract, express or implied, not in writing and not specially provided for in the Limitation Act shall be dismissed unless it is instituted, preferred or made

within three years from the time when the breach of contract has occurred.

It is obvious that this Article cannot be applied directly to the case in point. The Court has not to deal here with a suit, appeal or application for compensation for a breach of contract but has to file an award in arbitration proceedings. But it was argued that the Limitation Act must be applied by analogy; and that analogy points to the necessity for proceedings under an arbitration clause to be taken within the same period after the disputes have arisen, within which a suit would have to be instituted.

It seems to me that this is an inaccurate and unsatisfactory method of considering the question. So far as the Courts are concerned the position in the present case is that the parties have entered into a contract for the sale and purchase of goods—a contract that includes Cl. 28, an arbitration clause. In view of the Indian Contract Act, S. 28, Excep. (1), the effect of such a contract is that when there is an alleged breach of one part of the contract (viz., the agreement to sell and buy) the other part of the contract (Cl. 28) has to be given effect to for determining what judgment a Court of law will pass; the right of action under such a contract only accrues after the award of the arbitrator inasmuch as only the amount awarded by the arbitrator is recoverable under the first exception to S. 28 in respect of the dispute so referred or to use the language of Lord Cranworth, L. C., the parties have entered into such a contract that no breach shall occur until after a reference has been made to arbitration: *Scott* v. *Avery* (1) and *Koeglar* v. *Coringa Oil Co., Ltd.* (2).

The Indian Limitation Act (which deals with limitation in regard to suits, appeals and applications in Court) consequently can come into operation only after the award has been made (cf. Arts. 1 and 45 of the Indian Limitation Act). Time can only begin to run after the parties are empowered to come to Court and the parties are not empowered to come to Court till after the award is made, therefore, the provisions of the Limitation Act that could apply would be such Articles as Art. 158 or Art. 178. But the contention of the 2nd respondent is quite different. He desires that the Law of Limitation applicable to Courts should be applied to proceedings which have to take place as a condition precedent to the emergence of the jurisdiction of the Court. If the arbitration clause is interpreted in the sense indicated in *Scott* v. *Avery* (1) and the Indian Contract Act, S. 28 (the second para. of the Excep. 1 to S. 28 which has been repealed by the Specific Relief Act is worthy of note) then the present application is not analogous to a suit for damages for breach of contract (to which Art. 115 of the Indian Limitation Act refers) but it consists of proceedings for the recovery of the amount awarded by the arbitrator (cf. Art. 120 of the Indian Limitation Act) and time would commence to run when the award was duly made.

In any case it is obvious that the objection I am considering has no reference to any delay in taking such proceedings as could have been taken in Court. The objection refers to proceedings anterior to the time when the Court could intervene. It refers to the method in which the arbitrator made his award, the law that he applied in making his award or the principles by which he conceived himself bound to be guided in coming to the conclusions which he formulated in his award. The 2nd respondent's grievance (if any) when truly stated is that the arbitrator has made a wrong award, inasmuch as he has proceeded to consider a claim that he should not have considered. The reason alleged why he should not have considered the claim is that if the claim had been brought for adjudication in Court the suit would have been barred.

In short the question placed before me is—in the language of Sir Erskin Perry, C. J., in the *Khojas'* and *Memons' case* [*Hirbai* v. *Sanabai* (3)] what law had been delivered to the domestic tribunal which the arbitration clause creates. For as Lord Macnaghten said: "Arbitrators may be Judges of law as well as judges of fact" and he adds in the same sentence "an error in law certainly does not vitiate an award": *Ghulam Khan* v.

(1) [1856] 5 H. L. C. 811=4 W. R. 746=25 L. J. Ex. 303=2 Jur. (N. S.) 815=10 E. R. 1121.
(2) [1875] 1 Cal. 42.
(3) [1847] Perry O. C. 110.

Muhammad Hassan (4). It is significant that the rule of law which is in question here is one of adjective law. But for the present it is enough to say that assuming that the arbitrator should have stated a case for the opinion of the Court or that his decision was wrong (which as I shall presently indicate would not appear to be the case even had Art. 115 of the Limitation Act been applicable by analogy) these objections are not now open to the second respondent.

Reliance was placed upon a judgment reported in *Official Receiver* v. *Kersandas Mavji* (5). In that case (which seems to have been decided ex parte) the objections to the validity of the award were upheld. Two objections were taken :

> The first which is discussed at length in the judgment was that the Official Receiver of the estate of an insolvent cannot take advantage of the clause for arbitration entered into by the insolvent. The decision on that point was fatal to the arbitration proceedings. Then the penultimate paragraph of the judgment deals with the second question propounded on page 25, viz., " the right of a party to submit to arbitration a claim for damages arising out of such contract after his right to sue for it is statute-barred "

and the answer is thus given. :

> The second objection is equally fatal to the award. The Official Receiver could only refer subsisting differences to arbitration, as he has purported to do. He clothed Mr. Brachi with authority to decide those disputes on 28th March 1924, more than three years after the right to sue for recovery of the claim in dispute had accrued and the claim had become statute-barred. There were, therefore, no subsisting differences between the parties at the date of the reference. The applicant was not bound to go to arbitration. His simple answer to the claim was that the right to enforce the alleged claim had been lost by lapse of time.

With the utmost respect, I am unable for the reasons I have already given to accept this. Apart from those reasons, a dispute or a difference does not cease to be subsisting because it is three years old, though the Indian Limitation Act may require the Courts to dismiss a suit based on the disputed claim. Nor is a right necessarily extinguished because it has not been enforced for the period referred to in the First Schedule of the Limitation Act unless the right claimed refers to the possession of property and S. 28 of the said Act is applicable or for some similar reason. Again a person may agree to pay a barred debt and a fortiori, to submit to arbitration ; the significance of the Indian Contract Act, S. 25 (3) must not be overlooked. As I have already said it is not for me to say in these proceedings whether there was any such agreement.

But assuming that the principle of Art. 115 of the Limitation Act applies one party may contend and the other deny that a suit (or other legal proceedings in Court) would be barred. That question would be a " difference " or " dispute " and would have to be decided by the arbitrator. In some cases that would be a question of law ; in others of fact.

Speaking with reference to the facts of the present case I will assume for a moment that the arbitrator was bound to disregard any claim which could not be enforced by a suit. There is nothing to show that he did not do so. The question might have depended upon whether the 1st respondents were prosecuting with due diligence any civil proceedings under S. 14 of the Indian Limitation Act as they apparently were and whether, therefore, any portion of the time between the arising of the disputes and the commencement of the arbitration proceedings, should be excluded for the purpose of computing the period of limitation. Again it may be that the party in the position of a defendant has been absent from British India (S. 13 of the Indian Limitation Act) on which state of facts a decision was given by Kemp, A. J. C., between *James Finlay & Co. and Anandji Damodar* (6) so that even if the disputes arose more than three years ago it does not follow that a suit based on those disputes would be barred. Assuming that the answer to that question would have to affect his decision whether or not the suit would be barred would be a question for the decision of the arbitrator.

The objections to the award will, therefore, be disallowed and the award will be filed. The 1st respondent's costs will be paid by the 2nd respondents.

R.D. *Application allowed.*

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(4) [1902] 29 Cal. 107=29 I. A. 51=6 C. W. N. 226=8 Sar. 154 (P. C.).

(5) A. I. R. 1926 Sind 209=19 S. L. R. 24.

(6) Misc. Judl. Case No. 170 of 1918, D/- September 12, 1918.

* A. I. R. 1927 Sind 182

TYABJI, A. J. C.

Kuverji Devchand—Plaintiffs.

v.

David Sassoon & Co.—Defendants.

Original Civil Suit No. 854 of 1926, Decided on 18th November 1926.

* *Civil P. C., O. 39, Rr. 2 and 3—Injunction restraining arbitration proceedings cannot be granted on the ground that the proceedings will be futile—The fact that arbitrators will only partially deal with the matter is also no ground.*

The Court will not restrain parties from proceeding to arbitration under O. 39 or S. 53, Specific Relief Act, where the proceedings sought to be restrained are merely futils and will do no injury to the applicant. Court will grant an injunction only where a suit has been brought in which the instrument containing the submission clause is impeached for fraud or mistake or surprise, or for some other reason : and where the arbitrator has misconducted himself.

[P 186 C 2]

The fact that the arbitrators will not deal with matters which ought to be dealt with together with those being dealt with by them is no ground for granting an injunction.

[P 187 C 1]

Fatehchand Dharamdas—for Plaintiffs.

Tolasing K. Advani—for Defendants.

Order.—This is an application purporting to be under O. 39, Rr. 2 and 3 of the Civil P. C., for a temporary injunction restraining the defendants from proceeding with a certain arbitration and procuring an award against the plaintiffs.

Order 39, Rr. 2 and 3 empower the Court to grant temporary injunctions restraining the defendants from committing the breach of a contract or injury in suits brought for obtaining such reliefs.

The question, therefore, is whether in proceeding with the arbitration in the present case, the defendant was committing either "a breach of contract or other injury of any kind" or "a breach of an obligation" under S. 54 of the Specific Relief Act to which I shall presently refer.

It is difficult to conceive of a case in which by purporting to have a matter arbitrated upon, the defendant should be committing the breach of a contract. If there is no contract or submission under which the parties have agreed to submit their differences to arbitration, and consequently the alleged arbitration proceedings are unauthorised and futile, then there is no breach of contract. Acting as though there were a particular contract between the parties where there is no such contract, is not, in itself, a breach of any contract. There may, of course, be a contract not to take particular proceedings, say in a foreign Court, and then, if any such proceedings are taken, there is no doubt a breach of contract which the Court can restrain : *Pena Copper Mines* v. *Rio Tinto Co.* (1).

It is clear, that the present case cannot be considered as arising out of a breach of contract and the application can succeed only if it can be brought under the second of the two heads mentioned in O. 39, R. 2. The applicant must show that there has been "injury of any kind" other than a breach of contract. The question may be considered in another form with reference to S. 54 of the Specific Relief Act. That section authorises the Court to grant a perpetual injunction to prevent the breach of an obligation (which term "includes every duty enforceable by law": Specific Relief Act, S. 3) existing in favour of the applicant. A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit. But the Civil P. C., also requires that there should be some obligation on the part of the respondents not to take arbitration proceedings; for the Code refers to the commission of an injury and the commission of an injury postulates the existence of an obligation the non-fulfilment of which causes the injury.

Under S. 19 of the Arbitration Act, the Court is empowered to stay legal proceedings where there is a submission to arbitration ; but the case before me is the converse and the Arbitration Act is not, therefore, directly applicable. The principle of this distinction, as it appears from the decision of the Courts in England, seems to be that the Court can control the proceedings before itself, and if a person brings a suit when he is not entitled to do so, it is an abuse of the process of the Court, which the Court can and will restrain : [cf. *London and Blackwall Ry.* v. *Cross* (2)], whereas the Courts in England have renounced jurisdiction to prescribe the Tribunal before which a person should bring his suit, cf. *Pennel* v. *Roy* (3), or to interfere with the proceedings of an independent Tribunal like that of arbitrators : *London and Black-*

(1) [1912] 1C5 L. T. 846.
(2) [1886] 31 Ch. D. 354=34 W. R. 201=55 L.J.Ch. 313=54 L. T. 309.
(3) [1853] 3 De. G. M. and G. 126=17 Jur. 247 =22 L. J. Ch. 409=1 W. R. 237.

wall Ry. v. *Cross* (2), though it is true that the Court of Chancery had power, in the words of Lord Cranworth, to "restrain persons within its jurisdiction from instituting or prosecuting suits in foreign Courts, whenever the circumstances of the case made such interposition necessary or expedient": *Carron Iron Co.* v. *Maclaren* (4). The force of this distinction is, no doubt, lessened in British India by such provisions as S. 22 of the Civil P. C., under which our Courts have to determine, on the application of the defendant, in which of the several Courts having jurisdiction the suit shall proceed; and by the Indian Contract Act, S. 28, Excep. 2, which empowers the Courts in India to specifically enforce arbitration clauses. In this last respect also our law differs from that of England: *Pena Copper Mines* v. *Rio Tinto Co.* (1). The distinction may indeed occasionally be of no practical effect; for under S. 19 of the Arbitration Act, the Court has to consider whether there is any sufficient reason why the matter should not be referred in accordance with the submission: cf. *Law* v. *Garrett* (5). It may nevertheless serve to remind one of the changed, or it may be the changing, attitude of the Courts towards arbitration, from the time when the creation of a private Tribunal was jealously discouraged.

That there is no obligation to refrain from futile arbitration proceedings seems to have been at least in part the basis of some decisions to which my attention has been drawn. Thus in *Ram Kissen Joydoyal* v. *Pooran Mull* (6) the learned counsel was invited by the Court to formulate the precise obligation of which there had been a breach, or the legal right which had been violated or threatened with violation, and on his being unable to do so it was stated that it was plain that no injunction could be claimed under S. 54 of the Specific Relief Act. It was further observed that, at the most, the arbitration proceedings, however unauthorised they may be, could result in an award which would be a nullity, that such an award could not possibly affect the rights of the plaintiffs and that the plaintiffs would have ample opportunities to protect themselves by an appropriate proceeding, so that Cl. (i) of S. 56 of the Specific Relief Act prevented the Court from granting an injunction.

This question was also considered in the *Firm of Manohar Lal Mahabir Pershad* v. *Firm of Jai Narain-Babu Lal* (7) decided in February 1920, by the High Court of Lahore, where it was pointed out that O. 39, Rr. 1 and 2 postulate a suit for restraining the defendant from committing a breach of contract or other injury of any kind; that the word "injury" means an act which is contrary to law and that it cannot be held that the defendant, in invoking the assistance of the arbitrators to settle the dispute, was committing any act which was contrary to law.

The applicants before me relied on *Firm of Kirpaldas-Kaliandas* v. *Firm of Gajanmal Bhagwandas* (8). That case proceeds on the general principle that the Court, in exercising its jurisdiction to grant injunctions, must be governed by considerations as to the comparative mischief or inconvenience to the parties, from granting or withholding the injunction, and that the burden lies upon the party seeking relief. But those general principles can be of no avail if it is true that proceeding with an arbitration can in no circumstances be the cause of an enquiry or the breach of an obligation.

The gist of the question, therefore, is whether there is any obligation or any duty enforceable by law, to refrain from arbitration proceedings either generally or in the specific circumstances that may be brought before the Court. This question is of some importance and requires careful consideration. The cases decided by the Calcutta and Lahore High Courts, which I have cited, have mainly proceeded on the *North London Ry. Co.* v. *Great Northern Ry. Co.* (9). There the contention was that the subject-matter of dispute sought to be referred to arbitration was not within the arbitration clause, and that, therefore, the arbitrator had no jurisdiction to proceed, so as to bind the respondents: and Brett, L. J., said that there was no jurisdiction to

(4) [1885] 5 H. L. C. 416=24 L. J. Ch. 620=3 W. R. 597.
(5) [1878] 8 Ch. D. 26=26 W. R. 426=38 L. T. 3.
(6) [1920] 47 Cal. 733=56 I.C. 571=31 C. L. J. 259.
(7) [1920] 2 L. L. J. 283=55 I. C. 403.
(8) A. I. R. 1921 Sind 114=15 S. L. R. 5.
(9) [1883] 11 Q. B. D. 30=31 W. R. 490=52 L. J. Q. B. 380=48 L. T. 695.

restrain by injunction the arbitrators, from proceeding with a futile arbitration. He pointed out that the other side may, if their contention was correct, stay away from the arbitration proceedings altogether without any injury to themselves, and though as to this last point I shall have to refer to other authorities that even assuming that the arbitration proceedings were vexatious, it was not a vexation of which the law could take notice. Brett, L. J., characterised the attempt to stop the appellants from proceeding with arbitration as " putting upon them a burden "and "as giving to the respondents a right neither of which existed in equity or at Common Law ". He concluded :

> What we are asked to do is to take away from the appellants their power of election, if there be any, and to enjoin them against proceeding at their own risk and at their own expense, without injury to anybody in what, for the purpose of this judgment, we must assume to be an entirely futile arbitration, which would not injure any one but the appellants.

Cotton, L. J., agreed with this judgment. He also came to the conclusion that the Court had no power to grant an injunction restraining the arbitration proceedings in question before them. He said he would assume that the defendants were proceeding before a tribunal which had no jurisdiction to deal with the matter, and proceeded :

> But then, can it be said that their doing so is any interference with any legal right of the plaintiffs or is inflicting on the plaintiffs that which the law considers a wrong ? Of course, it is very inconvenient to anyone to be brought before a tribunal which has no jurisdiction, but he asked : " Does that give a right to the High Court to interfere ?" He explains

the power of the Court later on at page 40 as follows :

> If there is either a legal or an equitable right which is being interfered with, or which the Court is called upon to protect, and the circumstances do not render it inconvenient or inadvisable to interfere, but render it convenient and advisable to interfere, the Court may protect that right by giving the remedy which previously would not have been given, viz., an injunction ;

and at page 41 :

> The argument fails, so far as it is founded on the Judicature Act, that though no legal right is interfered with by the party asking to go on before the arbitrator, who has no jurisdiction, yet the Court ought to grant an injunction, because it is convenient and just to do so in order to save expense.

I do not overlook that I am bound not by the law prevailing in England, but by the provisions of the Specific Relief Act and the Code of Civil Procedure to which I have already referred. The case of the *North London Ry. Co.* v. *Great Northern Ry. Co.* (9) clearly shows, however, that though the Judicature Act, 1873, S. 25 (8) empowers the High Court in England to grant an injunction

> in all cases in which it shall appear to the Court to be just and convenient that such order should be made

yet, for the reasons explained in the decision, there must be a legal right on the one side and a legal liability on the other before an injunction can be granted by the Courts in England; so that the ultimate question to be decided in England is the same as in India. Order 39, Rr. 2 and 3, seem to be derived from the Common Law Procedure Act, 1854, S. 79, which empowered a party to claim an injunction against the committal or any breach of contract or other injury.

It was argued on behalf of the defendants that the decisions I have cited lay down that an unauthorised and futile attempt to get an arbitrator to make an award on matters which are not subject to his jurisdiction, are not a breach of any obligation existing in favour of the applicant ; that an injunction cannot be granted restraining such an attempt ; and that it followed that in no case would the Court restrain arbitration proceedings by injunction, as the case for such an injunction (it is argued) cannot be stronger than where the arbitration proceedings are entirely unauthorised and futile. But this is not the case as the decisions I am about to cite will show.

Speaking of the *North London Ry. Co.'s* case (9), Lord Justice Lindley said :

> The case does not decide that in no case is it right to restrain persons from proceeding to arbitration ; there are cases in which it is quite right to do so.

London & Blackwall Ry. v. *Cross* (2) and in *Kitts* v. *Moore* (10), A. L. Smith, L. J., said that the effect of that decision was not that under no circumstances has the Court jurisdiction to stay by injunction proceedings by arbitration.

In the *North London Ry. Co.'s* case (9), itself the decisions of Jessel, M. R., in *Beddow* v. *Beddow* (11), *Stannard* v.

(10) [1895] 1 Q. B. 253=64 L. J. Ch. 152=71 L. T. 676=12 R. 43=43 W. R. 84.
(11) [1878] 9 Ch. D. 89=47 L. J. Ch. 588=26 W. R. 570.

St. Giles Camberwell (12), *Hedley* v. *Bates* (13) were referred to and *Beddow's* case (11) at least was approved. There the arbitrator had become unfit or incompetent to act, because after he had assumed his authority as arbitrator he had become indebted to one of the parties without the knowledge of the other side, and the Master of the Rolls granted an injunction restraining the arbitrator from acting as arbitrator or referee. *Beddow's* case (11) was assumed to be correctly decided in *Jackson* v. *Barry Ry. Co.* (14). Then there are cases such as *Sissons* v. *Oates* (15), *In the matter of Frankenbery & Security Co.* (16), *Grey & Co.* v. *Tolme* (17) where the Court has directly or indirectly granted an injunction restraining arbitration.

The *North London Ry. Co.s'* case (9) is explained by Chitty. J., by saying that the Court will not restrain the defendant from proceeding with an arbitration beyond or outside the arbitration agreement although such arbitration proceedings may be futile and vexatious. In *Wood* v. *Lillies* (18), Chitty, J., adds that an injunction will not be granted in a simple case such as that before him. In *Farrar* v. *Cooper* (19), Kekewich, J., stated as follows :

> I entirely adopt what Lord Justice Lindley says in the case of *London & Blackwall Ry.* v. *Cross* (2), viz., that there are cases in which the Court will restrain parties from proceeding to arbitration, and Mr. Marten has cited other authorities to that effect ; but the Lord Justice does not say, and I do not myself pretend to say, in what cases it is right to do so. I do not think the decision in the *North London Ry. Co.* v. *Great Northern Ry. Co.* (9) would prevent my doing so in a proper case, that is to say, in a case in which I saw that injustice or injury which ought not to be borne would result to the party complaining from the abritration proceeding. But where I see that merely futile proceedings may result or that nothing to injure the plaintiff is likely to result, I do not think that I ought to grant an injunction.

He then cited, Jessel, M. R., as having said in an unreported case :

> I have no right to interfere with gentlemen meeting and passing futile resolutions if they please ;

and Kekewich, J., held that he would not grant an injunction, as the arbitration before him, if it proceeded in the absence of the plaintiff or without the proper forms being observed, would not have the slightest binding authority and would be a futile proceeding. He, however, made the costs of the application for injunction costs in the action. The decision was tantamount to a declaration that as the proceedings were futile, no injunction was necessary. The practical result would be hardly distinguishable from the grant of an injunction restraining arbitration, unless a higher Court took a different view of the binding effect of the arbitration proceedings. At any rate the attitude of the Court was very different from that under which the plaintiff is left at his own peril to the election of either submitting to arbitration or letting the award go in his absence, and trust that the Court will subsequently declare it futile and inoperative, instead of passing a decree in accordance with it.

Of the decisions that I have last mentioned, indicating the limitation to be placed on what might have been considered to be the effect of the *North London Ry. Co.'s* case (9) the most important is that of *Kitts* v. *Moore* (10), which is also a decision of the Court of appeal and which besides containing the dicta of Lindley and A. L. Smith, L. JJ., to which I have already referred laid it down that the Court will restrain parties from proceeding with an arbitration where an action is being brought impeaching the instrument containing the arbitration clause. Lindley, L. J., explains the case before him in these terms :

> The plaintiff brings an action for an ordinary partnership account, and asks for an injunction to restrain the arbitration proceedings ; and he does so upon the footing that the agreement which contains the arbitration clause is, for some reason, not binding whether for fraud, or mistake, or surprise, or for some other reason I do not say because the statement of a claim has not been launched ; but his equity is to impeach that agreement.

A little later he says :

> Courts of Equity have always granted an injunction to restrain a reference to arbitration under an agreement which is impeached until the right to impeach it has been determined.

He distinguishes the *North London Ry. Co.'s* case (9) as follows :

(12) [1882] 20 Ch. D. 190=51 L. J. Ch. 629=30 W. R. 693=46 L. T. 243.
(13) [1880] 13 Ch. D. 498=28 W. R. 365=49 L. J. Ch. 170=42 L. T. 41.
(14) [1893] 1 Ch. 238=68 L. T. 472=2 R. 207.
(15) [1894] 10 T. L. R. 392.
(16) [1894] 10 T. L. R. 393.
(17) [1915] 59 S. J. 218=31 T. L. R. 137.
(18) [1892] 61 L. J. Ch. 158.
(19) [1890] 44 Ch. D. 323=38 W. R. 410=59 L. J. Ch. 506=62 L. T. 528.

There was no impeaching the agreement; there was nothing of the kind: there was no more ground in that case for stopping the arbitration, than there would have been for stopping an action because it was a frivolous one.

The *North London Ry. Co.'s* case (9) had not previously been accepted, without demur in England. The following remarks were made by Mr. Justice Chitty, a Judge, I need hardly say, whose words have always carried great weight:

In that particular case it was held that there was no jurisdiction to grant an injunction to restrain a party from proceeding with an arbitration in a matter which was outside the agreement though the arbitration proceeding would be futile and vexatious. That is the rule which the Court of appeal has adopted with reference to what is 'just and convenient' within the meaning of the words in S. 25 and although their decision is unquestionably at variance with what was done by the late Master of the Rolls, I am bound by it, and it is no part of my duty even to comment upon the decision. It might have appeared that it was very useful to stop a course which led to very great expense at the commencement, but the Court of Appeal says, and I am bound by it, that at any rate in a case in which a proceeding in an arbitration would be futile and vaxatious, it is better to let the futile and vexatious proceedings go on than to restrain them at the beginning, for in that case the idleness of the proceedings will be afterwards discovered when an action is brought on the award. As I have said that binds me. The question is, whether the principle of that case applies to the one before me.

Later on he says:

The present plaintiff, it would be said, would have gone into arbitration, for most prudent men would go into an arbitration even when they are advised that the proceedings in the arbtration are altogether wroug; they do not like to run the risk of treating them as futile, and letting a much larger sum go against them even on the futile proceedings than would be awarded if they were to go in.

The last remark is supported by Lord Justice Lindley, though he adds:

One can easily see that there are conveniences on the one side and on the other, but in my opinion the balance of convenience is in favour of declining to interfere by injunction.

This last remark refers to the position under the Lands Clauses Act, and it must not be overlooked that that Act provides for a very special procedure which had been settled by a long series of decisions though not without differences of opinion.

It is significant that in *Smith Coney & Barrett* v. *Becker Gray & Co.* (20), The *North London Ry., Co.'s* case (9) is not relied upon.

(20) [1916] 2 Ch. 86=31 T. L. R. 151=84 L. J. Ch. 865=112 L. T. 914.

In the result the position for my present purposes may be thus stated. The Court can grant an injunction if, in suits referred to in O. 39, Rr. 2 and 3, S. 53 of the Specific Relief Act, there is a breach of a contract or an injury of any other kind, or a breach of an obligation existing in favour of the applicant; and provided that no

equally efficacious relief can certainly be obtained by any other usual method of proceeding.

In regard to arbitration proceedings there are cases where the Court will restrain parties from proceeding to arbitration but it will not do so where the proceedings sought to be restrained are merely futile and will do no injury to the applicant. On the other hand an injunction has been granted in certain cases out of which I may mention two examples: (1) where a suit has been brought in which the instrument containing the submissien clause is impeached for fraud or mistake or surprise, or for some other reason; and (2) where the arbitrator has misconducted himself. There are other decided cases to which I need not refer more fully now.

The argument on behalf of the applicants was finally based on *Kitts* v. *Moree* (10). Under that decision it was argued that an injunction may be claimed on equitable grounds to restrain the defendant from proceeding to arbitration where an action has been brought impeaching the instrument containing the agreement for reference; and it was argued that there exist similar equitable grounds in this case, inasmuch as the arbitration proceedings actually taken are intended to deal with some only of the contracts between the parties and not all of them; that thus the whole of the transaction between the parties will not be arbitrated upon; that as the relation between the parties was that of principal and agent all the transactions between them ought to be considered as a whole and not as though they consisted of separate and unconnected contracts.

This argument overlooks the gist of the decisions. There is here no impeachment of the agreement containing the submission: it is the case of neither party that the arbitration proceedings will be futile or a mere nullity; nor is it said that I must restrain the proceedings for any such reason as that the arbitrator

has misconducted himself or that any question of law not proper to be submitted to arbitration is involved. These are the classes of cases in which it has been held that the Court will restrain arbitration proceedings. But the argument before me is that the arbitrators will not deal with matters which ought to be dealt with together with those now being dealt with. It is unnecessary to go into the details of this argument or to inquire whether this ground is of the same nature as the instances I have particularized, and must, therefore, be dealt with in the same way, since the obvious reply to the substance of the applicant's grievance is that it lies in his power to place before the same or any other arbitrator all the matters on which he desires to have the arbitrators' award. All the contracts to which he refers stand on the same footing. All contain arbitration clauses in identical terms. He can obtain the relief he seeks more efficaciously by proceeding under the arbitration clauses than by having the arbitration proceedings restrained by injunction.

There is no doubt in my mind that this appplication must be dismissed with costs.

G.B. *Application dismissed.*

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* A. I. R. 1927 Sind 187

RUPCHAND BILARAM AND TYABJI, A. J. Cs.

In re application by Sunderdas and another.

Misc. Appeal No. 18 of 1925, Decided on 20th October 1926, from the decision of Kennedy, J. C.

(a) Succession Act (1925), Ss. 370 and 375—Application for certificate by minor through next friend is competent—Next friend should be asked to execute bond under S. 375 and Civil P. C., O. 32, R. 6.

An application for a Succession Certificate in the name of a minor represented by his next friend is competent and the interests of the minor may be safeguarded by the Court by requiring the next friend who is not a certificated guardian to execute a bond both under S. 375 of Succession Act and under O. 32. R. 6 (ii), Civil P. C.; 20 *All.* 352 and 36 *Mad.* 214, *Foll.*
[P 190, C 1]

(b) Civil P. C., S. 141—Provisions of Civil P. C. relating to procedure are applicable to Succession Certificate Act.

Section 141 refers only to the procedure in suits being applicable to other civil proceedings and does not confer any substantive rights not expressly given elsewhere by the Code, e. g., the rights of appeal, revision or review; and any express provision in the Succession Certificate Act conferring these rights does not render the provisions of Civil P. C. regarding procedure inapplicable to the Succession Certificate Act.
[P 189, C 1, 2]

(c) Succession Act (1925), S. 370.—Guardian—(Obiter.)

A Succession Certificate cannot be issued to the certificated guardian of a minor personally and in his own name; 28 *Bom.* 344, *Diss. from.*
[P 190, C 1]

Srikishondas H. Lulla — for Applicants.

E. V. Castollino—Amicus Curiæ.

Rupchand Bilaram, A. J. C.—In this appeal the following two interesting questions have been raised: (1) Whether a Succession Certificate can be issued to a minor on the application presented on his behalf by his guardian acting as his next friend and, if not can it be granted to the guardian personally for the benefit of the minor? (2) In either case should the guardian necessarily be a person appointed as such under the Guardians and Wards Act VIII of 1890 before the certificate is issued, and if not what safeguards should be provided for the protection of the minor?

Both these questions bristle with difficulties and have been answered differently by different Courts. In *Ram Kuar v. Sardar Singh* (1) the Allahabad High Court took the view that a certificate may issue to a minor represented by his next friend. In *Gulabchand v. Moti Chatraji* (2) Jenkins, C. J., and Ranade, J., held that the application by a guardian of a minor not appointed as such under the Guardians and Wards Act for a Succession Certificate being granted to him personally was incompetent as it contravened the provisions of S. 6, Cl. (d) of the Act which permits an application by a petitioner who claims the right for himself.

In *Ex parte Mahadev Gangadhar* (3) Jenkins, C. J., drew a distinction between application by a guardian not appointed under the Guardians and Wards Act and one appointed under that Act and pointed out that in the latter case S. 27 of the Guardians and Wards Act

(1) [1898] 20 All. 352=(1898) A. W. N. 64.
(2) [1901] 25 Bom. 523=3 Bom. L. R. 795.
(3) [1904] 28 Bom. 344=6 Bom. L. R. 281.

cast an obligation on the legal guardian of dealing with the property of his ward as carefully as a man of ordinary prudence would deal with his own, and subject to the provisions mentioned in Ch. III of the Guardians and Wards Act, he may do all acts which are reasonable and proper for the realization, protection or benefit of the property and that he was thereby vested with the power to recover debts due to his ward and this constituted his right which he claimed for a certificate within the meaning of S. 6 (d) of the Succession Certificate Act. It was, therefore, competent to the Court to grant a certificate to the guardian personally. His Lordship further observed that it was

> at least open to doubt reading the Succession Certificate Act as a whole whether a grant should be made to a minor.

In *In the matter of Dhanbai* (4) Pratt, J. C., sitting as a Single Judge on the Original Side of this Court dissented from the decision of the Allahabad High Court in *Ram Kuar's* case (1) and held that an application by a minor through his next friend for a Succession Certificate was incompetent. The learned Judicial Commissioner observed that a next friend was only a volunteer who at the risk of costs undertook to protect the minor's interest in a suit or an application, that his limited right of representation ceased with the application and that he had no power of management of the minor's estate.

In *Krishnamacharlu* v. *Venkatamma* (5) Abdur Rahim and Sundara Ayyar, JJ., agreed with the view of the Allahabad High Court that a certificate could be granted to a minor, and while commenting on *Ex parte Mahadev Gangadhar* (3) referred to S. 4 of the Succession Certificate Act which prevented the Court from passing a decree against a debtor of the deceased person in favour of a person claiming to be entitled to the effects of the deceased except on the production by the person so claiming of a certificate issued under the Act, and pointed out that in the event of the guardian appointed under the Guardians and Wards Act being required to institute a suit for a debt specified in the certificate the suit would have to be filed in the name of the minor heir in whom the property had vested and the certificate issued to the guardian would not satisfy the requirements of S. 4, a result which could not have been contemplated by the Act.

In the case now under appeal Kennedy, J. C., sitting again as a Single Judge has preferred to follow the decision of Pratt, J. C., in the application of Dhanbai and has refused to issue a certificate to the minor applicant.

The provisions of the Succession Certificate Act have now been repealed and are substituted by Ss. 214 and 370 to 390 of the Indian Succession Act, 39 of 1925. So far as the points at issue in the present appeal are concerned the substituted provisions are in no way different. The introduction of the words: "On succession" in S. 214, Cl. (a) corresponding to S. 4 (a) of the old Act is only intended to make it abundantly clear that the section refers to succession as opposed to survivorship among Hindu coparceners and the like. The objection to the grant of the certificate to the guardian personally under S. 4 of the old Act which was pointed out in *Krishnamacharlu* v. *Venkatamma* (5) still holds good and is, in my opinion, a formidable objection.

Section 27 of the Guardians and Wards Act does not purport to vest the property in the certificated guardian or purport to vest in him the right to institute a suit in his own name for recovery of debts due to a deceased person which have devolved on the minor. He is, no doubt, under an obligation to deal with the property of the minor as a man of ordinary prudence would deal with as if it were his own; the provisions of O. 32, Civil P. C., which contemplated a suit instituted on behalf of the minor being so instituted in his name seems to have been left unaffected by the provisions of the Guardians and Wards Act, and, so far as I am aware, all such suits are at present instituted in the name of the minor concerned except when the guardian has taken out an administration certificate under S. 9 of Bombay Registration Act 8 of 1827 on the ground that the heir is an infant.

Apart from this objection it would appear that the issue of a Succession Certificate to the certificated guardian personally is likely to result in certain minor difficulties, as, for instance, where

(4) [1910] 4 S. L. R. 266=10 I. C. 981.
(5) [1912] 36 Mad. 214=15 I. C. 408=(1912) M. W. N. 411.

the certificated guardian dies or is removed from his guardianship or the minor attains the age of majority before his debt is recovered, the Succesession Certificate becomes ipso facto useless and the issue of a fresh certificate to the new guardian of the minor or to the minor himself if he has attained majority means the irretrievable loss of the certificate fees which have been paid to Government.

I can find nothing in either the old Act or the provisions of the Consolidating Act 39 of 1925, to justify the Court in holding that an application by the minor for the grant of a certificate is incompetent. On the contrary it would appear that as Ss. 223 and 236 of the Consolidating Act expressly prohibit the grant of Probate and of Letters of Administration to minors, and as it contains no provision excluding the grant of a Succession Certificate to a minor, the maxim *expressio unius est exclusio alterious* applies and it may well be presumed that the Legislature intended to permit ,the issue of the certificate to a minor.

Section 141, Civil P. C., provides that the procedure laid down in the Code in regard to suit shall as far as it can be made applicable be allowed in all proceedings in any Court of Civil Jurisdiction and it would, therefore, appear that there is nothing to prevent the application for a certificate being made on behalf of a minor by his next friend. Our attention has been drawn to the observations of Walsh and Ryves, JJ., in *Kanhaiya* v. *Kanhaiya Lal* (6), that the Succession Certificate Act cannot be treated as analogous to other Acts like the Guardians and Wards Act and the Bengal Tenancy Act to which the general principles of the Civil P. C. have been held to apply and that S. 141, Civil P. C., cannot be made applicable to the Succession Certificate Act except in so far as it is expressly introduced by S. 19 (3) and as corollary by S. 26 (3). With all respect I am unable to accept this view. S. 141 refers only to the procedure in suits being applicable to other civil proceedings and does not confer any substantive rights not expressly given elsewhere by the Code, e. g., the rights of appeal, revision or review. Any express mention in the Succession Certificate Act conferring such rights or making the order of the Court final subject to the orders passed in appeal, revision or review cannot, in my opinion, render the provisions of the Code relating to procedure inapplicable to the Succession Certificate Act. As a matter of fact similar express provisions as to appeal, etc., are alike contained in the Guardians and Wards Act. In the particular case before their Lordships the question at issue was as to the appointment of a Receiver pending suit being applied to proceedings for grant of a Succession Certificate.

Now, it is not every rule of procedure enacted by the Code, which necessarily applies to every other civil proceeding and possibly the answer to the application for a Receiver of a debt due may be that it is always open to a claimant to institute a suit for the recovery of the debt before he has got his certificate and, to have a Receiver appointed in that suit or that the recovery of the debt is not the subject-matter in the certificate proceedings, but the recognition of the person who is entitled to recover the same and, therefore, no Receiver can be appointed in the Succession Certificate proceedings. With all respect, again, I am unable to accept the view of Pratt, J. C., that the functions of a next friend of a minor in a suit are confined to the proceedings in Court, or that they cease with the passing of the decree. O. 32, R. 6, Cl. (2) clearly contemplates permission being granted to the next friend to receive money or other property of a minor outside Court by way of compromise before the decree or order or to receive the same under the decree or order passed in favour of a minor. Such leave, however, may not be granted to a next friend who has not been appointed a guardian under the Guardians and Wards Act unless he gives such security as will in the opinion of the Court sufficiently protect the property from waste and ensure its proper application.

These provisions may well be read in conjunction with the provisions of S. 9 of the Succession Certificate Act corresponding to S. 375 of the Act of 1925.

If this is done the only serious objection to the grant of a certificate to a minor through his next friend would disappear. The next friend would not only be required to furnish security that the money recovered on behalf of

(6) A. I. R. 1924 All. 376=46 All. 372.

the minor in pursuance of the certificate would be properly applied for the benefit of the minor, but that he would also idemnify any persons other than the minor who may be entitled to the whole or any part of the debt. Though I am inclined to the view that a Succession Certificate may not issue to the certificated guardian personally and in his own name, I would without recording a definite finding on that point—as it is not necessary for the present appeal—answer the question argued before us by holding that an application for a Succession Certificate in the name of a minor represented by his next friend is competent and that the interests of the minor may be safeguarded by the Court by requiring the next friend who is not a certificated guardian to execute a bond both under S. 375 of Act 39 of 1925, and under O. 32, R. 6 (ii), Civil P. C., as indicated above. For these reasons I hold that the order of the learned Judicial Commissioner refusing to grant a certificate to the minor be vacated and that a certificate do issue to him by his next friend on the next friend executing a bond as indicated above.

In the end we wish to acknowledge our indebtedness to Mr. Castellino for arguing the appeal amicus curiæ with great ability.

Tyabji, A. J. C.—This is an application to revise an order by Kennedy, J.C., refusing the grant of a certificate under the Succession Certificate Act (7 of 1889). That Act has been now repealed and in effect re-enacted as Ss. 214 and 370 to 390 of the Succession Act 39 of of 1925. The learned Judicial Commissioner followed a previous decision of Pratt, J. C., reported in *In the matter of Dhanbai* (4). The question involved is, whether, where the person claiming to be entitled to the effects of a deceased person, and applying for a Succession Certificate is a minor it is within the powers of the Court to grant a certificate to the minor or to some one on his behalf, and if so to whom and with what safeguards.

It is beyond dispute that the certificate must be granted to a person claiming to be entitled to the effects of the deceased person or any part thereof and not to a stranger. This appears sufficiently from the terms of the Act, but is emphasized in *Gulabchand* v. *Moti Chatraji* (2), *Ex parte Mahadev Gangadhar* (3), *Krishnamacharlu* v. *Venkatamma* (5).

Neither can there be any doubt that there may be more persons than one competent to claim the certificate under S. 6 (*a*) the Succession Certificate Act. The arguments before us refer to four classes of persons whose claims to a Succession Certificate may become relevant where the person who can claim to be entitled to the effects of the deceased is a minor. In the first place reference may be made to *Ex-parte Mahadev Gangadhar* (3), where Sir Lawrence Jenkins, with whom Mr. Justice Batty was sitting, held that there being a guardian of the property of the minor appointed under the Guardians and Wards Act the proper person to receive the certificate in the case before them was the guardian and not the minor. I had written out a judgment on this point in which I had accepted the position laid down by Sir Lawrence Jenkins, and considered the present case to be distinguishable from that with which he was dealing inasmuch as there is here no guardian appointed under the Guardians and Wards Act. I have since had the benefit of reading the judgment that my brother Rupchand, A. J. C. is going to deliver in which he argues that that decision is erroneous and that the certificate cannot be granted to any person but the minor himself and that the decision in *Krishnamacharlu* v. *Venkatamma* (5) should be preferred to that of Sir Lawrence Jenkins. I am not prepared to dissent from the reasoning of my learned brother. Only it seems to me that it is not necessary for us in the present proceedings to decide the point which directly involves the correctness of the decision in *Ex parte Mahadev* (3).

The second class of persons whose claim to obtain a Succession Certificate has been argued before us is the natural guardian of the minor claimant. With reference to the claim of a natural guardian it was held in *In the matter of Dhanbai* (4), that before the natural guardian could be given a certificate the Court would have to determine certain questions which are not appropriate in such summary proceedings as are held under the Succession Certificate Act, without going any further, it seems to me that this is an attitude that the Court is entitled to take under the Succession Certificate Act.

I, therefore, come to the third class of persons who may possibly be entitled to claim the certificate, and that is the next friend of a minor on whose behalf the application is made. But the objections as against the next friend as such are obvious. The Succession Certificate Act refers to the person being entitled to the effects of the deceased, the next friend of the minor may be a perfect stranger. Again S. 4 of the Succession Certificate Act provides that the persons entitled to sue for the recovery of the effects of the deceased shall not be entitled to a decree unless he produces a certificate under the Act or something equivalent so that if the certificate were granted to the next friend and not to the person entitled to sue (viz., the minor) there would be no person claiming to be entitled to the effects of the deceased who could obtain a decree for their recovery.

Finally, therefore, we come to the minor himself. Here I find that though there are sections negativing the grant of Probate or Letters of Administration to minors there is no provision laying down that a minor shall not be entitled to a Succession Certificate. In *Ram Kuar* v. *Sardar Singh* (1) and *Krishnamacharlu* v. *Venkatamma* (5) the Allahabad and the Madras High Courts have definitely held that a Succession Certificate may be granted to a minor and it is stated in one of the cases that the Calcutta High Court in the case of *Kali Coomar Chatterjee* v. *Taru Prosunno Mookerjee* (7) impliedly came to the same conclusion, although I have not been able to see that decision. On the other hand Sir Lawrence Jenkins in the case of *Exparte Mahadev Gangadhar* (3) cautiously said that

> it was at least open to doubt reading the Succession Certificate Act as a whole whether a grant should be made to a minor.

He did not express an opinion that a grant could not be made to a minor, but only a doubt whether a grant should be made to a minor; and, as I have stated before he was considering a case whether there was a guardian appointed under the Guardians and Wards Act who, he conceived, was better qualified for the certificate.

Apart from the decisions it seems to me that the reasons for granting a certificate to the minor are conclusive when reference is made to Ss. 4 and 6 of the Succession Certificate Act unless there is some inherent difficulty in the way of the grant. The difficulties that have been referred to are first: that it would be futile to grant a certificate to a minor because he cannot give a valid discharge to debtors; secondly the necessity for protecting the interests of the minor; thirdly the necessity in many cases and the advisability in others of obtaining security from the persons to whom a certificate is granted coupled with the impossibility of requiring the minor to furnish such security. These difficulties, it seems to me, may be overcome in the same way as the difficulties in the minor appearing before the Court and prosecuting legal proceedings, viz., by the joining of a next friend with the minor. The present proceedings are brought by the minor through a next friend and if he is competent to appear here could he not be made equally competent for other purposes?

It was held in the Madras decision *Krishnamacharlu* v. *Venkatamma* (5) that the next friend could be required to give security bond in such terms as would protect not only the interests of the minor as against the next friend, but enable any debtor of the deceased to discharge his debt validly by payment to the holder of the certificate.

First under S. 9 of the Succession Certificate Act (corresponding to S. 375 of the Succession Act, 1925) the person to whom the certificate is granted may be required to execute a bond by way of security. As the application is by the minor by his next friend the security can also be given by the minor by his next friend under this section.

Secondly, in order to protect the interests of a minor as against his next friend who may receive money or other moveable property on behalf of the minor O. 32, R. 6, of the Civil Procedure Code provides that the next friend may be required to furnish security. The procedure in this rule seems to me to be peculiarly applicable when the Court grants a Succession Certificate authorising the collection of debts and receiving of interest or dividends on securities to which a minor is ultimately entitled and, therefore, it seems to me that under S. 141 of the Code of Civil Procedure we are bound to follow or at least to call in

(7) 5 C. L. R. 517.

the aid of O. 32, R. 6. Doubt is thrown on the applicability of O. 32, R. 6, by the decision of *Kanhaiya* v. *Kanhaiya Lal* (6). That decision refers to the appointment of receivers which is a very different class of matters. It may require consideration whether the law and the powers of the Court relating to receivers ought to be deemed to be "procedure provided in regard to suits" within the language of S. 141 of the Civil Procedure Code. But the decision in *Kanhaiya* v. *Kanhaiya Lal* (6) does not rest on this consideration and with great respect I am not able to follow the reasoning that :

where assistance to the Succession Certificate Act is required from the Code, it is introduced by an express enactment.

Section 6 of the Succession Act being cited, for example followed by a reference to S. 19 (3). It seems to me that the effect of S. 6 of the Succession Certificate Act is very different from the flexible provisions of S. 141 of the Civil Procedure Code.

On the other hand, S. 19 (3) expressly refers to S. 141, (S. 647 of the old Code) in terms which meticulously construed would imply that S. 141 is applicable to the Succession Certificate Act. To follow the reasoning of *Kahaiya's* case (6) would lead to the conclusion that the minor cannot make this application by his next friend or be served with a notice under S. 7 which has not been suggested in any of the numerous cases where the point might have been taken.

My learned brother has in a very learned judgment dealt with several other points which I need not elaborate.

The order that seems to me to be proper in those circumstances is that the grant of the certificate should be made to the minor through his next friend on the following conditions ; first, that security be taken from the next friend under O. 32, R. 6 (2) of the Civil Procedure Code, that any money under or other moveable property which may be received by the next friend on behalf of the minors by virtue of the Succession Certificate will be applied by the next friend for the benefit of the minors and, secondly, that security be furnished by the next friend on behalf of the minors as the grantees of the certificate under S. 9 of the Succession Certificate Act (or S. 375 of the Succession Act, 1925) for rendering an account of the debts and securities received by them and for endemnity of the persons other than the minors who may be entitled to the whole or any part of those debts and securities.

I would, therefore, set aside the refusal to grant the certificate and issue a certificate to the minors by their next friend on their executing (by their next friend) a bond under S. 375 of the Succession Act 39 of 1925 provided that the next friend furnishes security under O. 32, R. 6, of the Code of Civil Procedure, the security in each case to be to the satisfaction of the Nazir of this Court for the value of the debts and securities to be mentioned on the certificate.

G.B. *Order accordingly.*

A. I. R. 1927 Sind 192

LOBO, A. J. C.

Hirabai Burjorji Cowasji—Plaintiff.

v.

Fakir Mahomed Vali Mahomed Khoja—Defendant.

Original Civil Suit No. 925 of 1926, Decided on 8th February 1927.

Court-fee—Excess paid by mistake—Court can allow refund.

A Court has jurisdiction to order the issue of a certificate to enable the plaintiff to apply to the revenue authorities to obtain a refund of the excess Court-fee paid under a bona fide mistake : 40 *Cal.* 365 and 3 *P. L. J.* 452, *Foll.*

Rewachand Vissanmal—for Plaintiff.

Order.—I think this application must be granted. There is clearly an over payment of Court-fees to the extent of Rs. 168-12-0. I have examined the record and considered the application of the learned Pleader of the plaintiff and I am of opinion that the over payment is the result of a bona fide mistake. On the authority of the cases reported as *Hari Har Guru* v. *Ananda Mahanty* (1) and *Chandra Hari Singh* v. *Tipan Prosad Singh* (2), I consider that I have jurisdiction to order the issue of a certificate to enable the plaintiff to apply to the revenue authorities to obtain a refund of the excess Court-fee.

Let a certificate issue to the plaintiff more or less in the form shown in *Hari Har Guru* v. *Ananda Mahanty* (1).

D.D. *Application granted.*

(1) [1913] 40 Cal. 365=20 I.C. 498.
(2) [1918] 3 P.L.J. 452=46 I.C. 271=1918 P. H.C.C. 273.

A. I. R. 1927 Sind 193

RUPCHAND BILARAM AND LOBO, A. J. Cs.

Lilaram and *others*—Applicants.

v.

Balchand and *others*—Opponents.

Civil Revision Application No. 47 of 1925, Decided on 4th February 1927, from an order of the Sub-J., Sehwan, D/- 31st March 1925, in Civil Suit No. 550 of 1925.

Civil P. C., Sch. 2, Para. 15 (c)—Reference pending suit—Arbitrator treating person not party to suit as party to arbitration—Award is 'otherwise invalid.'

Where an arbitrator in a reference pending a suit treats a person who is not a party to the suit as a party to the arbitration and decides disputes between parties to the suit or any of them and such person, however just and equitable the award may be 'it is otherwise invalid' within the meaning of para. 15, sub-Cl. (c).

[P 193 C 2 & P 194 C 1]

Dipchand Chandumal—for Applicants.

Fatehchand Assudamal — for Opponents.

Judgment.—This is a revision application against the order of the learned Sub-Judge of Sehwan disallowing objections to an award made in a suit and passing a decree in terms of the award.

It appears that the plaintiffs instituted this suit for settlement of partnership accounts which according to them commenced in Sambat 1976 and ended in Sambat 1979. The defendants inter alia pleaded that there were two other prior partnerships in which one Idanmal was also a partner with the plaintiffs and the defendants; that all the accounts had to be taken together in the suit and that if any partnership accounts were to be taken Idanmal should be made a party to the suit. One of the issues raised by the Court was whether Idanmal was a necessary party to the suit. The disputes were thereafter referred to arbitration. The arbitrators disallowed the claim of the plaintiffs and on the contrary passed a decree against the plaintiffs for Rs. 12,456 odd. In para 1 of their award they stated as follows: "In this suit Idanmal is joined as defendant." In para. 7 of their award they stated that

the share of each defendant in the sum of Rs. 12,456 odd, awarded against the plaintiffs is shown below according to which the Court may pass a decree against the plaintiffs.

The plaintiffs to pay . . . . . to the defendant No. 5 Ailmal and with him Idanmal defendant Rs. 5,458-10-4 less debt.

Now the main objection of the applicants taken before the lower Court and which has been pressed before us is that it was not open to the arbitrators to join Idanmal as a party to the proceedings before them, that as soon as they had come to the conclusion that Idanmal was a partner in the transactions of which they were taking accounts they should either have dismissed the suit as not having been properly constituted or they should have stayed their hands and asked the parties to apply to the Court to have Idanmal joined as a party; and if thereafter all the parties including Idanmal had again agreed to refer their disputes to the same arbitrators they should then have proceeded with the matter.

It is urged and not without considerable force, that the award happens to be beneficial to Idanmal. He has not complained, but if the award had been against him it was open to Idanmal to file a fresh suit for settlement of the same partnership accounts, on the ground that he was not a party to the suit; why should they therefore, be now bound to pay the amounts which have been awarded either to Idanmal or to any other partners. It is equally open to the plaintiff to urge that all that he bargained for when he referred the disputes to the arbitration was that the arbitrators would either settle the disputes pertaining to the partnership in which Idanmal was a partner or dismiss his suit for want of proper parties and that he never agreed to their deciding the dispute regarding the prior partnership or to a decree being passed against him. The arbitrators were evidently conscious of the defect in their proceedings. They probably realized that though they had made Idanmal a party before them he was not a party to the suit and, therefore, they awarded a lump sum to Idanmal and Ailmal together so that the latter who was a party to the suit may enforce the decree on behalf of both.

It is abundantly clear that the arbitrators have exceeded their jurisdiction in treating a person as a party to the suit when he had not been properly served, and in settling partnership accounts between him and the other partners who

alone were parties to the suit. However just, and equitable the award may be "it is otherwise invalid" within the meaning of para. 15, sub-Cl. (c) of Sch. II, Civil P. C. We think this objection is fatal to the award and the learned Judge has exceeded his jurisdiction in giving effect to it.

We accordingly set aside the award and allow the appeal with costs and remand the case to the lower Court for being dealt with according to law.

R.D. *Case remanded.*

A. I. R. 1927 Sind 194

RUPCHAND BILARAM, A. J. C.

Assudomal Fatehchand—In re.

Original Insolvency Case No. 131 of 1926, Decided on 21st February 1927.

Provincial Insolvency Act (1920), *S.* 51 (1)—*Meaning of the word "Realized" explained.*

Where the Court holding the assets of the judgment-debtor is the same as the Court attaching the same on behalf of the creditor in another suit, the assets cannot be said to have been "realized" within the meaning of S. 51, unless the money standing to the credit of the judgment-debtor is ordered to be transferred to the credit of the attaching creditor's suit: *A. I. R.* 1921 *Mad.* 218, (*F. B.*), *Applied.*

[P 194 C 2 & P 195 C 1]

Durgomal Nariansing—for Judgment-creditor.

Fatehchand Assudamal — for Official Receiver.

Rupchand Bilaram, A. J. C.—The facts of this case are not disputed.

In Suit No. 1012 of 1925, *the firm of Assudomal Fatehchand* v. *the firm of Balchand Deumal* pending in this Court before my brother Dr. De Souza, a sum of Rs. 1,734-10-0 has been realized by the sale of certain perishable goods belonging to the defendants which were attached before judgment.

The judgment-creditor in the present execution application has obtained a decree against the same defendants in the Sub-Civil Court Hyderabad and has got it transferred to this Court. He has obtained an order for attachment of money in the custody of the Court in the above suit, under O. 21, R. 52. On application for payment to him of the money a notice has issued to the plaintiffs in Suit No. 1012 of 1925 to show cause why the payment should not be made. So far however no transfer entries have either been sanctioned or made and the amounts stand to the credit of Suit No. 1012 of 1925.

Now in the meantime an application has been filed under Provincial Insolvency Act 5 of 1920 to have the defendants adjudged insolvents and the Official Receiver has been appointed interim receiver of their property. He has intervened and claimed the money for the general benefit of the creditors under S. 51 (1) of the Act, which reads as follows:

Restriction of rights of creditor under execution.

> 51. Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of the execution by sale or otherwise, before the date of the admission of the petition.

Now, admittedly the money in Court has not been realized by the sale of the defendant's goods in execution of the present decree. The only question therefore for consideration is whether the amount which is in custody of the Court in Suit No. 1012 of 1925 should be treated as assets realized otherwise than by sale in execution of the present decree.

The expression "assets realized in the course of the execution by sale or otherwise" in S. 34 of the Provincial Insolvency Act of 1907 which is reproduced in S. 51 (1) of the present Act was evidently adopted from similar words used in S. 295 of the old Code of Civil Procedure.

There was no doubt as to the meaning of those words, and in the Code of 1908 they were substituted by the words "assets held by the Court" which are more clear.

The effect of an attachment of money in the hands of the Court under O. 21, R. 52, Civil P. C., on the rights of the subsequent attaching creditors to claim rateable distribution under S. 73 of the Code of Civil Procedure came up for consideration before the Full Bench of the Madras High Court in *Visvanadhan Chetty* v. *Arunachelan* (1), their Lordships held that where the attaching Court and the custody Court are the same, there is a receipt of assets within

(1) A.I.R. 1921 Mad. 218=44 Mad. 109 (F.B.).

the meaning of S. 73 Civil P. C., only when so much of the money standing to the credit of the judgment-debtor as is necessary to satisfy the decree-holders who have applied to it for execution is ordered to be transferred to the credit of the first attaching creditor's suit.

This case was referred to with approval in a later Full Bench case of the same Court in *Nachiappa* v. *Subbier* (2) where it was held that the amount deposited in Court in pursuance of an order of attachment before judgment in one suit becomes "assets held in Court" within the terms of S. 73, Civil Procedure Code, only when the Court passes an order on the application of the attaching creditor for payment of the amount in execution. The dictum in *Visvanadhan Chetty* v. *Arunachelan* (1) may safely be applied to the interpretation of S. 51 (1) of the Provincial Insolvency Act.

There has been no order either for transfer of the money to the account of the judgment-creditor or for payment of the money to the money to him. The Official Receiver has therefore a preferential claim to the money in the hands of the Court. I reject the application of the judgment-creditor for payment of the money to him.

D.D. *Application rejected.*

(2) A. I. R. 1923 Mad. 505=46 Mad. 506 (F. B.).

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* A. I. R. 1927 Sind 195

RUPCHAND BILARAM, A. J. C.

Firm of Rameshardas-Benarashidas—Plaintiffs.

v.

Firm of Tansookhrai Bashesharilal—Defendants.

Original Civil Suit No. 319 of 1922, Decided on 17th February 1927.

Contract Act, S. 215—Purchase or sale by agent of his own goods for or to principal without disclosing the fact is not ipso facto void—Each case will depend upon its own facts.

A purchase or a sale made by the commission agent of his own goods for or to his principal without disclosing that fact is not ipso facto void for failure to disclose a material fact. So also a contract for future delivery, if made by the agent on his own behalf, is not ipso facto void because there is a possibility of its being disadvantageous to the principal if the agent is entrusted with carrying it out.

[P. 196, C. 2, P. 197, C. 1]

The words "dealings of the agent have been disadvantageous to him . . . ." mean disadvantageous in fact and not a mere possibility of their being disadvantageous. Whether such a contract is disadvantageous or not must be decided on the facts of each case and no presumption arises : 10 *S. L. R.* 86, *Dist.* and *Diss. from* ; *A. I. R* 1922 *Mad.* 497, *Rel. on.* [P. 197, C. 1]

Kulumal Pahlumal—for Plaintiffs.

Kodumal Lekhraj—for Defendants.

Judgment.—This is a suit on a commission agency account which consisted of two transactions : the first transaction was a purchase of 30 tons white Java sugar of July-September 1921 shipments ; and the other a purchase of 25 tons white Java sugar of October-December 1921 shipments.

The defendants are a firm carrying on business at Ferozepore. It is not certain who its partners are, but it is not seriously disputed that the two brothers Sohanlal and Mahadeoparsad are partners in that firm. They had a third brother by name Ramnath. He was working at Karachi as a partner in the firm of Badridas-Mohanlal, and admittedly it was he who introduced the firm of the defendants to the plaintiffs. The plaintiffs say that it was under his instructions and with his knowledge and consent that they entered into the two transactions in question on behalf of the defendants.

Now, with regard to the first contract of 30 tons July-September shipments : it appears that the plaintiffs made a contract of purchase of 10 tons July shipment with the firm of Allibhoy-Mamooji at the rate of Rs. 22-10-0 per cwt. For the balance of 20 tons, 10 tons being of August shipment and 10 tons of September shipment, the plaintiffs made a contract in which they were themselves the sellers. The explanation of the plaintiffs is that they instructed the broker Devchand Madhowji to buy all the 30 tons from the bazar. The broker bought only 10 tons from Allibhoy-Mamooji at Rs. 22-10-0 per cwt. and reporte to them that the balance of 20 tons could not be had at that rate from a respectable merchant. Ramnath was then present and with his consent they sold their own goods to the defendants at the same rate.

With regard to the second contract of 25 tons, it appears that the defendants intended to buy only 15 tons of October-December shipments ; but in the telegram

sent by them to the plaintiffs the quantity mentioned was 25 tons which meant 8⅓ tons for each shipment. The usual quantity which changes hands in the bazar is a multiple of 5 tons for each shipment. The plaintiffs say that, as there was difficulty in getting 25 tons from the bazar, they again consulted Ramnath and with his consent sold 25 tons of their own out of a lot of 30 tons of theirs to the defendants. The goods covered by these two transactions were subsequently disposed of by the plaintiffs under instructions from the defendants to different dealers, and it is the loss resulting therefrom for which this suit has been filed.

The main defence of the defendants is, that they are not liable to pay the loss because the plaintiffs failed to disclose to them that they were the sellers in respect of 20 tons out of 30 tons of the first transaction and in respect of the 25 tons of the second lot. None of the defendants have appeared here in person to go into the witness-box. (The judgment then discussed the evidence and proceeded). I hold, therefore, that both these transactions are binding on the defendants, notwithstanding the fact that they were made partly by the plaintiffs in their dual capacity as principal and as agents. It is, therefore, not open to the defendants to repudiate under S. 215, Indian Contract Act, the transactions. It has also not been shown that either material facts had been dishonestly concealed by the agent or that their dealings had been disadvantageous to the principal so as to make the provisions of S. 215 applicable. My attention has been drawn to the Single Judge judgment of Fawcett, A. J. C., in firm of *Jankidas Banarsidas* v. *Dhumanmal* (1). In that case the commission agents had not only failed to disclose to their principals that they were the purchasers, but had made the contract of purchase in a pseudo name. There was also evidence that the agents had not only concealed the facts that they were the purchasers, but had made a misrepresentation in fact on that point. Though the learned Additional Judicial Commissioner came to the conclusion that there was a dishonest concealment he was not prepared to hold that the concealment was of a "material fact" within the meaning of S. 215 and observed :

> At the same time it is doubtful whether the words 'any material fact' in S. 215 include the fact of the agent dealing on his own account with the business of agency, and the context and illustration (a) rather suggest the contrary. I do not, therefore, rely on this point in holding that the case falls under S. 215.

This judgment is, therefore, no authority for holding that a purchase or a sale made by the commission agent of his own goods for or to his principal, without disclosing that fact, is ipso facto void for failure to disclose a material fact. Moreover in this case the transactions were not made by the plaintiffs in any pseudo name and have been proved to be fair. Devchand, Ex. 7, has deposed to the fact that he could not get the balance of 20 tons of July to September shipment from a respectable party at the same rate. The plaintiffs sold their own 20 tons at the same rate of Rs. 22-10-0 at which they had themselves bought from Allibhoy Mamooji at Rs. 22-10-0 which was a fair market rate (Benarsidas Ex. 6, 11th October 1920). According to Tayebali, Ex. 8, this rate was an anna or two cheaper, as he sold the August shipment at Rs. 22-12-0 and the September shipment price was still steadier. The second lot of 25 tons was likewise sold by the plaintiffs at the bazar rate (Benarsidas, 1-35) and was two annas cheaper than the price paid by the plaintiffs themselves : (Tayebali, line 12 and Ex. 8-2.)

With regard to the question whether the dealing in that suit was disadvantageous to the principal or not again, the learned Additional Judicial Commissioner in the case referred to above was of the opinion that the dealing was in fact disadvantageous to the principal. In the present case it is the contrary. There were covering contracts duly made by the plaintiffs in the bazar with strangers on behalf of and under the instructions of the principals who thus became liable to pay the difference in price.

While dealing with the general question whether in the case of a contract for future delivery a purchase or sale by the agent of his own goods to his principal is ipso facto disadvantageous or not the learned Additional Judicial Commissioner observed at page 93 (of 10 *S. L. R.*):

(1) (1917) 10 S. L. R. 86=37 I. C. 241.

This dealing of plaintiffs on their own account was, however, clearly disadvantageous to defendants, because the contract was one for future delivery, and plaintiffs as agents for defendants still had duties to perform for defendants which would almost necessarily come into conflict with their interest as the actual purchasers from defendants.

The mere possibility of the agent's duty to his principal and his own interests being in conflict is, I think, sufficient to bring the case under S. 215, since the possibility of this conflict is in itself a disadvantage to the principal.

With all respect, I can find nothing in the section to warrant the suggestion that a contract for future delivery, if made by the agent on his own behalf, is ipso facto void because there is a possibility of its being disadvantageous to the principal if the agent is entrusted with carrying it out. The words of the section are that "dealings of the agent have been disadvantageous to him..." which I take it to mean as disadvantageous in fact. That appears to be the meaning attached to those words by Schwabe, C. J., in *Achuta Naidu* v. *Oakley Bowden & Co.* (2). It is somewhat difficult to presume that the principal would in every case engage his agent to specifically perform the contract, and more so in transactions of a speculative nature bordering on wagers, where in almost every case covering contracts are made before the due dates and only the differences paid and received.

I quite conceive of cases where a foreign principal instructs his agent to buy and ship goods to a foreign country, where a presumption may arise that the contract by the agent to sell his own goods was likely to be disadvantageous to the principal. But, in my opinion, no presumption can arise in every case from the mere fact that the agent is instructed to enter into a contract for future delivery. Whether such a contract is disadvantageous or not must be decided on the facts of each case, and no such presumption arises here.

I hold that in the present case there was neither dishonest concealment of any material facts nor were the dealings disadvantageous to the defendants.

It is clear from the correspondence that on the account sales being submitted to the defendants they raised at first certain other disputes which they subsequently gave up and requested for time to pay up the money which they never paid. The defendants have disputed their liability for commission and brokerage charged in the account. The only material point on which Mr. Kodumal has been able to draw my attention is that, in addition to the rebate already allowed by the plaintiffs to the defendants, they are entitled to a reduction in the brokerage charged of a sum of Rs. 18, being brokerage on the transactions made by the plaintiffs with themselves without the intervention of a broker. (The rest of the judgment formally recorded the findings on the issues raised and is not material to this report).

G.B. *Suit decreed.*

(2) A. I. R. 1922 Mad. 497=45 Mad. 1005.

A. I. R. 1927 Sind 197

PERCIVAL, J. C., AND TYABJI, A. J. C.

Pessumal and *another*—Appellants.

v.

Valoo—Respondent.

Misc. Appeal No. 12 of 1925, Decided on 20th January 1927, from the judgment of the Asst. J., Hyderabad, D/- 1st December 1924, in Civil Appeal No. 134 of 1920.

Dekkan Agriculturists' Relief Act, S. 12—Suit under—Parties can compromise—Court can consider its suitability or correctness.

In a suit falling under S. 12 of the Act, parties are not precluded from entering into a compromise and the Court before it records it under Civil P. C., O. 23, R. 3 can go into the question of suitability or correctness of the compromise : 34 *Bom.* 502, *not Foll.*; 35 *Bom.* 190, *Rel. on.*

[P 193 C 1]

Dipchand Chandumal—for Appellant.

Percival, J. C.—This is an appeal against the order of the Assistant Judge, Hyderabad, refusing to file a compromise in the case of Perssumal and Valoo, defendant being an agriculturist.

The learned pleader for the appellants contends that the learned Assistant Judge should not have gone into the question of the correctness or suitability of the compromise at all, but should have simply recorded it under O. 23, R. 3, Civil P. C. He relies on certain rulings which go to show that there is nothing in S. 12 of the Dekkhan Agriculturists' Relief Act which deprives the parties of the power of entering into a compromise and of having that compromise recorded under O. 23, R. 3 vide *Piraji* v. *Ganpati* (1)

(1) (1910) 34 Bom. 502=6 I. C. 527=12 Bom. L. R. 378.

and other rulings. I think, however, when the Dekkhan Agriculturists' Relief Act is considered as a whole, and the rulings on the point are considered, the view that the Assistant Judge could not go into the question of the suitability of the compromise cannot be accepted. The provisions of the Dekkhan Agriculturists' Relief Act are very drastic regarding the power and the duty of the Court and to take account under Ss. 12 and 13 of the Act. It is laid down in S. 12 that, if the amount of the creditor's claim is disputed the Court shall go into the question under S. 12. Where if, the amount of the claim is admitted before the Court, still it is laid down that the Court may, if it thinks fit, take accounts under that section.

There are further rulings regarding the awards which point to the same direction. They lay down that no document purporting to be an award is to be accepted by the Court unless the Court is satisfied that it is an award and that the parties should not be allowed to go behind the provisions of the Dekkhan Agriculturists' Relief Act, by filing awards which are merely colourable documents obtained not ingenuine agreements but for the purpose of inducing,the Court to sanction the claim. The whole tenor of the Act is to the effect that the Court can and should go into the question of the correctness of awards affecting the parties. The inference, therefore, is that the Court cannot be precluded from going into the question of the correctness of the compromise. The view is borne out by the case of *Kisandas* v. *Rama Vir* (2), where it is laid down that the compromise must not be in conflict with the provisions of the Act. If the Court cannot go into the question of compromise it will not be in a position to decide whether in fact the compromise was in accordance with the provisions of the Act or not. It is to be noted that in this particular case the defendant-agriculturist had put his thumb mark to the compromise but still when he came into the Court and was examined, he made a different statement and said that this amount is not rightly due from him. So that it is not a case in which the defendant has stated in Court that he adheres to the compromise.

(2) [1911] 35 Bom. 190=8 I. C. 651=12 Bom L. R. 1024.

Having regard to all the facts of the case I do not think that it can be held that the learned Assistant Judge was wrong in refusing to admit the compromise on the record. The appeal to the Assistant Judge has not as yet been disposed of and the appellant will be able to place before the Assistant Judge the facts which go to show that the amount claimed by the plaintiff was due from the defendant. But I do not think that one can accept the argument advanced that it was not open to the Judge to go into details of the compromise.

I would, therefore, dismiss the appeal.

Tyabji, A. J. C.—I agree. In this case the parties stated that they had arrived at a compromise with reference to the subject-matter of the suit and the learned Judge considered that he was bound to act in accordance with that part of S. 12 of the Dekkhan Agriculturists' Relief Act which applies to the admission of a claim by the defendant. It was urged before us that this course was not open to the learned Judge by reason of the decision in *Piraji* v. *Ganpati* (1). In that decision it is laid down that in addition to the two courses open to the Court under S. 12 of the said Act a third alternative is open to the parties, namely, that under O. 23, R. 3 of the Civil P. C.

Two alternatives are mentioned in S. 12 with regard to suits for recovery of money alleged to be due to the plaintiff the defendant being an agriculturist; the first alternative is where the amount of the creditor's claim is disputed; the second where the amount of the claim is admitted. According to the judgment mentioned these two alternatives do not exhaust the possibilities of the case, and

there is nothing in the language of S. 12 or any other section which expressly deprives the parties to a suit of the power of entering into a compromise and having that compromise recorded under O. 23, R. 3.

A compromise, it was said, cannot be treated as a mere admission by the defendant of the claim, that the Court is not then asked to pass a decree on any admission of the defendant, but to make one in terms of the compromise, which, after trial commenced had been deliberately entered into by the parties.

It seems to me, with all deference, that S. 12 completely provides for a compro-

mise, and that no third alternative is open beyond the two contained in the section. When the parties come before the Court after a suit has been instituted for recovery of money, there is either a dispute outstanding between them as regards the claim made by the plaintiff or there is no dispute. When there is dispute because a compromise has been entered into between the parties, the plaintiff may have either waived a portion of the claim or altered it; in any case the defendant admits either the whole of the original claim or the claim as altered or to the extent that it is asserted, in the compromise; the position, therefore, is that the defendant admits the amount of the claim that is put forward, or to the extent that it has not been relinquished, by the plaintiff in accordance with the compromise. There is thus an admission of the claim on the part of the defendant at the time when the Court is asked to pass a decree by consent. This admission is, no doubt, based on the fact that the defendant has entered into a compromise after the trial had commenced. But that does not (it seems to me) the less make it an admission of the amount of the claim nor does it prevent the provisions of S. 12 from governing the position.

It seems to me, therefore, that when the question has to be considered by the Court, whether a suit to which S. 12 applies has been adjusted wholly or in part by any lawful agreement or compromise under O. 23, R. 3, then the Court must examine the terms of the compromise, and, in so far as they consist of admissions by the defendant of the claim then put forward by the plaintiff, the Court must act, in accordance with the provisions of S. 12, viz.: (1) if the Court believes that such admission is true and is made by the debtor with full knowledge of his legal rights as against the creditor it should record its reasons for so believing; and then it shall not be bound to make the enquiry referred to in S. 12, but may do so if it thinks fit; (2) in other cases it shall be bound to make the enquiry.

That this is so is indicated amongst other cases by the one in *Kisandas* v. *Nama Rama Vir* (2). There the defendant had entered into a compromise which was presented by both parties for a decree to be passed in accordance with its terms. The Court nevertheless examined the defendant on the terms of the compromise and explained them to him who then again agreed to be bound by it. Thereupon the learned Subordinate Judge referred to the High Court two questions: first, whether the compromise was lawful; and, secondly whether the Court was bound to pass a decree on the compromise in question. Both questions were answered in the negative. The ground on which it was held that the compromise was not lawful is worthy of consideration in the present connexion. Under S. 15 B. Cl. (2) of the Dekkhan Agriculturists' Relief Act, the Court is required

> except for reasons to be recorded by it in writing, instead of making an order for the sale of the entire property mortgaged or foreclosure, order the sale of such portion only of the property as it may think necessary for the realization of that sum.

Whereas in the compromise then before the Court it was provided that in default of payment of two instalments, the plaintiff should realize the whole balance due by the sale of the entire mortgaged property. On the ground the compromise was held to be illegal, it seems to me that when this and similar decisions are considered, it appears that the distinction made in *Piraji* v. *Ganapati* (1) cannot be upheld.

For these reasons, I think, the learned Judge proposed to follow the correct procedure and this appeal should be dismissed.

R.D. *Appeal dismissed.*

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* A. I. R. 1927 Sind 199

LOBO, A. J. C.

Thakursi Raisi and *another*—Judgment-creditors—Plaintiffs.

v.

Fida Hussain and *others*—Judgment-debtors—Defendants.

Original Civil Suit No. 618 of 1923, and Execution Misc. Case No. 149 of 1926, Decided on 23rd February 1927.

** Civil P.C., O. 21, Rr. 95 and 96—Judgment-debtor other than a Hindu co-parcener in joint possession with a third party—Auction-purchaser may sue for partition but Court will not refuse to assist him in obtaining possession under Rr. 95 and 96.*

The remedy of a purchaser in execution of the undivided interest of a Hindu co-parcener is

not one under the provisions of O. 21, but by a suit for partition against the joint family; but there is no authority for the proposition that Rr. 95 and 96 of O. 21 have no application to a case where a judgment-debtor, not a Hindu coparcener whose interest has been purchased, is in joint possession with a third party. In such cases it may well be that the auction-purchaser who has purchased an undivided share in immovable property has open right to file a suit for partition of the undivided share purchased in execution of a decree; but there is no warrant for holding that that is his only remedy, and that the Court will not assist him, as far as possible, consistently with Rr. 95 and 96 of O. 21, Civil P. C., to obtain possession. [P 201 C 1, 2]

Kalumal Pahlumal — for Decree-holders.

Suganlal H. Jeswani—for Safiabai.

Order.—This application under O. 21, Rr. 95 to 98, Civil Procedure Code, arises out of execution proceedings in respect of a mortgage-decree obtained by the applicants-decree-holders in Suit No. 618 of 1923.

The preliminary decree in this suit was passed on 25th July 1925, against six defendants, including one Safiabai, daughter of Mahomedalli. On 2nd November 1925, an application was filed by Safiabai under O. 9, R. 13, Civil Procedure Code, and S. 151, Civil Procedure Code praying that the decree in the said suit so far as it related to her be set aside on the ground that it had been passed against her as a major when, as a matter of fact, she was a minor both on the date of the institution of the suit and on the date of judgment. She alleged that the decree as against her was a nullity. The application was disposed of by Tyabji, A. J. C., on 23rd December 1925. The learned Additional Judicial Commissioner held in favour of Safiabai and the concluding words of his order are as follows:

In these circumstances, the decree cannot affect Safiabai's 1/8th share in the property. The decree will, therefore, be made absolute against the other defendants but it will not affect Safiabai's 1/8th share in the mortgaged property.

On the same date, there was a final decree for sale in respect of the right, title and interest of the Defendants Nos. 1 to 5 in the suit, that is in respect of 7/8ths of the mortgaged property.

In execution proceedings the applicant decree-holders purchased the 7/8ths share of the Defendants Nos. 1 to 5 and obtained a sale certificate in respect of the said 7/8ths share on 5th August 1926.

A warrant for possession was thereafter issued by this Court. It has, however, not been executed and the applicants decree-holders have not obtained possession in the circumstances set out in the application now before me for disposal.

This application states that in pursuance of a warrant issued for possession the judgment-creditors' representative accompanied the bailiff of this Court to receive possession. That a board bearing the name of Mahomedalli Hassanalli was found attached to the property outside. That the judgment-debtors in order to obstruct the obtaining of possession by the applicants have been instrumental in putting up the said board, that Mahomedalli Hassanalli is a relation of theirs. The applicants contend that if Mahomedalli claims through the judgment-debtors the purchasers are entitled to be put in possession by removing him if in possession. If the said Mahomedalli is proved to be a tenant prior to attachment, the judgment-creditors are entitled to constructive possession as provided in O. 21. R. 95, Civil Procedure Code. The applicants pray that the bailiff be ordered to put them in possession, if need be, by removing the person, in occupation and removing the resistance or obstruction to the execution of the decree.

Notice of this application was issued and served upon Mahomedalli Hassanalli. He has, however, not appeared.

There is nothing on the record to show how and through whom Mahomedalli claims an interest in the property in question or whether he claims any interest at all, and in the circumstances it appears to me that the contention of the applicants that the name of Mahomedalli Hassanalli has merely been put forward for the purpose of obstructing the execution of the decree and preventing the applicants from obtaining possession in execution of their decree is well founded.

The application, however, is opposed by Mr. Suganlal who appears for Safiabai against whom there is no decree and who is, as stated before, entitled to 1/8th share in the property and is alleged to be in part possession.

The point taken by the learned pleader for Safiabai may be put in the following form. The applicants have purchased in execution of the decree in question a 7/8th undivided share in the property

in question. Safiabai against whom there is no decree is in part possession. R. 95 of O. 21, Civil Procedure Code, can have no application to the case of a purchase of an undivided share. The applicants' remedy, if any, is a suit for partition against Safiabai.

A number of rulings were cited in support of the above contention on behalf of Safiabai. Most of them, however, are cases in which the creditor of a coparcener in a joint Hindu family obtained a decree against him and sought in execution of that decree to take possession of the undivided share of the said coparcener in the joint family property. In these cases, it has been held, and the law is well settled on the point that a creditor's remedy is not one under the provisions of O. 21 of the Civil Procedure Code, but by a suit for partition against the joint family. The ratio decidendi of these cases is that an individual coparcener in a Hindu joint family cannot be considered to be in possession on his own behalf of any portion of the joint family property, but that he holds possession on behalf of the joint family of which he is a member.

I am not here dealing with the case of a joint Hindu family or with a decree against a coparcener in a joint Hindu family and the cases which have been cited, therefore, cannot apply to the application now before me.

No ruling has been cited as authority for the proposition that Rr. 95 and 96 of O. 21, Civil Procedure Code have no application to a case where a judgment-debtor not a Hindu coparcener whose interest has been purchased is in joint possession with a third party. I have myself been unable to find any such case.

The point arose in the case of *Hassan Ammal Bibi* v. *Ismail Moideen Rowther* (1). It was, however, not decided as the learned Judge there states :

> It is unnecessary to consider whether the section (O. 21, R. 96. Civil Procedure Code, S. 318 of the old Code) is applicable to a case where the judgment-debtor whose interest was purchased was in joint possession with a third party.

On general considerations, however, it appears to me that there is no good ground for confining the application of Rr. 95 and 96 of O. 21, Civil Procedure Code, to cases where the judgment-creditor has purchased in execution of a decree the whole of an immovable property.

(1) [1915] 28 M.L.J. 612=29 I. C. 976=(1915) M. W. N. 414.

Rules 95 and 96 of O. 21, Civil Procedure Code, maintain no such distinction. They refer generally to immovable property sold in execution of a decree. Under R. 94 of O. 21 an auction-purchaser obtains a certificate in respect of his purchase, and the rules subsequent to R. 94 are intended to assist the auction-purchaser in obtaining by possession in one form or other the fruits of his purchase. It may well be that the auction purchaser who has purchased an undivided share in immovable property has open right to file a suit for partition of the undivided share so purchased in execution of a decree ; but there appears to me to be no warrant for holding that that is his only remedy, and that the Court will not assist him, as far as possible, consistently with Rr. 95 and 96 of O. 21, Civil Procedure Code, to obtain possession.

The Defendants Nos. 1 to 5 in Suit No. 618 of 1923 are admittedly in part possession of the property in question, and it appears to me that the applicants are in any event entitled to such possession as the judgment-debtors themselves have by virtue of the fact that they owned a 7/8th share in the property which has been purchased by the applicants.

With regard to Mahomedalli Hassanalli there is no difficulty. As I have stated above he has not appeared, and I hold that the judgment-debtors have merely put his name up for the purpose of obstructing the execution of the decree. The judgment-debtors Defendants Nos. 1 to 5 in the suit are in possession and under R. 95 of O. 21, Civil Procedure Code, the applicants are entitled to such possession as they have by having them removed, if necessary.

As regards Safiabai, she is in possession in her own right and the applicants are not entitled to any remedy against her in execution.

I, therefore, grant the application before me, and order that the applicants be placed in possession of the property in question if need be by removing the judgment-debtors if they are in possession. The applicants will not be entitled to disturb the possession of Safiabai.

D.D. *Application granted*

A. I. R. 1927 Sind 202

PERCIVAL, J. C., AND TYABJI, A. J. C.

Teoomal—Appellant.

v.

Giyanomal and *others*—Respondents.

Misc. Appeal No. 57 of 1925, Decided on 22nd January 1927 against the order of the 1st Cl. Sub-J., Sukkur.

Civil P. C., O. 40, R. 1, O. 43, R. 1, Cl. (3)—Order for appointment of receiver—No receiver named—No appeal lies.

No appeal lies from an order that there is a fit case for the appointment of a receiver, but nobody is appointed by name as receiver: 17 *Bom. L. R.* 510 *Appl.*; 40 *Mad.* 18 and *A. I. R.* 1922 *Patna* 577, *Diss. from.*

[P 202 C 1, 2]

T. G. Elphinston—for Appellant.

Dipchand Chandumal—for Respondents.

Percival, J. C—This is a miscellaous appeal against the order of the First Class Sub-Judge, Sukkur, appointing a Receiver of the suit property.

In the course of the arguments the question was raised whether an appeal lies or not, as no particular individual has been appointed as Receiver. The order of the learned Sub-Judge is:

I consider this is a fit case for the appointment of a Receiver; parties should nominate on 30th January.

It appears that the Calcutta, Bombay and Allahabad High Courts hold that no appeal lies at this stage, while Madras and Patna High Courts hold that an appeal does lie at this stage. I have looked at the judgments of the five High Courts in question and I decidedly prefer the view taken by the Calcutta, Bombay and Allahabad High Courts to that taken by the Madras and Patna High Courts. It may be noted that the Madras decision, though it was a Full Bench ruling, was only a majority decision of 2 Judges to 1.

As to the reasons for the decision they are given by the Bombay High Court in *Nurbadashankar Mugatram Vyas* v. *Kewaldas Raghunathdas* (1), and as I agree entirely with the reasons there set out, I need not add thereto. The remarks of the Sub-Judge in this case: "I consider this is a fit case for the appointment of a Receiver", may be regarded merely as an opinion or reason why in due course he should pass an order appointing a Receiver. But this appeal was filed and proceedings were stayed before he had time to appoint any particular person as Receiver. The appeal is accordingly dismissed with costs.

(1) [1915] 17 Bom. L. R. 510=29 I. C. 504.

Tyabji, A. J. C.—I agree. The question is whether the order of the learned Subordinate Judge stating as follows:

This is a fit case for the appointment of a Receiver: parties should intimate on 30th November;

is an appealable order. It is appealable if it is an order under R. 1 or R. 4 of O. 40, so as to fall within the terms of O. 43, R. 1, Cl. (s). Only Cl. (a) of R. 1 (1) of O. 40 is relevant to the present case. Speaking with reference to it, in my opinion, no appeal lies, because there lies an appeal only when the Court makes an order finally and completely exercising the jurisdiction under that rule by appointing or refusing to appoint a Receiver. At the present stage no Receiver has been appointed, though the Judge has declared his intention of doing so.

The argument before us is that the Civil P. C., S. 2, Cl. (14) defines an order as meaning. "The formal expression of any decision of a civil Court which is not a decree," that the learned Judge could give such a decision as he has given under O. 40, R. 1, and only under that rule; that, therefore, the formal expression of his decision is an order made under O. 40, R. 1. This argument seems to me to prove too much. For, in accordance with it, any order in the course of an application for the appointment of a Receiver; for instance an order for the postponement of the hearing of the application would be subject to an appeal under O. 43, R. 1. If this reasoning were applicable to the various clauses of O. 43, R. 1, that rule would be reduced to absurdity. The object of that rule is to restrict and define the orders from which appeals are allowed: see S. 104 of the Code of Civil Procedure. The order referred to in O. 43 must, therefore, be understood in the sense I have stated.

Another aspect of the argument with which I have dealt has been accepted in the judgment of Srinivasa Ayyangar, J., in *Palaniappa Chetty* v. *Palaniappa Chetty* (2). He says that an order refusing the appointment of a Receiver has been held to be subject of appeal, and

(2) [1917] 40 Mad. 18=32 M. L. J. 304=5 L. W. 776=40 I. C. 185=1917 M. W. N. 393.

that an order of refusal does not expressly fall within the terms of R. 1 or R. 4 of O. 40. This, he says, emphasizes the fact that the right of appeal is not restricted to any particular kind of order. His inference is that an appeal lies against all orders under the rule. But with all respect for the careful and well thought out judgment the basis of the decision that an order refusing the appointment of a Receiver is subject to appeal is inapplicable to the order in the present case. That basis is that when R. 1 of O. 40 empowers the Court by order to appoint a Receiver, it is implied that the Court may also refuse to appoint a Receiver, and that whether the Court exercises the power by appointing or refusing to appoint in either case, there is a final order under R. 1 : *Reasut Hussain* v. *Hadjee Abdoollah* (3).

The decision of the present case, however, depends upon whether there is any such order under O. 40, R. 1, as is contemplated under O. 43, R. 1. It must be taken, as I have already said, that O. 43, R. 1 refers to the final and effective orders of the kind enumerated and not to every interlocutory or incidental order made in the course of the proceedings. Srinivasa Ayyangar starts with the premise that an appeal lies from both forms that the final order may take (viz., granting the application for Receiver or rejecting it), and from this premise concludes that an appeal lies from all orders under the rule (irrespective of their being final or not). To this, with great respect, I cannot accede. The expression of the opinion that a Receiver ought to be appointed is no doubt an important stage in the course of the proceedings, but the expression of such an opinion is not, it seems to me, such an order as is contemplated by O. 40, R. 1. It is only a step towards the order contemplated.

One or two other considerations alluded to in *Palaniappa Chetty's* case (2) are also, it seems to me, more subtle forms of the argument, which I have found myself unable to accept. It is relied upon that in England a Receiving order is first made and the question as regards the personality of the receiver is decided in Chambers : and that, as soon as a receiving order is made an appeal is allowed from that order. I speak with great hesitation as regards the practice in England. But from this consideration of the fact that

> from the forms printed in it is seen that an 'order' appointing a Receiver includes an order that a proper person be appointed a Receiver as well as an order appointing a named person (e.g., forms Nos. 13 and 19 with Nos. 16, 20 and 21, S. 1. Chap. XXXII." *Palaniappa Chetty* v. *Palaniappa Chetty* (2),

it might be inferred that so far as the Court is concerned the order is considered in England to be complete when the receiving order is made, notwithstanding that the Receiver is not nominated ; and the nomination of the Receiver is considered a ministerial function. On the other hand, so for as our Courts are concerned, there is no such division in the course of the proceedings : the whole jurisdiction is vested in and exercised by the Court. The question of the person to be nominated may take a very different form in India, where we have joint families, than in England, where individuals alone have to be generally considered. Though the learned Judge may for covenience divide up the proceedings into two stages, there is no recognition by the Legislature of the two stages. In my opinion it would be extremely inconvenient to allow an appeal at each of these stages.

The fact, if it be the fact, that :

> in the majority of cases the appeal will be directed against the determination that it is necessary to appoint a receiver, rather than against the particular person, as the person to be appointed is very often a matter of agreement between the parties,

does not appear to me to affect the question. For, first I do not see what grievance is caused to a person who contends that no receiver ought to be appointed at all, until some person is actually appointed. He might want to appeal till he has a grievance. Nor do I see any difficulty in the way of a party contending that no receiver should be appointed, and yet conceding that if any has to be appointed, then one person is less objectionable than another. If the person so indicated is appointed, it is possible that he may not consider an appeal necessary but if he desires to appeal he may certainly do so under O. 43, and in the appeal he will only be bound by his previous attitude to the extent of his concession that the person he mentioned was better qualified than others.

(3) [1876] 2 Cal. 131=3 I. A. 221=26 W. R. 50=3 Sar. 221 (P. C.).

Assuming that the question whether any person at all should be appointed a receiver can be considered in a detached manner irrespective of the circumstances of the particular case, and of the qualifications of the various persons available for acting as receiver—with this aspect of the matter I shall deal a little later, and assuming that the most important matter for determination by the appellate Court is whether it is necessary to appoint any receiver at all, I do not see why its determination should not await the decision by the Court of first instance of the question who should be appointed receiver, nor do I see why, what are alleged to be the more important and the less important matters should not be considered together and for once by the appellate Court.

Certain other points referred to in *Palaniappa Chetty* v. *Palaniappa Chetty* (2) are concerned with the question, when the order appointing or refusing to appoint a receiver must be deemed to be complete. It is obvious that the order need not be given effect to in order that it should be complete. The question whether furnishing security is a necessary part of the order appointing a receiver has been alluded to at pages 25 and 29. The question of security may on occasions have some bearing on the correctness or at least the effectiveness of the order appointing a receiver, as e. g., if it is alleged that the person nominated receiver would be unable to give security. It may for the present case be conceded that it is not clear whether the order appointing a receiver should be considered complete before security is furnished or only after it, but there can be no doubt that it cannot be considered to be complete at the stage with which we have to deal.

In *Gobind Ram* v. *Ganesh Ram* (4) Bucknill, J., in preferring to follow the Madras decision rather than those of the Bombay and Calcutta High Courts, says that there is a marked distinction between two matters; (1) "the fact of a necessity for the appointment of a receiver" and (2):

> the circumstances relating to the qualifications and the conditions upon which the receiver is appointed.

From this distinction it is inferred that an appeal lies from the decision on each of those matters. With great respect it seems to me that exception may be taken to this reasoning from two directions. In the first place the fact firstly mentioned is not disconnected from the circumstances secondly mentioned. The one is, in a sense, a condition precedent to the other. It is only if the fact is established that it is necessary, perhaps possible, to consider the circumstances. The two are on occasions indistinguishable, e. g., the person in possession may be the only person whose possession can be contemplated, and then the question whether the appointment of a receiver is just and convenient may become transformed into the question whether the person in possession has to be clothed with the responsibilities, duties and powers of a receiver.

Secondly Bucknill, J., omits to consider whether, assuming the two matters to be as distinct and disconnected as he considers them to be, that is any reason why there should be an appeal from a decision on each of them (1) whether there is an appeal or not depends upon the terms of the rules. The gist of the decisions opposed to Bucknill, J.'s opinion is that the Code does not provide for an appeal from a decision that "the necessity for the appointment of a receiver" has been proved, and that an appeal lies only where an order is made on the basis of that fact, where there is "an order under R. 1 or R. 4 of O. 11," viz. (speaking with reference to the present case) where "the Court does by order appoint a receiver" under Cl. (a) of R. 1. No order is contemplated by O. 40, R. 1 or R. 4 merely deciding that the necessity has been proved for appointing a receiver. If the Court for its convenience pauses midway, and expresses an opinion on a preliminary point (however necessary and important that point may be and however, convenient it may be so to pause) before taking the final step which is provided for by the rule, that expression of opinion does not become an order under the rule within the terms of O. 43, R. 1 (s).

I have now dealt with the most important arguments against the view that I hold—many of these arguments tend to encroach on the question how the rules ought to be framed. The question really depends on the interpretation of the rules as they stand. I agree that this appeal should be dismissed with costs.

D.D. ——— *Appeal dismissed.*

(4) A.I.R. 1922 Pat. 577=1 Pat. 625.

A. I. R. 1927 Sind 205

RUPCHAND BILARAM AND LOBO, A. J. Cs.

Mt. Talehbai—Appellant.

v.

Bulchand Hotchand—Respondent.

Second Appeal No. 6 of 1925, Decided on 1st February 1927, from the judgment of the Asst. J., Hyderabad.

Contract Act, S. 74—Acts on the part of purchaser justifying deprivation of specific performance and his conduct amounting to repudiation—Vendor is entitled to retain deposit.

If the purchaser repudiates the contract, then he can have no right to recover the earnest money. [P 205, C 2]

In all cases where Court would refuse specific performance, the vendor would not necessarily be entitled to retain the deposit. [P 205, C 2]

Where there are acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract, the vendor is entitled to retain the deposit: *Howe* v. *Smith*, (1884) 27 *Ch. D.* 89 *Appl.* [P 205, C 2]

Dipchand Chandumal—for Appellant.

Kimatrai Bhojraj—for Respondent.

Judgment.—This second appeal arises out of a suit instituted by the plaintiff-respondent for specific performance of a contract for purchase of land for Rs. 2,000 or in the alternative for return of Rs. 1,300 paid in two sums of Rs. 700 and Rs. 600 as part purchase money and for damages. The Court of first instance dismissed the suit. The Court of first appeal has passed a decree in favour of the plaintiff for Rs. 700 only. The defendant has filed this appeal and the plaintiff has filed cross-objections claiming the return of the sum of Rs. 600 more.

The first appellate Court has given clear findings of fact holding that the sum of Rs. 700 was advanced at first as a loan by the plaintiff to the defendant and subsequently treated by mutual consent as earnest money, that the defendant was ready and willing to convey the land, and had, as a matter of fact, executed the deed of conveyance filed with the plaint, though she had denied its execution in her pleadings, that the breach of contract was on the part of the plaintiff who was not prepared to pay the full purchase money, as he thought the price was too much, and that the sum of Rs. 600 was advanced by him as a loan and not as part purchase money and could, not therefore, be recovered in this suit.

With these findings we are bound, and, therefore, so far as the cross-objections go, they fail in limine. The document produced by the plaintiff in proof of the payment of Rs. 600 is in the form of a hundi and shows on the very face of it that it was a loan. The plaintiff delayed filing his suit for nearly three years after the alleged loan. At no time did he make any application for amendment of his pleadings claiming in the alternative this amount on the footing of a loan, and it is too late in the day now, after a lapse of nine years for any application being entertained in that behalf. On these findings it is equally clear that the plaintiff is not entitled to get back his Rs. 700 paid by him as earnest money.

In the leading case of *Howe* v. *Smith* (1), while dealing with the right of the vendor to retain the earnest money or deposit paid to him Cotton, L. J., made the following pertinent observations at page 95 [of 27 *Ch. D.*] :

The deposit, as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then according to Lord Justice James, he can have no right to recover the deposit.

I do not say that in all cases where this Court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to its ordinary rules, to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract.

This statement of the law has been accepted as correct and draws a clear distinction between the two cases

(1) [1884] 27 Ch. D. 89=48 J. P. 773=53 L. J. Ch. 1055=32 W. R. 802=50 L. T. 573

where the deposit may be ordered to be returned to the purchaser or not.

The rulings referred to by the learned pleader for the plaintiff are all cases where there were, in the words of Cotton, L. J., acts on the part of the purchaser amounting to mere delay sufficient to deprive him of the equitable remedy of specific performance, but which did not make his conduct amount to a repudiation on his part of the contract.

In the present case, however, there is a clear finding of fact that the conduct of the plaintiff in not getting the sale deed registered, and in not paying the full purchase price, was the result of the repudiation by him of his contract to purchase the property for Rs. 2,000 as he considered it to be a bad bargain.

Under the circumstances, the defendant is entitled to succeed in this appeal.

The conduct of both parties throughout the proceedings has been, to say the least, reprehensible, they having accused each other of forgery and perjury, and having considerably altered their case from that set out in the pleadings.

The first appellate Court ordered each party to bear his own costs. We think that each party should likewise be made to bear his own costs of this appeal, and we order accordingly. The result, therefore, is that the plaintiff's suit stands dismissed with no order as to costs.

R.D. *Appeal allowed.*

✻ A. I. R. 1927 Sind 206

RUPCHAND BILARAM AND LOBO, A. J. Cs.

Bhagwatibai—Appellant.

v.

Bhagwandas and *others*—Respondents.

Misc. Appeal No. 22 of 1925, Decided on 9th March 1927, from the judgment of the 1st Cl, Sub-J., Shikarpur, D/- 26th March 1925, in Suit No. 125 of 1924.

(a) *Transfer of Property Act, S. 9—Bona fide award is not required to be in writing and registered—Registration Act, S. 49, and Evidence Act, S. 91.*

There is nothing in the Transfer of Property Act to suggest that no transfer of an interest in immovable property can be effected without a writing duly registered or that non-registration of every document which effects a transfer of such interest renders it inadmissible in evidence. [P 207 C 2]

All that the Transfer of property Act provides for, is that certain specified transfers such as sales, gifts and mortgages of property exceeding Rs. 100 in value and leases for a period exceeding one year shall only be made by a writing duly registered. [P 207, C 2]

A bona fide award affecting immovable property, would not ordinarily fall within the definition of any of the specific transaction referred to in the Transfer of Property Act, so as to require to be made by a writing duly registered, as it is not an act of the parties themselves but the act of a Judge chosen by the parties: 13 *M. L. J.* 500 and 34 *Bom.* 139, *Foll.* [P 208, C 1]

It is no doubt true that under certain circumstances an award may become inadmissible in evidence or inoperative as a valid transfer. For example where an award effecting a partition of immovable property is signed by the parties in token of their consent thereto, the award cannot be received in evidence unless it is registered. In such a case, the award is not a mere award but something more. It is an instrument of partition executed by the parties as well. As such it is compulsorily registrable and is rendered both ineffective and inadmissible under S. 49 of the Registration Act; 9 *Bom.* 50 (*F. B.*) and 18 *C. W. N.* 475, *Foll.* [P 208, C 1]

Again, where an award is not a genuine award based on a bona fide reference but a disguise to give effect to the agreement of the parties arrived at before the reference to arbitration and intended to evade the law relating to stamps and registration the award is not inadmissible in evidence for want of registration but is no award at all and is therefore inoperative as an award, [P 208, C 1,2]

✻ (b) *Civil P. C., Sch. 2, para. 15—Exercise of excessive authority—Only party who is prejudiced can object on this ground.*

It is only the party prejudiced by the exercise of excessive authority by the arbitrator who is entitled to object to the award by reason of it; the party in whose favour the erroneous action of the arbitrator operates cannot be heard to impeach the validity of the award on this ground: 15 *C. L. J.* 110, *Foll.* [P 208, C 2]

G. A. Kikla—for Appellant.

Dipchand Chandoomal — for Respondents.

Judgment.—This is an appeal against the order of the learned First Sub-Judge, Shikarpur, Mr. Sheikh, refusing to file an award made without the intervention of the Court.

The plaintiff-appellant is the widow of one Gordhandas. She claimed that she had inherited the property of her deceased husband who was separate from his brothers the Defendants 1—3 in the case and Respondents 1-3 in this appeal.

On the other hand, the defendants contended that the deceased was a member of a joint Hindu family and all that the plaintiff was entitled to was the right of residence and maintenance in that joint family property. They also

contended that she was in possession of certain jewellery valued at about Rs. 5,000 which she should account for. The parties referred their disputes to an arbitrator who was a cousin of the deceased and conferred very wide powers on him. Under the reference he was empowered to decide whether the deceased Gordhandas was separate from his brothers and if that was so, to award her ¼th share in the joint family estate. In the alternative, if he came to the conclusion that the deceased was not separate it was open to him either to award to the plaintiff her maintenance and at the same time to provide for her residence or, in full or part satisfaction thereof, to give to her a certain portion of the property either absolutely or conditionally. The arbitrator was also authorized to give directions for safeguarding of such property, to provide for the devolution of such property as the plaintiff might die possessed of including her jewellery, and to make his award in different parts if he so wished, as certain sums of money were expected to be received from the Land Acquisition Officer in respect of a portion of the disputed property which was under acquisition.

In his award the arbitrator evidently proceeded on the assumption that the deceased Gordhandas formed a member of the joint Hindu family with the defendants. He has awarded to the plaintiff a sum of Rs. 8,000 for her maintenance and for the marriage expenses of her two daughters subject to certain conditions. He has awarded to her the ornaments which were in her possession stating that they were her stridhan property but has imposed certain conditions as to their devolution on her death. In addition to the foregoing he has awarded to her a life estate in ¼th of the residential house with directions that it should devolve at her death, on her daughters and their heirs and has made certain provisions as to the different parts of the house which would be occupied by the parties during her life time and has imposed certain restrictions as to alienation on both the parties.

Several objections to the award were filed by the defendants. The learned Judge has disallowed all of them except two. The first is that the award not having been registered was inadmissible in evidence; and the second is that the provisions as to the devolution of the stridhan property was in excess of the authority of the arbitrator and was therefore bad. He has accordingly refused to file the award.

The appellant has demurred to the findings on both these points. On the other hand the respondents have filed cross objections and have pressed that the learned Judge was not only not right on these points but was in any case wrong in deciding the other objections against them.

Now with regard to the two grounds on which the learned Judge below has proceeded, we think that he was clearly in error.

In support of the first ground all that the learned Judge has said is :

> that in places to which the provisions of the Transfer of Property Act have been extended the award cannot by itself transfer an interest in law and as the Act has been extended to Sind the award must be registered before it is admitted in evidence.

This is an absolutely incorrect statement of the law, and is based on a misconception of the provisions of the Act.

There is nothing in the Act to suggest that no transfer of an interest in immovable property can be effected without a writing duly registered or that non-registration of every document which effects a transfer of such interest renders it inadmissible in evidence.

All that the Act provides for is that certain specified transfers such as sales gifts and mortgages of property exceeding Rs. 100 in value and leases for a period exceeding one year shall only be made by a writing duly registered.

If a transaction falling within any of those sections is not reduced to writing S. 91 of the evidence Act excludes its proof by a parol evidence. If it is reduced to writing but the writing is not registered, S. 49 of the Registration Act declares that that such writing shall neither affect immovable property nor shall it be received as evidence of a transaction affecting such property.

Nor the Registration Act which specifically deals with the effects of non-registration is wider in its operation and applies to documents which affect an interest in immovable property exceeding Rs. 100 in value other than those specifically referred to in the Transfer of Property Act, but limits the operation of

S. 49 to those documents only which are compulsorily registrable that is to say documents referred to in S. 17, Cl. 1 of the Act are not excepted in Cl. (2) of that section.

An award is one of the excepted documents and as such it is neither rendered inoperative nor inadmissible in evidence by virtue of S. 49 of the Registration Act.

A bona fide award affecting immovable property whether by way of transfer or otherwise would also not ordinarily fall within the definition of any of the specific transaction referred to in the Transfer of Property Act.

A compromise of dispute resulting in the transfer of immovable property has been held not to fall within the purview of the transaction referred to in the Transfer of Property Act so as to require the compromise to be made by a writing duly registered: *Thiru Vengidachariar* v. *Ranganatha Aiyanger* (1) and *Krishna* v. *Aba Shetti Patel* (2). More so a genuine award effecting a transfer of property is not such a transaction, as it is not an act of the parties themselves, but the act of a Judge chosen by the parties.

It is no doubt true that under certain circumstances an award may become inadmissible in evidence or inoperative as a valid transfer.

Where an award effecting a partition of immovable property is signed by the parties in token of their consent thereto, it has been held that the award cannot be received in evidence unless it is registered: *Amarsi* v. *Dayal* (3), *Tek Lal Sing* v. *Sirpati Chowdhury* (4). In such a case the award is not a mere award but something more: it is an instrument of partition executed by the parties as well. As such it is compulsorily registrable and is rendered both ineffective and inadmissible under S. 49 of the Registration Act.

Again, where an award is not a genuine award based on a bona-fide reference, but a disguise to give effect to the agreement of the parties arrived at before the reference to arbitration, and intended to evade the law relating to stamps and registration, the award is not inadmissible in evidence for want of registration, but is no award at all and is therefore inoperative as an award.

No such circumstances exist in the present case. The award is therefore not inadmissible in evidence.

The second ground is equally unsustainable and for two reasons. The reference expressly empowers the arbitrator to provide for devolution of the ornaments on the death of the plaintiff. There was therefore no excess of jurisdiction. The provision in that behalf again was in favour of the objectors and one which could not be relied upon by them as being in excess of the arbitrators' authority. As said by Mukerji, J., in *Narsing Narainsing* v. *Ayodhya Prasad* (5):

> It is only the party prejudiced by the exercise of excessive authority by the arbitrator who is entitled to object to the award by reason of it; the party in whose favour the erroneous action of the arbitrator operates cannot be heard to impeach the validity of the award on this ground.

With these observations we are entirely in agreement.

So far therefore as the two points on which the learned Judge proceeded are concerned, it would appear that the appellant is entitled to succeed. But we think that there is more substance in the objections which are disallowed by the lower Court. Though we have tried to make every intendment in favour of the award, we think that in respect of each of the three items awarded to the plaintiff the arbitrator has exceeded his authority in several particulars to the prejudice of the objectors, and for which they have every cause to complain. We also think that the award is uncertain in several respects and clothes the arbitrator with certain wide powers and confers benefits on him which lead us to the conclusion that the arbitrator has been partial in his own cause and that his award is one which should be set aside. In dealing with the sum of Rs. 8,000 reserved for meeting the expenses of the maintenance of the plaintiff and of the marriage of her daughters the arbitrator has provided that interest accruing therefrom, viz. Rs. 40 per month, shall not be given wholly to the widow for her maintenance, but shall be under the control of Chetumal Hariram, the

(1) [1903] 13 M. L. J. 500.
(2) [1909] 34 Bom. 139=4 I. C. 833=11 Bom. L. R. 1336.
(3) [1885] 9 Bom. 50 (F. B.)
(4) [1914] 18 C. W. N. 475=20 I. C. 860=19 C. L. J. 123.
(5) [1912] 15 C. L. J. 110=13 I. C. 118=16 C. W. N. 256.

brother of the arbitrator, who may award out of the said sum of Rs. 40 such sum as he considers proper for her maintenance. The award therefore provides that in the event of the plaintiff marrying any of her daughters, or requiring any sum for purposes of sickness and the like, it shall be within the power of Chetumal to award her such sum as he thinks proper out of the capital, and that the amount which remains after the marriages are performed shall be dealt with by Chetumal either in paying it out to the second party, i. e. the objectors, or to any of them or to the heirs of the first party, i. e. the plaintiff, or to any of them, or if he so wishes, in paying the amount to any other person whomsoever which would include the arbitrator himself. If the sum of Rs. 8,000 was reserved for the purposes of maintenance and marriage expenses then what remained of it was the property of the objectors, and any power conferred by the arbitrator on his brother to deal with such excess was a clear excess of jurisdiction prejudicial to the objectors.

With regard to the residential house the arbitrator has provided that the plaintiff shall have a life interest in $\frac{1}{4}$th share therein, that she shall occupy separate specified portions of the house and on her death the property shall absolutely belong to her daughters who shall however have no power to alienate their interest in the house without the consent of the arbitrator's brother, and in the event of their alienating with such consent they shall not use the money realized therefrom without his consent. It further provides that during the lifetime of the plaintiff the objectors shall have no right to alienate or let the $\frac{3}{4}$ths portion belonging to them. These provisions again are clearly in excess of the authority of the arbitrator and such as to benefit the arbitrator and to result in great hardship on the objector.

The third item dealt with by him is that of the ornaments. Now, though, no doubt, the provisions as to the devolutions of the ornaments after the death of the plaintiff is not by itself against the interest of the objectors, such conditions have been attached to it rendering its provisions vague and indefinite. The award recites that the ornaments shall be the property of the objectors on condition that they bear her funeral expenses and the expenses of the gifts of the daughters and sisters and charity funds, but leaves undefined the nature of such gifts and the amount of the charity funds. We think therefore that the award is one which cannot be enforced.

We accordingly uphold the order passed by the lower Court on grounds different from those on which the learned Judge has proceeded, and in the circumstances order that each party should bear his own costs throughout.

G.B. *Appeal dismissed.*

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* * A. I. R. 1927 Sind 209

RUPCHAND BILARAM AND LOBO, A. J. Cs.

Mt. Hakima and *others*—Appellants.

v.

Mt. Jiandi and *others*—Respondents.

First Appeal No. 24 of 1924, Decided on 28th February 1927, against the judgment and decree of the 1st Class Sub-J., Hyderabad, D/- 23rd January 1924.

* *(a) Evidence — Evidence conflicting and suspected to be perjured—Case probable according to facts undisputed should be accepted.*

There is no better criterion for the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute and to examine which of the two cases best accords with those facts according to the ordinary course of human affairs and the usual habits of life : 5 W. R. P. C. 26, *Appl.* [P 211 C 1 2]

* * *(b) Mahomedan Law—Legitimacy by acknowledgment—Person setting it up must prove that acknowledgor accepted him as legitimate son —Presumption of both legitimacy of child and validity of his mother's marriage arises.*

Mahomedan Law does not recognize the legitimation or the adoption of a son as under the Hindu Law. It only permits of proof of legitimacy by indirect evidence where direct evidence of marriage is wanting. Admission by the acknowledgor that the acknowledgee was his "son" may, under certain circumstances raise the twofold presumption that the acknowledgee was the legitimate son of the acknowledgor and that the mother of the acknowledgee was the wedded wife of the acknowledgor. [P 212 C 2 P 213 C 1]

The onus of proof is in the first instance upon the person setting up the acknowledgment to prove that the expression "son" was used as meaning a legitimate son and that it was used, not casually, but with the intention of conferring legitimacy. It is only when that burden is discharged that the twofold presumption arises, which the other side is called upon to rebut.

[P 213 C 1]

The presumption may be taken advantage of either by a wife-claimant or a son-claimant : *A. I. R.* 1922 *P. C.* 159, *Rel. on* ; *A. I. R.* 1916 *P. C.* 27, *Dist.* [P 214 C 1]

Continued cohabitation as husband and wife, plus birth after such co-habitation and treatment tantamount to acknowledgment, raises a prima facie presumption of legitimacy, but the same presumption would not arise where the mother of the acknowledgee admittedly started life with the father as his concubine ; 11 *M. I. A.* 94 (*P. C.*). *Ref.* [P 214 C 1. 2]

* (c) *Mahomedan Law—Marriage— Admission of marriage—Effect of, as proof thereof is question of Evidence Act—Evidence Act, S.* 17.

The effect of an acknowledgment of paternity validly made as establishing marriage between the parents of the acknowledgee may be a matter of substantive Mahomedan Law ; but the effect of an admission of marriage, as proof of such marriage, is a question merely of adjective law governed by the Indian Evidence Act. Its probative value must necessarily depend on the surrounding circumstances. [P 216 C 1]

(*d*) *Mahomedan Law—Marriage—Ikrar is only admission of marriage.*

Ikrar of marriage is certainly no more than an admission of marriage to be weighed according to the ordinary rules of evidence and treated as only a piece of evidence which the Court may consider in deciding whether the marriage is proved or not : *A. I. R.* 1917 *P. C.* 160, *Dist.*; 32 *All.* 345, (*P. C.*), *Ref.* [P 216 C 2]

* (e) *Evidence Act, S.* 157—*Prior whole statement of a witness cannot be admitted—Even admissible parts cannot be admitted before witness is examined.*

The trial Judge in a civil suit permitted an officer in charge of the Record-of-Right proceedings to be called as the very first witness and to produce the statements of witnesses recorded in those proceedings, which were exhibited notwithstanding the objection raised on that behalf.

Held : that only parts of such statements, as were necessary to corroborate or contradict the witnesses when they were examined in the case, could be put in through them under the provisions of S. 157. [P 219 C 1]

Rupchand, A. J. C.—This case relates to the devolution of considerable property left by one Ghulamali, a Sunni Mahomedan, of Matiari. Ghulamali was admittedly regularly married twice : the first time in 1906 to his maternal uncle's daughter, one Wassandi by name, who died in 1913, and the second time in 1916 to her sister Hakima, plaintiff 1. Plaintiff 2 is Ghulamali's son from Wassandi. Plaintiff 3 is his daughter from Hakima. Both are minors and their interests are protected by their paternal uncle Atta Mahomed. The plaintiff's right of inheritance is admitted.

Ghulamali was employed as a judicial munshi of the resident Magistrate at Mirpur Khas up to 1909, when his father died leaving considerable property to him and his elder brother Atta Mahomed. Ghulamali then left service and came to live permanently at his house at Matiari. He lived there till his death which took place in 1918.

Jiandi defendant 1, is also a resident of Matiari. She is a Mirbahar by caste and of a much lower status in life than the plaintiffs. She lives with her mother Murki and her sister Halima at Maitari about 100 paces away from Ghulamali's house. For a few years before Ghulamali resigned his service, Jiandi lived with him at Mirpur Khas as his mistress. At Matiari she appears to have lived up to the time of Ghulamali's death mostly in her mother's house, which was considerably enlarged in 1910, after the purchase of certain adjoining land.

Defendants 2 to 4 are Jiandi's children, defendant 4 being a posthumous child. On the death of Ghulamali Jiandi applied to the revenue authorities that she was also the wedded wife of Ghulamali, having married him after his return to Matiari, that defendants 2 to 4 were Ghulamali's children born in lawful wedlock, and that their names should all be entered in the Records-of-Rights as co-sharers in Ghulamali's property. In 1920, the revenue authorities granted Jiandi's application. The plaintiffs then instituted this suit for a declaration of their rights as the exclusive heirs of Ghulamali and for an injunction restraining the defendants from interfering with their possession. Defendants 2 to 4 who are also, like plaintiffs 2 and 3, minors, are represented by the Court of Wards as their guardian ad litem.

The lower Court decided the suit in favour of the defendants. The plaintiffs have now come to us in appeal.

A mass of evidence has been adduced in the Court below by both parties, on the single issue of fact which arises viz., whether Jiandi has been proved to be the wedded wife of Ghulamali. The evidence for the defence consists of : (a) the evidence of the actual marriage which is said to have taken place in 1910 ; (b) the fact of the performing by Ghulamali of the Akila or tonsure ceremony of defendants 2 to 4 ; (c) an admission by the deceased of his marriage with Jiandi and an acknowledgment by him that defendant 2 was his son, said to

have been made to a pleader named Jethsing, one of the principal witnesses in the case ; and (d) an acknowledgment in writing as to his marriage with defendant 1 and of the legitimacy of defendants 2 to 4, said to have been made by Ghulamali on a flyleaf of his Qoran shortly before his death.

The evidence for the plaintiffs is more or less of a negative character, and consists of : (a) evidence of friends and relatives, including Atta Mahomed and Hakima denying knowledge of the marriage; (b) documents executed in favour of Jiandi and relating to her in her name in 1910, 1916 and 1917, wherein she is not described as the wife of Ghulamali, but as the daughter of Mahomed ; (c) evidence of Jiandi's conduct in living outside the purdah, inconsistent with her being a married wife of an Akhund ; and (d) evidence that the writing in the Qoran is not genuine.

We are at considerable disadvantage in appreciating the oral evidence in the case. The trial in the lower Court was protracted, and the evidence has been recorded by no less than three Judges. The Judge who delivered the judgment has recorded only the evidence of Mr. Scott, the handwriting expert. We have therefore no considered opinion of the trial Court as to the demeanour of the witnesses in the case, and as to the weight to be attached to their evidence. We are left to estimate the latter from what has been elicited in cross-examination.

The evidence of the principal witnesses on either side has been attacked as perjured. Our difficulties have been further increased by the fact that the evidence of some of the witnesses bears palpable traces of having been procured, in the first instance, in the Record-of-Rights enquiry under pressure, or of it having been subsequently tampered with by the opposite party. In analyzing the evidence for ourselves we cannot do better than examine it in the light of the observations of their Lordships of the Privy Council, made 40 years ago, in the case of *Meer Usudoolah* v. *Bibi Imaman* (1), that

> there is no better criterion for the truth, no safer rule for investigating cases of conflicting evidence where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with those facts according to the ordinary course of human affairs and the usual habits of life.

(The judgment then discussed the evidence and concluded that Jiandi was not the married wife of Ghulamali and proceeded.) The mainstay of the defendant's case, however, is the evidence of Jethsing, pleader. This evidence is on three points : (1) an alleged acknowledgment by Ghulamali in one of his letters to the witness that defendant 2 was his son ; (2) an admission made by Ghulamali that defendant 2 was his married wife ; and (3) proof that the writing on the flyleaf of the Qoran was that of Ghulamali.

In cross-examination the witness was put to a very severe test. Some of his answers are not so convincing as to induce us to place that implicit confidence in his evidence, which his position otherwise demands. His evidence disclosed bias, possibly unintentional, in favour of the defendants. On the first and second points he was giving evidence of what he had been told a number of years before, and there is possibility of his memory playing him false.

Though Jethsing was on friendly terms with Ghulamali before the latter gave up his appointment as Judicial Munshi, he knew nothing about the domestic affairs of his friend. He was not aware, if Ghulamali had any other wife besides Jiandi or if he lived with Jiandi at Mirpur Khas as his mistress, or what children he had (*ll.* 292—320), or, if he was a tenant-in-common with his brother or what property he possessed (*ll.*550—565). The first time Jethsing came in contact with Jiandi was in November 1911 (*ll.* 312-372, 430 and 582), when he visited Matiari in response to a letter sent by Ghulamali stating that he wished to engage him in connexion with a criminal case pending against Jiandi's brother. That letter has not been produced, but admittedly there was nothing in it to show that Jiandi was Ghulamali's wife (*l.*440). It was at Ghulamali's *otak*, and before he visited Jiandi at her house, that Ghulamali is said to have informed the witness that Jiandi was his married wife. Jiandi was not present then (*ll.* 75,390). It is not clear what were the exact words used in the vernacular by the deceased. In cross-examination the witness deposed that Ghulam-

(1) [1867] 5 W. R. P. C. 25=1 M. I. A. 19=1 Suther 46=1 Sar. 80 (P. C.).

ali had informed him that Jiandi was his wife (*l.* 372). In re-examination he explained that he thereby understood Ghulamali to say that she was his legally wedded wife. (*l.* 580). But at the close of his evidence, and in answer to a Court question, he stated that Ghulamali told him that he was married to Jiandi, that this was in answer to an inquiry made by the witness himself as he was anxious to know why Ghulamali was taking interest in Jiandi's brother's case (*ll.* 600—610). The witness was speaking of an incident 12 years old, and it was not impossible that if Ghulamali said anything at all about Jiandi, it was in equivocal terms quite consistent with Jiandi being his mistress and not his married wife.

The witness admits that, except on the first occasion when Ghulamali was present, he visited Jiandi at her house to get instructions from her on several occasions between 1912 and 1917, that she likewise visited him in his house at Hyderabad and that on all those occasions she was accompanied by her mother (*ll.* 330—340 470, 520—530).

It is somewhat difficult to comprehend why Ghulamali did not personally interest himself in the three Court cases of his married wife's brothers, but left the witness to receive instructions from Jiandi herself with the aid of her mother. It is equally inconceivable why, as deposed to by the witness, there should have been any quarrels between Jiandi and her mother over ornaments and money belonging to Jiandi as the wedded wife of Ghulamali and what occasion witness had to constantly remind Jiandi's mother that Ghulamali had admitted to him that he was married to Jiandi (ll. 520—530). Jiandi does not speak of quarrels between herself and her mother; but, on the contrary, she has deposed to the mother being so well disposed towards her as to have the sale-deed, Ex. 276, executed in her name alone though the purchase price was contributed by the mother and both her daughters. The explanation that the witness informed Jiandi's mother about the admission by Ghulamali to have been offered by the witness on the spur of the moment, in order to account for his being called as a witness on that point when no one except himself knew about it. The explanation appears to us to be highly improbable.

In *Mahatala Beebi* v. *Prince Ahmed* (2) the acknowledgor, Prince Ghulam Mahomed, while proceeding to England, had requested the witness, Prince Rehimuddin to look after his zenana in the following words :

> Here are my two wives Hamidunissa and Mahatala. You are to look after them and write to me about their health.

The witness admitted that the expression used which he translated as signifying "wives" was "bibees." In the wakfnama executed by the acknowledgor he had likewise referred to the two females as "bibees," which was translated by the Court Translator as "wives." Garth, C. J., drew attention to the fact that the word "bibee" might have been used with reference to a favourite concubine as well as to a nikah wife and refused to draw a presumption of marriage in the case of Mahatala though, in the case of Hamidunissa the evidence of acknowledgment of her son as legitimate was accepted as proving her marriage.

In the absence of definite evidence showing what words, if any, were used by Ghulamali in this particular case, and, in view of the inconsistencies in the evidence of Jethsing, referred to above, we are not prepared to hold that Ghulamali declared Jiandi to be his married wife.

We shall presently refer to the legal effect of an acknowledgment of an admission of marriage.

Jethsing's evidence is equally of no value. He speaks of two incidents; the first a reference made by Ghulamali in a letter "that his wife (i. e., Jiandi) was bringing the boy to Hyderabad to get his eyes treated" (*ll.* 80—90). That letter has not been produced and is not proved to have been destroyed. The witness had opportunities to look for it as he was examined on different days. The fact that he was not required by either party to look for it was no excuse for letting in secondary evidence. The second incident referred to is an oral statement made by Ghulamali, and when he was told "that this was the boy he had from Jiandi." Assuming that these statements were made they have no probative value.

The Mahomedan Law does not recognize legitimation or the adoption of a son

(2) [1881] 10 C. L. R. 293.

as under the Hindu Law. It only permits of proof of legitimacy by indirect evidence where direct evidence of marriage is wanting.

The question whether legitimacy by acknowledgment of paternity should be presumed or not must depend on the circumstances of the particular case in which it arises: *Nawab Mahomed Azmal-ali Khan* v. *Mt. Lalli Begum* (3).

Admission by the acknowledgor that the acknowledgee was his "son" may, under certain circumstances, raise the twofold presumption that the acknowledgee was the legitimate son of the acknowledgor and that the mother of the acknowledgee was the wedded wife of the acknowledgor.

The onus of proof is in the first instance upon the person setting up the acknowledgment to prove that the expression "son" was used as meaning a legitimate son and that it was used, not casually, but with the intention of conferring legitimacy. It is only when that burden is discharged that the twofold presumption contended for arises, which the other side is called upon to rebut.

In *Ashsuffoodowlah* v. *Hyder Hossein* (4), while dealing with the amendment by the lower appellate Court of an issue raised in the case, their Lordships said:

> It substitutes for the ambiguous word "sonship," which might include an illegitimate son, the word "legitimacy" and uses the word "acknowledgment" in its legal sense under the Mahomedan Law, of acknowledgment of antecedent right established by the acknowledgment on the acknowledgor that is in the sense of a recognition not simply of sonship but of legitimacy as a son.

In *Abdul Razak* v. *Aga Mahomed Jaffer Bina* (5), Lord Macnaughten refused to accept as sufficient proof of legitimacy statements made by the putative father to a witness that he was going to see his son, and in his will bequeathed his property to his brother and mentioning that he had an offspring in Burma, which will was not produced, but it was said to give the name of the offspring and to contain a recital that the brother should give property to his offspring.

In *Habibur Rahman Chowdhary* v. *Altaf Ali Chowdhary* (6), there was unchallenged evidence to prove that the deceased Sobhan had referred to the claimant Habib as his son in his letter on two important occasions: the first, when he wished the boy to be admitted into the Madressah; and the second when he wrote to Miss Sorabji and to Mr. Clayton, the Collector of Chittagong, for the purpose of inducing a marriage between Habib and the daughter of Salamatali Khan. In dealing with the point Woodroffe, J. has stated at p. 310:

> It is true that the Judicial Committee say that prima facie 'my son' means 'my legitimate son.' But when we use the word "prima facie" we assume that there may be circumstances which may be considered to ascertain whether the primary meaning is not negatived. In short and for the aforesaid reasons, my conclusions on the important question of law mooted are these: The appellant has not established an acknowledgement in the sense of a clear intention to confer legitimacy on the plaintiff . . . . . If the plaintiff was in fact illegitimate the Nawab by using the words 'my boy,' 'my son' may have thought that the Collector and Miss Sorabji would understand these words in the sense of legitimate child and did not intend to enlighten them in this matter. What, in short, the Nawab seems to have done was to have made a statement consistent with the illegitimacy of his son possibly believing that Miss Sorabji and the Collector would naturally interpret it in the sense that the plaintiff who was referred to as a son was the legitimate son.

In this case the marriage of Habiba's mother with Sobhan was disproved as a fact; and, in dealing with the effect of an acknowledgment generally, the Court observed that it operated only where on the evidence the marriage and legitimacy were left in doubt and not otherwise. The decision of the Calcutta High Court was upheld in *Habibar Rahman* v. *Altaf Ali* (7), where their Lordships of the Privy Council have summarized the law on the subject at page 120 as follows:

> There is no legitimation under the Mahomedan Law. . . . By the Mahomedan Law a son to be legitimate must be the offspring of a man and his wife or of a man and his slave, any other offspring is the offspring of a zina, that is, illicit connexion, and cannot be legitimate. The term 'wife' necessarily connotes marriage, but, as marriage may be constituted without any ceremonial, the existence of a marriage in any particular case may be an open question. Direct proof may be available; but, if there be no such, indirect proof may suffice. Now one of the ways of indirect proof is by an acknowledgment of the legitimacy in favour of a son. This acknowledgment must not be merely of sonship,

(3) [1881] 8 Cal. 422=9 I. A. 8=4 Sar. 310 (P. C.).
(4) [1866] 11 M. I. A. 94=7 W. R. P. C. 1=1 Suther. 659=2 Sar. 223 (P. C.).
(5) [1894] 21 Cal. 666=21 I. A. 56=6 Sar. 389 (P. C.).
(6) [1918] 46 Cal. 259=29 C.L.J. 601=49 I.C. 545=23 C.W.N. 1.
(7) [1921] 48 I.A. 114=A.I.R. 1922 (P.C.) 159 (P.C.).

but must be made in such a way that it shows that the acknowledgor meant to accept the other not only as his son but as his legitimate son and must not be impossible upon the face of it. The acknowledgment may be repudiated by the acknowledgee. But if none of these objections occur, then the acknowledgment has more than a mere evidential value. It raises a presumption of marriage—a presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being, however, a presumption of fact, and not juris et de jure, it is, like every other presumption of fact, capable of being set aside by contrary proof. The result is that a claimant son who has in his favour good acknowledgment of legitimacy is in this position ; the marriage will be held proved and his legitimacy established unless the marriage is disproved. Until the claimant establishes his acknowledgment the onus is on him to prove a marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in fact.

There is in the words of their Lordships no proof in the present case that the acknowledgment, if any, was not merely of sonship, but was made in such a way that it showed that the acknowledgor meant to accept the other not only as his son, but as his legitimate son.

The learned counsel for the defence has relied on the case of *Sadik Hussein* v. *Hashim Ali Khan* (8). That case is clearly distinguishable as Sultan Mirza was the son of a slave-girl and not of a woman who had commenced her life with the Nawab as a concubine ; there was evidence of continued cohabitation between the slave-girl and the Nawab as husband and wife raising a presumption of paternity. Sultan Mirza was treated as the Nawab's son, and not only acknowledged as a son by the Nawab himself but to four witnesses on different occasions; but there were clear admissions by Fatma Begum the wife of the Nawab in many written documents as to the sonship or heirship of Sultan Mirza and those statements were considered good evidence of family repute.

Now, no doubt, continued cohabitation as husband and wife plus birth after such cohabitation and treatment tantamount to acknowledgment raises a prima facie presumption of legitimacy : *Ahruffood Dowlah Ahmed* v. *Hyder Hussein Khan* (4), explaining *Khajah Hidayutalla* v. *Rai Jan Khanum* (9), *Masit-un-nissa* v. *Pathani* (10). The presumption was stronger in olden days in the case of sons born of slaves. The same presumption would not arise where the mother of the acknowledgee admittedly started life with the father as his concubine. It has been pertinently pointed out in *Mt. Jarintool Butool* v. *Hoseini Begum* (11), at page 209 that :

> If it were once conceded that a woman once a concubine could be converted by juridical presumption into a wife merely by lapse of time and propriety of conduct and the enjoyment of confidence with powers of management reposed in her, when and after what period of time should such presumption arise ? The ordinary legal presumption is that things remain in their original state.

Unlike the lady in *Sadik Hussein's* case, defendant 1 was not a slave. She started life as the concubine of Ghulamali. Defendants 2 and 3 were too young to afford any evidence of their treatment as legitimate sons and defendant 4 was not even born during Ghulamali's lifetime. There was no recognition by the relatives of Ghulamali of the sons as legitimate. No presumption of legitimacy could therefore arise from the alleged reference by Ghulamali to defendant 2 as his son on the occasion deposed to by Jethsing.

The third point on which evidence has been given by Jethsing is as to the resemblance between the handwriting of the entry on the flyleaf of the Qoran Ex. 129, and the hand writing of Ghulam Ali. Ex. 129 reads as follows :

> (1) I shall not deny the nikah to anyone.
> (2) During my life time I shall give Allahbachayo, Ali Ahmed and their mother, their "Haq" (what is due to them).
> (3) I shall live in the otak daily from sunset to 10 p. m. and shall some time visit them in their house also. I have not lied in all this. Otherwise this (i. e., the Qoran) will punish me.

To the handwriting is affixed a seal which is alleged to be that of Ghulamali (After considering the evidence, the judgment proceeded.) The learned counsel for the defence has urged that false explanation, if any offered by Jiandi, and her negligence in not producing the document at the proper time, should not prejudice the rights of the infants, and has contended that, if the document is held to be genuine, it proves both marriage of defendant 1 and the legitimacy of defendants 2 to

(8) A.I.R. 1916 P.C. 27=38 All. 607=43 I.A. 212 (P.C.).
(9) [1842] 3 M.I.A. 295=6 W.R. (P.C.) 52 (P.C.).
(10) [1904] 26 All. 295.
(11) [1867] 11 M.I.A. 194=10 W.R. 10=2 Suther 56=2 Sar. 243 (P.C.).

4. Even conceding that genuineness of Ex. 129 we do not think that it establishes these contentions.

The only plausible inference to be drawn from para. 2 of the document is that Ghulamali intended to make provision for Jiandi and her sons during his lifetime as they would not inherit his property at his death. It is difficult to believe that he wished that, in addition to the provision he might make for them, they should share in his inheritance to the prejudice of the paintiffs. Para. 2 is therefore no acknowledgment of parternity or marriage.

Paragraph 1, on which so much stress has been laid, is not an admission at all, but a negative statement by Ghulamali that he would not deny a marriage. Treating it, however, as an admission of marriage with Jiandi, we think that it cannot by itself prove marriage. The effect of an acknowledgment of paternity validly made as establishing marriage between the parents of the acknowledgee may be a matter of substantive Mahomedan Law; but the effect of an admission of marriage as proof of such marriage is, in our opinion, a question merely of adjective law governed by the Indian Evidence Act. Its probative value must necessarily depend on the surrounding circumstances. We are aware of the passage in Baillie's Digest of Mahomedan Law, second edition page 407:

> Ikrar (i. e. acknowledgment) is to be regarded as declaratory with respect to right in the matter acknowledged, so that the right takes effect in favour of the person to whom the acknowledgment is made on the mere ikrar and is not dependent on his assent.

And also the illustration at page 412:

> A man has acknowledged that he married such and such one for a thousand dirchms (in health or in sickness makes no difference) and then denies that marriage after which the woman assents during his life or after his death, this is lawful and she is entitled to her share in the inheritance and also to the dower with this difference: that if the acknowledgment were made in sickness and the dower be in excess of her propor dower, the acknowledgment is of no avail as to the excess.

The logical conclusions to be drawn from these passages are that: (1), so long as there is no acceptance there is no marriage; (2), the acknowledgor is bound by his offer which is irrevocable even after his death; and (3), so long as it is not accepted the acknowledgee is free, but the moment it is accepted it establishes the status of marriage, and this status relates back to the date of ikrar. As so stated it is clear that this is not the law in force at present or the law which could be acceptable to the present state of society, so very different from that which existed when these rules were promulgated.

Like several other texts pertaining to ikrar, for instance, the texts which showed that an admission of paternity, though made casually and not intended to have serious effect was sufficient to confer the status of legitimacy, the result of subsequent acceptance creating the status of married life from the date of the offer appears not to have been treated as good law. These passages have not been referred to in any of the cases decided by their Lordships of the Privy Council which have proceeded on the assumption that ikrar of marriage was certainly no more than an admission of marriage to be weighed according to the ordinary rules of evidence and treated as only as a piece of evidence which the Court may consider in deciding whether the marriage is proved or not.

There are several instances where, notwithstanding the indubitable proof of clear admission of marriage, the Court has found against the acknowledgee and held the marriage disproved.

In *Ghaznafar Ali Khan* v. *Kaniz Fatima* (12) the deceased Mozafur Ali Khan had brought into his zenana one Phundan, a young dancing-girl of whom he was enamoured. She lived with him for a number of years either from 1870 or 1875 up to his death in 1890. She observed purdah, which was unusual for a dancing-girl. There was clear and convincing evidence of admissions made by Mozafar Ali Khan not only to two leading men of the Province that he had married Phundan, but in a document, Ex. A-1, that nikah had taken place between him and Mt. Phundan, a description which could refer to her and to no other Phundan. There was further his admission in his deposition recorded in 1883, by Mr. Lincoln, District Judge of that place, to the effect that he had another wife of a family of prostitutes, the daughter of Balanali or Buddiali, and that nikah had taken place between them. The claimant Ghaznafar was born

(12) (1910) 32 All. 345=6 I. C. 674=37 I. A. 105 (P. C.).

to Phundan four years later. The claimant relied on direct evidence of a marriage in 1870, which was disbelieved; he also relied on long cohabitation between his parents and admissions of marriage by the deceased. In holding the legitimacy proved, the trial Judge said:

> It is clear that when this statement (i. e. the statement before Mr. Lincoln) was made, there was no question of the succession to the property of Mozafar Ali Khan and no necessity for him to speak an untruth at the time in respect of his wife and children. If the admission does not operate as an acknowledgment; and, even if it amounts to acknowledgment, it is not sufficient to make the woman the wife of the man; still it is strong evidence of a deceased person's relations with a woman. Now, when Mozafar Ali made the statement before Mr. Lincoln, Ghaznafar Ali was not born. and his birth after the admission of the nikah by this father with his mother makes him legitimate if nothing else.

On the first appeal the learned Judicial Commissioner of Oudh reversed the decision, holding that in the circumstances of that case legitimacy was not proved.

In delivering the judgment of their Lordships of the Privy Council Sir Arthur Wilson observed that the presumption arising from long cohabitation was not of much value, as Phundan was admittedly a prostitute before she was brought to the father's house, and that the effect of the acknowledgement had been rightly estimated by the learned Judges below. We take this to mean that the acknowledgment was insufficient as an admission standing by itself to prove marriage.

The learned counsel for the defence has referred to *Irshdali* v. *Mt. Kariman* (13), where an admission in a deed of 1892, executed by the deceased Syedali, that he had been married to Kariman, who was born in the prostitute centre, was relied upon as proof of marriage. The circumstances of that case were peculiar. Prior to 1869 Kariman carried on the occupation of a prostitute in her father's house at Nehal Garh where she received casual visits from Syed Ali. On 7th January 1869 she executed a registered deed in favour of Syedali, agreeing to enter his service, and removed to his house at Poonda. On 20th March 1869 she borrowed from him Rs. 200 by another deed. In both these documents she was described as a prostitute and signed them as such. In 1872 one Mukhduman, claiming to be the sister of Kariman, brought a criminal charge against Syedali for abduction and wrongful confinement of Kariman. Syedali, in his turn instituted matrimonial proceedings against Kariman claiming to have married her. The suit, together with the criminal proceedings, were settled by the agreement in question which inter alia recited that the marriage had taken place on 11th June 1869 subsequent to the two deeds where she was described as a prostitute, that there had been a quarrel between them as to maintenance and concluded with a recital in these terms.

> And whereas the claim brought by Syedali is in fact correct and proper, and I am his lawfully wedded wife, so now we the declarants have come to terms.....

After that date Kariman had lived with Syedali as his wife, and two daughters and a son were born to her. The daughters had been married to Syedali's nephews. A document purporting to be power of-attorney executed by Syedali in favour of Yarali, the son from Kariman, and Ishadali, a son born from another woman who was admittedly his wife, described both of them as his sons mentioning Yarali's name befor that of Ishadali, and Yarali was held to have been always treated by Syedali as his son. There was also the independent testimony of a witness to the marriage which was believed.

Now, there can be no doubt that in this particular case the admission of the marriage in the deed of 1872 was a strong piece of corroborative evidence in regard to the marriage, the more so when the circumstances under which it was executed vouched for its recitals being true.

This case is therefore no authority whatsoever for the contention that an admission of marriage is by itself sufficient in every case to prove a marriage, or that, in the case of Mahomedans, it has any greater probative velue than an admission under S. 17, Evidence Act.

The alleged admission, if any, to Jethsing was casual, not intended to operate as such, and of little or no probative value. Taking the statement in Ex. 129 as a whole, the effect, if any, of the negative statement in para 1, is sufficiently counterbalanced by para. 2 which proceeds on the assumptiot that there was no marriage in fact.

(13) A. I. R. 1917 P. C. 169=21 O. C. 86.

It is not for us to opine what motive Ghulamali had, if he was the writer of Ex. 129, in not denying a marriage which had no existence, or, if he was not the writer, what motive the clever forgerer had to introduce such a statement into Ex. 129.

To sum up: we hold that the marriage of Jiandi with Ghulamali is disproved by her admission that she started life with him as his concubine, the course of her subsequent conduct and the recitals in the deeds Exs. 256,276 and 277, which are consistent with her being a concubine and not the wife of Ghulamali. No question of legitimacy by admissions can therefore arise. We further hold that no presumption arises in favour of defendants 2 to 4 of legitimacy by long cohabitation between Ghulamali and Jiandi as Jiandi started her life with Ghulamali as his concubine; that the alleged admission of paternity is not proved, that in any case it does not amount to a valid acknowledgment of paternity intentionally made to operate as such, and that the admission of marriage, if any, is likewise not sufficient in the circumstances of this case to amount to proof of marriage.

The plaintiffs are therefore entitled to the relief claimed by them. We accordingly allow this appeal. We understand the costs of both parties have been incurred by the Court of Wards out of the estate of Ghulamali. Taking into consideration the fact that Ghulamali was responsible for bringing the defendants 2 to 4 into existence, and to a certain extent responsible for this litigation, we think that the costs of both parties in both the Courts should come out of his estate and we order accordingly. This order will, however, not justify the Court of Wards in incurring further costs of an appeal to the Privy Council if such an appeal is contemplated.

Finally, we think that we cannot, consistently with our duty as the highest Court of appeal in this province, have done with this case without making a few observations on the duration of this litigation and on certain irregularities during the trial to which our attention has been drawn.

The trial commenced before Mr. Thawerdas in September 1922. During his temporary absence it was continued in October and November 1922 before Mr. Agha; in December 1922, and March, May and August 1923, before Mr. Thawerdas and in January 1924, before Mr. Dialmal.

There is no reasonable explanation why the rule of proceeding with trials de die in diem, so often insisted on by this Court was not followed. In the words of their Lordships of the Privy Council in *Sadik Hussain Khan's* case (8) such delays as they are discreditable to any judicial system, they vastly increase the costs, keep litigants in a state of anxious uncertainty and prejudice their interests.

We are not able to comprehend why no application was made to this Court to transfer the case to the file of Mr. Thawerdas who continued to be in service as a Judge in this province in 1924, so as to enable him to examine Mr. Scott and to give his decision when he had recorded the bulk of the evidence. He would have been in a far better position to weigh the evidence than his successor, The failure to adopt this obvious course has, on the one hand, deprived us of the considered opinion of the Judge who examined the bulk of evidence; and, on the other, it has resulted in considerable waste of time both in the lower Court and before us in discussing the evidence.

We find again that the learned trial Judge permitted an officer in charge of the Record-of-Rights proceedings to be called as the very first witness and to produce the statements of witnesses recorded in those proceedings, which were exhibited notwithstanding the objection raised on that behalf. Only parts of such statements as were necessary to corroborate or contradict the witnesses when they were examined in this case could have been put in through them under the provisions of S. 157, Evidence Act. The admission wholesale of those statements at the very commencement of the trial, subject to the deponents being examined as witnesses, was, in our opinion not warranted by the section and was a procedure calculated to prejudice the Court and to embarrass the parties at the trial. One of the witnesses, whose statement was thus exhibited subject to his being called, was never called as a witness. His statement in the Record-of-Rights proceedings was referred to at consider-

able length before us as having been admitted in evidence by consent where our attention was drawn to the condition on which it was exhibited.

We cannot but express our strong disapproval of the irregularities referred to and express the hope that such avoidable delays in the disposal of important suits, and such irregularities on the part of the subordinate judiciary, will not occur in future.

D.D. *Appeal allowed.*

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* A. I. R. 1927 Sind 218

RUPCHAND BILARAM AND TYABJI, A. J. Cs.

Firm of Radha Kishendas and *others* —Appellants.

v.

Mt. Gangabai and *others*—Respondents.

Second Appeals Nos. 1 to 5 of 1924, Decided on 12th January 1927, from the judgment of the Dist. J., Sukkur, D/- 29th September 1923, in Appeal No. 2 of 1923.

Contract Act, S. 211—Business carried on by surviving partners in old name — Effects of deceased partner are not liable for debts contracted after his death.

The continuance by the surviving partners of a firm to carry on the business in the old firm's name does not by itself render the effects of a deceased partner liable for any partnership debts contracted after his death. [P 218 C 2, P 219 C 1]

Srikishandas H. Lulla — for Appellants.

Lurindaram T. Belkani — for Respondents.

Tyabji, A. J. C.—The only point that is now left for decision is whether Gangabai the first respondent should be considered to be a partner in the firm of Choithram Gopaldas and Co. That firm consisted originally of, amongst others, two partners Gapaldas and his father Choithram. There were other partners who were not members of the family. Choithram died in about 1902 leaving a widow Hemibai and also Gopaldas and a daughter. Gopaldas died in 1913 leaving as his widow Gangabai the first respondent. Choithram's daughter had a son Thakurdas who was the third defendant.

It is argued that Gangabai became responsible as a partner because she allowed the firm to be carried on in the name of her deceased husband and her father-in-law. That point has no force because it was a matter for the partners amongst themselves to decide whether the goodwill of the firm including the right to carry on the business in the name of the partnership should continue to the surviving partners or to anyone else and Gangabai could not, even if she had desired it, have interfered with the carrying on of the business in the old name. She cannot by any possibility be considered to make herself liable by the fact that the firm continued in the old name. Nor can the fact that she as the representative of a deceased partner allowed the property left by the deceased partner to be used in the business necessarily make her a partner unless there is a special contract making her a partner in the firm. Section 243 of the Indian Contract Act specifically provides for the case of the widow of a deceased partner of a trader receiving a proportion of the profits made by such trader in his business. This section is overlooked in the second point made by Mr. Lurindaram for supporting his case that Gangabai should be treated as a partner in the firm of Choithram Gopaldas and Co. It is in evidence that a small sum of money was paid to her. But first that sum represented the profits of the firm made in the lifetime of Gopaldas, her husband; second, that sum has not been actually paid to her but merely credited to her. I do not see in what way that point can help the appellant.

I would, therefore, dismiss the appeal with costs.

Rupchand, A. J. C.—I concur. The suits of the plaintiffs fail on two grounds. In the first place these suits are not against Gangabai as a partner in the firm of Choithram Thakurdas Gopaldas, but against her in her capacity as the legal representative of her deceased husband Gopaldas. The plaintiffs could only succeed *secundum allegata et probata*. If the plaintiffs wished to hold Gangabai liable as a partner in the firm of her deceased husband they should have applied for the necessary amendment at the proper time. In the next place there is no evidence to prove that she is liable as a partner in that

firm. It is admitted that there is no direct evidence that she agreed to be a partner after the death of her husband. All that has been attempted to be proved is (a); that she allowed the capital which belonged to her husband to remain in the firm; (b) that the surviving partners carried on the business in the old firm name; (c) that the profit due to her husband during his lifetime was credited to the personal account of her husband with her consent or to her knowledge; and (d) that a sum of Rs. 200 was paid by the surviving partners out of the charity account of the firm to commemorate the name of her husband.

These facts are not sufficient to render her liable as a partner in the firm. The capital remained in the hands of the surviving partners as a loan, vide S. 241, Indian Contract Act. Again as pointed out by my learned brother they had every right to carry on the business in the old firm's name. It is well settled that the continuance by the surviving partners of a firm to carry on the business in the old firm's name does not by itself render the effects of a deceased partner liable for any partnership debts contracted after his death: cf. S. 14, Cl. 2, English Partnership Act 1890, 53 & 54 Vic. c. 39. The two other Acts relied on are equally consistent with the surviving partners having continued the business on their own account and cannot render her liable as an ostensible partner. All the five appeals, therefore, fail and are dismissed with costs.

D.D. *Appeals dismissed.*

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* *A. I. R. 1927 Sind 219

RAYMOND AND MADGAVKAR, A. J. Cs.

Ratansing Gulabsing—Appellant.

v.

Nanikram Chatumal—Respondent.

First Appeal No. 20 of 1920, Decided on 31st August 1923, from the decree of the 1st Class Sub-J., Hyderabad.

(a) *Practice—Pleadings—Decision should not be inconsistent with pleadings.*

It is of absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made: 11 *M. I. A.* 7 (*P. C.*) *Foll.* [P 220 C 2]

(b) *Evidence—Appreciation—Sufficient weight should be given to the trial Court's opinion.*

The Court of appeal ought to give sufficient weight to the opinion of the trial Judge on the demeanour, intelligence, position and character of the witnesses who were brought before him before reviewing the findings of the trial Judge, who, upon such matters, is in a position to form a much better judgment than could be formed by Judges who had not had the advantage of seeing the witnesses: *A. I. R.* 1923 *P. C.* 62, *Rel. on.* [P 221 C 1]

* * (c) *Specific Relief Act, S.* 18—*Hindu father agreeing to sell ancestral property without necessity and asserting sole ownership in himself—His title is imperfect within S.* 18—*He is guilty of misrepresentation within Contract Act, S.* 18 (3)—*Vendee can rescind contract under Specific Relief Act, S.* 35, *and is entitled to refund.*

Where a Hindu father agrees to sell family property without necessity, alleging that he is the only owner thereof, his title to the property is an imperfect title within S. 18 of the Specific Relief Act and he is guilty of misrepresentation within S. 18, Cl. 3 of the Contract Act. The vendee in such a case is entitled to compensation under Specific Relief Act, S. 19 and is entitled under S. 35 to rescission and its consequences such as refund. [P 222 C 1]

(d) *Hindu Law — Alienation by father—Benefits may approximate to necessity—Extension of money-lending business is not necessity*

The original word in the Mitakshara "कुटुंबार्थे" is not easy to render into English, and there may be cases where the benefit approximates so closely to necessity that the transaction may be upheld and even specific performance ordered. Alienation of ancestral property by father to extend his money-lending business cannot be said to be one for necessity. [P 222 C 2]

Tolasing Khushalsing—for Appellant.

Kimatrai Bhojraj—for Respondent.

Facts.—This is a suit by the vendor for recovery of earnest money and charges from the vendee. The agreement Ex. 66 stipulated for completion within six months and purported to sell for Rs. 48,000, eight shops and "a family house the ancestral property" of the defendant and contained a specific recital as follows;

"There is no other owner thereof but myself."

When the conveyance was tendered, the plaintiff objected on the ground that besides the defendant his three minor sons were along with him co-parceners in the joint Hindu Mitakshara family and therefore had an interest in the property and declined to complete the transaction. Subsequent negotiations proved infructuous and the present suit was the result.

In his plaint the plaintiff alleged that at the time of execution of the kabuliat,

the defendant had expressly informed him that he had no male issue. This allegation the defendant denied in his statement and alleged that the plaintiff was aware of the existence of his son and moreover contended that he had title to sell.

In the lower Court only two issues were raised.

Madgavkar, A.J.C.—(After setting out facts as above the judgment proceeded). The lower Court held that on the one hand the plaintiff was not shown to have had knowledge of the existence of the minor sons nor on the other was the defendant proved to have explicitly denied their existence. But it held that the defendant had power to sell inasmuch as the ancestral joint family trade of the defendant and his sons was that of the sale and purchase of property.

It therefore dismissed the suit without costs ; the plaintiff appeals.

It is contended for the appellant that the title tendered was different from the title agreed and was in any case imperfect. There was no allegation or evidence of legal necessity. The plaintiff was therefore entitled to refund of the earnest money. For the respondent, it is argued that the powers of alienation of the father, manager of the joint Hindu family particularly as regards the interests of the minor sons are larger, benefit to the family sufficed, and that even if the finding of the lower Court as regards the ancestral business of the respondents were not upheld, the title tendered was a good title which the plaintiff was bound to accept. His refusal in effect caused him to be guilty of the breach and he is not therefore entitled to the refund claimed.

The plaintiff by reason of his absence elsewhere did not go into the witness-box. The defendant, however, did. Accepting the entire evidence and case for the defendant-respondent to the extent to which it has been accepted by the lower Court, it would appear from the pleadings that the issues were not so precisely framed as they ought to have been and that moreover the lower Court lost sight of the well-known principle laid down by the Privy Council in the case of *Eshen Chunder Singh* v. *Shamcharan Bhutto* (1)

> of the absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.

In this case the contention of the respondent that the title-deed was perfect because the ancestral joint family business consisted of the sale and purchase of the houses is not set forth in the pleadings and it is not even clearly to be found in the correspondence between the parties. Under these circumstances, it appears doubtful whether the respondent having failed to support the sale on the other points raised could be allowed to raise this point or to succeed even if he established it.

Apart from this point, we see no good reason to differ from the appreciation of the evidence by the lower Court. On this particular point, however, it appears to us that the respondent did not prove this nature of the ancestral business. Both he and his father in all the documents and forms are described either as merchants or as money-lenders. The respondent himself claimed to be worth not more than one lakh. Certain deeds of conveyances were produced for the first time in the course of the defendant's evidence, after the plaintiff had closed his case. They showed at the most that his father had in his lifetime bought and sold six properties. It appears, however, that the father had not entered into any such transaction for about five years before his death, a total period of nine years. The ancestral business claimed was not that of property broker. Nor apart from speculative booms in property does it appear how a merchant with a capital of a lakh could indulge in such a business. In the particular facts of this case, it appears that after the agreement the defendant went to Java for Sind Works business, and, as he himself admits, the object of the proposed sale to the plaintiff was partly to extend this business and partly to invest the proceeds in money-lending. We are of opinion, therefore, that, even if the plea of ancestral business set up were allowed to be raised, as it was in the evidence of the respondent and in the judgment of the lower Court, on the evidence the respondent would fail.

(1) [1866] 11 M. I. A. 7=2 Ind. Jur. N. S. 7 =6 W. R. P. C. 57 (P. C.).

In this finding, we are not unmindful of the dictum laid down by their Lordships of the Privy Council in several cases, one of the most recent being the case of *Banubai Framji* v. *Manilal Jugaldas* (2), that

> the Court of appeal ought to give sufficient weight to the opinion of the trial Judge on the demeanour, intelligence, position and character of the witnesses who were brought before him before reviewing the findings of the trial Judge, who, upon such matters, was in a position to form a much better judgment than could be formed by Judges who had not had the advantage of seeing the witnesses.

In the present case, moreover, the learned Sub-Judge who decided the case was the learned Sub-Judge who recorded the greater portion of the evidence, including that of the respondent.

Taking therefore, the present case at its best, from the point of view of the defendant-respondent, and accepting his evidence in other respects, the facts either agreed or proved appear to be as follows :

The appellant and the respondent were not personally known to each other and they did not meet until after the agreement was brought about through the medium of brokers on both sides and was signed by the parties. The appellant is not shown to have had at the time knowledge of the existence of the three minors, sons of the respondent. The subsequent birth of the fourth son, as well as the existence of two other ladies, a mother and sister-in-law of the respondent, may for the purposes of this case be eliminated, the former for obvious reasons, the latter as they were apparently willing to join in the conveyance. The respondent, on the other hand, is not shown to have expressly denied the existence of his sons or indeed at any time ever to have had fraudulent intent. Shortly after the agreement the respondent left for Java, but returned somewhat before the due date. The appellant, on the legal advice of his pleaders about the due date, refused the conveyance when he came to know of the existence of the three minor sons. The subsequent negotiations did not affect the legal point now in dispute and may be left out of consideration.

The question, therefore, was whether upon the agreement as actually made, in which the existence of the sons is not referred to and sole ownership expressly asserted, the appellant was bound to accept the conveyance, or whether he could in law refuse and claim refund. On reading the agreement carefully, it is a point for the respondent that he had referred to the house as his family house and to the property as ancestral property. And it is therefore argued for him that this was sufficient to put the appellant on guard and that he could have assumed or with reasonable diligence come to know of the existence of the sons. It is doubtful whether this argument could have been upheld even if the words "ancestral property" had stood by themselves. But in any case with one addition actually or immediately following of an express assertion by the respondent that there was no other owner but himself, it clearly fails. In regard to the powers and special powers of a father-manager, the general principles and limitations on these powers have never been in doubt even from the case of *Hunooman Pershad Pandy* v. *Mt. Babooee Munraj Koonweree* (3), and a recent clear enunciation of the principle by their Lordships of the Privy Council is to be found in *Jogi Das* v. *Gangaram* (4), following *Sahuram Chandra* v. *Bhup Singh* (5), where Lord Shaw has enunciated the law as follows :

> Under the law of the Mitakshara the joint family property owned, as stated, by all the members of the family as co-parceners, cannot be the subject of a gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all the co-parceners. Any deed of gift, sale or mortgage granted by one co-parcener on his own account of or over the joint family property is invalid; the estate is wholly unaffected by it and its entirety stands free of it. The law of the Mitakshara has, however, given to the father in his capacity of manager and head of the family certain powers with reference to the joint family property. The general principle with regard to the matter is that he is at liberty to effect or to dispose of the joint property in respect of purposes denominated necessary purposes.

And the judgment proceeds to state the single exception of antecedent debts and the limitations of this exception, as well as the desirability of not extending the exception as the Courts in India have sometimes tended to do so far as almost to merge the principle in the exception. To the same effect are the cases of *Chet*

(2) A. I. R. 1923 P. C. 62.

(3) [1854-57] 6 M. I. A. 393=2 Suther. 29=18 W. R. 81 n = 1 Sar. 552 (P. C.).

(4) A. I. R. 1917 P. C. 76.

(5) A. I. R. 1917 P. C. 61=39 All. 137=44 I. A. 126 (P. C.).

Ram v. *Ram Singh* (6), and *Anant Ram* v. *Collector of Etah* (7). In the former case the grandsons recovered the property alienated by the grandfather and in the latter the mortgage was upheld only to the extent of the necessity proved. It would therefore appear that the observations of a single Judge of this Court in the case of *Chinkumal* v. *Rahndomal* (8), can hardly stand.

Under these circumstances, it appears clear that the title which the respondent agreed to give and the appellant innocently to take was an imperfect title within the meaning of S. 18 of the Specific Relief Act and that the respondent was guilty of misrepresentation within the meaning of S. 18, Cl. (3) of the Contract Act. And it follows that under S. 19 of the Specific Relief Act the vendee is entitled to compensation. The contract made by the respondent, who was in fact a trustee was in excess of his powers within the meaning of S. 21 Cl. (e), and could not be specially specifically enforced under S. 25, Cl. (b) of the Specific Relief Act. The vendee is entitled under S. 35 to rescission and its consequences such as refund. The question of marketable title is considered by one of us in the recent case of *Khemchand* v. *Dhalomal* (9), and this has been throughout the accepted law in the case of Hindus governed by the Mitakshara, and not as in Bengal by the Dayabhaga: *Gurusami* v. *Ganpathia* (10), *Kosuri Ramaraju* v. *Ivalury Ramalingam* (11), *Munni Babu* v. *Kamta Singh* (12), *Srinivasa Reddi* v. *Sivaram Reddi* (13), *Ravji Janardhan Saranangpani* v. *Ganga Dharbhat* (14), *Jamsetji* v. *Kashinath* (15), and the recent cases, such as in *Valabdas* v. *Nagardas* (16). In the last case the facts were very similar to the present, except that while the present appellant has stated that the property was ancestral, the vendor in that case had omitted so to do. It was held both in the trial and in the appeal Courts that the vendee was entitled to damages, the reason being that the vendor, knowing that the property was ancestral and that his interest in the property was limited, contracted to sell the same to the vendee who was unaware that the property was ancestral.

The last two arguments on behalf of the respondents are: firstly, that the benefit to the joint family in this case sufficed; and secondly, that the appellants could with reasonable diligence have assertained the existence of the sons. It is not shown, however, that he could have done so at the time of the agreement, and in fact the respondent admits that they never met till afterwards. This ground therefore fails. As regards the former, it is true that the original word in the Mitakshara "कुटुंबार्थे" is not easy to render into English, and there may be cases where the benefit approximates so closely to necessity that the transaction may be upheld and even specific performance ordered. A house in a dilapidated condition fetching no rent, and ordered to be demolished by the Municipality, so that the choice is between demolition and fresh expenditure or sale: in such a case the line between benefit and necessity is so slight that the transaction may stand and specific performance decreed if the vendor so desires and sues: *Nagindas* v. *Mahomed Yusif* (17). In the present case, however, the respondent admits that there were no debts or pressure and that his object was to extend the Sind Works business and money-lending, which he hopes would yield more than the rent. By no stretch of language could this be called "necessity" in law absolutely or necessarily sufficient even to entitle the respondent to sell: *Palaniappa Chetty* v. *Devasikamony* (18): much less to compel the appellant to accept the title tendered. It is clear that the title was imperfect and that the appellant could reasonably apprehend exposure at subsequent uncertain and distant time to litigation and its hazards from the sons of the respondent. The only means perhaps of surmounting the difficulty, namely sanction by the Court of sale of the interests of the minors, was never offered by the respondent. The appel-

(6) A. I. R. 1922 P. C. 217=44 All. 368=49 I. A. 228 (P. C.).
(7) A. I. R. 1917 P. C. 188=40 All. 171.
(8) [1898-1906] 2 S. C. S. Decisions 30.
(9) A. I. R. 1922 Sind 33=15 S. L. R. 180.
(10) [1882] 5 Mad. 337 (F. B.).
(11) [1903] 26 Mad. 71=12 M. L. J. 100.
(12) A. I. R. 1923 All. 321=45 All. 378.
(13) [1909] 32 Mad. 320=4 I. C. 506.
(14) [1880] 4 Bom. 29.
(15) [1902] 26 Bom. 326=3 Bom. L. R. 893.
(16) A. I. R. 1921 Bom. 331.
(17) A. I. R. 1922 Bom. 122=46 Bom. 312.
(18) A. I. R. 1917 P. C. 33=40 Mad. 709=44 I. A. 147 (P. C.).

lant was thus clearly within his rights in refusing to complete by reason of the imperfect title.

The appeal must therefore be allowed and the judgment of the lower Court set aside. There will be a decree for Rs. 5,955-2-8, with interest at 6 per cent from the date of suit to payment, made up as follows : the amount of the deposit of Rs. 5,000, together with charges incurred in the transaction. These are set forth in para. 7 of the plaint and no reasonable exception appears to them, except as to the item of interest which must be calculated, not at 9 per cent, amounting to Rs. 629-8-0 but at 6 per cent. from the 3rd November 1916, when the deposit was made. Costs in both Courts on the respondent.

D.D. *Appeal allowed.*

A. I. R. 1927 Sind 223 (1)

KENNEDY AND TYABJI, A. J. Cs.

Loung and *others*— Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 4 of 1926, Decided on 27th January 1926, from a judgment of the Addl. S. J., Hydorabad (Sind), D/- 10th November 1925.

Criminal P. C., S. 420—Appeal under S. 420 can be summarily dismissed under S. 421.

The practice of the Court, in dismissing summarily appeals filed by accused through jailor under S. 420, without calling on the appellant to appear is a correct procedure. [P. 223, C. 2]

Partabrai D. Punvani — for Appellants.

Kennedy, A. J. C.—This is an appeal by six persons against the decision of the Additional Sessions Judge, Hyderabad, who sentenced them to various terms of rigorous imprisonment under Ss. 395, 342, 332 and 323 of the I. P. C.

This appeal was admitted for regular hearing and the papers were called for. On these papers being called for, it appeared that these same persons had made an appeal from jail to this Court being Criminal Appeal No. 179 of 1925 which was summarily dismissed by this Court on 9th December 1925. If that was an effective disposal, then the present appeal, now before us, must be dismissed as being incompetent and irregular as this matter has already been disposed of by this Court. With regard to the argument that this Court was in error in passing its order in No. 179 of 1925 there seems to be no substance in that argument. The matter of criminal appeals is dealt with in Ss. 419, 420 and 421 of the Criminal P. C. Section 419 contemplates the case where an appeal is made in person by the appellant or by his pleader ; and S. 420 contemplates the case where the appellant is in jail and makes his petition in appeal through the jailor ; and S. 421 provides that on receiving the appeal the appellate Court shall peruse the petition ; and, if it considers that there are no sufficient grounds for interfering, it may dismiss the appeal summarily, and that is what this Court did in Criminal Appeal No. 179 of 1925. But it is urged that this action of the Court is wrong in view of the proviso to S. 421; but it is clear that this proviso is confined solely to S. 419, where the appeal is made by the appellant in person or through his pleader ; but this appeal No. 179 of 1925 was made from the jail under S. 420 ; of course the law did not require notice to be given to an appellant actually in prison, under S. 420, that would be useless. If an appellant has a pleader, or is able to appear in person, he may be able to give further arguments, but if he is in jail and if he cannot afford a pleader, then issuing of a notice to him is not necessary because he cannot give any further information to the Court. It would, therefore, seem that the practice of the Court, in dismissing summarily such appeals, when occasion arises, without calling on the appellant to appear, is a correct procedure, and there was nothing irregular in the order of dismissal in Criminal Appeal No. 179 of 1925. That being so, we must hold that this appeal is already disposed of in Criminal Appeal No. 179 of 1925, and cannot rehear the appeal. This appeal is, therefore, dismissed.

D.D. *Appeal dismissed.*

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* A. I. R. 1927 Sind 223 (2)

RUPCHAND BILARAM AND LOBO, A. J. Cs.

Firm Chatanmal Samanmal—Applicants.

v.

Rato Khan—Opponent.

Civil Revision Application No. 56 of 1926, Decided on 21th March 1927.

* *Civil P. C., O. 9, Rr. 9 and 13—Party appearing later in the day without sufficient reason cannot have ex-parte decree set aside on that ground—Civil P. C., S. 151.*

There is no warrant in the Code to permit litigants to absent themselves without rhyme or reason from the Court at the time when their case is called up for hearing, and then, without assigning any sufficient cause, to claim the restoration of their suit by appearing in Court later in the day. O. 9, Rr. 9 and 13, both contemplate that, when the suit has been dismissed for default or has been decreed in the absence of party, the party at default can only have the decree vacated on showing sufficient cause. Neither of these rules makes any exception in favour of a party appearing in Court on the same day after the case has been disposed of ex-parte ; *A. I. R.* 1924 *Bom.* 392 and 1925 *Bom.* 423, *Diss. from.* [P 224 C 2]

Except under very special circumstances calling for the application of S. 151, Civil P. C., the applicant is bound to make out a sufficient cause for non-appearance at the proper time : *A. I. R.* 1926 *Sind* 249, *Rel. on.* [P 224 C 2]

Dipchand Chandumal—for Applicants.

Srikishandas Lulla—for Opponent.

Judgment.—It is clear from the record that the plaintiff-applicant has been negligent in the conduct of this suit. It was fixed for hearing before the learned Judge below on September 2, 1925. He failed to attend on that day and the suit was dismissed for default. On September 4 he applied for restoration of the suit and his application was fixed for hearing on December 1, 1925. On that day, though the usual time for attendance in Court was 12 o'clock, he did not appear till about 2 p. m. and found that his application for restoration of the suit had been dismissed for default. He then put in an application for restoration of the application for restoration of the suit, and all that he stated in that application was that he left Thull, where he resides by the morning train at 5 a. m. and arrives at the Jacobabad station at 1-30 p. m., from where he drove straight to the Court. He offered no explanation as to why he did not leave his village the previous day or by an earlier train, if any, so as to be present in Court at the proper hour. The learned Judge was, therefore, perfectly right in rejecting the second application which is now the subject-matter of revision. Mr. Dipchand has drawn our attention to the observations of Macleod, C. J., in *Sorabji Rustomji* v. *Ramjilal Devjibhai* (1), which were repeated by the learned Chief Justice a year later in *Chotalal Mohanlal* v. *Ambalal Hargovan* (2) and which are to the following effect :

We have more than once laid it down as a rule of practice, to be observed in the subordinate Courts, that when a party arrives late before the Judge, and finds that his suit or application has been dismissed before his arrival, he is entitled to have his suit or application restored on payment of such costs as may have been incurred by reason of his default by the opponents.

With all due respect we think that there is no warrant in the Code to permit litigants to absent themselves without rhyme or reason from the Court at the time when their case is called up for hearing, and then, without assigning any sufficient cause, to claim the restoration of their suit by appearing in Court later in the day. O. 9, Rr. 9 and 13, both contemplate that when the suit has been dismissed for default, or has been decreed in the absence of party, the party at default can only have the decree vacated on showing sufficient cause. Neither of these rules make any exception in favour of a party appearing in Court on the same day after the case has been disposed of ex-parte. If the course suggested by the learned Chief Justice is permissible, it will be open to litigants to compel the trying Judge not to proceed with his case for the greater part of the day and to put in his appearance in Court a few minutes before the Court rises, when it is too late for his case to be disposed of, thereby securing for himself an adjournment, on payment of the costs of the day, to the great prejudice and annoyance of his opponent and waste of public time. The question as to the right of a party to have an ex-parte decree vacated, or an ex-parte dismissal of suit set aside was considered by this Court in *Ghumalmal* v. *Secretary of State*, *All India Reporter* 1926 *Sind*, *page* 249. As pointed out there, except under very special circumstances calling for the application of S. 151, Civil P. C., the applicant is bound to make out a sufficient cause for non-appearance at the proper time. With this statement of the law we concur. We have therefore no hesitation in dismissing this application with costs.

D.D. *Application dismissed.*

(1) A. I. R. 1924 Bom. 392.

(2) A. I. R. 1925 Bom. 423.

A. I. R. 1927 Sind 225

RUPCHAND BILARAM AND LOBO, A. J. Cs.

Shewakram Gurdinomal—Applicant.

v.

Ghulam Shah—Opposite Party.

Civ. Rev. Appln. No. 70 of 1924, Decided on 21st February 1927, from the order of the Addl. Dist. J., Hyderabad Sind, D/- 28-5-1924, in Suit No. 325 of 1919.

(a) *Practice—Precedents—Sind Sadar Court single Judge's judgments are not binding on Judicial Commissioner's Court.*

Single Judge judgments of the Sind Sadar Court, though entitled to every respect, are in no way binding on Sind Judicial Commissioner's Court. [P 226 C 1]

(b) *Sind Encumbered Estates Act, S. 5—Liability, meaning explained.*

The liability contemplated by the Act is a liability which may be valued by the manager and its payment provided for in the liquidation scheme: *Linton* v. *Linton* (1885) 15 *Q. B. D.* 239; 3 *S. L. R.* 95; 2 *S. D.* 38 and *A. I. R.* 1926 *Sind* 279, *Rel. on.* [P 226 C 2]

(c) *Interpretation of statutes—Act taking away jurisdiction must be construed strictly.*

It is a cardinal rule of interpretation that an Act by which the jurisdiction of the ordinary Courts of Judicature is taken away must be construed strictly and it is not to be taken away by putting a construction upon an Act of the Legislature to deprive such Courts of its jurisdiction; 8 *W. R.* 428 (*F. B.*). *Rel. on.* [P 226 C 2; P 227 C 1]

(d) *Sind Encumbered Estates Act, S. 5—Suit for specific performance of contract for sale of immovable property is not in respect of liability.*

A suit for specific performance of a contract for sale of immovable property is not in respect of a liability under the Act, and there is nothing in the Act to clothe the manager with the right to decide for himself whether he should convey the property or compel the purchaser to accept damages in lieu thereof. [P 227 C 1]

(e) *Sind Encumbered Estates Act—Application for protection under, cannot be made when the applicant's property is auctioned by Court.*

There is nothing in the Act to enable the Court to hold that the legislature ever intended to put it in the power of a debtor to oust the jurisdiction of the Court by applying for protection at such a late stage of the proceedings, after the property had been auctioned, and thereby to create a chaos to the serious prejudice of both the aution-purchaser and the judgment-creditor. [P 227 C 2]

Dipchand Chandumal—for Applicant.

Mulchand Hazarising—for Opposite Party.

Judgment.—The facts giving rise to this application are as follows: On August 30, 1923, the property of the opponent was sold in execution of a mortgage decree passed against him by the sub-Civil Court, Tando, and transferred to the Collector of Hyderabad under Sch. 3, Civil P. C. for execution. On September 29, 1923, the opponent applied to the Court under O. 21, R. 90, Civil P. C., to set aside the sale. He thereafter took protection under the Sind Encumbered Estates Act and obtained an order from the Sub-Civil Court staying under S. 5 (i) of that Act the application filed by him for setting aside the sale and all subsequent proceedings in the case. The judgment creditor has now come to us in revision and the only point in issue is whether the order of the lower Court staying the proceedings was within the competence of the Court.

The operative part of S. 5 (i) which provides for interim stay of proceedings is as follows:

5. (1) When the Commissioner (in Sind) has directed an inquiry under S. 4, he may, if he thinks fit, further direct that, until he dismisses the application or appoints an officer under S. 7, sub-S. (2), Cl. (c),

(a) All proceedings then pending in any Civil or revenue Court or office in British India, in respect of any of the debts and liabilities to which the debtor is subject, or which are charged on the whole or any part of his immovable property, shall be stayed, and the operation of all processes, executions and attachments then in force for, or in respect of, such debts and liabilities shall be suspended.

It is urged on behalf of the opponent that so long as the Court had not confirmed the sale the mortgaged property belonged to him, that the auction held by the Collector rendered his property subject to a liability to be conveyed to the auction-purchaser on the sale being confirmed, and that, therefore, the application under O. 21, R. 90, Civil P. C., was a proceeding in respect of such liability. In the alternative it is urged that this application was an application in the suit instituted by the plaintiff-mortgagee, that the suit, was indubitably a proceeding in respect of a debt and that the effect of the protection order was to prevent the whole suit, whatever stage it may have reached including every application made therein, being dealt with by the civil Court.

In support of the first contention considerable reliance has been placed on the observations of Batty, J., in *Mohamed Salleh* v. *Mato* (1), remarks at page 1021, to the effect that a contract to sell which does not pass the ownership in the property to the purchaser would merely create a liability against the

(1) [1899] 2 Sel. Dec. 88.

vendor and a suit to enforce such liability would be stayed under the Act.

Apart from the fact that single Judge judgments of the old Sind Sader Court, though entitled to every respect, are in no way binding on this Court, the observations relied on by the learned Pleader are mere obiter dicta. The only point before the learned Judge in that case was whether a suit by the plaintiff, claiming partition of his one 'third 'share 'in the property jointly owned by him and the debtor was liable to be stayed under the Act, and this point was decided in favour of the plaintiff.

It is not seriously disputed that the expression "liability" is not used in the Act in its widest sense as meaning responsibility, or the state of one who is bound in law and justice to do something which may be enforced by action irrespective of its having arisen out of contract or in tort. It is no doubt true that in *Chakar Khan* v. *Hetumal* (2), Whitworth, J., had taken the view that the term "liability" was not a technical term and that he saw no logical reason for restricting it to mean a partial liability and not a liability to surrender land. The learned Judge thought that the true test in dealing with such cases was whether the claimant had got the property in suit absolutely or whether he required the assistance of the Court to get it. This judgment was adversely criticised by Batty, J., in *Salleh Mohamed's* case (1) and does not, in our opinion, correctly state the law. Both *Salleh Mahomed's* case (1), and the very recent case of *Birokhan* v. *Malik Salukhan* (3), proceed on the assumption that the term 'liability" has a much narrower scope.

Throughout the Act this term is associated with the word "debt" and forms part of the expression "debts and liabilities." That expression is in no respect a new expression. It has been used from very early times in Statutes, relating to the law of Bankruptcy both in England and in India and has received judicial interpretation. In *Linton* v. *Linton* (4), a liability proveable under the Bankruptcy Act was held to be something, the value of which was capable of being estimated in some way or the other.

In *Sadhuram Tindanmal* v. *Ali Akbar Shah* (5), Crouch, A. J. C., without expressly holding that a liability under the present Act had the same meaning as that under the Bankruptcy Statutes referred to S. 28 (i), Provincial Insolvency Act as giving some assistance in ascertaining the meaning of this expression.

A careful consideration of the different sections of the Act, however, makes it abundantly clear that the expression "liability" in the present Act bears the same meaning as given to it in *Linton* v. *Linton* (4). For we find that in Ss. 3 (i), 11 (ii), 28 (iii) and 33 (i) the liabilities of the debtor are spoken of as "incurred." S. 4 refers to the sufficiency of the property of the debtor to discharge his liabilities. S. 15 again refers to the powers of the manager to determine the liabilities "justly due" to the several claimants. S. 17 enjoins him to submit a liquidation scheme showing the mode in which it is proposed to pay and discharge such liabilities. And lastly S. 21 of the Act refers to the power of the manager to deal with a mortgage in possession and a conditional vendee who are both bound in law to retransfer the property of the debtor on payment to them of their respective claims. All these sections point to the fact that the liability contemplated by the Act is a liability which may be valued by the manager and its payment provided for in the liquidation scheme.

Now, a vendor who agrees to convey his property incurs a two fold liability. He may be compelled to specifically perform his contract or to pay damages for breach of contract at the option of the purchaser. His liability to specifically perform the contract is hardly one which could be valued in money. There is nothing in the Act to suggest that a protection order has the effect of either putting an end to the liability of the vendor to convey the property or to clothe the manager with the right to decide for himself whether he should convey the property or compel the purchaser to accept damages in lieu thereof. Every purchaser has a right to come to the Court and ask for specific performance of his contract and to enforce his right in a Court of law. It is a cardinal rule of interpretation that an Act by

(2) [1899] 2 Sel. Dec. 38.
(3) A. I. R. 1926 Sind 279.
(4) [1885] 15 Q. B. D. 239=54 L. J. Q. B. 529 =2 Morral 179=52 L. T. 782.
(5) [1909] 3 S. L. R. 95=3 I. C. 900.

which the jurisdiction of the ordinary Courts of Judicature is taken away must be construed strictly and that it is not to be taken away by putting a construction upon an Act of the legislature to deprive such courts of its jurisdiction.

Per Sir Barnes Peacock, C. J., in *Prosunno Coomar Paul Chowdhry* v. *Koylash Chunder Paul Chowdhry* (6).

If the legislature intended to deprive the purchaser of his right to sue for specific performance or to clothe the manager with the powers of the Court it would have said so. If it is still open to a purchaser to enforce specific performance of his contract, in a law Court ; ipso facto neither the interim stay order under S. 5 nor the final stay order under S. 9 is a bar to the Court proceeding with such a claim.

We are, therefore, of the opinion that there is no warrant in the Act for the observations of Batty, J., relied on by the learned pleader, and that a suit for specific performance of a contract for sale of immovable property is not in respect of a liability under the Act.

The case of a purchaser at a Court auction stands even on a better footing. A Court auction is not a voluntary contract between the vendor and the vendee which may be broken at the will of either party. It is held in pursuance of statutory powers and may be set aside only on certain conditions. If those conditions do not exist or are not otherwise availed of the sale must be confirmed. The express jurisdiction vested in the Court by the Code of Civil Procedure to adjudicate on those conditions has in no way been controlled by the Act and no provision has been made to indicate what should be done in the event of the debtor taking protection under the Act. The anomalous results which would follow from an order staying the application to set aside a sale are best illustrated by the present case. The price realized at the auction is in excess of the mortgage claim. The auction-purchaser cannot get back his purchase money from the Court as in the first place the proceedings have been stayed and the money cannot be paid, and in the next place he is not willing to forgo his bargain : and there is no provision in the Act to provide for the purchase-money being paid over either to the purchaser, the creditor, the debtor, or the manager, and on what terms. The judgment-creditor primarily looks to the money in Court for payment of his claim and unless the sale is either confirmed or set aside, it is doubtful if he can either prove his claim before the manager or be included in the liquidation scheme unless he gives up his claim on the sale-proceeds. He cannot give up his claim to the money unless the sale is set aside ; and the only authority competent to set aside the sale is the Court.

We can find nothing in the Act to enable us to hold that the Legislature ever intended to put it in the power of a debtor to oust the jurisdiction of the Court by applying for protection at such a late stage of the proceedings, after his property had been auctioned and thereby to create a chaos to the serious prejudice of both the auction-purchaser and the judgment-creditor.

There is less substance in the alternative contention. The proceedings to set aside the sale have no doubt arisen out of a claim for the debt due to the applicant, but it is not in respect of the debtor, nor is it in respect of a liability which may be valued in money. The opponent's property is liable to be conveyed to the auction-purchaser unless the sale is set aside. On the one hand the liability to convey property cannot be valued. On the other hand, if the sale is set aside, there is no liability whatsoever of the debtor to the auction-purchaser though there would in that case be a liability on his part to pay to the judgment-creditor the amount due under the decree, and so far as that liability goes, it would be open to him to apply for stay of the proceedings.

We think, therefore, that the order of the learned Judge below staying the hearing of the application for setting aside the sale was without jurisdiction. We accordingly set it aside and direct him to proceed with the same. Costs to be costs in the cause.

After this judgment was pronounced Mr. Dipchand drew our attention to the note made by the learned Judge below which appears at p. 5 of the paper-book and is as follows :

(6) 8 W. R. 128 = B. L. R. Sup. Vol. 759 (F. B.).

The defendant gives up the objections to the sale and does not wish to have the witnesses examined. Postponed for hearing only on the law point on 1st May 1924.

The learned pleader has contended that as the defendant gave up his objections to the sale he cannot now be permitted to revive his application. We, however, think that the object with which this note was made was that as the defendant considered that he was entitled to a stay of the proceedings under S. 5 (i) of the Act, there was no occasion for the Court to go into the question of fact. We do not think that it was ever intended by either party or by the Judge that in the event of the Court holding that it had jurisdiction to investigate into the question of the validity of the sale, the defendant would not be permitted to revive his application and to lead evidence thereon. We, therefore, order that the learned Judge below should take back the application under O. 21, R. 90, Civil P. C., on the record and deal with it according to law.

R.D. *Order set aside.*

A. I. R. 1927 Sind 228

PERCIVAL, J. C., AND RUPCHAND BILARAM, A.J.C.

Lachiram and *others*—Applicants.

v.

Mt. Almi and *others*—Opponents—Respondents.

Misc. Civil Appeal No. 32 of 1925, and Revision Applications Nos. 53 and 84 of 1925, Decided on 24th November 1926, from the various orders of the 1st Cl. Sub-J., Shikarpur.

(a) *Civil P. C., O. 9, R. 3—Date fixed for hearing of application in the suit—Whole suit cannot be dismissed.*

Where on the day fixed for hearing of an application made in the suit, no party appears, the whole suit cannot be dismissed. At the most, the application can be dismissed for default. [P 229 C 2]

(b) *Civil P. C., O. 9, R. 9—Pleader sitting in adjoining Court-room but not hearing call—Restoration should be ordered.*

What is sufficient cause for non-appearance must depend on the facts of each case. Where the pleader had not left the precincts of the Court and was actually sitting in the adjoining Court-room and he did not appear as he did not hear the call but soon after he appeared and applied for restoration.

Held: that there was sufficient cause for restoration: 13 *Bom.* 12, *Dist.* [P 229 C 2]

Pahlajsing B. Advani—for Applicants.

J. L. Bhojwani—for Respondents.

Judgment.—The facts giving rise to these three matters are somewhat as follows:

Lachiram the appellant and two other banias, Sugnomal and Rochamal, joined together as co-plaintiffs with one Almi and instituted a suit for partition of property against the relatives of Almi. In the plaint it was stated that Almi was entitled to 39/108 share in the property by right of inheritance and that out of her share she had by a deed. dated the 26th February 1921, sold 1/3rd share therein to the bania plaintiffs and by a deed, dated 9th of March 1921, she had granted to them a lease in their favour of the remaining 2/3rds. The claim of the plaintiffs was resisted on several grounds. But after the evidence on both sides was recorded and the case fixed for arguments, Almi and her Mahomedan relatives arrived at a compromise and put in a petition to the Court dated 20th of November 1924, agreeing to give to Almi her proper share according to Mahomedan Law. They appeared before the Court and admitted the compromise on that very day. The bania plaintiffs were not present at that time. Up to that stage all the plaintiffs were represented by Mr. Kishendas, Pleader. On 11th of December 1924, an application was put in on behalf of Almi by another pleader named Mr. Parsram asking the Court to refuse to give the share of the plaintiffs 2 to 4 to them and to strike out their names from the record as co-plaintiffs. This was objected to by the bania plaintiffs inter alia on the ground that the application was not entertainable as the parties had closed their case.

The learned Judge Mr. Bijasing, who was then presiding over the Court of the first instance on the one hand called upon the pleader for Almi to satisfy him that Almi's application was entertainable and on the other ordered a notice to issue of the objections filed by the bania plaintiff to Mr. Parsram the new pleader of Almi. Mr. Kishandas who was thus in a difficult position having originally appeared for all the plaintiffs who had quarrelled between themselves then put in an application on the 3rd of February 1925, asking that his power be cancelled. Almi readily consented to it and as the

bania plaintiffs were not present in Court a notice was issued to them returnable on the 25th of February. This notice, however, was returned unserved and as unfortunately the learned Judge Mr. Bijasing died the matters had to be put off for some time till a new Judge took over charge. The different applications which were made by the parties were fixed for disposal before the Court on the 25th of February 1925. On that date no party whatsoever appeared and the learned Judge passed an order dismissing the suit for default of both parties.

An application was then made on behalf of the bania plaintiffs for restoration of the suit. This application was fixed for hearing on the 20th of April 1925, and on that day when the matter was called up Mr. Vishendas, pleader, who then represented the bania plaintiffs was actually within the precincts of the Court but sitting or attending to some other work in the Court of the Joint Sub-Judge and according to his version he did not hear his name being called out and so did not respond to the call at once. His application for restoration of the suit was dismissed for default. Within a few minutes of the order of dismissal and as soon as he was informed of the order of dismissal he appeared in Court to explain his absence and put in a regular application for the ordor dismissing his application for restoration of the suit being vacated. But this application was dismissed on the ground that no sufficient cause had been shown for his non-appearance when his name was called out.

It also appears that a receiver had been appointed in the suit and after the dismissal of the suit for default of both parties the learned Judge ordered the receiver to hand over the property to plaintiff 1. that is, Almi and to the defendants her relatives who all claimed to have inherited the property from the original owner. The different orders passed by the learned Judge are now the subject-matter of the appeal and revision applications now before us. Revision Application No. 53 of 1925 is against the order passed by the learned Judge on the 25th February 1925, dismissing the suit. This is really the main application and may be considered first. We have carefully looked into the diary of the case and we find no mention in it that the whole suit was fixed for hearing on the 25th February. The arguments in the case could not be heard till the diverse applications made by the parties were disposed of and it was only these applications which were to be brought up for consideration on that day. We think, therefore, that the learned Judge was clearly in error in dismissing the whole suit for default. Mr. Kishendas's application was not even ripe for hearing and all that the learned Judge could at the most do on that day was to dismiss the applications of the plaintiffs inter se and to fix a date for hearing the suit. Under the circumstances his order of dismissal cannot be maintained and we set it aside.

It is, therefore, hardly necessary for us to discuss at considerable length the different applications filed by the bania plaintiffs against the subsequent orders passed by the learned Judge. It is sufficient for us to observe that the learned Judge was in error in dismissing the application filed by Mr. Vishendas for setting aside the ex-parte dismissal of his application for restoration of the suit.

Now what is sufficient cause for non-appearance must necessarily depend on the facts of each case. The facts of the present case are distinguishable from those in *Manilal Dhunji* v *Gulam Husein Vazeer* (1). Mr. Vishendas had not left the precincts of the Court and was actually sitting in the adjoining Court-room and if what he states is true that he did not hear the call then in our opinion, there was sufficient cause, for his non-appearance within the meaning of the rule. The learned Judge had no ground for holding that the statement of Mr. Vishendas was not true and we think that he was in error in refusing his application.

We also think that the order of the learned Judge requiring the receiver to hand over the property to Almi and the defendants to the exclusion of the bania plaintiffs was equally bad. The application of Almi that the bania plaintiffs could not get their share in the suit had not been disposed of on the merits. Almi was only a co-plaintiff in the suit and according to her own admission in the plaint the bania plaintiffs were not

(1) [1889] 13 Bom. 12.

only co-owners of the property but lessees of all her interests therein and, therefore if the receiver was ordered to hand over possession to the parties the bania plaintiffs should not have been excluded.

We accordingly allow Miscellaneous Appeal No. 32 of 1925 and Revision Applications Nos. 53 and 84 of 1925 with costs. Costs to be borne by Almi as it was really on behalf of her that the restoration of the suit was opposed in the lower Court. We direct the learned Judge to take back the case on his file and dispose of the case, as also the application filed in the case by Almi and by Mr. Kishendas and the objections filed by the bania plaintiffs to the application of Almi, according to law.

G.B. *Appeal and petitions allowed.*

A. I. R. 1927 Sind 230

RUPCHAND BILARAM, A. J. C.

Punjab National Bank Ltd., Karachi—Plaintiffs.

v.

Moosaji Jafferji and *another*—Defendants.

Original Civil Suit No. 929 of 1925, Decided on 4th March 1927.

(a) *Civil P. C., O. 40, R. 1—Receiver can be appointed in mortgage suit.*

Court has power to appoint a receiver in all mortgage suits when it finds just and convenient to do so. [P 231 C 2]

The law does not contemplate that a mortgagor is entitled to retain possession of the mortgaged property till sale. All that it provides is that a certain fixed time should be allowed by the Court to the mortgagor to arrange for payment of the decretal amount before his property is sold and thereby irretrievably lost to him : 14 *Bom.* 431 ; 7 *C. W. N.* 452 ; 13 *C. L. J.* 495 ; 29 *M. L. J.* 457 and 47 *Cal.* 418, *Rel. on.* ; 43 *I. C.* 533, *Diss. from.* [P 230 C 2 ; P 231 C 1]

(b) *Civil P. C., O. 40, R. 1—Mortgage suits—That sale-proceeds will be insufficient to discharge the incumbrance is sufficient ground.*

That the sum for which the mortgaged lands will be sold will be insufficient to pay the encumbrances or charges thereon is a sufficient ground for appointment of receiver. [P 231 C 1]

Dipchand Chandumal—for Plaintiffs.

Fatehchand Assudamal—for Defendants.

Order.—This is an application for appointment of a receiver in a suit based on an equitable mortgage which has terminated in the usual preliminary decree for sale of the mortgaged property. The amount payable by the defendants on the date fixed for redemption is Rs. 79,166-12-0. The ground on which the application is made is that the present market value of the property is about Rs. 65,000 and the tendency of the land market is on the decline. It will take over six months before the property is brought to sale and in the meantime the defendants continue to enjoy rent, which is substantial, to the prejudice of the plaintiffs.

It is clear from the affidavit of Nathumal broker filed on behalf of the defendants that the present value of the mortgaged property is below the decretal amount. He has valued it at between Rs. 70.000 and Rs. 75,000 probably it is much less. The rent of the property is said to be not less than Rs. 500 a month and the rent for the period which is likely to elapse between this date and the sale is fairly substantial. The defendant is not in a position and has declined to give security to duly account for the rent which will accrue due after this date. It is contended on his behalf that O. 40, R. 1, Civil P. C., has no application to mortgage suits or decrees and reliance has been placed on the ruling of the Allahabad High Court in *Gobind Ram* v. *Jawala Pershad* (1) where one of the grounds on which their Lordships interfered with the appointment of a receiver appears to be that Cl. (ii) of O. 40, R. 1, Civil P. C. prevented the Court from removing from the possession or custody of the property any person whom any party to the suit had no present right to remove and that as in the case of a suit on a mortgage the mortgagor was entitled to remain in possession of the mortgaged property until such time as that property had been brought to sale, O. 40, R. 1, Civil P. C. had no application.

With all respect I am unable to accept the view that Cl. (ii) of O. 40, R. 1, Civil P. C., limits in any way the powers of the Court to remove from possession or custody a person who is a party to the suit. It only aims at preserving in status quo the rights of persons who are not parties to the suit. I am equally unable to accede to the proposition that a mortgagor as entitled to retain possession of the mortgaged property till sale.

(1) [1918] 43 I. C. 533.

In my opinion all that the law provides is that a certain fixed time should be allowed by the Court to the mortgagor to arrange for payment of the decretal amount before his property is sold and thereby irretrievably lost to him. It does not follow therefrom that the Court may not either before or after the preliminary decree appoint a receiver to preserve and make available for payment to the mortgagee in satisfaction of the mortgage debt such rents as might accrue due till the property is sold. On a proper case being made out the Courts both here and in England have appointed receivers in mortgage suits : See *Jaikissondas Gangadas* v. *Zenabai* (2) ; *Ghanashyam Misser* v. *Gobinda Moni Dasi* (3) ; *Weatherall* v. *Eastern Mortage & Agency Co.* (4) ; *Eastern Mortgage & Agency Co.* v. *Fakir-ud-din* (5); *Venkata Rajagopala Surya Row* v. *Basavi Reddy* (6) and *Rameshwar Singh* v. *Chuni Lal Shah* (7). One of the grounds which has been generally accepted as good ground for appointment of a receiver is said in *Herbert* v. *Greene* (8) to be the apprehension

> that the sum for which the lands will be sold will be insufficient to pay the encumbrances or charges thereon.

That apprehension is amply proved to exist in the present case.

I may further observe that the present suit is not based on a simple mortgage as defined by S. 58 of the Transfer of Property Act, but is on an equitable mortgage created by deposit of title-deeds which is a creature of the English Courts of equity and governed by principles of English Law. These mortgages were in force in Karachi long prior to 1908 when certain sections of the Transfer of Property Act were for the first time extended to Sind. The remedies afforded to an equitable mortgagee correspond as nearly as possible to those which are available to a legal mortgagee under the English Law, and, therefore, the question of the alleged right, if any of a mortgagor under a simple mortgage to retain possession of the property till sale thereof in execution proceedings does not arise. I, however, propose to base my decision on the broader ground that the Court has power to appoint a receiver in all mortgage suits when it finds just and convenient to do so.

I therefore appoint the official assignee as receiver of the mortgaged property with powers to manage the property and to collect its rents ; and, if necessary, to institute suits against tenants for ejectment and rent.

G.B. *Application allowed.*

(2) [1890] 14 Bom. 431.
(3) [1903] 7 C. W. N. 452.
(4) [1911] 13 C. L. J. 495 =) I. C 985.
(5) [1912] 17 C. W. N. 16=17 I. C. 819.
(6) [1914] 29 M. L. J. 457 =1 M. L. W. 785 = 26 I. C. 985 =(1914) M. W. N. 771.
(7) [1920] 47 Cal. 418 =56 I. C. 830=31 C. L. J. 385.
(8) [1851] 3 Ir. Ch. Rep. 270.

A. I. R. 1927 Sind 231

PERCIVAL, J. C., AND ASTON, A. J. C.

Manilal—Applicant.

v.

Kamberali—Opponent.

Criminal Revision Application No. 52 of 1927, Decided on 25th March 1927, from an Order of the Addl. City Mag., Karachi.

Criminal P. C., S. 439—Charge framed and only defence remaining to be heard—High Court will not interfere.

It is only in very exceptional instances that the High Court will interfere in revision with the action of a Subordinate Court in respect of any pending case, and especially when such a case has reached the stage where a charge has been drawn up and only the defence of the accused remains to be heard : 26 *Cal.* 786, *Foll.*, 8 *S. L. R.* 143, *Dist.* [P 232 C 1]

Rewachand Vassanmal — for Applicants.

Motiram Idanmal—for Opponent.

T. C. Elphinston—for the Crown.

Percival, J. C.—This is a revision application by Manilal Vyas, in which he asks this Court to set aside the order of the Additional City Magistrate, Karachi, in which he has framed a charge against the applicant for an offence of defamation under S. 500, I. P. C., in respect of certain remarks made by him in a municipal meeting against Kamberali, an Assistant Engineer of the Karachi Municipality.

We have heard Mr. Rewachand on behalf of the applicant, Mr. Motiram, on behalf of the opponent and Mr. Elphinston for the Crown.

We have found it necessary to go into the facts to a certain extent ; but it seems

to me that the main question arising in this case is whether, at this stage of the proceedings, the Court should interfere, whatever view we may take of the facts of the case. It has been laid down in *Jagat Chandra Mozumdar* v. *Queen-Empress* (1) that

> it is only in very exceptional instances that the High Court . . . . will interfere in revision with the action of a subordinate Court in respect of any pending case, and especially when such a case has reached the stage where a charge has been drawn up and only the defence of the accused remains to be heard.

With these remarks I entirely agree; and it appears to me that an undue number of applications are made to this Court while cases are still proceeding. No doubt this Court has power to interfere in revision at any stage of a case before a Subordinate Court. But, to my mind, it is not at all satisfactory that this Court should interfere while a case is proceeding, unless there are very exceptional circumstances requiring the Court so to interfere.

I do not think it desirable to express any opinion regarding the merits of this particular case, because one is apt to express an opinion which may influence the trying Magistrate one way or the other, without having all the facts before this Court. As pointed out by Mr. Motiram, the effect of going into the question at this stage, that is to say after the charge has been framed, but before the Magistrate has disposed of the case, means, in effect, that this Court goes into a case twice over; and to that extent the applicant obtains two rights of appeal instead of one. Moreover this Court is obliged to give an opinion before the Magistrate has recorded his judgment on the case. Reference has been made on behalf of the applicant, to *Murlidhar Jeradass* v. *Narayandas* (2). But even in that case, the Additional Judicial Commissioner, Mr. Crouch, observed that he would have been unwilling to quash the proceeding on the ground merely that it was not shown that the accused had committed any offence. The Court interfered in that case on account of certain very special circumstances. For these reasons I am of opinion that this Court should not encourage applications of this character.

(1) [1899] 26 Cal. 786=3 C. W. N. 191.
(2) [1915] 8 S. L. R. 143=27 I. C. 205=16 Cr. L. J. 141.

Without, therefore, expressing any opinion, one way or the other, on the merits of the case, and in accordance with the remarks made in *Jagat Chandra Mozumdar* v. *Queen-Empress* (1), I would dismiss the application on the ground that this Court should not interfere at this stage.

Aston, A. J. C.—I concur in the view taken by the learned Judicial Commissioner. It seems to me that the words used by the applicant in this case are certainly capable of being construed as a suggestion that the opponent was dishonest. Whether the language came within the exceptions to the offence of defamation in the Indian Penal Code is a question of fact, and that question depends very largely on the question whether the words were uttered in good faith. It seems to me that somewhat intricate questions are involved in the question whether the utterance in this case was an utterance made with due care and caution, and I do not think that the circumstances of the present case are so exceptional that this Court should interfere in the exercise of its revisional jurisdiction at this stage.

R.K. *Application rejected.*

A. I. R. 1927 Sind 232

PERCIVAL, J. C. AND LOBO, A. J. C.

Ghazi—Accused—Appellant.

v.

Emperor—Respondent.

Cr. A. No. 155 of 1926, Decided on 22nd April 1927, against an order of the Sessions Judge, Larkana, D/- 11th October 1926.

Penal Code, Ss. 304, 299 and 300 — Murder and culpable homicide not amounting to murder —Distinction—Accused intending to cause injury likely to cause death — Punishment should be under Part I of S. 304.

If the act of the accused falls within either of the Cls. 1, 2 and 3, S. 300 but is covered by any of the five Exceptions it will be punishable under the first part of S. 304; and if the act falls within Cl. 4, S. 300 but is covered by any of the Exceptions it will be punishable under the second part of S. 304: (1887) 32 *P. R.* 1887 *Cr. Ful.* (1876) 1 *Bom.* 352, *Ref.*

Where there is an intention on the part of the accused to cause some injury which injury is likely to cause death the case comes within the middle part of S. 299 and corresponds with the third part and not the fourth part of S. 300.

[F 233 C 2]

Partab Rai D. Dunwani — for Appellant.

Parsram Tolaram—for Respondent.

Lobo, A. J. C.—The appellant Ghazi, son of Shahdad was tried along with one Laloo, son of Kamerali, by the learned Sessions Judge of Larkana for the offence of culpable homicide not amounting to murder by causing the death of Kouro on 21st January 1926. The learned Sessions Judge acquitted Laloo and convicted the appellant under S. 304, Part 2, I. P. C., and inflicted upon him a sentence of two years' rigorous imprisonment. Against this conviction and sentence the appellant has come on appeal.

The prosecution story briefly is that on the day in question two bullocks belonging to the deceased Kouro and one Ranjho, Jamalis by caste, had strayed into the cultivation of the appellant, a barber by caste. The bullocks were detained by the appellant and his people. On the afternoon of that day appellant and Laloo passed through the field of one Begum, an old Jamali woman, armed with bianos or forked sticks and using abusive and threatening language towards the Jamalis. Begum interposed and asked them to desist from abusing as it might lead to bloodshed. Thereupon the appellant struck the old woman Begum with his biano causing an injury. On her cries the deceased Kouro and his companion Ranjho who were working in their own adjoining field came running up to where Begum was and finding that she had been assaulted called out to the appellant and his companion that they should not strike a defenceless woman but if they were men they should fight with them. The appellant and his companion readily accepted the challenge. A fight ensued in the course of which the deceased was struck a violent blow on the head which caused his death.

The evidence for the prosecution consists mainly of four eyewitnesses: Begum, Ranjho, Sumar and Nabu the latter two are cultivators who were working in a field nearby the scene of the offence, Nabu being the son of the old woman Begum.

The medical evidence shows that the death of the deceased Kouro was due to an injury on the left parietal region 2½" in length and deep to the bone, that the interior injury resulting from this blow was a fracture of the skull 3½" in length. After discussing the evidence of the prosecution including the medical evidence the learned Sessions Judge came to the conclusion that the appellant Gazi to whom the blow above referred to is clearly traced on the evidence, was exercising his right of private defence but that he exceeded that right in dealing a savage and formidable blow to the deceased in a reckless manner. His conviction and sentence are based on the finding that the appellant was exercising his right of private defence but exceeded it.

The whole argument of the learned pleader who appears for the appellant is that accepting the finding of the learned Sessions Judge the appellant is entitled to an acquittal because in the circumstances of the case and in the position the appellant and his companion found themselves, it cannot reasonably be said that the appellant exceeded his right of private defence in striking deceased the blow which proved fatal.

I have gone carefully through the evidence in this case and feel that I am unable to accept the position that the appellant was exercising his right of private defence or that this was a case in which the right of private defence could be exercised. I have come to the conclusion on a consideration of the evidence and the circumstances in the case that the appellant and his companion were clearly aggressors.

They had seized the cattle of the Jamalis becuse damage had been caused to their cultivation. They were not content with this, but proceeded armed with bianos and breathing threats of vengeance in the direction of the field of the deceased and his companion Ranjho. This is clear from the evidence of Begum who says that the appellant and his companion were running through her field breathing threats of vengence and armed with bianos. That Begum correctly sized the situation is clear from thefact that she remonstrated with these men and called upon them in the name of the Koran to desist from what she found they were preparing to do. That the appellant and his companion were bent upon revenge is clear from the fact that instead of desisting as requested by the woman Begum they assaulted her with a stick causing her an injury. It was this that attracted the attention of the deceased Kouro and his companion who very naturally said to the appellant and his companion that if they were men they

would fight them and not with a defenceless woman. That the appellant and his companion had really come up for a fight is clear again from the fact that they very readily accepted the challenge held out to them and it is clear from the evidence that it was the appellant Ghazi who struck the first blow. It was perhaps not a very serious blow as it left no mark on the deceased Kouro. But all the circumstances referred to above clearly show that the appellant and his companion came armed to fight, that they assaulted the old woman Begum and that they struck the first blow in the fight which ultimately resulted in the death of the deceased.

I feel no doubt on the evidence and the circumstance that the appellant and his companion were the aggressors. Being the aggressors the appellant cannot claim the right of private defence and must be held responsible for the injury which caused the death of the deceased Kouro and which has been traced to and is practically admitted to have been caused by the appellant. I would, therefore, confirm the conviction of the appellant under S. 304, I. P. C.

The learned Sessions Judge in the view that he took of the case considered that a sentence of two years rigorous imprisonment was sufficiently deterrent. I am not inclined to disturb the sentence passed by the learned Sessions Judge considering the fact that the appellant had a certain amount of provocation and that the deceased Kouro used a *lorh* in the fight and caused considerable injuries to Laloo an old man of 60 years of age, the companion of the appellant. I would, therefore, confirm the conviction and sentence of the appellant and dismiss this appeal.

Percival, J. C.—I wish to say a few words on a legal point which I noticed in this case and have noticed in other cases too.

In this case the accused was charged under S. 301, Part 2 and has been found guilty by the learned Sessions Judge under that same S. 304, Part 2 and we do not interfere with that conviction, as there is no need to do so. But at the same time I should like to note that it appears to me, properly speaking to be a case falling under S. 304, Part 1. It has been laid down in the case of *Barkatulla* v. *Empress* (1) that if the act of the accused falls within either of the Cls. 1, 2 and 3, S. 300, but is covered by any of the five exceptions it will be punishable under the first part of S. 304, and that if the act falls within Cl. 4, S. 300, but is covered by any of the exceptions it will be punishable under the second part of S. 304. This, I think, is the right distinction between the two parts of S. 304. The main differences between culpable homicide not amounting to murder and murder have been brought out very clearly in the old case of *Reg.* v. *Govinda* (2). It is there pointed out that knowledge that the act is likely to cause death in S. 299 corresponds with the fourth part of S. 300. If one reads S. 304 with this case *Reg* v. *Govinda* (2), it is clear that the knowledge that the act is likely to cause death refers to the last part of S. 299 and the the fourth part of S 300. That is to say, it refers to cases such as are mentioned in *Reg* v. *Govinda* (2), namely furious driving, firing at a mark near a public road, etc. In such cases there is, no intention to cause any bodily injury; it is only likely that death may be caused. In this particular case there was intention on the part of the accused to cause some injury which injury was likely to cause death. It is a case, therefore, such as is described in the middle part of S. 299 and corresponds with the third part, not the fourth part of S. 300.

For these reasons, in my opinion, this case falls under the first part of S. 304 rather than under the second part of that section.

G.B. *Appeal dismissed.*

(1) [1887] 32 P. R. 1887 Cr.
(2) [1876] 1 Bom. 342.

A. I. R. 1927 Sind 234

RUPCHAND BILARAM AND LOBO, A.J.Cs.

Nandiram Tahilram—Appellant.

v.

Motiram Pessumal—Respondent.

F. A. No. 14 of 1926, Decided on 22nd March 1927, from the judgment of the 1st Cl. Sub-Judge, Hyderabad Sind, D/- 18th January 1926.

(a) Will—Construction—Reference to expressions in similar wills is undesirable.

To construe one will by reference to expressions of more or less doubtful import to be found in other wills is an unprofitable exercise. *A. I. R.* 1921 *P. C.* 311 and 23 *Cal.* 563 (*P. C.*) *Foll.* [P 236 C 2]

(b) *Hindu Law—Will—Condition by testator as to devolution of estate on legatee's dying intestate is void.*

Any conditions imposed by the testator as to the mode in which the estate which had become the absolute property of the legatee should devolve on the legatee dying intestate is repugnant to the grant and as such void according to Hindu law. [P 237 C 1]

(c) *Will—Testator disinheriting a person—Such person is not debarred from inheriting the legatees.*

Where by a will the testator has disinherited a person expressly, such person is not prevented from inheriting the testator's property, not as heir to the testator but as heir to the legatees to whom an absolute estate is conferred. [P 236 C 1]

Dipchand Chandumal—for Appellant.

Dingomal Narain Sing—for Respondent.

Judgment.—The suit out of which this appeal arises concerns the will of one Tahilram, a Hindu inhabitant of Hyderabad who died in 1915. At the time of his death he left the following near relatives:

Tahilram=Devibai widow.

Nandiram defendant. | Chuhermal. | Pessumal=Jamnabai.

Motiram plaintiff. | Vensimal. | Jethomal.

He possessed two houses and one karkhana or business which he carried on in partnership with strangers. Chuhermal was separate from him and Motiram was not in his good books. The bequests were in favour of his wife and the other relatives and Motiram was expressly disinherited by him. By para. 1 of his will he declared that so long as he was alive he would be the master of all his property, that after his death his wife Devibai shall exercise the same rights as himself in the said property and that two of his friends Bhai Tarachand Parsram and Bhai Jhamatmal Gurbomal were to act as trustees of the property on behalf of his wife. He declared that after his death one of the houses should be given to Mt. Jamnabai and her two sons and the other house should be given to Nandumal, and directed that out of the profits of the karkhana certain amounts should be paid for certain specified purposes. He further declared that Mt. Devibai was at liberty to dwell in any of the houses bequeathed to Jamnabai and her sons or to Nandumal during her lifetime and that none should prevent her from doing so but that she would have no power to dispose of by gift, mortgage or otherwise any of the said houses which were to go after her death to the respective legatees.

By para. 2 to his will he declared that the karkhana should be continued in the same name as before, that the shares of himself and his working partners should continue to be the same as during his lifetime, the property of the karkhana along with his share of the profits being treated as the capital invested therein. He empowered Devibai and his trustees to make any alterations in the shares which they considered fit and likewise to partition the property of the karkhana and give over the same to the heirs, viz., (a) wife and the children of the deceased Pessumal; and (b) Nandiram, according to their respective shares. By para. 3 of the will he declared as follows:

Motiram has got nothing to do with my property and nothing is bequeathed to him.

Paragraphs 4 and 5 of the Will are as follows:

4. The property shown in Cl. A for Jamnabai and the property shown in Cl. B for Nandumal shall both of them neither be sold nor gifted nor mortgaged by them. But under unavoidable circumstances they are at liberty to do so if the said Mt. Devibai and the trustees of the property Bhai Tarachand and Bhai Jhamatmal give permission. But such permission should be in writing and not verbal.

5. Moti son of Pessumal shall have no right whatever in the property bequeathed to Mt. Jamnabai and her two sons Jetho and Vensi because he is not of good character, and I am dissatisfied with him for his misconduct.

Jethomal died in May 1916, Mt. Jamnabai in October 1918, Mt. Devibai in March 1920, and Vensimal in May 1920. It was after their death that Motiram instituted the present suit for recovery of the house allotted under the will to Mt. Jamnabai and her two sons Vensimal and Jethomal and also for accounts of the karkhana and payment to him of his half-share therein. He based his claim not as an heir of Tahilram nor under his Will, but as the heir of Vensimal, Jethomal and Jamnabai. In the plaint Motiram described himself to be of the age of about 21 years. He sued in forma pauperis. The application for leave to sue in forma pauperis is dated October 23, 1923. Nandiram raised several pleas in the lower Court which he subsequently gave up. The only issues on

which the parties went to trial were as follows :—

(1) Whether the will excludes plaintiff from inheriting to Mt. Jamnabai, Jethomal and Vensimal ? If so, whether the said term in the will is valid and operative.

(2) To what amount on accounts taken and to what mesne profits, if any, is plaintiff entitled.

(3) General.

The learned Judge found on the first issue in the negative ; on the second issue that a sum of Rs. 700 was due as rent from July 1920 to June 1925, and appointed a Commissioner to take the accounts of the karkhana. It is against these findings that Nandiram has come to us in appeal.

We think that the learned Judge below was perfectly right in holding that the clause in the will disinheriting Motiram, only applied to his claim as a legatee or as an heir of the deceased qua grandson, and not as the heir of his own brothers and mother. Reading the will as a whole we have no hesitation in holding that Tahilram bequeathed a life estate in all his property to his widow Devibai and that he bequeathed an absolute estate to Mt. Jamnabai and her two sons Jethomal and Vensimal both in the house referred to as house 'A' and in half of the karkhana. The bequests were to take effect on the death of Devibai and did, as a matter of fact, take effect. On her death, Vensimal became absolutely entitled to both the house A and half of that karkhana and that on his death this property devolved on plaintiff as Vensimal's heir. The clause in the will disinheriting Motiram from the property owned by the testator has no application whatever to the property left by Vensimal as his own absolute property though the two may be identically the same.

Mr. Dipchand has drawn our attention to the case of *Dinbai* v. *Nusserwanji* (1), decided by this Court which went up in appeal to their Lordships of the Privy Council, *Dinbai* v. *Nusserwanji Rustomji* (2) as an authority for the proposition that even on the death of Vensimal, Motiram was excluded from inheriting that part of Vensimal's estate which originally belonged to the testator. We do not think that the case referred to applies. As pointed out by their Lordships in that very case quoting from *Norendra Nath Sircar* v. *Kamal Basini Dasi* (3).

> To construe one will by reference to expressions of more or less doubtful import to be found in other Wills is for the most part an unpsofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To extend it to India would hardy, be desirable. To search and shift the heaps of cases on wills which cumber our English Law Reports in order to understand and interpret wills of people speaking a different tongue trained in different habits of thought and brought up under different conditions of life, seems almost absurd.

In *Dinbai's case* (1) the will was of a Parsi written in the English language. In that case the will of the testator contained the following paragraph as para. 5.

> My executors shall hold the residue (of my property) upon trust to pay the net income thereof to my son Jamsedji for and during his lifetime and from and after his death upon trust for the widow and children of my Jamsedji absolutely as tenants-in-common. In the event of the said Jamsedji dying without leaving any issue how lowsoever my executors shall stand possessed of the balance of the said residuary trust estate in trust to appropriate a moiety of the balance to certain charitable objects and divide the other namely amongst my heirs, according to the law of intestate succession amongst Parsis, but excluding the widow of Jamsedji from getting any share in such distribution.

Jamsedji died without issue. His widow Dinbai claimed a share at the distribution on the ground that as Jamsedji was one of the heirs of the testator according to the Parsi law of intestate succession, and as he would have taken a share as such at the distribution if alive, she, as the administratrix of his estate, was entitled to claim that share and to appropriate to herself such portion of it as would come to her as the heir of Jamsedji. Their Lordships agreed with the view taken by this Court that the testator did not intend that his son Jamsedji should take any interest under his will as an heir, and that the only interest in the property which Jamsedji should take or have was a right of maintenance under para. 6 of the will during the lifetime of the testator's wife, if she survived him and a life-interest under para. 7 of the will.

In the present case the will is that of a Hindu written in the Sindhi language unaided by legal advice. After the death of the life tenant, it confers an absolute estate on the legatees, and makes no provision as to the mode in which the pro-

(1) [1920] 14 S.L.R. 203=28 I.C. 481.
(2) A. I. R. 1922 P. C. 311=49 Cal. 1005=49 I.A. 323 (P.C.).
(3) [1896] 23 Cal. 563=23 I.A. 18=6 Sar. 667 (P.C.).

perty should devolve on the death of any of the legatees.

We are not, therefore, prepared to construe the two Cls. 3 and 5, referred to above as meaning anything more than that Motiram was to get no share in the property of the testator as such. It is hardly believable that the testator expected that Jamnabai and her two sons will die without any issue and that Motiram would, within five years after his (testator's) death come to claim the same property as the heir of one of the legatees. There was, therefore, no occasion for him to provide for such a contingency. Furthermore, it would appear that any conditions imposed by the testator as to the mode in which the estate, which had become the absolute property of the legatee, should devolve on the legatee dying intestate would be repugnant to the grant and as such void according to Hindu law. So far, therefore, as the objection to Motiram claiming house A is concerned there is no substance in it.

With regard to the karkhana again it would appear that Motiram was prima facie entitled to the accounts of the karkhana and to get his share therein as the heir of Vensimal. It is, however, urged that as Vensimal died in May 1920 and the application to sue in forma pauperis was not filed till October 1923, the plaintiff's claim for accounts is barred by limitation. Not only was this point not taken in the lower Court, but the pleader for Nandiram made a distinct admission that he disputed the right of the plaintiff on the sole ground that he had been disinherited under the will. It does not, therefore, lie in the mouth of Nandiram to raise at such a late stage the plea of limitation which is a mixed question of law and fact. In the petition to sue in forma pauperis Motiram had described himself as of the age of about twenty-one years. If he was less than twenty-one years, no limitation ran against him. He had under S. 6, Limitation Act, three years' time allowed to him to institute his suit after attaining majority. There is also nothing to show that the karkhana was not managed by the trustees even after the death of Vensimal for the benefit of the true owners. If that be so, the period of limitation would run only after the defendant had assumed possession of the karkhana on his own behalf. We, therefore, decline to allow Mr. Dipchand to raise the point of limitation at this stage.

We accordingly confirm the decree of the lower Court with costs and discharge the stay order.

R.D. *Decree confirmed.*

A. I. R. 1927 Sind 237

RUPCHAND BILARAM AND LOBO, A. J. Cs.

Assardas Manghumal—Appellant.

v.

Mt. Thakurbai and *another* — Respondents.

Mis. Appln. No. 34 of 1925, Decided on 31st March 1927.

Civil P. C., O. 40, R. 1 — Proceedings under Trusts Act, S. 74—Receiver cannot be appointed,

Court cannot appoint a receiver in a proceeding for the removal of a trustee and the appointment of a new trustee under the Trusts Act, S. 74: 3 S. *L. R.* 118 and *A. I. R.* 1924 *All.* 376, *Rel. on.*

[P 238 C 2]

Dipchand Chandumal—for Appellant.

Srikishandas H. Lulla — for Respondents.

Judgment.—The facts giving rise to this appeal are somewhat as follows: One Idanmal died in 1922 leaving a will by which he appointed Assardas, the present appellant, and two other persons as trustees of his property which he bequeathed to his minor sons and to his widow. Assardas was a partner of Idanmal during his lifetime. There were three other partners in the same business. The will inter alia provided that the business was to be carried on after the death of Idanmal and it appears that that business has been carried on up to date. The widow of Idanmal, not being satisfied with the management of the trust property, applied on behalf of herself and her minor children to the District Judge, Sukkur, under S. 74, Indian Trusts Act, for removal of Assardas as a trustee and for appointment of a new trustee in his place. In the course of these proceedings the learned District Judge passed an order appointing the nazir of the Court as interim receiver of the trust property and directed that the receiver should move the Court for such orders as he considered necessary to enable him to assume control of that property, and further directed Assardas to produce the partnership account books before the receiver when called upon to do so. This order was passed on the 23rd May 1925.

The nazir then called upon Assardas to produce the partnership account books before him within a particular time and on his failure to do so moved the Court for directions. On the 16th June 1925, the Court ordered

> the receiver or officer in charge to enter the house or shop of Seth Assardas for the purpose of attaching and securing the books.

It is against the first order dated 23rd May, 1925, which is the principal order passed by the learned District Judge that Assardas has come to us in appeal and has inter alia prayed that if that order is set aside the consequential order of attachment should likewise be set aside.

Mr. Lulla who appears for the beneficiaries has taken a preliminary objection to this appeal on the ground that as the appellant has not made his co-trustees as parties to this appeal, the appeal should be dismissed for want of necessary parties. He has drawn our attention to the proceedings before the lower Court to show that, on the day when Court appointed the nazir as interim receiver, the trustees were present and took part in the proceedings. We do not think that their presence in Court on that day was sufficient to make it obligatory on the appellant to join them as parties to the appeal. The application giving rise to this appeal was made by the beneficiaries under S. 74, Trusts Act. The beneficiaries and Assardas were the only parties to it and they are both before us. The preliminary objection, therefore, fails.

On the merits there can be no doubt that the order passed by the learned District Judge appointing the nazir as interim receiver was without jurisdiction. It is no doubt, true that the provisions of O. 40, R. 1, Civil P. C., have been extended so as to enable the Court to appoint a receiver not only in pending suits but in proceedings other than suits. The point, however, is that the powers of the Court are limited to the appointment of a receiver in respect of property which is the subject-matter of such suit or proceedings. This was laid down by this Court in *Pounchbai* v. *Lekhraj* (1). In that case a suit had been instituted for a declaration that the plaintiff was entitled to certain property left by the deceased, subject to the widow's right of maintenance, and it was held that, as the suit was one for a declaration and injunction, and not for recovery of property the Court had no jurisdiction to appoint a receiver. In the recent case of *Kanhaiya* v. *Kanhaiya Lal* (2), the Allahabad High Court has taken a somewhat similar view and has held that the Court has no jurisdiction to appoint a receiver in proceedings under the Succession Certificate Act.

In proceedings under S. 74, the only question which the Court is called upon to decide is whether the trustee who is sought to be removed is a fit person and should continue as such or not. If he is removed and another trustee is appointed in his place the trust property vests in the newly appointed trustee by virtue of S. 75 of the Act who may then take proceedings to recover it. It is urged that if in the meantime the Court finds that there is danger of the trust property being done away with why should not the Court appoint a receiver for its interim protection. But the obvious answer to it is that S. 74 affords only an alternative summary remedy for removal of a trustee and that it is open to the beneficiaries or to the co-trustees, if any, to file a regular suit for his removal and for recovery of property if they apprehend that the trust property is likely to disappear and to get a receiver appointed in that suit on payment of proper Court-fees. They cannot evade payment of the Court-fees by recovery of trust property from the trustee in such summary proceedings.

Apart from the point of jurisdiction, which goes to the very root of the order appealed against there is another equally fatal objection. The property sought to be taken possession is not the exclusive property of the testator, but partnership property belonging to the appellant, the trust estate and the other two partners. It may be that on a settlement of partnership accounts a large sum of money is due by the appellant, but till such accounts have been settled it cannot be said that the whole of the property which is in the possession of the trustee is trust property of which an interim receiver can take possession in these proceedings. The books likewise, which are the subject-matter of the order of attachment are partnership property. The trustee has as much right to retain them in his

(1) [1909] 3 S.L.R. 118=4 I.C. 605.

(2) A.I.R. 1924 All. 370=46 All. 372.

personal capacity as a partner as in that of a trustee.

We accordingly allow this appeal and set aside the order appointing the nazir as receiver, as also the subsidiary order for attachment of books. The appellants to have costs of the appeal from the respondents.

D.D. *Appeal allowed.*

* A. I. R. 1927 Sind 239

RUPCHAND BILARAM AND LOBO, A. J. Cs.

Hassomal Hirdomal—Applicant.

v.

Kodanmal Motiomal and *others*—Opponents.

Civ. Rev. Appl. No. 1 of 1925, Decided on 23rd March 1927.

* (a) *Civil P. C., Sch. 2, para. 1—Consent of all persons interested in specific dispute to be referred is necessary.*

It is not the consent of all the parties interested in the suit, but that of all the parties interested in the subject-matter of the specific dispute referred to arbitration, which is a condition precedent to the order of reference. It is open to the parties in certain cases to refer to arbitration through the intervention of the Court only some of the disputes in a pending suit and the expression "all the parties interested" in para. 1 can only refer to the parties interested in the subject-matter of the arbitration, and not in the subject-matter of the whole suit where the two are not identical; 14 *S. L. R.* 156, *Diss. from*; 47 *Cal.* 555; *A. I. R.* 1923 *Mad.* 502 and *A. I. R.* 1924, *Pat.* 33, *Appr.* [P 239 C 2]

* (b) *Civil P. C., S. 115—Court's jurisdiction disputed—Court deciding thereon—Decision can be challenged in revision.*

A distinction must be drawn between the decision of the Court on the preliminary point whether it has jurisdiction to entertain a particular dispute or to pass a particular order and the power to decide any matters within its admitted jurisdiction. It is an elementary principle that where the Court's jurisdiction in any particular matter is disputed it must adjudicate upon it, but that such adjudication is not final and is always open to revision under S. 115, Civil P. C. [P 240 C 2]

Kimatrai Bhojraj—for Applicant.

Dipchand Chandumal—for Opponents.

Judgment.—The substantial question raised in this revision application is as to the jurisdiction of the Court below to refer to arbitration certain disputes in a pending suit on a reference agreed to by only some of the parties to the suit.

Our attention has been invited to the case of *Choith Ram* v. *Lal Chand* (1) and remarks at p. 159 [of *S. L. R.*—Ed] where Raymond, A. J. C., sitting as a Single Judge on the original side of this Court said:

It is apparent from the clear wording of the section (i. e., para. 1, Sch. 2, Civil P. C.,) that to give the Court jurisdiction to make the order of reference, the fundamental requisite is the assent of all the parties interested in the suit, to refer the matters in difference between them to arbitration.

It has been suggested that the very fact that some of the parties to the suit were not parties to the reference was in itself sufficient to oust the jurisdiction of the Court to submit the disputes to arbitration and the award and decree based thereon were ipso facto void.

With all respect, we think that the observations relied upon go beyond the scope of para. 1, Sch. 2, Civil P. C. It is not the consent of all the parties interested in the suit, but that of all the parties interested in the subject-matter of the specific dispute referred to arbitration which is a condition precedent to the order of reference. It is obvious from the terms of para. 1 and the paragraphs that follow that it is open to the parties in certain cases to refer to arbitration through the intervention of the Court only some of the disputes in a pending suit and that the expression "all the parties interested" in para. 1 can only refer to the parties interested in the subject-matter of the arbitration and not in the subject-matter of the whole suit where the two are not identical.

That was the view taken in *Laduram Nathumall* v. *Nandalal Karuri* (2), *P. Bhagavanulu* v. *B. Seetharamaswami* (3) and *Raghunath Sukul* v. *Ramrup Raut* (4). With that view we are in entire agreement.

Two questions, therefore, require our consideration: (1) what disputes were referred to arbitration; and (2) were defendants 6 to 13 interested in such disputes?

We have examined the reference and the order passed thereon. Both of them are in the widest terms and empower the arbitrator to decide all the issues in the suit some of which directly concern the non-assenting defendants. Reliance has, however, been placed on the last part of the reference which reads as follows:

Defendants 6 to 13 are given up for the present from this reference. On the receipt of the arbi-

(1) [1920] 14 S. L. R. 156.

(2) [1920] 47 Cal. 555=55 I. C. 747=31 C. L. J. 150.

(3) A. I. R. 1923 Mad. 502.

(4) A. I. R. 1924 Pat. 33=2 Pat. 777.

trator's award and its being confirmed they will be given up.

It is urged that this clause limited the powers of the arbitrator to adjudicate upon only such disputes as concerned the plaintiff and the consenting parties.

We are not prepared to accept this view. We think that if that was the intention of the parties it was an improper reference for them to file in Court and for the Court to accept. It left the arbitrator in the most unfortunate position of having to determine what disputes if any concerned the plaintiff and defendants 1 and 2, and after he did so, of having his award challenged on the ground that he had dealt with certain disputes in which the non-consenting parties were vitally interested. Furthermore, on a perusal of the pleadings, we find that the main dispute in the suit, and one which has been decided by the arbitrator is a dispute in which defendants 6 to 13 were indubitably interested.

The suit was for partition of immovable property. The plaintiff's right to the property was denied by defendants 1 and 2 on several grounds. It was further contended by them that the suit could not proceed without the joinder of certain persons, some of whom were coowners in the property prior to the alleged purchase by the plaintiff and the defendants 1 and 2 and others who were alienees from defendants 1 and 2.

It was on this further plea of defendants 1 and 2 that those persons were joined as defendants 6 and 13.

Now, it is no doubt true that, as the arbitrator has found that the plaintiff had no subsisting interest in the property in suit, defendants 6 to 13 are not affected by the award. But it was equally open to the arbitrator to hold otherwise and to award partition of the property irrespective of any rights which defendants 6 to 13 had in the property either as co-owners or as alienees. We find no provision in the reference and no directions given therein as to the course which the arbitrator was to adopt if he held that the plaintiff had made out a subsisting right to partition the property so that his award may not affect the non-assenting defendants. If the award had been in favour of the plaintiff it would have been ipso facto bad and would have been successfully challenged by defendants 6 to 13, not only on their own behalf, but for the benefit of defendants 1 and 2. The interest of defendants 6 to 13 has to be judged, not by the award, but by what was referred to arbitration.

We think that the assent of defendants 6 to 13 to the reference was clearly essential and that, as they were not made parties to the reference, the order of reference and the award based thereon cannot be maintained.

On behalf of the opponents a faint attempt was made to support the reference and award on the ground that the Court below had jurisdiction to decide if the reference was a valid reference or not and that having, decided it, though wrongly, it is not open to us to interfere in revision. But a distinction must be drawn between the decision of the Court on the preliminary point whether it has jurisdiction to entertain a particular dispute or to pass a particular order and the power to decide any matters within its admitted jurisdiction. It is an elementary principle that where the Court's jurisdiction in any particular matter is disputed it must adjudicate upon it, but that such adjudication is not final and is always open to revision under S. 115, Civil P. C. It falls under Cl. (a) of that section where the Court holds that it has jurisdiction when it has none and in consequence thereof exercises such jurisdiction. It falls under Cl. (b), where the Court wrongly holds that it has no jurisdiction, and, therefore, fails to exercise it. The decision of the learned Judge below, that the condition precedent to the exercise of his jurisdiction in referring the matters to arbitration had been fulfilled, was the very basis and foundation of his jurisdiction and is clearly one which is open to revision.

We think that in the circumstances of this case the order of reference was without jurisdiction. We accordingly set aside that order, the award and the decree based thereon and direct that the learned Judge should take back the case on his file and proceed with it according to law. Costs to be costs in the cause.

D.D. *Order set aside.*

* A. I. R. 1927 Sind 241

RUPCHAND BILARAM AND LOBO
A. J. Cs.

Tajan—Accused—Appellant.

v.

Emperor—Opposite Party

Criminal Appeal No. 112 of 1926, Decided on 31st January 1927, from an order of the Addl. Sub. Judge, Hyderabad, Sind, D/- 15th July 1926.

(a) Penal Code, S. 201—"Offender" in S. 201 refers to person other than the person charged.

It is settled law that a principal cannot be convicted as an accessory and it may well be presumed that in enacting this section the legislature never intended to depart from that rule. If it be so, the offender in S. 201 must needs refer to a person other than the person charged. *A. I. R.* 1923 *Bom.* 262; *A. I. R.* 1925 *Sind* 306, and *A. I. R.* 1925 *Nag.* 407, *Foll.*; *A. I. R.* 1926 *All.* 737, *not Foll.* [P 242, C 2]

(b) Penal Code, S. 201 — Suspicion of principal offence being committed by person charged under S 201 does not render his conviction under S. 201 illegal.

A conviction for the accessory offence under S. 201 is not illegal merely because it is suspected, but not proved or admitted, that the accused committed or was one of several persons who committed the principal offence. ; *A. I. R.* 1925 *P. C.* 130 and *Rat. Un. Cr. C.* 799, *Foll.*; 6 *Cal.* 789, and 22 *Cal.* 638, *Ref.* [P 244, C 1]

(c) Penal Code, S. 201—Ingredients—Mere knowledge of accused that he is likely to screen principal offender is not sufficient — Actual intention must be proved.

Under S. 201 mere knowledge on the part of the accused that his act is likely to screen the principal offender is not sufficient, but actual intention must be established. Whether the requisite intention is proved or not is a question to be decided on the facts of each case. Ordinarily where the Crown has satisfactorily proved that (a) an offence has been committed for which some person is criminally responsible and (b) that the accused caused the disappearance of the evidence of the commission of the offence or gave false information concerning it, as the case may be, a presumption arises in favour of the Crown that the accused did act with the requisite intent. That presumption may, however, be rebutted by circumstances or by direct evidence. Where it is so rebutted the accused is entitled to be acquitted except where he is charged with giving false information, in which case he may still be convicted under S. 203 [P 244, C 1]

(d) Penal Code S. 201—Intention to screen specified offender is not necessary.

There is nothing in the section to require the Crown to prove that the accused intended to screen a specified offender. An intention to screen an offender unknown to the Crown is sufficient: *A. I. R.* 1925 *Sind* 257, *Expl.* [P 244, C 2]

Abdul Rahman—for Appellant.

Partabrai D. Puniwani — for the Crown.

Judgment.—The appellant Tajan is a zamindar and a cattle-owner. He has been convicted and sentenced to seven years' rigorous imprisonment on a charge under S. 201, I. P. C., for giving certain false information concerning the death of one of his herdsmen named Sidik which is said to be contained in the following report made by him on September 14, 1925, to the thanedar Sirani Police station.

I, Tajan son of Piniladho, state that on the 13th September 1925, as usual all of my herdmen after taking their meals went and slept at my pen at night. I went and slept in my house. In the morning my herdman by name Darheon Shidi went to take out the young ones of buffaloes from the pen, when he saw that behind the pen in a grove of babul trees my other herdsman Sidik, son of Sango Menghwar, whom I had converted to Islam about twelve years back and who lived with me and who also used to do the work of a mason had a cord round his neck and was hanging from a babul tree. Seeing this he called me from a house whereupon I and my cousin Mohamed Khan came out of the house to the pen and saw from a distance that he (Sidik) had a rope round his neck and was hanging from the babul tree. I cannot say as to what the rope is made of as I saw the corpse from a distance. I have come to make a report. Investigation may be held at the scene of offence. I do not entertain any doubt or suspicion in regard to the death of the deceased. The age of the deceased was about 28 years.

The case for the Crown is, that the last part of the statement that appellant entertained no doubt or suspicion as to the cause of death of the deceased was false and that the statement read as a whole was made with the intention of leading the thanedar into belief that it was a case of suicide pure and simple and again as said it was false. It is argued that the appellant so impressed the thanedar and the mashirs by his version that at the inquest which followed they treated the case as one of suicide, and it was only for the purpose of having further assurance in the matter that the mashirs directed the dead body to be taken to the dispensary at Badin for post mortem examination.

The medical officer, however, discovered internal marks of injury on the head of the deceased which, in his opinion, had been caused by a blow with a blunt instrument resulting in compression of

the brain and he gave the following certificate :

In my opinion the cause of death is due to hanging. I also find that the deceased had sustained an injury with a blunt instrument before death which has caused compression of the brain. Compression of the brain can cause death but hanging is antemortem.

This certificate led to a further investigation in the matter. Rani the wife of the appellant's cousin who lived with him in the same enclosure then made a certain statement to the police which was recorded under S. 164, Criminal P. C., inculpating the appellant and one Yusif also a herdsman, employed under him, on a charge of murder. Before the committing Magistrate Rani resiled considerably from her previous statement and the learned Magistrate finding that there was no sufficient evidence for committing either of the accused on a charge of murder, discharged Yusif and committed the appellant to the Sessions Court for trial on a charge under S. 201, I P. C., which has resulted in his conviction.

The evidence against the appellant consists of (a) the medical opinion as to the cause of death of Sidik, (b) proof that the appellant offered a bribe to the medical officer to give a false certificate as to the cause of Sidik's death, (c) strong motive on the part of the appellant to cause his death as he was suspected of being on terms of criminal intimacy with the appellant's wife, and (d) the extreme improbability of the appellant not being acquainted with the cause of his death. Several interesting points of law and fact have been raised in support of the appellant's case. The first point has been stated somewhat as follows :

Section 201 contemplates the disappearance of evidence of the commission of an offence, or the giving of false information concerning an offence with the intention of screening the offender. This could only refer to an offender other than the person charged under that section. Where, therefore, as in the present case, the evidonce for the Crown is inconsistent with the person charged under S. 201 being the offender himself, his intention in causing the disappearance of the evidence of the crime of giving false information in respect thereof, is to screen himself from penalty and not to screen another. Appellant is, therefore, entitled to an acquittal under S. 201, whether he is liable to be convicted of any other offence or not. The first part of the argument which deals with the meaning to be attached to the words " the offender " appears to us to be well founded.

As pointed out by Rowe, J., in *Sumanta Dhupi* v. *Emperor* (1) S. 201 is an attempt to define the position known in England as that of an accessory after the fact. It is settled law that a principal cannot be convicted as an accessory, and it may well be presumed that in enacting this section the legislature never intended to depart from that rule. If it be so, the offender in S. 201 must needs refer to a person other than the person charged.

In the leading case of *Reg.* v. *Kashinath Dinkar* (2), Lloyd, J., observed as follows :

Section 201 and the following sections commence with precisely the same words thus : " Whoever knowing or having reason to believe that an offence has been committed " : now, as there is no law which obliges a criminal to give information which would convict himself, it is evident that Ss. 202 and 203 could not apply to the person who committed that offence, i. e., " the offence which he knew had been committed, " and S. 201 should, we think, be construed in a similar manner ; and, looking at the only illustration which follows S. 201, it would appear that the law was intended to apply exclusively to " another " and we are, therefore, of opinion that the conviction of the accused, as accessories to an offence known or believed to have been committed by themselves, is illegal.

There are a number of decisions of several High Courts in which it has been consistently held that a person cannot be convicted both as the principal offender and as an accessory after the fact. Reference may be made to *Queen* v. *Ram Soondar Shootar* (3), *Empress of India* v. *Kishna* (4), *Queen-Empress* v. *Lalli* (5), *Queen-Empress* v. *Dungar* (6), *Emperor* v. *Ram Khilawan* (7), *Emperor* v. *Ghanasham Ramchandra* (8), *Crown* v. *Ghulam* (9), *Emperor* v. *Bawa Manghindas* (10), *Han-*

(1) [1916] 20 C. W. N. 166=32 I. C. 132=23 C. L. J. 333.
(2) 8 B. H. C. Cr. 126.
(3) 7 W. R. Cr. 52.
(4) [1879] 2 All. 713.
(5) [1885] 7 All. 749=(1885) A. W. N. 165.
(6) [1886] 8 All. 252=(1886) A. W. N. 71.
(7) [1906] 28 All. 705=(1906) A. W. N. 191.
(8) [1906] 8 Bom. L. R. 538.
(9) [1907] 1 S. L. R. 73.
(10) [1910] 4 S. L. R. 174=8 I. C. 936.

mappa Rudrappa v. *Emperor* (11), *Andal Shah* v. *Emperor* (12) and *Kudaon* v. *Emperor* (13).

In the case of *Emperor* v. *Har Piari* (14), Walsh and Pullan, JJ., have struck a somewhat discordant note and have observed as follows :

> The first point, namely, whether S. 201 applies to the actual culprit in a case of murder is obviously academic. None the less we are unable to agree with the view that the person who has actually committed a crime himself, whether murder or any other crime, is any the less guilty of removing traces thereof if it is proved against him that he has done so, because he was the person who actually committed the offence. If the legislature intended to provide such an exception, they would undoubtedly have said so in express language. This was the point decided in the case of *Queen-Empress* v. *Dungar* (6).

With all respect to the proposition laid down in the above passage, it is too broadly stated. It may be that on the merits *Dungar's case* (6) was wrongly decided, but in that case Mr. Justice Brodhurst, without expressing any other opinion on the facts, set aside the conviction under S. 201 relying inter alia on the dictum of Mr. Justice Lloyd in *Kashinath's* case (2). So far as that dictum goes, it cannot be disputed. If once it is proved that the person charged under S. 201 is himself the principal offender that section ceases to have any application. The language of the section, taken as a whole, is express enough to exclude principal offender. It might equally well be stated that as the language used does not include the principal offender, there was no occasion for the legislature of providing an exception in that behalf. The section does not say that whoever having committed an offence or knowing or having reason to believe, etc., but it says only "whoever knowing or having reason to believe, etc." The same words appear in S. 202, and, as pointed out in *Kashinath's* case (2), it is not possible to hold that S. 202 applies to a person who intentionally omits to give information of the offence committed by him so as to render him liable under that section. Our attention has not been drawn to any other decided case where a contrary view has been taken. We would, therefore, hold that the offender under S. 201 does and can only mean a person other than the person held liable under that section.

The second part of the argument which is advanced as a corollary to the first appears to us to be fallacious. If there is mere suspicion, but not sufficient evidence for the Court to hold that an accused person has committed the principal offence, it cannot be said that he and no one else was the principal offender so as to exclude the operation of S. 201, I. P. C., He may or may not have been the principal offender. It is, therefore, open to the Crown to accept his version as true and to assert that some person or persons other than the accused were criminally liable for the offence and that he himself was only an accessory after the fact.

The learned counsel has relied on *Empress* v. *Behala Bibi* (15) and *Torap Ali* v. *Queen-Empress* (16) in support of his contention. In *Behala's* case (15) their Lordships said :

> We think that S. 201, Penal Code, was not intended to apply to such a case—a case, that is, in which the person, who is the possible or probable offender, makes statements exculpating himself by inculpating another.

In *Torap's* case (16), where two persons who had been tried together were acquitted on a charge of murder but convicted under S. 201, their Lordships set aside the conviction under S. 201 as well and observed :

> The evidence for the prosecution pointed conclusively to one or the other of them being the actual murderer, but it was impossible upon the evidence to say which of them caused the death.

Both these cases have been discussed and adversely commented upon by Jardine and Ranade, JJ., in *Queen-Empress* v. *Limbaya* (17). Their Lordships have very pertinently observed that the principle enunciated by Mr. Justice Lloyd in *Kashinath's* case (2) cannot be so extended as to acquit of the offences to which S. 201 applies, not only the person found by the judgment or the verdict to be the principal offender, but also the person not so found to be a principal offender ; but even acquitted of being such, or about whom the judgment goes on further

(11) A. I. R. 1923 Bom. 262.
(12) A. I. R. 1925 Sind 303=18 S. L. R. 185.
(13) A. I. R. 1925 Nag. 407=21 N. L. R. 36
(14) A. I. R. 1926 All. 737=49 All. 57.
(15) [1881] 6 Cal. 789=8 C. L. R. 207.
(16) [1895] 22 Cal. 638.
(17) Rat. Un. Cr. C. 799 = Cr. Reg. No. 56 of 1895.

than to say that either he or somebody else is the principal offender. Both *Behala* (15) and *Torap's* (16) cases have also been doubted in later decisions of the Calcutta High Court [46 *Cal.* 427.]

It is hardly necessary to refer to the numerous reported decisions where a charge framed against a person as the principal offender, or in the alternative as an accessory after the fact has been held valid and has resulted in a conviction on the alternative charge. We have now the authoritative decision of their Lordships of the Privy Council in *Begu* v. *Emperor* (18), holding that a person who has been charged only with the principal offence may rightly be convicted of the offence under S. 201, I. P. C., cf. *Begu* v. *Emperor* (18).

The head-note in *Limbaya's* case (17) is as follows:

> A conviction of the accessory offence under S. 201, I. P. C., is not illegal merely because it is suspected, but not proved or admitted, that the accused committed or was one of several persons who committed the principal offence.

This proposition is, in our opinion, indisputable. In this connexion it has been further urged that under S. 201 mere knowledge on the part of the accused, that his act is likely to screen the principal offender, is not sufficient, and actual intention must be established. This is undoubtedly so; but whether the requisite intention is proved or not is a question to be decided on the facts of each case. Ordinarily where the Crown has satisfactorily proved that: (a) an offence has been committed for which some person is criminally responsible, and (b) that the accused caused the disappearance of the evidence of the commission of the offence or gave false information concerning it, as the case may be, a presumption arises in favour of the Crown that the accused did act with the requisite intent. That presumption may, however, be rebutted by circumstances or by direct evidence. Where it is so rebutted the accused is entitled to be acquitted except where he is charged with giving false information, in which case he may still be convicted under S. 203, I. P. C.

Lastly, our attention has been drawn to certain obiter dicta in the judgment delivered by me in *Adho* v. *Emperor* (19), and it is urged that there should be evidence to prove an intention to screen a specified offender. I must admit that the passage referred to is not very precise and is open to the construction put upon it by the learned counsel as through a typing error the expression "specified offender", instead of the expression "offender", has got into the passage. I take this early opportunity of removing any misapprehension thereby created. There is nothing in the section to require the Crown to prove that the accused intended to screen a specified offender.

An intention to screen an offender unknown to the Crown is sufficient. The law in England in this respect appears to be the same. This is clear from the provision in S. 2 of 11 and 12 Vic. c. 46, S. 3, re-enacted in 24 & 25 Vic. c. 44, altering the previous law and expressly providing that an accessory after the fact may be indicted and convicted as such whether the principal felon had been convicted or not or was not amenable to justice.

The facts of *Adho's* case (19) were somewhat peculiar. The accused were charged under S. 202, I. P. C., for failure to give information as to the death of a woman Mahnaz and were further charged under S. 201, with having subsequently given false information to the police as to the cause of her death. It was after the police had been apprised of the murder and had exhumed the body that the accused were said to have given false information. Their object in supplying false information to the police was equally open to the suggestion that they wished thereby to save themselves from being run in under S. 202, I. P. C., and not to protect the principal offender. Any presumption, therefore, arising under S. 201 was rebutted by the circumstances of the case. There is nothing in the evidence in the present case to rebut the presumption of such intention provided the other ingredients of the offence are made out. The first point urged on behalf of the appellant, therefore fails.

The second point urged on behalf of the appellant is, that the information contemplated by the section refers to an averment of facts true to the knowledge of the informant and not to a mere expression of opinion or belief, and that all

(18) A. I. R. 1925 P. C. 130 =6 Lah. 226= 52 I. A. 191.
(19) A. I. R. 1925 Sind 257=19 S. L. R. 6.

that the appellant was accused of was that he had expressed his opinion as to the cause of Sidik's death. The answer, however, to this argument is supplied by the very section itself which speaks of information which the informant either knows to be false or believes to be false. It, therefore, includes an averment made by the informant as true to his belief.

The statement made by the accused has been reproduced in extenso in the earlier part of this judgment. It is urged that though the appellant may have known the real cause of the death of Sidik, every word of the first part of the statement may be true; that the second part of the statement which forms the gravamen of the charge was made in answer to a question by the thanedar and was, therefore, not voluntarily made. This was not the case of the appellant in the Court below, and no question was put on his behalf to the thanedar to prove that any part of the statement was in answer to a question. As a matter of fact the appellant had gone of his own accord to the police station to report that Sidik had committed suicide and not that he had been murdered. On the evidence before us, we are not prepared to hold that any part of the statement was in answer to questions by the thanedar or that any part of it was not voluntarily made. On the merits the learned counsel has not been able to convince us that Sidik was not foully done to death. The evidence of the Civil Surgeon who was called as a defence witness is in no way in conflict with that of the medical officer who held the post mortem examination.

The non-existence of external injuries has been sufficiently explained. The long hair of the deceased, and the fact that he was probably wearing a turban at the time when he was struck, were sufficient to prevent the outer skin from being so injured as to attract attention. On the medical evidence it is not possible for us to hold that Sidik committed suicide. He must have been stunned if not rendered unconscious by the blow which caused the compression of his brain and could not, therefore, have put an end to his own life in the manner suggested. It is also certain that the appellant must have known of the real cause of Sidik's death. He was the local magnate. The murder was committed just outside his enclosure which contained only two houses, one occupied by him and his wife, and the other by Rani his cousin's wife. Outside this enclosure was his cattle-pen surrounded by his fields. The offer of a bribe to the doctor raises a presumption of guilty knowledge on his part. The force of this presumption has been considerably augmented by the attempt made on the part of the appellant to deny falsely that he never visited the medical officer or offered him a bribe. There are other circumstances also which show that a deliberate attempt was made in this case to screen the offender whoever he was and to remove all traces of the crime. There was a delay of about five hours in having the first report recorded: this was not done till 12 noon. There was a further delay of four hours in preparing the inquest report and sending the body to the Badin dispensary. There is unaccounted for the fact that it took about seven hours for the body to be delivered at the dispensary though the distance between the scene of offence and the dispensary is only eight miles, a distance which could easily have been covered in two hours. This delay does not appear to us to be accidental, but to have been intentionally devised to afford the appellant an opportunity to approach the doctor in company with a resident of Badin, named Sidik who was well known to the doctor.

We have, therefore, no hesitation in upholding the conviction and sentence and dismissing the appeal.

R.D. *Appeal dismissed.*

A. I. R. 1927 Sind 245

RUPCHAND BILARAM AND LOBO, A. J. Cs.

Shewaram Chandria—Applicants.

v.

S. M. S. Punjab Electric Co. and *another*—Opponents.

Civ. Rev. Appln. No. 154 of 1925, Decided on 27th April 1927, from the order of the Addl. J. C., Sind, D - 16th November 1925, in Suit No. 215 of 1925.

Civil P. C., O. 9, R. 13—Ex-parte decree against one defendant—Suit dismised by consent against another — Court cannot restore suit against that other while setting aside the ex-parte decree.

An ex-parte decree passed against an absent defendant may be set aside only as against him,

but the Court cannot restore the suit as against another defendant who was present and against who n the suit was dismissed by consent of the plaintiffs : *Sind Rev. App. No.* 63 of 1924, *Dist.* [P 246 C 2]

Dipchand Chandumal — for Applicants.

Suganlal Hassanand and *Nadirshah Naoroji*—for Opponents.

Judgment.—This revision application raises the question of jurisdiction of the trying Court to bring a defendant on the record after his name has been struck off with the consent of the plaintiff. It arises under the following circumstances :

Plaintiff-respondent 1 instituted this suit for recovery of Rs. 1,961 as rent due in respect of two tenements in the occupation of two defendants who were sought to be held jointly and severally liable for the same.

On the date fixed for hearing defendant 1, was absent. Defendant 2 pleaded that he had taken one of the tenements on rent from defendant 1, as his sub-tenant and had taken the other tenement from one Kanayalal who was not a party to the suit. He denied his liability to pay rent to the plaintiffs and also disputed the rate and the period for which it was claimed. In his anxiety to snatch an ex-parte decree against defendant 1, the plaintiff agreed to give up defendant 2. on his foregoing the costs of the suit, and the learned Additional Judicial Commissioner passed an order as follows :

Defendant 2 struck off, no order as to costs'

We take this order to mean that the suit as against defendant 2, was dismissed with no order as to costs. After passing this order the learned Judge proceeded with the case ex parte as against defendant 1, and passed an ex-parte decree against him, for Rs. 1,736 only being the rent due in respect of the tenement which was alleged by the defendant 2, to have been sublet to him by the defendant 1. Thereafter defendant 1 applied for setting aside the ex-parte decree passed against him. The learned Additional Judicial Commissioner not only granted this application but ordered

that the decree be set aside against both the defendants

on payment by the defendant 1 of Rs. 50 as costs thrown away and on his giving security for the claim in suit.

It is against that order that defendant 2 has come to us in revision.

With all respect to the learned Additional Judicial Commissioner, we can find nothing in O. 9, R. 13, Civil P. C., to warrant that an ex-parte decree passed against an absent defendant may be set aside not only as against him but that it should have the effect of restoring the suit as against another defendant who was present and against whom the suit was dismissed by consent of the plaintiffs.

On the date fixed for hearing the plaintiffs were evidently not in a position to substantiate their claim against defendant 2, as a joint tenant and were not prepared to accept from him such rent as he admitted to be due to his immediate landlords. Whatever be their motives, they preferred to forgo their claim, if any, as against him in consideration of his giving up costs of the suit. The plaintiffs are, therefore, clearly estopped from reviving their claim, if any, against defendant 2, which they deliberately gave up. Defendant 1 could not, therefore, ask the Court to vacate the order of dismissal passed in favour of defendant 2, and more so as defendant 1, who, if he is entitled to recover anything from defendant 2 as his sub-tenant, had a remedy open to him by a separate suit.

The learned pleader for the plaintiffs has drawn our attention to the decision of this Court in Revision Application No. 63 of 1924 where this Court declined to interfere with a decree of the Small Causes Court passed against a defendant, though in the first instance the suit had been dismissed against him and had been decreed ex parte against his co-defendant. The facts of that case are distinguishable. The suit was for damages in respect of a contract against the principal contracting party or in the alternative against the broker through whose intervention it was made. The broker was absent at the first hearing, and the Court dismissed the suit against the merchant for want of proof and decreed it ex parte against the broker and dismissed the application of the broker to set aside the ex-parte decree. In the application for revision filed by the broker, to which the principal was made a party, he failed to appear in this Court. In his absence this Court directed the

Small Cause Court to inquire further into the matter, and if it found that the broker was prevented by sufficient cause from non-appearance, to consider the position of the defendants. It was in pursuance of these directions that the Small Cause Court Judge re-opened the whole case which resulted in a decree against the principal. At no time before the decree did he attempt to move this Court to have the ex-parte proceedings against him set aside or have the directions given by this Court, which were prejudicial to him set aside. In dismissing his application for revision this Court proceeded mainly on the ground that a revisional Court exercises its authority in application under S. 25, Provincial Small Cause Courts Act, only in order to do justice and not to disturb the decrees and orders of the Small Cause Court on technical grounds and further observed as follows :

It may be possible that the Small Cause Court could not itself have done, yet it is clear that this Court could have, in exercise of its powers under O. 41, R. 33, (the terms of which are very ample) rescinded the whole decree. It is to be observed that the merchant was a party to those revision proceedings although apparently he did not appear and, therefore, he would have been bound by such an order. That this was in the mind of this Court is clear from the final words of the order where it says that in case the Small Cause Court does set aside the decree against the broker, it will have to consider the position of the other defendants.

We think that this decision has, therefore, no bearing on the present case.

We accordingly allow the application and set aside the order of the learned Additional Judicial Commissioner as being without jurisdiction so far as it relates to defendant 2, with costs.

R.K. *Application allowed.*

A. I. R. 1927 Sind 247

D'SOUZA, A. J. C.

Rajmal Trilokchand—Applicant.

v.

F. O. Isherdas Kishenchand—Non-Applicant.

Misc. Judicial Application No. 527 of 1922, Decided on 18th November 1926.

(a) *Contract Act, S. 239—All co-parceners of joint Hindu family are not necessarily partners in a firm in which one of them is a co-parcener.*

The co-parceners of the joint Hindu family are not necessary partners in a firm in which one of the co-parceners is interested merely because they are co-parceners. It is necessary to show that the co-parceners alleged to be partners agreed to combine their property, labour and skill and share the profits or losses in the concern as required by S. 239, Indian Contract Act : 27 *Bom.* 157 ; 2 *S. L. R.* 13 and *A. I. R.* 1925 *Sind* 159 ; *Rel. on.*

[P 247 C 2 & P 248 C 1]

(b) *Contract Act, S. 239—Person signing plaint, etc., in firm's name is not necessarily a partner.*

The fact that a person filed suits in the name of a firm and signed process sheets also in the name of the firm would not necessarily lead to the inference that he was a partner. It is well known that the salaried managers in a firm not infrequently conduct legal proceedings and sign documents in Court in their own name, going to the extent of describing themselves as managing proprietors. But this misdescription would not be sufficient to fasten upon them the character of partners. [P 248 C 2]

(c) *Civil P. C., O. 21, R. 50—Sons of a deceased partner are liable for debts to the extent of father's assets.*

Even where the sons are not partners in a firm of which their deceased father was a partner, they are liable for partnership debts to the extent of their father's assets in their hands.

[P 248 C 2]

Tahilram Maniram—for Applicant.

Fatehchand Asudamal—for Non-applicant.

Order.—This is an application under O. 21, R. 50, Civil P. C., for leave to execute an award decree obtained by the plaintiffs against Isherdas, Beharilal and Gulzarilal, sons of one Utamchand, on the ground that they were partners in the firm of Isherdas Kishenchand.

The application is resisted by the opponents on the ground that they had no interest in the partnership business and that the real partners in the firm of Isherdas Kishenchand were their father Uttamchand and one Kishenchand.

It appears that Uttamchand had three sons : the present opponents. It is undisputed that Uttamchand himself was a partner with Kishenchand in the firm against whom the award decree was obtained. The question here is whether Uttamchand's sons are liable under the decree as being members of the firm.

The allegation of the plaintiffs is that the opponents were co-partners with Uttamchand in an undivided Hindu family. This is denied on behalf of the opponents who contend that Uttamchand had divided the interest from his sons as early as 12 years ago. Be it as it may, the rule of the law is well settled that the co-parceners of the joint Hindu family are not necessarily partners in a firm in which one of the co-parceners is

interested merely because they are co-parceners. It is necessary to show that the co-parceners alleged to be partners agreed to combine their property, labour and skill and share the profits or losses in the concern as required by S. 239, Indian Contract Act. It is unnecessary to quote authorities for this proposition which is well settled. I need only refer to *Vadilal Lallubhai* v. *Khushal Dhalpatram* (1) and two rulings of this Court, *Sanwalmal Pinanamal* v. *Pinanamal Daumal* (2), and *Trustees of the firm of Motharam Doulatram* v. *Pahlajrai Gopaldas* (3).

The plaintiff in this case states that the three sons of Utamchand agreed to form a partnership with their father in the manner suggested. The learned pleader for the plaintiff points to the fact that the firm traded under the name and style of Isherdas Kishenchand as indicating that the sons of Uttamchand must have had interest in the firm. He also points to the fact that Isherdas sued in the name of the firm as managing proprietor thereof in the plaints Ex. 6 and Ex. 12, and signed the process sheets Exs. 7 and 8, as managing proprietor of the firm as convincing proofs that Isherdas not only held himself out to be a managing proprietor, but was actually one of the proprietors of the firm.

The learned pleader further argues that it was not till July 1925, after the death of Uttamchand, that the idea suggested itself to the opponents to disclaim liability on the ground of their not being partners in the firm, and with this aim in view they concocted the partnership deed Ex. 13 and allowed the suit, the plaint of which is Ex. 6, to be dismissed on that ground as would appear from the judgment Ex. 15.

It is, however, not accurate to say that the opponents kept this plea up their sleeve till July 1925, because we find that in the objections, Ex. 10 filed by Isherdas on 17th March 1925 showing cause why execution should not proceed against him. Isherdas expressly says that the decree has been passed, not against him, but against the firm of Isherdas Kishenchand, and that he was not the manager of the firm of Isherdas Kishenchand nor was any summons issued to him, nor had he received any summons nor was he served. The theory advanced by the learned pleader, that the plea was invented after the death of Uttamchand and the partnership deed Ex. 13, fabricated in support of this plea, seems to me to be too elaborate involving the putting together a considerable mass of perjured evidence to be readily accepted. The fact that Isherdas filed suits in the name of the firm of Isherdas Kishenchand and signed process sheets also in the name of the firm would not necessarily lead to the inference that he was a partner. It is well known that the salaried managers in a firm not infrequently conduct legal proceedings and sign documents in Court in their own names going to the extent of describing themselves as managing proprietors. But this misdescription would not be sufficient to fasten upon them the character of the partners.

The burden of proof to show that the opponents in this case were partners in the firm of Isherdas Kishenchand lies upon the plaintiffs. I do not think that that burden has been sufficiently discharged.

But I do not see how the plaintiffs would be adversely affected by my finding that the opponents are not shown to be partners; admittedly Uttamchand was one of the partners and his estate in the hands of his sons, the opponents, would be liable for his debts.

The present application must be dismissed against opponents 1 to 3. No order as to costs.

D.D. *Application dismissed.*

(1) [1903] 27 Bom. 157=4 Bom. L. R. 968.
(2) [1908] 2 S. L. R. 13.
(3) A. I. R 1925 Sind 159.

A. I. R. 1927 Sind 248

RUPCHAND BILARAM AND LOBO, A.J.Cs.

Mt. Mulibai—Plaintiff—Appellant.

v.

Mt. Vassibai—Defendant—Respondent.

F. A. No. 130 of 1925, Decided on 11th March 1927, from the judgment and decree of Aston, A. J. C., D/- 7th May 1925, in Suit No. 641 of 1924 reported in A. I. R. 1926 Sind 98.

(a) *Practice—Pleading—Rule of* secundum allagata et probata *should not be applied regardless of circumstances.*

It is, no doubt, true that a cause should be decided *secundum allegata et probata* but that rule should not be applied in an abstract way regardless of the circumstances. It would not be satisfactory to decide against a party on a view which might have been obviated by a mere amendment of the pleading, and in a case where the parties had been allowed to go to proof: *A. I. R.* 1915 *P. C.* 2 *Foll.*

[P 250 C 1]

(b) *Landlord and tenant—Notice to quit.*

A tenant denying tenancy and setting up adverse title in himself cannot plead want of notice to quit. [P 250 C 2]

(c) *Court-fees Act, S.* 7 (*xi*)—*Plaintiff in possession of part of house—Suit to recover another portion from alleged tenant—Court-fees should be paid on* 12 *times monthly rent.*

Where plaintiff is in possession of part of a house and wants to recover another part from his alleged tenant, Court-fee on 12 times monthly rent would be reasonable. [P 251 C 1]

Tahilram Maniram—for Appellant.

Dipchand Chandumal—for Respondent.

Judgment.—In this case Mulibai sued to eject her husband's sister Vassibai, and one Pitumal, the sub-tenant of Vassibai. She stated in the plaint that about 12 months before suit, she had permitted Vassibai to occupy the first floor of her residential house as a tenant-at-will without payment of any rent, and that subsequently Vassibai had, without the consent and knowledge of Mulibai, put Pitumal in occupation of the second floor and was recovering rent from him. She stated that she had given due notice to Vassibai and Pitumal to vacate the premises and asked for their ejectment as also for rendition by Vassibai of the recoveries made by her from Pitumal and for mesne profits from the date of suit till possession. She valued the suit for the purpose of Court-fees at Rs. 420 in respect of the relief for ejectment on the assumption that the rent per month of the two floors was Rs. 35 and valued the relief for rendition of account at Rs. 40 The case was tried as a short cause. Pitumal failed to appear. On behalf of Vassibai, her pleader orally stated the following defence:

That vassibai had been in adverse possession of the property for more than 12 years and that the suit was not maintainable as framed as Thawerdas, the father-in-law of the plaintiff, and Doongarmal, the husband of Vassibai, were partners in their business and in the purchase of the properties, that the house in suit was partnership property purchased out of partnership funds, that the second floor of the house had been constructed at Vassibai's expense—that she had been in possession of the permises for about 40 years, that even otherwise she was entitled to residence and maintenance being a widowed daughter of Thawerdas and that she could not, therefore, be ejected.

She also claimed compensation for improvements made by her on the construction of the second floor. As a re-joinder to this defence, the learned Pleader for Mulibai admitted that Vassibai had been in possession of a part of the house as permissive occupant for a number of years; but stated that she had given up possession of that part about four years before suit, that a suit had been filed by her in the Lasbella Territory with regard to the business of Thawerdas which exclusively belonged to Thawerdas and had descended to her, and that she had obtained a decree to that effect and that it was subsequent to that decree that Vassibai had again come to live in the property with her permission about a year before the suit and had then refused to go out. It was on these pleadings that the parties went to trial.

The learned Additional Judicial Commissioner came to the conclusion that Vassibai was a permissive occupant of the premises, that she had not acquired any rights by adverse possession and was liable to be ejected. He, also, held that Vassibai had spent money on the construction of the second floor and that, therefore, she was entitled to compensation which he fixed at Rs. 2,500 to be paid to her after deducting the mesne profits which had accrued due to Mulibai and which he fixed at Rs. 50 a month. The learned Judge declined to give any decree against Pitumal.

It is against the latter part of the decree that Mulibai has come to us in appeal. Vassibai has filed cross-objections on that part of the decree which is against her. Several interesting questions of law and fact have been argued by the pleaders for either side. We shall deal with them in the order in which they were advanced.

Mr. Dipchand has urged that Mulibai had failed to establish that Vassibai was a permissive occupant and that, at any rate, she had not established that Vassibai came a second time to live in the house, about a year before the suit, There can be no doubt on the facts and on her own evidence that her possession was permissive. Thawerdas died in

1900 leaving as his son, Menghraj, a child about one year old. Doongermal was only a gumashta partner of Thawerdas, and on his death he continued to manage the business of the minor up to 1905, when he died. The business was then managed by Chellaram, father of Doongermal, up to the year 1912. After Chellaram's death, Vassibai looked after Menghraj and his affairs. It was she who got Menghraj married to Mulibai and in her capacity as manager, came to live with Mulibai in the premises. It is not certain if Chellaram died before Menghraj, but it is clear that after Menghraj's death, Vassibai managed the affairs of Mulibai. The property was purchased in the name of Thawerdas in 1880, before he took up Doongermal as his gumashta partner, and probably before Doongermal was married to Vassibai. Under the circumstances, an inference may fairly be drawn against her that she came to live with Mulibai as a permissive occupant only.

We are not inclined to attach any weight to the plea that Mulibai should be non-suited as she had only set up in her plaint a permissive occupation for one year before suit. That statement was a mere surplusage. It has, in no way, prejudiced the trial. The parties exactly know what their contentions were and have led evidence on all the points urged by both the sides. It is, no doubt, true that a cause should be decided *secundum allegata et probata* but, as pointed out by their Lordships of the Privy Council in *Motabhoy Mulla Essabhoy* v. *Muljı Haridas* (1) that rule, should, however, not be applied in an abstract way regardless of the circumstances and

> that it would not be satisfactory to decide against a party on a view which might have been obviated by a mere amendment of the pleading, and that, in a case where the parties had been allowed to go to proof.

In the present case, the pleader for Mulibai had made it abundantly clear that Vassibai has been in occupation for a very long time, though with a break, and the defect could have been cured by an amendment of the pleading. There is also no question of any adverse possession by her. The only overt act on her part, amounting to a denial of the title of Vassibai, was her act of subletting the second floor to Pitumal. This was admittedly within a few months of the date of the suit,

The next point urged is that Mulibai had not proved that she gave a proper and valid notice of ejectment. But in her pleadings Vassibai had denied the tenancy and set up an adverse claim in herself; she was, therefore, entitled to no notice whatsoever.

Now with regard to the sum of Rs. 2,500 awarded by the learned Additional Judicial Commissioner, as compensation for the building, assuming that any money was spent by Vassibai on the construction of the second floor, it was, according to her own case, partnership money, and was, therefore, debitable to the private account of Thawerdas and his son Menghraj on the partnership books. She failed to produce the partnership books and, therefore, it would not be unfair to presume that the item was so debited. If no debit entry was made, it is equally not open to her to say that she should get credit for partnership money spent by her in the construction of the building. Her right, if any, to any money due to her husband by the partnership, is by a suit for settlement of partnership accounts. She cannot, therefore, claim payment of any money spent by her on the property belonging to one partner as a condition precedent to her going out of the house.

The next question raised is as to the amount of Court-fee which Mulibai should have paid on this suit. Mr. Dipchand has urged that S. 7, Cl. (XI) Courts-fees Act, has no application as it presupposes a lease as defined by S. 105, Transfer of Property Act, that is, a tenancy or an agreement to pay a premium or to pay rent. He has drawn our attention to the words:

> according to the amount of rent of the immoveable property to which the suit refers,

appearing in S. 7, Cl. (XI) Court-fees Act. He has contended that S. 7, (4) (e) and not S. 7, Cl. XI, applies to the circumstances of the present case. On the other hand, it is contended that the relief falls under Sch. 2, Cl. (17) (vi), and that only a Court-fee of Rs. 10 should have been paid. It is immaterial for the purposes of this case to decide which of these clauses apply. The land and the building stand in the name of Mulibai. She is in physical possession of

(1) A. I. R. 1915 P. C. 2=39 Bom. 399=42 I. A. 103 (P. C.).

the land and the building on the ground floor. She wants Vassibai and Pitumal to vacate the portions occupied by them. The value of the relief claimed by her cannot be the value of the land and the buildings thereon. Either the relief is not valuable at all and, therefore, falls within the purview of Cl. (17) (vi), Sch. 2, or if it can be valued, it is not unreasonable to value it at 12 times the monthly rent which the two portions would yield. This is what the plaintiff has done. The suit, therefore, appears to us to have been properly valued.

The last point raised by Mr. Dipchand is with regard to the money-decree. No rent has been awarded to Mulibai for any period prior to the suit. We see no reason why Vassibai should not be made to pay for use and occupation of the portion in her possession and the portion in the possession of Pitumal from the date of this suit to delivery of possession. The learned Additional Judicial Commissioner has fixed it at Rs. 50 per month, i. e. Rs. 25 for the portion in the occupation of Pitumal and a like amount for the portion in the occupation of Vassibai. There is, however, no evidence as to the fair letting value of Vassibai's portion. Mulibai valued the rent of both the portions at Rs. 35 a month. We think that under the circumstances the amount payable by Vassibai should be fixed at Rs. 35 instead of Rs. 50 per month.

We accordingly, maintain the decree passed by the learned Additional Judicial Commissioner for ejectment against both Vassibai and Pitumal and vary the rest of the decree by ordering that Mulibai do recover from Vassibai mesne profits at the rate of Rs. 35 per month from 1st July 1924, up to vacant possession.

We allow costs of this appeal to Mulibai. The order for costs passed by the lower Court will stand.

D.D. *Decree varied.*

A. I. R. 1927 Sind 251

RUPCHAND BILARAM AND LOBO, A. J. Cs.

Valiram and *another*—Appellants.

v.

Karachi Bank and *others* — Respondents.

F. A. No. 88 of 1926, Decided on 27th April 1927.

Civil P. C., O. 34, R. 4 (2) — Preliminary decree passed — Court-fee on appeal should be ad valorem on the amount awarded by the decree and not that claimed in suit — Court-fees Act, Sch. 1, Art. 1.

The proper Court-fee payable by an unsuccessful defendant on a memorandum of appeal challenging the validity of the whole of the preliminary mortgage decree passed against him under O. 34, R. 4, Cl. (2), Civil P. C., is ad valorem on the subject-matter in dispute, namely not merely the amount claimed in the suit but the amount awarded by the decree inclusive of the interest which is to accrue due up to the date fixed for redemption : [34 *Cal.* 150 (*P. C.*), *Ref.*; 17 *Bom.* 41, *Doubted* ; 35 *All.* 94 and 36 *All.* 40, *Diss. from.*] No Court-fees are charged on costs awarded by the Court as they are within the discretion of the Court and do not strictly come within the purview of the subject-matter in dispute between the parties. [P 252 C 2]

T. G. Elphinston—for Appellants.

Kimatrai Bhojraj—Amicus Curiae.

Judgment.—The only question with which we are at present concerned is as to the proper Court-fee payable by an unsuccessful defendant on a memorandum of appeal challenging the validity of the whole of the preliminary mortgage-decree passed against him under O. 34, R. 4, Cl. (2), Civil P. C.

The decree in the present suit provides that the mortgagor should pay the sum of Rs. 14,300 as principal, Rs. 426-14-0 as interest, up to the date of the suit and Rs. 7,939-7-1 as interest from the date of the suit up to the date fixed for redemption.

The appellants are the purchasers from the mortgagors subsequent to the alleged mortgage, and dispute the validity of the mortgage as affecting their rights as purchasers on several grounds which it is not necessary to refer to at present. They have paid Court-fee on Rs. 14,726-14-0 and have refused to pay the Court-fee on the balance of Rs. 7,989-7-0.

On their behalf it is contended that no Court-fee is payable on the amount of interest accruing due after the date of the institution of the suit, and that in any case it is not payable on interest which is allowed by the decree from the date thereof up to the date fixed for redemption.

Now there can be no doubt that such an appeal falls within the purview of Art. 1, Sch. 1, Court-fees Act, which, inter alia, declares that the Court-fee payable on an appeal, not otherwise provided in the Act, shall be an ad valorem fee calculated on the subject-matter in dispute in

such appeal. Our attention has not been drawn to any provision in the Court-fees Act which expressly provides for Court-fee payable on an appeal against a preliminary mortgage decree for sale.

The fee must, therefore, depend on the value of the subject-matter in dispute in the appeal.

What is the subject-matter in dispute in such an appeal is a question which is not free from difficulty and is one on which there is a divergence of opinion. In dealing with this case, we wish, therefore, to confine ourselves strictly to the case of an unsuccessful defendant who is appealing against the preliminary mortgage decree. So far as that case is concerned the subject-matter in dispute in the appeal is, in our opinion, not merely the amount claimed in the suit but the amount awarded by the decree inclusive of the interest which is to accrue due up to the date fixed for redemption.

As pointed out by their Lordships of the Privy Council in *Sundar Koer* v. *Rai Sham Krishen* (1) :

> The scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of the bond, but on the directions in the decree.

These observations equally apply to the scheme and intention of, O. 34, Civil P. C., which has been substituted for the corresponding provisions of the Transfer of Property Act.

Once a preliminary decree is framed, the decree-holder is entitled to the full amount of his decree whether the payment is made to him on that very day immediately after the passing of the decree or at any subsequent date within the time allowed.

Order 34, R. 2, Cl. (c) provides that the decree shall direct as follows :

> That if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff.

Order 34, R. 4, Cl. (1) reads as follows :

> In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in Cls. (a) (b) and (c). of R. 2 and also directing that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, etc.

It is this liability declared by these two clauses which the unsuccessful defendant wishes to be relieved of, and the Court-fee should prima facie be paid on the value of that liability, which means the amount shown in the decree, inclusive of interest up to the date fixed for redemption.

No Court-fees are charged on costs awarded by the Court as they are within the discretion of the Court and do not strictly come within the purview of the subject-matter in dispute between the parties.

Our attention has been invited to the case of *Vithal Hari Athavle* v. *Govind Vasudeo* (2), where it was held that a claim for interest subsequent to the date of suit was on the same basis as a claim for further mesne profits and was not liable to payment of Court-fee.

That case is distinguishable from the present one, as there the appeal was not filed by an unsuccessful defendant, but by an unsuccessful plaintiff, who had been disallowed interest after the date of his suit. We may, however, state that with all respect, we entertain considerable doubt as to the correctness of the dictum of their Lordships, even with regard to an appeal by an unsuccessful plaintiff.

Different rules have been applied by different High Courts in appeals by the unsuccessful paintiffs : vide *Gobardhan Das* v. *Narendra Bahadur Singh* (3), *Percival* v. *Collector of Chittagong* (4), *Prag* v. *Bhagwan Din* (5) which support one view and *Kali Prasad Singh* v. *Mathura Prasad* (6) and the cases collected therein, which support another view. We wish to reserve the further consideration of that question for a future occasion when that question is properly raised before us. The only cases of appeals by unsuccessful defendants to

(1) [1907] 34 Cal. 150=34 I.A. 9=11 C.W.N. 249=5 C.L.J. 106 (P.C.)

(2) [1893] 17 Bom. 41.
(3) [1919] 22 O.C. 1=50 I.C. 798.
(4) [1903] 30 Cal. 516.
(5) A.I.R. 1925 All. 734=47 All. 926.
(6) A.I.R. 1923 Pat. 28.

which our attention has been drawn, are the cases of *Baldeo Singh* v. *Kalka Prasad* (7) and *Raghbir Prasad* v. *Shanker Bux Singh* (8). In the first case a Division Bench of the Allahabad High Court held that where the preliminary mortgage-decree provided for payment of a fixed sum of money due as principal and interest, including interest payable up to the date fixed by the Court for redemption, the whole sum specified in the decree was the subject-matter in dispute and that the Court-fee should be paid thereon. In coming to that finding their Lordships solely confined themselves to the wording of the decree of the lower Court and observed at page 98 [of I.L.R.-Ed.] as follows :

It may be that the decree is not properly drawn up, but we cannot go behind the decree in deciding this matter. It is quite clear that as the decree stood it imposed on the defendants a liability to pay a sum of Rs. 1,321-7-6 on a fixed date and by the appeal they sought to set aside that liability. An argument has been strongly pressed upon us that in the circumstances of the present case the subject-matter of the appeal is the same as the subject-matter of the suit, i. e., the value of the plaintiff's claim. In our opinion, the decree being as it is, there is no force in this contention.

In the second case which arose out of a suit for foreclosure governed by S. 7, Cl. (9), Court-fees Act, a Full Bench of the Allahabad High Court held that the Court-fee was payable not only on the principal amount of the mortgage but on the subsequent interest which had accrued due and which was awarded by the decree in accordance with the provisions of O. 34, Cl. (c), but observed that in all cases in which the amount declared by the Court to be due at the date of the decree can be ascertained by reference to the judgment and the decree, it is that amount at which the appeal should be valued and that future interest should not be taken into account or, in other words, the interest accruing due from the date of the judgment appealed against, and the date fixed for redemption was not liable to payment of Court-fee.

With all respect we are unable to accept this distinction. If the decree fixes the amount of interest due up to the date of redemption, such interest forms as much part of the decree as any other sum awarded as interest; and, as pointed out above, in the event of the decree not being challenged, the whole sum is payable to the mortgagee even if the property be redeemed before the date fixed by the decree. No distinction can, therefore, be drawn between interest which has accrued due before the date of the decree and which is payable by the decree as part of the redemption money. We, therefore, hold that the appellants are liable to pay additional Court-fee on the whole sum of Rs. 7,987-7-0.

In the end we wish to express our thanks to Mr. Kimatrai who has so ably argued the point at issue amicus curiae.

D.D. *Order accordingly.*

(7) [1913] 35 All. 94=18 I.C. 365=11 A.L.J. 20.

(8) [1914] 36 All. 40=21 I.C. 723=11 A.L.J. 1016 (F.B.).

A. I. R. 1927 Sind 253

RUPCHAND BILARAM AND LOBO, A. J. Cs.

Burma Oil Co.—Applicants.

v.

Naraindas Dayalsing—Opponents.

Civil Revision Appln. No. 30 of 1925, Decided on 25th March 1927.

(a) Contract—One party agreeing to abide by the decision of the other—He must accept the decision unless it is arbitrary or unjust—Arbitration.

If a party to a contract agrees that in case of any dispute arising out of the contract or in any matter concerning the contract he will abide by the decision of the other party, he cannot afterwards be allowed to say that such decision is not binding upon him, being a decision by a person in his own cause. The only possible ground on which perhaps he may attack it, is by showing that it was arbitrary or otherwise unjust: 5 *Mad.* 173, *Rel. on.* [P 255 C 1]

(b) Master and Servant—Service terminated before stipulated period—Servant can sue for damages—He must prove that he was willing and able to do his part—Servant ill for the whole period of requisite notice — Failure by master to give notice does not entitle servant to claim damages.

Where the services of a servant are terminated before the stipulated period, it is open to him to sue for damages for breach on the part of the master to keep him in service so as to enable him to earn his wages. But, before he succeeds he must prove that he himself was ready and willing and able to perform his part of the contract. [P 255 C 2]

In the case of service terminable at a month's notice the stipulated period of service extends only to such date on which notice given in that behalf would expire; and when it is certain that the illness or incapacity of the servant will extend to the whole of the period of notice, the failure of the master to give the requisite notice is not sufficient to entitle the servant to claim damages : (*English cases, Dist.*)

[P 255 C 2 ; P 256 C 1]

D. N. O'Sullivan—for Applicants.

Kodumal Lekhraj—for Opponents.

Judgment.—This is an application, under S. 25, Provincial Small Cause Courts Act, against the judgment and decree passed by the learned Small Cause Court Judge, Karachi, in favour of the plaintiff opponent for a sum of Rs. 318-10-0.

The broad facts of the case are hardly in dispute, and are amply proved by the documentary evidence. It appears that the plaintiff was employed as a clerk of the defendants from January 1920. He continued to be in their service right up to the 22nd April 1924. In December 1923, he was working at the Kiamari installation office of the defendants under their assistant manager, Mr. Handerson. His work had been satisfactory till then, and he had been recommended for a promotion of five rupees. On the 5th January 1924, he wrote to Mr. Handerson asking for six days' leave, on the ground that on account of overwork he was suffering from ill-health and some nose trouble. The leave was not granted to him and he continued to work till the 30th January 1924, when he wrote another letter asking for two months' leave stating that he had been advised to leave Karachi for some other place to recoup his health. He got no answer to that letter. From the 6th February he absented himself from office without leave. On the 8th February, he wrote another letter supported by a medical certificate of one Premichand, a medical practitioner, stating that he was very ill and that he should be given one month's leave. The certificate states that the plaintiff was suffering from chronic hypertrophy of turbinated bones of the nose and also from flatulent dyspepsia. He got no reply to his application and stayed away till the 12th March, when he resumed his duties and nothing further was said about the matter. From the 26th March to the 28th March, he again absented himself, and, on the 28th March, he sent a letter to Mr. Handerson, supported by a medical certificate of the Civil Surgeon, stating that as he had been made to work on Sundays and holidays, his health had suffered and that he had been advised by the Civil Surgeon to get an operation made with regard to his nose trouble and that two months' leave should be granted to him. The certificate of the Civil Surgeon stated that the plaintiff was suffering from deflection of the nasal system and tonsillitis for which he required two operations which he was willing to undergo, and that in order that these may be carried out he required about two months' leave which may be granted if he undergoes an operation. There was no suggestion in the certificate that an immediate operation was essential. On the 30th March and the 2nd April he sent reminders for leave to Mr. Handerson. On the 2nd April he sent a letter to Mr. Cooper, the head manager, complaining that on account of his absence his salary amounting to Rs. 66-15-0 for February, and Rs. 24 for March had not been paid to him, and that his promotion had been stopped, and asked for two months' leave being granted to him. On that Mr. Cooper called for the papers in connexion with the plaintiff's case and also called for the report of Capt. Phelan, the medical officer of the company. Capt. Phelan reported that the plaintiff had some nose trouble, but his disability was very slight and not sufficient to render him unfit for work. He further said that he had consulted Major Newton Davis, an expert in these matters, whose opinion was the same. On a consideration of the whole case Mr. Cooper came to the conclusion that the services of the plaintiff should be dispensed with. He accordingly informed the plaintiff that his services were not required and that he would be paid his salary at the rate of seventy rupees per month up to the 30th April 1924, inclusive of the days on which he had absented himself and that he would be paid the amount of his own deposit in the Provident Fund with interest thereon, but not the contribution made by the company to the Provident Fund.

The plaintiff then instituted this suit for recovery of the following items:

1. Rs. 223-10-0 on account of the contribution of the company to the Provident Fund.
2. Rs. 150 as compensation for wrongful dismissal equal to two months' pay at Rs. 75 per month.
3. Rs. 20 on account of promotion at five rupees per month sanctioned by the head office from 1st January 1924.

The learned Judge below has allowed the first item, half of the second item, and the whole of the third item.

Now, with regard to the first item of Rs. 223-10-0 the question depends on the construction of the Provident Fund Rules of the company which were consented to in writing by the plaintiff. According to R. 11 of these rules an employee dismissed for misconduct is entitled to the return of his own contributions and interest towards the Provident Fund called the A Fund, but not to the contribution of the company called the B Fund. Rule 1 gives the managing agent absolute discretion in the matter of the interpretation and the application of the rules and provides that the decision of the managing agent shall be final. So far, therefore, as the claim of the plaintiff to the B Fund was concerned the decision of Mr. Cooper that he had been dismissed for misconduct was prima facie final, and was a bar to his suit for recovery of that amount. It is well settled that if a party to a contract agrees that in case of any dispute arising out of the contract or in any matter concerning the contract he will abide by the decision of the other party, he cannot afterwards be allowed to say that such decision is not binding upon him being a decision by a person in his own cause. The only possible ground on which perhaps he may attack it, is by showing that it was arbitrary or otherwise unjust. See the case of the *Secretary of State* v. *Augustus John Arathoon* (1), and the observation referred to therein at p. 176 [of 5 *Mad.*], of Martin, B., in the case of *Grafton* v. *Eastern Counties Ry. Co.* (2), that parties ought to be careful how they enter into contracts containing stipulations giving such powers.

On the documentary evidence we are not prepared to hold that Mr. Cooper's decision in the matter was in any way arbitrary or otherwise unjust. He was perfectly within his rights to come to the conclusion that the plaintiff had absented himself without just cause and that he could, if he so wished, have easily postponed the operation until such time as the rush of work at Kiamari deposed to by Mr. Handerson had subsided, or at any rate until he had interviewed Mr. Cooper and obtained his order on the application for leave.

This aspect of the case has not been dealt with by the learned Judge, and we think that under the circumstances he had no jurisdiction to go behind Mr. Cooper's decision *re* the item of Rs. 223-10-0 or to award the same to the plaintiff.

With regard to the next item of Rs. 150 the learned Judge came to the conclusion that the plaintiff was a monthly servant whose service could be terminated with one month's notice. He further held that, as the plaintiff had absented himself on account of ill health he had not forfeited his right to a month's notice and accordingly awarded to him a sum of Rs. 75.

Now, a contract of service means nothing more than an agreement by the servant on the one hand that he will render personal services for a fixed or terminable period in consideration of the payment to him of his wages or the price for such service, and, on the other hand, an agreement by the master that he will employ the servant for the stipulated period so as to enable the servant to perform his service and earn his wages. Where, therefore, the services of a servant are terminated before the stipulated period it is open to him to sue for damages for breach on the part of the master to keep him on in service so as to enable him to earn his wages. But, before he succeeds he must prove that he himself was ready and willing and able to perform his part of the contract. When the plaintiff has failed to attend to his work for a number of days on account of ill health, it does not necessarily follow that he will not be able to perform his part of the contract during the rest of the stipulated period, and it is a question of fact to be decided in the circumstances of each case whether his absence on account of ill health was sufficient for the master to presume that the servant will not be able to perform his contract for the rest of the stipulated period. This must necessarily depend upon the length of the unexpired term of service and the nature of the illness.

Now, in the case of service terminable at a month's notice the stipulated period of service extends only to such date on which notice given in that behalf would expire; and therefore, when it is certain that the illness or incapacity of the servant will extend to the whole of the period of notice, it would appear that

(1) [1882] 5 Mad. 173.
(2) [1853] 8 Ex. 699=155 E. R. 1533=91 R. R. 712.

the failure of the master to give the requisite notice is not sufficient to entitle the servant to claim damages.

The learned pleader for the plaintiff has drawn our attention to several decided cases but none of them seems to have any bearing upon the present case. In the case of *Cuckson* v. *Stones* (3) there was no question of the services having been terminated at all, but what the master had done was that he had withheld payment of wages for the period of the servant's illness. The only question before the Court was whether the servant had through his own default absented himself from work so as to disentitle him to his wages for the period during which he was absent from work.

In *K.* v. *Raschen* (4) again the specific point, whether a servant absenting himself from work owing to ill health was entitled to a month's notice or not, was never raised. The point dealt with was stated by Cleasby, B., as follows :

> The question is whether or not illness is such an excuse as to disentitle him to recover wages during his absence from the employment in consequence of it.

In *Loates* v. *Maple* (5), the jockey was appointed for three seasons 1900, 1901 and 1902. He was not disabled from doing work throughout the whole season of 1902, but only for a period from 13th March to 14th May ; and it was held that this period did not involve such a failure of consideration and such destruction of the substance of the agreement so as to bring the agreement to an end.

In *Storey* v. *Fulham Steel Works Co.* (6) the contract for service was for a period of five years commencing from 1903. In 1905 the servant was absent from work for three short intervals, and in January 1906, he was medically advised to take complete rest for a considerable time. In May, 1906, his services were terminated. There was nothing to show at that time that the plaintiff would not be able to resume his work for the unexpired portion of the agreement. The Court held that the plaintiff's illness was not such as to put an end, in a business sense, to the engagement and to frustrate the object of the engagement. We take this to mean that the servant was not incapacitated from rendering service through the whole of the unexpired period of service which was to end two years later, i. e., 1908. In the present case, however, there is clear evidence on the record to show that the plaintiff had an operation performed notwithstanding the refusal of leave by the defendants and that thereby he had been disabled from performing his duties for a period of two months from that date or for a period of about 40 days from the date on which Mr. Cooper terminated his service. We are not aware of any authority where a master has been compelled to pay damages for want of notice when he is certain that during the period of such notice, if given, the servant would not be able to perform his duties. It is not suggested that in this case the servent was,entitled to any leave earned by him under the terms of his engagement and that he should get his pay for the period of such leave. We think, therefore, that under the circumstances of this case, the learned Judge below was in error in awarding a month's salary to the plaintiff.

With regard to the third item of twenty rupees again, there is nothing to show that though the head office intended to give promotion of five rupees to the plaintiff, intimation was given to him that he had been granted the promotion. If the plaintiff had not absented himself without leave he would very probably have got it. It had been sanctioned at the suggestion of Mr. Handerson, and it was within his power or at any rate within the power of Mr. Cooper to withhold it, when it was found that the plaintiff had taken a defying attitude.

In the view taken by us of this case, it had not been necessary for us to examine critically the finding of the learned Judge that there was no misconduct in fact on the part of the plaintiff. We do not wish to say anything on that part of the case except to observe that the plaintiff had not been unfairly dealt with and that this suit was ill advised.

We allow this application and dismiss the suit with costs throughout.

R.K. *Application allowed.*

(3) [1859] 28 L. J. Q. B. 25=7 W. R. 134=1 El. & Bl. 248=5 Jur. (N. S.) 937.
(4) [1878] 38 L. T. 38.
(5) [1903] 88 L. T. 288.
(6) [1907] 24 T. L. R. 89.

A. I. R. 1927 Sind 257 (1)

PERCIVAL, J. C., AND ASTON, A. J. C.

Amir Bux—Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 116 of 1927, Decided on 19th July 1927, made by Dist. Magistrate, Upper Sind Frontier, D/- 13th May 1927.

Penal Code, S. 379—Cattle theft in Sind—Deterrent punishment is necessary—Trying such a case summarily is not proper—Criminal P. C., S. 260 (d).

In Sind, where cattle-thieving is so prevalent and the offences of cattle theft so often go unpunished, it is necessary that deterrent sentences should be imposed, and a Court which decides to try such a case summarily is not exercising its discretion in a proper manner.

[P 257 C 2]

Thakursingh Lalsingh—for Accused.

C. M. Lobo—for the Crown.

Judgment.—This is a reference by the learned District Magistrate, Upper Sind Frontier, forwarding the record and proceedings in the case of Amir Bux alias Mahomed Bux together with an extract from a summary register with a recommendation for enhancement of the sentence or for setting aside the conviction and ordering re-trial of the accused for the offence of stealing a bullock.

It appears that the complainant's bullock was stolen on the night of the 22nd February 1927. The complainant made enquiries and ascertained that his bullock had been secured by the police at Jacobabad Thana. He proceeded to Jacobabad and recognized his bullock. The learned First Class Magistrate, Jacobabad, by whom the accused was tried, tried the offence summarily. The accused pleaded guilty to an offence under S. 411, I. P. C. He was convicted on his plea and sentenced to undergo rigorous imprisonment for three months.

It is conceded by Mr. Lobo, the Acting Public Prosecutor, that the learned Magistrate's order was technically correct. So far as the Criminal Procedure Code is concerned the learned Magistrate had jurisdiction to try the case summarily and the maximum sentence which could be inflicted was restricted by S. 262, Cl. (2) to a sentence of three months' rigorous imprisonment. At the same time, the learned District Magistrate draws attention to the fact that cattle theft is the curse of Sind and that it is undesirable in the public interest that cases of cattle thefts should be tried summarily in this province.

I am of opinion that the view of the learned District Magistrate is correct. In a place where cattle-thieving is so prevalent and where offences of cattle-theft so often go unpunished, it is necessary that deterrent sentences should be imposed. And it seems to me that a Court which decides to try a case of cattle-theft summarily is not exercising its discretion in a proper manner. We have no power, in my opinion, to enhance the sentence in view of the provisions of S. 262, Cl. (2). But in the interests of justice, I think it is necessary to set aside the conviction and order the re-trial of the accused.

We accordingly set aside the conviction and sentence of the learned Magistrate, and remit the case to the learned District Magistrate, Upper Sind Frontier, who will order the case to be tried by such Magistrate as he may select. The punishment which the accused has undergone and the period spent as an under-trial prisoner will be taken into consideration by the Court which tries him in the event of his being convicted. The accused should be released on the same bail, namely, of Rs. 500, with one surety in the like amount.

S.J. *Re-trial ordered.*

A. I. R. 1927 Sind 257 (2)

DESOUZA, A. J. C.

Mahomed Yusif—Plaintiff.

v.

Nur Jan and others—Defendants.

Original Civil Suit No. 431 of 1925, Decided on 25th April 1927.

Decree—Setting aside of—A decree cannot be set aside merely on the ground that it was obtained by perjured evidence.

Where a decree has been obtained by means of evidence challenged by the other side and duly weighed by the Court before acceptance the decree cannot be set aside merely on the ground that such evidence can be proved to be false.

[P 261 C 1]

The jurisdiction to impugn a previous decree for fraud is to be exercised with care and reserve and the fraud must be established by proof before the propriety of the prior decree can be considered by the Court. There is an important distinction between ex-parte decrees and contested decrees and a very heavy burden will be upon the party endeavouring to set

aside a contested decree of a Court : 41 *Cal.* 990 ; 38 *Mad.* 203 ; 41 *Mad.* 743 ; 8 *S. L. R.* 81 and 10 *Ch. D.* 327, *Foll.* [P 261 C 1]

Kimatrai Bhojraj—for Plaintiff.

Hakumatrai M. Eidnani—for Defendants.

Judgment.—This is a suit by the plaintiff for a declaration that the decree obtained by one Mahomed Umer Khan deceased husband of defendant 1 and the father of defendants 2, 3 and 4 in Suit No. 347 of 1919, in the Court of the Sub-Judge of Hyderabad, Sind, on 11th April 1921, is void and unenforceable at law and for an injunction restraining the defendants from executing the said decree and for costs of the suit.

It appears that the plaintiff had, on 26th August 1926, executed a promissory note in favour of one Mahomed Umer Khan who brought an action upon the pro-note in Suit No. 347 of 1919 in the Court of the Sub-Judge of Hyderabad and obtained a decree thereupon on 11th April 1921. This decree was confirmed on appeal by the District Court of Hyderabad on 16th October 1924, and has been transferred to this Court for execution, being foreign Court Decree No. 29 of 1925.

The present plaintiff had resisted the suit in the trial Court. In para. 3 of his written statement he had denied that Mahomed Umer Khan had advanced to him any consideration or that he had executed a pro-note thereof for the benefit of Mahomed Umer Khan. In para. 4 of his written statement the present plaintiff had stated that his wife's brother Mahomed Sulleman, in May 1916, had sent an amount of Rs. 5,000 to him from the share of his wife, sister of the said Mahomed Sulleman, out of her father's estate, that a few months later the said Mahomed Sulleman on hearing that the present plaintiff had used up Rs. 4,500 out of this money of his wife and presumably with the idea of protecting his sister's interests proposed to him that he should pass a pro-note for the above-mentioned amount, and on his doing so the said Mahomed Sulleman would give a further like sum from the share of the present plaintiff's wife out of her father's estate which he, Mahomed Sulleman, actually did in October 1916, and that as an incentive to the present plaintiff to save and pay back his wife money it was arranged that the aforesaid pro-note should be executed in the name of Mahomed Umer Khan who should collect the remittances made by the present plaintiff to be handed over for the benefit of his wife and that the pro-note so executed should not create any legal obligation on the present plaintiff unless the beneficial owner so wished it.

There was a further contention in the written statement of the present plaintiff that Mahomed Umer Khan has no right, title or interest over the amount of the pro-note and that, if at all, the suit was to proceed, representatives of Sirdar Mahomed Yacoob, from whose estate the amount of the consideration proceeded should be brought on the record as they were necessary parties to the suit.

On these pleadings issues were framed whether the present plaintiff executed a pro-note in favour of Mahomed Umer Khan and agreed to pay the amount at Hyderabad and whether the allegations of fact in the written statement as above were true. Evidence was recorded on all the issues and findings were given against the present plaintiff on the two issues which I have stated. These findings were upheld in appeal by the District Court of Hyderabad.

The present suit has been instituted by the plaintiff to set aside the above decree on the grounds stated in paras. 8 and 9 of the plaint, viz. that the deceased Mahomed Umer Khan wilfully concealed certain facts from the Court which passed the aforesaid decree, falsely asserted that the consideration of the pro-note proceeded from him and that he alone was entitled to recover the amount thereof and thus fraudulently obtained the above decree against the plaintiff. Secondly, that under the above circumstances the said decree is null and void and liable to be set aside, the deceased Umer Khan having obtained the same by false allegations of fact constituting the very cause of action deliberately put forward for the purpose of deceiving the Court which passed the decree and defrauding the plaintiff and by misleading the Court.

A further allegation was made in the plaint that it had come to the knowledge of the plaintiff that the deceased Mahomed Umer Khan actually executed a writing on 19th October 1920, long before he obtained the above decree against the plaintiff wherein he admitted that he

had no interest in the subject-matter of Suit No. 347 of 1919 filed against the plaintiff on the pro-note.

The defendant in his written statement contended inter alia that the allegations and contentions contained in the plaint are entirely false and having been raised by the plaintiff and decided against him in Suit No. 347 of 1919 and in the appeal therefrom the same are barred by res judicata. And that, even assuming that the alleged writing, said to have been discovered by the plaintiff, is a genuine writing it does not entitle the plaintiff to file the present suit or to reopen matters already finally decided. In his further written statement the defendant contended that the plaint was insufficiently stamped and that the suit to set aside the decree in Suit No. 347 of 1919 on the ground that the same was obtained by the alleged perjured evidence is not maintainable in law.

On these pleadings issues were framed and of these issues 2, 3 and 5 were set down for preliminary hearing to day and issues 6 and 7 were also argued as preliminary issues being connected with the previous issues.

The contention of Mr. Kimatrai on behalf of the plaintiff is that the present suit to set aside the decree in Suit No. 347 of 1919 will lie on the ground of fraud and collusion under S. 44, Evidence Act, on the following grounds :

1. The suit was in its very foundation false and the decree has been obtained directly by false allegations of fact constituting the very cause of action deliberately put forward for the purpose of deceiving the Court and defrauding the present plaintiff.

2. There was a deliberate contrivance engineered by Mahomed Umer Khan which prevented the present plaintiff from putting forward his case inasmuch as there was collusion between Mahomed Umer Khan and the relations of the wife of the present plaintiff more especially her uncle Mahamed Dawood.

3. It was the bounden duty of Mahomed Umer Khan to disclose to the Court the fact that the pro-note was a nominal one and that his claim, if any, had been satisfied before the decree was passed as would appear from the letter, dated 19th October 1920, written by Mahomed Umer Khan to Mahomed Dawood acknowledging the receipt of the consideration of the pronote in suit. It was argued that the wilful concealment of this fact from the Court was tantamount to a fraud practised on the Court.

The principle defining the jurisdiction of a Court to impugn a previous decree for fraud has been examined with care by Jenkins, C. J., in the case of *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (1). After a review of the authorities the conclusions of the learned Chief Justice are stated as follows :

> Decrees, whether made ex-parte or by consent or after contest apparent or real are equally liable to be attacked for fraud, the character of the fraud varying with the circumstances of each case. One who seeks to impugn a decree passed after contest takes on himself a very heavy burden and it is not satisfied by merely inducing the Court to come to the conclusion that the appreciation of the evidence and the ultimate decision in the former suit was erroneous . . . . The fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining a decree by that contrivance.

In the case of *Logadapatti Chinnayya* v. *K. Ramanna* (2), which is cited with approval in the Full Bench decision of *Kadirvelu Nainar* v. *Kuppuswami Naicker* (3), the test to be applied to determine the nature of the fraud sufficient to vacate a previous judgment is thus defined :

> The test to be applied is, is the fraud complained of not something that was included in what has been already adjudged by the Court but extraneous to it ? If, for instance, a party be prevented by his opponent from conducting his case properly by tricks or misrepresentation, that would amount to fraud. There may also be fraud upon the Court if, in a proceeding in which a party is entitled to get an order without notice to the other side, he procures it by suppressing facts which the law makes it his duty to disclose to the Court. But where two parties fight at arms length, it is the duty of each to question the allegations made by the other and to adduce all available evidence regarding the truth or falsehood of it. Neither of them can neglect this duty and afterwards claim to show that the allegation of his opponent was false.

The Full Bench referred with approval to the dictum of Jenkins, C. J., in *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (1), that "the jurisdiction to set aside a decree for fraud is to be exercised with care and reserve, for it would be

(1) [1914] 41 Cal. 990=18 C. W. N. 681=23 I. C. 337=19 C. L. J. 457
(2) [1913] 38 Mad. 203=25 M. L. J. 228=19 I. C. 579=(1913) M. W. N. 387.
(3) [1918] 41 Mad. 743=34 M. L. J. 590=8 M. L. W. 103=45 I. C. 774=(1918) M. W. N. 514 (F. B.)

highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation and the Full Bench ruled that in India the considerations mentioned by James, L.J., in *Flower* v. *Lloyd* (4) apply with very great force as it is dangerous to allow a fresh suit to be brought by an unsuccessful litigant to set aside the decree passed against him on the ground that his opponent had imposed on the Court by letting in perjured evidence. . . . . The passion for litigation wherever it exists in this country is likely to turn into almost incurable mania and the doctrine of res judicata would become practically useless if the contrary view prevailed in Indian Courts. Nowhere more than in India it is necessary to enforce the salutary rule *interest reipublicæ uts it finis litum*.

What, in effect, does the alleged fraud said to have been practised upon the Court by the deceased Mahomed Umer Khan amount to ? Simply this : that he did not disclose to the Court the true nature of the pro-note upon which he brought his action that it was really executed in favour of Mahomed Umar Khan benami for the plaintiff's wife and that he colluded with Mahomed Dawood to give false evidence in support of his claim. Every one of these allegations formed a subject of an issue by the trial Court, evidence was led on these issues including the evidence of Mahomed Dawood and the plaintiff's wife examined on commission. The trial Court found adversely to the present plaintiff and if now the plaintiff were allowed to re-agitate the matter on no other grounds than those I have stated it would practically amount to an attempt to vacate a decree in a previous suit on the ground that it was obtained by perjured evidence.

Mr. Kimatrai further argued that there was even a grave item of fraud on the part of Mahomed Umer Khan in that he concealed from the Court that he had obtained payment of the consideration of the pro-note some time after the institution of the suit but long before the decree was passed. In support of this contention Mr. Kimatrai relied on the letter, dated the 19th October 1920, which he said came to the knowledge of the plaintiff shortly before he filed his plaint. Assuming this letter to be a genuine letter all that it shows is that Mahomed Umer Khan had received the amount of the pro-note from Mahomed Dawood. This circumstance in no way affected the liability of the present plaintiff upon the pro-note. The letter distinctly contemplates the suit on the pro-note being proceeded with and the expenses of the litigation as from that date being borne by Mahomed Dawood. This is purely a matter between Mahomed Umer Khan, the then plaintiff, and Mahomed Dawood. The present plaintiff, the defendant in that suit, had nothing to do with the transaction. It was open to Mahomed Dawood under O. 22, R. 10, Civil P. C., to ask the Court to allow him to continue the suit in his own name if he so wished. But apart from that the position of the present plaintiff was in no way affected.

But Mr. Kimatrai argued that the fact stated in the letter would support his case that the consideration of the pro-note was not advanced to him personally but that it represented the share of his wife in the estate of her deceased father Mahomed Sirdar Mahomed Yacoob. If that is so the plaintiff's remedy is clear. He has the remedy open to him of applying to the trial Court to rectify its judgment by way of review showing that evidence has come into his possession which he failed to adduce at the previous hearing and which he could not with all proper diligence have then adduced.

But he certainly cannot institute a fresh suit to get the judgment vacated on that ground.

Mr. Kimatrai has placed very strong reliance upon certain observations of Crouch, A. J. C., in the case of *Khushiram Pohumal* v. *Ganshamdas* (5). The learned Judge there observed :

> The circumstances must be such that the Court was not merely mistaken but misled ; the circumstances must be such that it can fairly be said that the decree was actually obtained by fraud. No hard and fast limitations can be set down : but it is certain that a decree can be set aside which has been obtained in a suit which is, in its very foundations false, which has been obtained directly by false allegations of fact constituting the very cause of action, deliberately put forward for the purpose of deceiving the Court and defrauding the defendant.

This observation of the learned Judge

(4) [1879] 10 Ch. D. 327=27 W. R. 496=39 L. T. 613.

(5) [1914] 8 S. L. R. 81=25 I. C. 946.

is, however, immediately followed by the following reservation:

> On the other hand, it is also certain that, where a decree has been obtained by means of evidence challenged by the other side and duly weighed by the Court before acceptance, the decree cannot be set aside merely on the ground that such evidence can be proved to be false.

To the same effect is the observation of Hayward, A. J. C. who relied upon the ruling of Jenkins, C. J., in *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (1) remarking as follows :

> The jurisdiction to impugn a previous decree for fraud is to be exercised with care and reserve and the fraud must be established by proof before the propriety of the prior decree can be considered by the Court. There is an important distinction between ex-parte decrees and contested decrees and a very heavy burden would lie upon the party endeavouring to set aside a contested decree of a Court.

On a careful consideration of all these authorities I am of opinion, that there is no ground for holding that the decree in Suit No. 347 of 1919 on the file of the Court of Firt Class Sub-Judge, Hyderabad was obtained by fraud in the sense indicated by the authorities. The plaintiff's suit must, therefore, be dismissed with costs.

N.K. *Suit dismissed.*

A. I. R. 1927 Sind 261

PERCIVAL, J. C., AND TYABJI, A. J. C

Charag Din—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln No. 289 of 1925, Decided on 25th January 1927, from order of 1st Cl. Spl. Magistrate, Karachi, D/- 13th January 1926.

Penal Code, S. 448—Intention to cause annoyance not expressly found—Procedure under S. 256, Criminal P. C., not followed—Proceedings were quashed.

Where in a case under S. 448 the Magistrate did not expressly find that the accused intended to cause annoyance and further omitted to follow the requirements of S. 256, Criminal P. C., in that the accused was not called upon to enter upon his defence and produce his evidence, the proceedings were quashed: 5 *S.L.R.* 29. *Rel. on.* [P 261 C 2]

Khemchand Sukhramdas—for Appellant.

Partabrai D. Punwani—for the Crown.

Judgment.—This is an application for the revision of an order made by the Special Magistrate of the First Class of Karachi convicting and sentencing the applicant to a fine of Rs. 10 under S. 448, I. P. C.

The facts as they appear from the record are that the applicant was a tenant of premises which were badly damaged by the cyclonic rains in August or September last year, and that the owner of the premises, the applicant's lessor was ordered by the authorities to restore the premises to a habitable condition. It is not clear whether the lessee left the premises while they were being repaired (as would appear from the record to have been the impression of the learned Magistrate), or whether (as is the case of the applicant), he continued to be in occupation of them while the repairs were going on. In any case, the learned Magistrate seems to have overlooked several matters of vital importance. The rights of the parties are governed by S. 108, T. P Act, under which it was in the option of the lessee either to determine the lease owing to the premises becoming unfit for occupation or not to do so. The learned Magistrate has paid no attention to the question whether the lessee exercised the option to determine the lease. He seems to have assumed that on the premises being damaged by the rain and becoming unfit for occupation or repairs becoming necessary, the lessor could put another tenant in the premises even if the lessee wished to continue in them.

Then again, there is no express finding that the applicant intended to cause annoyance as is required for a conviction under S. 448, I. P. C.: *cf Tharu* v. *Emperor* (1).

Finally we have the circumstances that the Magistrate seems to have omitted to follow the requirements of S. 256, Criminal P. C., in that the accused was not called upon to enter upon his defence and produce his evidence.

For these reasons we quash the proceedings. The fine, if paid, will be refunded.

We do not consider it necessary that the accused should be re-tried for the offence.

G.B. *Proceedings quashed.*

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(1) [1911] 5 S. L. R. 29=9 I. C. 895=12 Cr. L. J. 148.

A. I. R. 1927 Sind 262

RUPCHAND BILARAM AND LOBO, A.J.Cs.

Naraindas-Aildas—Applicant.

v.

Mt. Jhalibai—Opposite Party.

Civil Rev. Appln. No. 23 of 1926, Decided on 9th March 1927, from an order of Dist. Judge, Sukkur, D/- 22nd March 1926, in Misc. Civil Appeal No. 56 of 1919.

(a) *Guardian and Wards Act, Ss. 45 and 43 —Surety bond by guardian and surety—Proper course is to assign and assignee should sue—Civil P. C., Ss. 141 and 144.*

The proper remedy for the Court to proceed against the sureties on the surety bond executed by the guardian and the sureties is to assign the bond to enable the assignee to sue on the bond and not by issuing execution on the strength of S. 141, Civil P. C.: *A. I. R. 1925 Sind 35, Foll.* [P 262 C 2]

(b) *Guardians and Wards Act, S. 43, Cl. 4—Cl. 4 applies to disobedience under Cls. 1 and 2.*

Clause 4 limits the exercise of powers mentioned therein to a disobedience of orders passed under Cls. 1 and 2. [P 262 C 2]

Tolasing K. Advani—for Applicant.

Dipchand Chandumal—for Opposite Party.

Judgment.—The facts giving rise to the present application are that the applicant Naraindas and the opponent Mt. Jhalibai were both appointed as guardians of the person and property of the minor Tulsidas, and that at that time they furnished two sureties, Khushiram and Girdaridas, in the sum of Rs. 70,000 that they will duly account for the management of the estate of the minor. Later on the applicant advanced certain money belonging to the minor to the two sureties on the mortgage of their immovable property. On an application made to the Court, the Court appointed the nazir as the third guardian to see to the recovery of this money and the proper management of the estate. The nazir then called upon the sureties to pay the amount of the mortgage, and, on their failing to to do so, the Court was moved to make the applicant account for all the moneys that had come to his possession and at the same time the Court was moved to recover the amount from the sureties on the strength of the surety bond by issuing execution against them, The learned District Judge acceded to both these requests. The matter then came up to this Court so far as it relates to the setting aside of the order issuing execution against the sureties on their surety bond. In setting aside that order it was pointed out by this Court in *Khushiram Tejbhandas* v. *Jhalibai* (1) that the proper remedy for the lower Court to proceed against the sureties on the surety bond was to assign the bond to enable the assignee to sue on the bond and not by issuing execution on the strength of S. 141, Civil P. C., which had no application. In dealing with that point this Court observed as follows:

> Even as against the guardian himself, who is the principal party under the bond, it would appear that the remedy for enforcing it by attachment and sale of the property of the guardian is not by proceeding under the Guardians and Wards Act, but by a suit filed by the assignee though S. 45, Guardians and Wards Act, empowers the Court to detain the guardian in prison and impose a daily fine on him until he complies with the orders of the Court.

After the proceedings were sent back to the lower Court, notice appears to have been issued to the applicant Naraindas to agree within eight days to pay up the amount due on the mortgage within a period of three months, and that in the absence of his agreeing to do so, to show cause why his property should not be attached or why he should not be imprisoned. On the date fixed for hearing of the notice the pleader for the applicant asked for an adjournment which was refused and the Court passed an order attaching his property It is against that order that this revision application has been filed.

Now it appears to us that evidently the learned Judge's attention was not drawn to the observations made by this Court and referred to above. As pointed out in that order he had no jurisdiction to order an attachment to issue for recovery of the amount which the applicant was required to pay. Mr. Dipchand, who has appeared for the opponent, has contended that the observations made by this Court were obiter dicta and has argued that the order of the learned Judge could be maintained as being an order passed under S. 43, Cl. (4), Guardians and Wards Act, which empowers the Court to punish a guardian for disobedience of its orders in the same manner as for disobedience of an injunction granted under Ss. 492 and 493, Civil P. C. R 4, however, limits the exercise of such powers to a disobedience of orders passed under Rr. 1 and 2. There was no question at all of any disobedience in the present

(1) A. I. R. 1926 Sind 35=19 S. L. R. 390.

case of orders passed under Rr. 1 and 2, for regulating the conduct of the proceedings of a guardian or of more than one guardian appointed by the Court. The money had already been lent by the guardian on mortgage of property and the only question was of rendering him liable for payment of this money. We have no hesitation in holding that the learned District Judge was in error in issuing an attachment of the property of the guardian for failure to agree to pay within three months the amount he was required to make good. We accordingly allow this application and set aside the order of the lower Court, but make no order as to costs.

D.D. *Appeal allowed.*

A. I. R. 1927 Sind 263

RUPCHAND BILARAM, A. J. C.

Osborne Garrett & Co. Ltd. — Plaintiffs.

v.

Raisi Jothabhoy and *another*—Defendants.

Original Civil Suit No. 537 of 1925, Decided on 19th May 1926.

Civil P. C., O. 29, R. 1—Plaint must be verified by secretary, director or principal officer—Signature of attorney is not enough—Civil P. C., O. 6, R. 14.

The provisions of S. 151, old Civil P. C., corresponding to O. 6, R. 14, Civil P. C., which permit an attorney to sign and verify a plaint on behalf of an absent plaintiff do not apply to a suit instituted on behalf of a limited company wherein the plaint must be signed and verified either by the Secretary or by a Director or other principal officer of the Company. Where it was not so signed, time was granted for getting it signed in accordance with law : 21 *Cal.* 60 (*P. C.*), *Foll.* [P 263 C 2]

D. N O'Sullivan—for Plaintiffs.

Manghanmal Bhojraj and *W. Lobo*—for Defendants.

Order.—The plaint in this case has been signed by Mr. Jessaram Banarsidas, duly constituted attorney of the plaintiffs, who are described as Messrs. Osborne Garrett & Co., Ltd. a firm carrying on business at Frith Street, Soho, London. A preliminary objection has been raised as to the maintainability of the suit on the ground that the plaintiff being a limited company, the plaint should have been signed and verified either by the Secretary or by a Director or other principal officer of the Company able to depose to the facts of the case as laid down by O. 29, R. 1, Civil P. C. Reliance has been placed on the ruling of their Lordships of the Privy Council in *Delhi and London Bank Ltd.* v. *Oldham* (1) where it was pointed out that the provisions of S. 151 old Civil P. C., corresponding to O. 6, R. 14, Civil P. C., which permit an attorney to sign and verify a plaint on behalf of an absent plaintiff do not apply to a suit instituted on behalf of a corporation. Prima facie, therefore, the plaint is neither properly signed nor verified. It is urged on behalf of the defendants that the suit should, therefore, be dismissed. I am not prepared to accede to this request in the present case. I see no reason why I should not exercise my discretionary powers of permitting the plaintiffs to comply with the provisions of O. 29, R. 1, Civil P. C., and allow them time to file an amended copy of the plaint properly signed and verified. No prejudice is being caused to the defendants by this delay as it appears that so far as defendant 1 is concerned, he says that he only acted as the agent of the Chartered Bank and is in no way concerned with the goods which are the subject-matter of the suit and are said to have the alleged purloined mark "Kropp" stamped on them. So far as defendant 2 again is concerned he does not allege having advanced any money on the goods. and he does not care whether the goods, in question which are said to be now in the possession of the Customs authorities are delivered to him or not. The interim injunction issued against defendant 2 is not working any hardship on him. If the plaintiffs have not brought on the record proper persons against whom they should have obtained an interim injunction and if in consequence of that they suffer they have to thank themselves. I, therefore, grant three months time to the plaintiffs to file an amended plaint properly signed and verified in accordance with O. 29, Civil P. C., and order that they should bear the costs of the defendants for three hearings, the time wasted unnecessarily in consequence of their failure to present a proper plaint.

DD. *Order accordingly.*

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(1) [1894] 21 Cal. 60=20 I. A. 139=3 Sar. 331 (P. C.).

A. I. R. 1927 Sind 264

PERCEIVAL, J. C., AND TYABJI, A. J. C.

Mt. Malanbai—Applicant.

v.

Nihal Chand Tikamdas and *another*—Opposite Party.

Civil Revn. Appn. No. 27 of 1926, Decided on 20th January 1927, from order of Addl. J. C., Sind, D/- 1st February 1926, in Suit No. 803 of 1923.

Civil P C., O. 26, R. 1 — Examination on commission refused—No revision lies.

No revision lies from an order refusing an application for the examination on commission of witnesses : 14 *S. L. R.* 28, *Foll.*

Srikishendas H. Lulla—for Applicant.
Dipchand Chandumal—for Opp. Party.

Percival, J. C.—I should personally have preferred in this case simply to have dismissed the application on the authority of *Firm of Yusifally Alibhoy Karimji & Co.* v. *Firm of Haji Mahomed-Haji Abdullah* (1). But I agree with the order as passed by my learned colleague, indicating that the applicant can, if so disposed, apply again to the Additional Judicial Commissioner for the issue of a commission, as it is still open to him to do so under the rules. I am, however, of opinion that the Court should proceed with the case as quickly as possible as it has already been considerably delayed by this revision application.

In regard to the question whether the Judge should issue a commission or not, in case any fresh application is made to him, I should only like to say that I do not wish it to be inferred from any remarks that I make that I personally think that the commission should be granted. In considering whether commission should be granted or not, if such an application is made, I think that the Judge should consider particularly the affidavits made by the five ladies other than the defendant herself in which they say that they do not propose to give any evidence.

The application is, therefore, dismissed with costs on the authority of *Firm of Yusifally Alibhoy Karimji & Co.* v. *Firm of Haji Mohamed-Haji Abdullah* (1).

Tyabji, A. J. C.—This is an application for revision of an order by the learned Additional Judicial Commissioner refusing an application for the examination on commission of certain witnesses.

The refusal was on the ground (1) that no distinction can be drawn between persons resident within the jurisdiction and exempt under S. 132, Civil P. C., and persons not so resident who are exempt from attendance because they reside more than two hundred miles off (O. 16, R. 19) ; (2) that the application for commission was accordingly made too late ; (3) that its issue was opposed by the plaintiffs ; and (4) that the witnesses aver that they can give no information.

The rules of this Court in regard to the issue of commissions are contained in Ch. 7, of the rules, p. 99-105. R. 2, of that chapter provides that at the time of institution of the suit intimation shall be given of the fact that a commission is required and that thereon the matter shall not be set down for final hearing.

The giving of such intimation is to be enforced by the sanction that no adjournment will be granted for the execution of such commission where no such intimation is given and the matter has been set down for final hearing. The next relevant rule is R. 13 which again provides that the parties requiring a commission for the examination of witnesses or other purpose shall give intimation of the fact. But under R. 13 the intimation is to be given at the first hearing of settlement of issues and the rule further provides that the said party shall save as hereinbefore provided be entitled to an adjournment not exceeding fourteen days for the filing and consideration of his application for the commission.

The two rules read together provide (1) that intimation shall be given of the fact that a commission for the examination of the witnesses or other purposes is required ; (2) as to the time when the intimation shall be given R. 2 provides that it must be at the institution of the suit and R. 13, that it shall be given at the first hearing or settlement of issues ; (3) if the intimation is given at the institution of the suit under R. 2, the result is that the matter shall not be set down for hearing ; (4) under R. 13 on such intimation being given at the first hearing or on settlement of issues the applicant shall "save as thereinbefore provided" (viz., presumably under R. 2), be entitled to an adjournment not exceeding fourteen

(1) [1920] 14 S. L. R. 28=58 I. C. 721.

days for the filing and consideration of his application for the commission (whether the saving clause in this rule is to be given effect so as to require intimation to be given both at the institution of the suit and at the first hearing) does not seem to be beyond doubt ; and (5) as regards the penalty for not giving such intimation under R. 2, in default of such intimation no adjournment will be granted for the execution of the commission when the matter has been set down for hearing. No specific penalty for default is laid down under R. 13 except that presumably the sanction under R. 2, is imported into R. 13 by the saving clause.

Shortly, though not very accurately, stated, on intimation being given, "the matter" shall not be set down for the final hearing in the ordinary course without giving opportunity for the commission to be executed ; in default of intimation it shall be so set down and the final hearing will not be adjourned.

A distinction between the two cases where the witnesses are within the jurisdiction of the Court and where they reside more than 200 miles off may, therefore, come about from the operation of the rules as they stand. For in the latter case it might frequently be difficult for the commission to be executed in time and to be returned so as to be available to the Court at the time of the hearing unless facilities are given for the return of the commission perhaps by postponing the hearing. I have referred to this consideration because it seems to me that the question whether the defendant herself and the witnesses sought to be examined on commission should be so examined may still be placed before the Judge who is to proceed with the trial of the suit and that it will be open to him either to grant the application or to refuse it "either wholly or in part" on the grounds which may seem to him to be satisfactory. If he refuses the application then the proper course for the applicant will be to proceed with the trial of the suit and if there is any appeal against the ultimate decision the appellate Court will have all the materials before it for approving or disapproving the conclusion at which the trial Judge will arrive.

The present application, however, is by way of revision and we have a decision of this Court in *Firm of Yusifally Alibhoy Karimji & Co.* v. *Firm of Haji Mahomed-Haji Abdullah* (1), laying down that such an application in revision does not lie.

It is argued before us that this decision is erroneous and opposed to the decisions of the other High Courts and that we should, therefore, refer that decision to a Full Bench so that it may be re-considered. For the reasons that I have indicated it seems to me that this is not a proper case in which we should refer the matter to the Full Bench, but that in the present case we should follow the decision in *Firm of Yusifally Alibhoy Karimji & Co.* v. *Firm of Haji Mahomed-Haji Abdullah* (1) and dismiss the application.

In doing so I express no opinion as to whether the learned Judge in the exercise of his discretion should or should not grant any application for the examination on commission of the defendant herself or of the other five witnesses whom she wishes to be examined on commission. If the learned Judge thinks either because the examination on commission will delay the hearing of the suit and that it has been made too late or for any other sufficient reasons considers that the application should be rejected, he will be entitled to do so on the grounds which will if necessary be considered by the appellate Court in case an appeal is preferred against his decision. If, on the other hand, he decides that the application should be granted, it will, in my opinion, be open to him to do so. I express no opinion on the question whether the application, if made to him, should be granted or rejected.

I would, therefore, dismiss the present application with costs in accordance with the decision in *Firm of Yusifally Alibhoy Karimji & Co.* v. *Firm of Haji Mahomed-Haji Abdullah* (1).

D.D. *Application dismissed.*

A. I. R. 1927 Sind 265

RUPCHAND BILARAM, A J. C.

Punjab National Bank, Ltd.—Plaintiffs.

v.

Adamji Lookmanji & Sons—Defendants.

Original Civil Suit No. 366 of 1926, Decided on 3rd December 1926.

Civil P. C., O. 34, R. 1—Suit to enforce mortgage—Person claiming paramount title is not necessary or proper party.

In a suit brought by the mortgagee to enforce a mortgage, a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary or proper party, and the question of the paramount title cannot be litigated in such a suit : 33 *Cal.* 425 ; 40 *All.* 584 ; 44 *Bom.* 698 : *A. I. R.* 1924 *Rang.* 240 ; *A. I. R.* 1926 *Rang.* 208 and *A. I. R.* 1916 *P. C.* 18, *Foll.* [P 266 2, P 267 C 1]

Isardas Oodharam—for Plaintiffs.

Fatehchand Assudamal — for Defendants.

Hatim B. Tyebji—for Applicant.

Order.—This suit has been instituted for recovery of a sum of Rs. 12,873-10-3 against the firm of Adamji Lookmanji & Sons. The amount is said to have been secured by an equitable mortgage of four properties belonging to Tayebally, Yusifally and Karimbhoy, sons of Adamji Lookmanji, and the usual mortgage-decree is claimed against them. These three persons have been served as the ostensible partners of the firm of Adamji Lookmanji under O. 30, R. 3, Civil P. C. Not only do the properties stand in the Record-of-Rights in the names of these three persons and these three persons only, but the leases issued by the Karachi Municipality in respect of three out of four plots have been issued in their names only. The sanad of the fourth plot has likewise been endorsed on behalf of the Secretary of State in their favour.

In the written statement filed by them they 'do not state that the mortgaged properties belonged to their father or that he was otherwise interested in them. An application has, however, been made to me purporting to be an application under O. 1, R. 10, Civil P. C., unsupported by any affidavit, on behalf of certain female relatives of theirs, praying that they be joined as parties to the suit. The ground urged is, that the properties belonged not to the three defendants served as partners, but to their father Adamji Lookmanji who died in August 1921, and as heirs of Adamji the applicants are as much co-owners of the properties as the three defendants and that it is, therefore, necessary that they should be made parties to the suit in order to decide all matters in controversy " particularly those relating to the properties in suit."

As I read the application it means nothing more than an application by certain persons who claim a title in a part of the mortgaged properties adversely to the mortgagors and, therefore, they are not only not necessary parties, but persons who, in my opinion, should not as such be brought on the record in a suit between the mortgagee and the mortgagors. The applicants are not persons without whom no decree can be rendered so as to make them necessary parties to the suit, nor are they persons whose presence would render the decree more effectual so as to make them proper parties to the suit. A certain confusion had at one time arisen on account of the words used in S. 85, T. P. Act, which provided that all persons having an interest in the property comprised in the mortgage should be made parties to a suit on the mortgage. This was differently interpreted by different High Courts.

The question came up for decision before the Calcutta High Court in *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (1) and it was held that the term "property" in S. 85 of the Act means not the physical object, but the interest therein, which the mortgagor is competent to transfer by way of mortgage at the date of the transaction. In delivering the judgment of their Lordships, the late Sir Ashutosh Mookerji then Mr. Justice Mookerji. after reviewing the whole case-law on the subject observed at p. 433 as follows :

> The interpretation, which we put upon S. 85 leads necessarily to the conclusion that the proper scope of a mortgage suit is to cut off the equity of redemption and to bar the rights of the mortgagor and those claiming under him : the only proper parties to such a suit are the mortgagor and the mortgagee and those who have acquired interest under them subsequent to the mortgage. It is not competent for the mortgagee to make as party defendant, one who claims adversely to the title of the mortgagor and mortgagee. He is a stranger to the mortgagee, has no connexion with mortgage, and as his adverse claim of title cannot in any way be affected by the mortgage suit, in which he has no interest, he cannot be made a party for the purpose of litigating such claim of title.

In 1908 the legislature set at rest the doubts raised by the use of the expression " property " by substituting in O. 34, R. 1 the words " having an interest in the mortgage security or in the right of redemption." And it is now well-settled law that in a suit brought by the mortgagee to enforce a mortgage, a

(1) [1906] 33 Cal. 425=3 C. L. J. 205.

person claiming a title paramount to the mortgagor and the mortgagee is not a necessary or proper party, and the question of the paramount title cannot be litigated in such a suit : *Gobardhan* v. *Munna Lal* (2), *S. Appanna* v. *S. Dariganda* (3), *Maung San Myaing* v. *U. Pon Gyaw* (4) and *Viswanathan Chettyar* v. *Ma Aye* (5). The cases which permit the joinder of Hindu coparceners as defendants to a suit on a mortgage executed by the de facto or de jure manager of the family have no application whatsoever. In these cases the mortgagee is attempting to hold the interest of the coparceners liable and thsir presence may, therefore, under certain conditions be proper.

In the words used by their Lordships of the Privy Council in *Radha Kunwar* v. *Reoti Singh* (6) the joinder of the applicants as parties to the suit would not only be irregular, but could only lead to confusion. It would convert an ordinary mortgage suit based on the contract between the plaintiffs and the three defendants into a suit inter alia for partition between the defendants and their female relatives requiring the determination of certain complicated questions which should, as far as possible, be avoided. The mortgagees can only sell the right, title and interest of their judgment-debtors in the mortgaged properperties and any decision given in their favour or any sale held by them in execution of their decree cannot affect the rights, if any, of persons who are not made parties to the suit and are, therefore, not before the Court. In any suit which the female relatives may institute for partition of the properties, it would be open to the mortgagees or the auction-purchaser as the case may be to contend that even if the mortgaged properties belonged to Adamji Lookmanji, by permitting them to be entered in the names of his sons, and by permitting his sons to deal with them as their own he was estopped from contending that they were his properties and that his heirs were likewise estopped from disputing the mortgage and to plead that the female relatives should in any event get their share from properties of the deceased Adamji Lookmanji other than those which are the subject-matter of the mortgage.

The applicants do not claim to be interested in the mortgage security or in the right of redemption, but in the mortgaged property itself so far as the case disclosed by them in their application goes and, therefore, their application, is in my opinion, entirely misconceived.

The learned counsel has, however, urged that as the suit is not only against the sons of Adamji, but also against the firm of Adamji Lookmanji & Sons, as one of the partners or rather the proprietor of that firm was Adamji and as the transactions in suit are said to have been entered into during the lifetime of Adamji, the applicants are interested in the subject-matter of the suit as heirs of Adamji and should, therefore, be made parties to the suit.

This is altogether a new ground of which the plaintiffs had no notice and there is no allegation either by the sons of Adamji or affidavit by the applicants in support of this new plea. The learned counsel on being pressed on this point clearly stated that the applicants do not claim any interest in the business carried on by the firm of Adamji Lookmanji & Sons after the death of Adamji and that so far as the property is concerned, they only claim it as the heirs of Adamji Lookmanji and in no other capacity.

I cannot permit the applicants to take the plaintiffs by surprise by urging a point of which they had no notice, and I must decline to go into this new plea. If the plaintiffs wish to hold the estate of Adamji liable on the ground that he was a partner of the firm and subsequently failed to enforce it against the estate of his heirs other than the three defendants, it is their own concern.

I dismiss this application will costs.

R.D. *Application dismissed.*

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(2) [1918] 40 All. 581=46 I. C. 559=16 A. L. J. 639.
(3) [1920] 44 Bom. 698=57 I. C. 577=22 Bom. L. R. 815.
(4) A. I. R. 1924 Rang. 240=2 Rang. 106.
(5) A. I. R. 1926 Rang. 208=4 Rang. 214.
(6) A. I. R. 1916 P. C. 18=38 All. 488=43 I. A. 187 (P. C.).

A. I. R. 1927 Sind 268 (1)

RUPCHAND BILARAM AND LOBO, A.J.Cs.

Khimanmal—Plaintiff—Applicant.

v.

Assanmal—Defendant--Opposite Party.

Civil Revn. Appln. No. 31 of 1925, Decided on 4th February 1927, from order of Small Cause Court Judge, Karachi, D/- 8th January 1925, in execution proceedings in Suit No. 875 of 1921.

Limitation Act, S. 20—Part payment by judgment-debtor certified beyond limitation does not save limitation unless it falls under S. 20.

Mere payment by the judgment-debtor of a certain amount towards part satisfaction of the decree, certified after the period of limitation for execution, cannot revive limitation unless it is made towards interest as such or towards principal, and the fact of such payments appears in the handwriting of the judgment-debtor. [P 269 C 1, 2]

Chuni Lal—for Applicant.

Kundanmal Dayaram—for Opposite Party.

Order.—This application arises out of execution proceedings. The plaintiff-applicant obtained a decree in the Court of Small Causes, Karachi, on 15th July 1921, for Rs. 621 payable by monthly instalments of Rs. 35, the first instalment commencing on 15th August 1921. The decree further provided that in the event of failure by defendant to pay any instalment on the due date the whole amount shall become payable at once. The plaintiff made no application to the Court for execution of his decree till 22nd September 1924. In that application he stated that he had received three instalments as follows: Rs. 35 on 27th August 1921, Rs. 35 on 17th September 1921, and Rs 40 on 3rd November 1921.

On this application a notice was ordered to issue to the defendant, but was not served and the application was struck off. The plaintiff made a second application on 1st December 1924, and on objection being raised by the defendant, the learned Small Cause Court Judge dismissed it on the ground of limitation.

The learned pleader for the plaintiff has contended that it was open to the plaintiff to certify the payments even after the period of three years and that he having certified these payments in the execution application filed by him, on 22nd September 1924, that application was within the period of limitation.

But the obvious reply to this contention is that mere payment to him by the judgment-debtor of a certain amount towards part satisfaction of the decree could not revive limitation unless he could invoke the aid of S. 20, Lim. Act. Admittedly the defendant had made default in the payment of the very first instalment and the whole amount was payable on 15th August 1921, and the three years expired on 15th August 1924, unless the alleged payment could revive limitation.

If the payments had been made towards interest as such, or if these payments had been made towards principal and the fact of such payments had appeared in the handwritig of the judgment-debtor then by virtue of the explanation to S. 20 such payments would have revived limitation. In this case it is admitted that the payments were not made towards interest as such and that there was no writing given by the judgment-debtor. Under the circumstances S. 20 had no application. The learned Judge was, therefore, right in holding that the execution was barred by limitation.

This application, therefore, fails and is dismissed with costs.

R.D. *Application dismissed.*

A. I. R. 1927 Sind 268 (2)

RUPCHAND BILARAM AND LOBO, A. J. Cs.

Chaganlal Aildas—Appellant.

v.

Tejoomai and *others*—Respondents.

First Appeal No. 63 of 1924, Decided on 4th February 1927, from order of 1st Cl. Sub-Judge, Sukkur, D/- 17th October 1924.

Hindu Law—Manager acting as guardian for suit is bound by Civil P. C., O. 32.

Where a managing member is the next friend or guardian of his minor brothers, his powers are controlled by the provisions of the law and he cannot do any act in his capacity of managing member which he is debarred from doing as next friend or guardian without leave of the Court: 36 *Mad.* 295, *(P.C.) Foll.* [P 268 C 1,2]

T. G. Elphinston—for Appellant.

Dipchand Chandumal — for Respondents.

Judgment.—This appeal arises out of proceedings in execution of a decree passed in terms of an award made without the intervention of the Court. All the plaintiffs were minors at the date of the decree and were represented by their mother

as their next friend. Plaintiff 1 has attained majority and has been substituted as the next friend of the two other plaintiffs who are his brothers and who form members of a joint Hindu family with him of which he is the manager. Certain payments have been made to him under the decree on his giving security to the Court by creating a charge on his interest in the joint family property for the due accounting by him of the amounts paid to him. He has demurred to giving further security in respect of the sums which are now due and are payable by the defendants. He has claimed that no security whatsoever should be demanded from him as he is the manager of the joint family and as such, he has an uncontrolled power to recover the debts due to the family. He has further contended that according to the terms of the award which was passed on a reference outside the Court, it was contemplated that the defendants should pay to him on his attaining majority all sums due under that award *qua* manager and without any security being furnished under O. 32, R. 6, Civil P. C.

The learned Subordinate Judge has upheld both these contentions and has ordered that no security need be furnished. Against that order the defendants have come to us in appeal.

Mr. Dipchand, who appears for plaintiff 1, has urged that no appeal lies. This is true but this defect is easily cured by our treating the application as a revision application. In holding that as manager plaintiff 1 could not be called upon to give security the learned Judge has relied on the case in *Hari Har Prasad Singh* v. *Mathuralal* (1), in support of his view. But that case is in conflict with the later ruling of their Lordships of the Privy Council *Ganesha Row* v. *Tuljaram Row* (2), where their Lordships have observed :

> How far the acts of a father or managing member may affect a minor, who is a party to the suit represented by another person as next friend or guardian ad litem is a question which does not arise in the case, and their Lordships are not called upon to express an opinion on it. But they consider it to be clear that when he himself is the next friend or guardian of the minor his powers are controlled by the provisions of the Law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment.

In this case the plaintiff is the next friend and is executing the decree as such. He is therefore bound by the provisions of O. 32, R. 6, Civil P. C. Any expression of opinion by the arbitrator in their award that on attaining the age of majority plaintiff 1 will not be required to furnish security * * * * cannot likewise control the power of the Court, to require security from the manager before granting leave.

The question, however, arises on what terms as to security should leave be granted to him to execute the decree so as sufficiently to protect the share of the minors in the property from waste and to ensure its proper application.

The total sum which plaintiff 1 is entitled to recover from the Court is about Rs. 85,000. He is entitled in his own right to a 1/3rd share therein. He has been incurring expenses for the maintenance and education of the minors and also for other family purposes. There is no allegation that he is unfit to act as the manager or that he is wasting the family property. The maximum security which he could be asked to give would be to the extent of 2/3rds of the property, i. e., about Rs. 60,000. However, taking into consideration the fact that he has already spent and has hereafter to spend large sums of money on behalf of and for the benefit of the minors we think that it will be sufficient if he is required to give security to the extent of Rs. 40,000. We understand that he has already given security to the extent of about Rs. 15,000. We therefore order that, on his giving security for a further sum of Rs. 25,000, either in one lump sum or in such smaller sums, as may be necessary from time to time he should be entitled to execute the decree for the instalments due and to become due subject, however, to the condition that, unless he has given security for the full sum of Rs. 40,000, he shall not recover more than double the amount for which he has furnished security.

We accordingly vary the order of the lower Court in the terms stated above and make no order as to costs.

D.D. *Order varied.*

(1) [1908] 35 Cal. 561=8 C. L. J. 256=12 C. W. N. 598.
(2) [1913] 36 Mad. 295=19 I. C. 515=40 I. A. 132 (P. C.).

A. I. R. 1927 Sind 270

KINCAID, J. C., AND RAYMOND, A. J. C.

Gangaram and *another*—Appellants.

v.

Secretary of State—Respondent.

First Appeals Nos. 27 and 28 of 1920, Decided on 3rd May 1922, from decision of Dist. Judge, Sukkur.

(a) *Limitation Act—Applicability.*

The law of limitation which prevails when a suit is brought, applies to that suit, unless it be shown that one or other of the parties have acquired vested rights under some earlier statute of limitation: 35 *All.* 227 (*P.C.*), *Foll.* [P 271 C 1]

Plaintiff whose enjoyment of an easement as against the Crown began in 1865, cannot acquire a prescriptive right against the Crown in view of S. 15, Easements Act, and S. 26, Lim. Act 1877, does not apply to such a case. [P 270 C 2]

(b) *Limitation Act, 1877, S. 26—No specific mention of Crown—It is not applicable to Crown—Interpretation of statutes.*

Unless the Crown is specifically mentioned in a statute, in this case S. 26, Lim. Act (15 of 1877) is excluded from its operation: 1 *Bom.* 7; 14 *Bom.* 23; 25 *Mad.* 457, *Foll.* 10 *Cal.* 214 and 5 *Mad. H. C.* 6, *Dist.* [P 271 C 1]

(c) *Easements Act, S. 15—There is no prescription against the Crown.*

The common law of England on the subject of acquisition of prescriptive rights does not apply in India, and, assuming that it does, there would be no presecription against the Crown: 3 *B. L. R.* 18, *Foll.* [P 272 C 1]

Tahilram Maniram—for Appellants.

Rupchand Bilaram—for Respondent.

Kincaid, J. C.—The facts of these appeals have been clearly set out in the judgment of the learned District Judge and are shortly as follows :

In suit No. 4 of 1915 (appeal No 27 of 1920) one Teumal and his sons Gangaram and Kishindas sued the Secretary of State to obtain a declaration that the Executive Engineer had no right on behalf of the defendant to reduce the sluice of a water-course known as the Khamand Wah from 1½ ft. depth and 1 ft. breadth to 1 ft. depth and ¾ ft. breadth and for an injunction requiring the defendant to maintain the former measurements. The plaintiff also asked for Rs. 200 by way of damages.

In suit No. 5 of 1915 (appeal 28 of 1920) the same plaintiff sued for a similar declaration in regard to the sluices of three water-courses, Kuha Waro, Nao Sami and Chutti. These sluices were reduced by the Executive Engineer by several feet both in depth and breadth, In this suit an injunction was asked for, but there was no claim for damages.

The cases were first tried by Mr. Palmer, then District Judge of Sukkur, who dismissed them both. On appeal Messrs. Fawcett, J. C., and Kemp, A. J. C., reversed the decision of the District Judge and remanded the suit for determination with reference to the following issues:

(1) Have plaintiffs an easement by grant of prescription to receive a supply of water in excess of quantity which they received through the reduced sluice ?

(2) Has the plaintiffs' supply been reduced to less then what they are entitled to under such easement ?

(3) If so, has the defendant the right to reduce the plaintiffs' supply of water from the canal to the extent to which it has been reduced ?

(4) If not, what damages, if any, have the plaintiffs suffered ?

On these issues the learned District Judge found issues 1 and 2 in the negative, issue 3 in the affirmative. He found issue 4 not proved and dismissed the suit. Against this decision the plaintiffs have appealed. Mr. Tahilram, who appeared for the plaintiffs, had, through illness, been prevented from reading through the entire case, and by agreement with the learned pleaders on either side the Court decided to hear their arguments on the following issue based upon Cl. 4 of the memo of appeal: Assuming that the plaintiffs' enjoyment began in 1865, had they acquired an adverse right against the defendants in 1915 when they filed their suits ?

We have to record our thanks to the pleaders on both sides for the assistance that they have rendered to the Court and for the learned legal arguments that they have developed before us. The suits were filed in 1915. The limitation law then prevailing was the Easements Act of 1882. S. 15 of that Act runs as follows :

> Where a right of way or other easement has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption and for 20 years, the right to such access and use of light or air, support or other easement shall be absolute. . . . when the property over which a right is claimed under this section belongs to Government, this section shall be read as if, for the words "twenty years" the words "sixty years" were subsitituted.

Now if the plaintiff's enjoyment began in 1865 and if he could only acquire an adverse right against the defendant by continued and uninterrupted enjoyment for 60 years it is clear that he cannot in view of S. 15, Easements Act, rely on a prescriptive title. It has been contended that if the enjoyment began in

1865, the law of limitation then in force should be deemed applicable. The Act was the Bombay Reg. 5 of 1827. But when a similar contention was advanced in the case of *Soni Lal* v *Kanhaiya Lal* (1) before the Judicial Committee, their Lordships observed:

> As to that contention it is sufficient for their Lordships to say that they agree with the High Court that Act 14 of 1859, does not apply to this suit and that the Limitation Act which does apply is Act 15 of 1877.

In other words they held that the law of limitation which applies to a suit is that prevailing at the time the suit is brought and not when the cause of action arose. This decision has been carefully interpreted in the case of *Gopeshwar Pal* v. *Jiban Chandra* (2) by a Special Bench of the Calcutta High Court and Jenkins, C. J. held :

> It is an established axiom of construction that though procedure may be regulated by the Act for the time being in force still the intention to take away a vested right without compensation or any saving is not to be imputed to the legislature unless it be expressed in unequivocal terms.

From these two decisions we may take the correct law to be that the law of limitation which prevails when a suit is brought, applies to that suit, unless it be shown that one or other of the parties have acquired vested rights under some earlier statute of limitation. It is thus for the plaintiffs in this case to show that their rights matured before Act 9, 1908 came into force.

But Act 5, 1882 (Easements Act) was the first statute of limitation which gave rights by prescription against the Government.

The learned pleader has, however, relied on S. 26, Lim. Act 15, 1877 wherein the only period mentioned for the acquisition of a right of easement is 20 years. The plaintiffs, according to Mr. Tahilram, acquired a vested prescriptive right under this Act, which could not be disturbed by any later Act of Limitation. But in S. 26, Act 15, 1877 the Crown is not alluded to and the legal presumption is that unless the Crown is specifically mentioned in a statute it is excluded from its operation. In this connexion I would quote the following passage from Maxwell, 6th edn., at p. 244.

> It has been said that the law is prima facie made for subjects only; at all events, the Crown is not reached except by express words or by necessary implication, in any case where it would be ousted of an existing prerogative or interest. It is presumed that the legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible. Where, therefore, the language of the statute is general, and in its wide and natural sense would divest or take away any prerogative or right from the Crown, it is construed so as to exclude that effect. When the King has any prerogative, estate, title or interest, he shall not be barred of them by the general words of an Act of Parliament.

Mr. Tahilram has relied on several reported cases to support his argument that that rule has not been observed in India. Only two of these are pertinent as in the others the Crown was not a party. The first is *Ponnusawami Tevar* v. *Collector of Madura* (3). A certain landlord Ponnusawami sued for the removal of shrines constructed by the Civil Engineer of the division in a channel attached to the plaintiff's village. The object of the construction of the shrines was to divert water into a Government village. The plaintiff made the Collector a party, as the Civil Engineer had acted under his orders. The High Court awarded the plaintiff's claim. Now this case would at first sight seem to support Mr. Tahilram's argument, but a closer examination shows that this is not so. The plaintiff succeeded in proving that he had enjoyed for a long series of years the right to use the water of the Vysay river as against the inhabitants of certain Government villages. The Collector arbitrarily interfered with that right and it was contended that the law of easement did not bind the Collector. In other words the Collector of a district was above the law and could do absolutely as he liked. Naturally the High Court rejected this plea and in doing so let fall certain observations on which Mr. Tahilram has relied. But the whole passage must be quoted and be fully understood:

> The arbitrary power claimed for the Government in para. 9 of the defendant 1's written statement has been rightly held by the Civil Judge not to be maintainable. However the lawful exercise of such a power may be in regulating the distribution of water amongst rayatwari villages held immediately of the Government or to the lands of proprietors or their tenants, whose enjoyment of it is simply permissive, there can be no doubt that the right to an easement in the flow of water through an artificial

(1) [1912] 35 All. 227=19 I. C. 291=40 I. A 74 (P. C.).

(2) [1914] 41 Cal. 1125=19 C. L. J. 549=24 I. C. 37=18 C. W. N. 804 (F. B.).

(3) [1868] 5 M. H. C. 6.

water-course is as valid against the Government as it is against the private owner of land.

In other words when once a subject of the Crown has obtained a right of easement against another subject of the Crown, the Crown cannot interfere arbitrarily with his right. This is very different from Mr. Tahilram's proposition that a subject can obtain an easement as against the Crown after an interrupted enjoyment of 20 years.

The second case is that of *Arzan* v. *Rakhal Chunder* (4). There too Government was a party and the Judges proceeded on the assumption that a 20 years' enjoyment of an easement would give a prescriptive right against Government. But in that case Government was merely a lessee and could not claim a better position than its lessor who was a mere subject of the Crown.

On the other hand there are several decisions opposed to Mr. Tahilram's contention. In *Ganpat Putaya* v. *Collector of Kanara* (5), West, J., observed:

It is a universal rule that prerogative and the advantages it affords cannot be taken away except by the consent of the Crown embodied in a statute. This rule of interpretation is well established and applies not only to the statutes passed by the British, but also to the Acts of the Indian legislature framed with constant reference to the rules recognized in England.

In *Secretary of State* v. *Mathurabhai* (6), Sargent, C J., said of S. 26, Act 15, 1877:

Here the section in question is clearly in prejudice of the Crown's rights and we, therefore, think that, on principle, the provisions of the Act do not afford sufficiently clear evidence of intention to include the Crown in S. 26.

In *The Government of Bombay* v. *Yusafali Salehbhai* (7), Batchelor, J., laid down:

The rule of English Law is that a statute does not bind the Crown unless it is named in it expressly or by necessary implication.

Finally after exhaustively reviewing the whole question Bhashyam Ayyangar, J., in *Belk* v. *Municipal Commissioner, Madras* (8), put first among the conclusions to which he therein came:

(1) The canon of interpretation of statutes that the prerogative or rights of the Crown cannot be taken away except by express words or necessary implication is as applicable to the statutes passed by the Indian legislatures as to Parliamentary and colonial statutes and this is really concluded by the authority of the Privy Council in more appeals than one from the colonies.

In last resort Mr. Tahilram fell back on the plea that where no statute covered the question at issue the Court should be guided by the common law of England In the common law of England, however, the learned pleader will not find much assistance. Under that law unless the landowner could show uninterrupted enjoyment back to the beginning of the reign of Richard, I., he could not succeed against the Crown. The reason why the Court stopped even at this point was because Henry, II., had scrutinized so severely all feudal claims against the Crown, that it was assumed that if a possession went back as far as that reign it had been deliberately examined and sanctioned by the royal officers.

In *John George Bogram* v. *Khettranath* (9), Markby, J,, remarked:

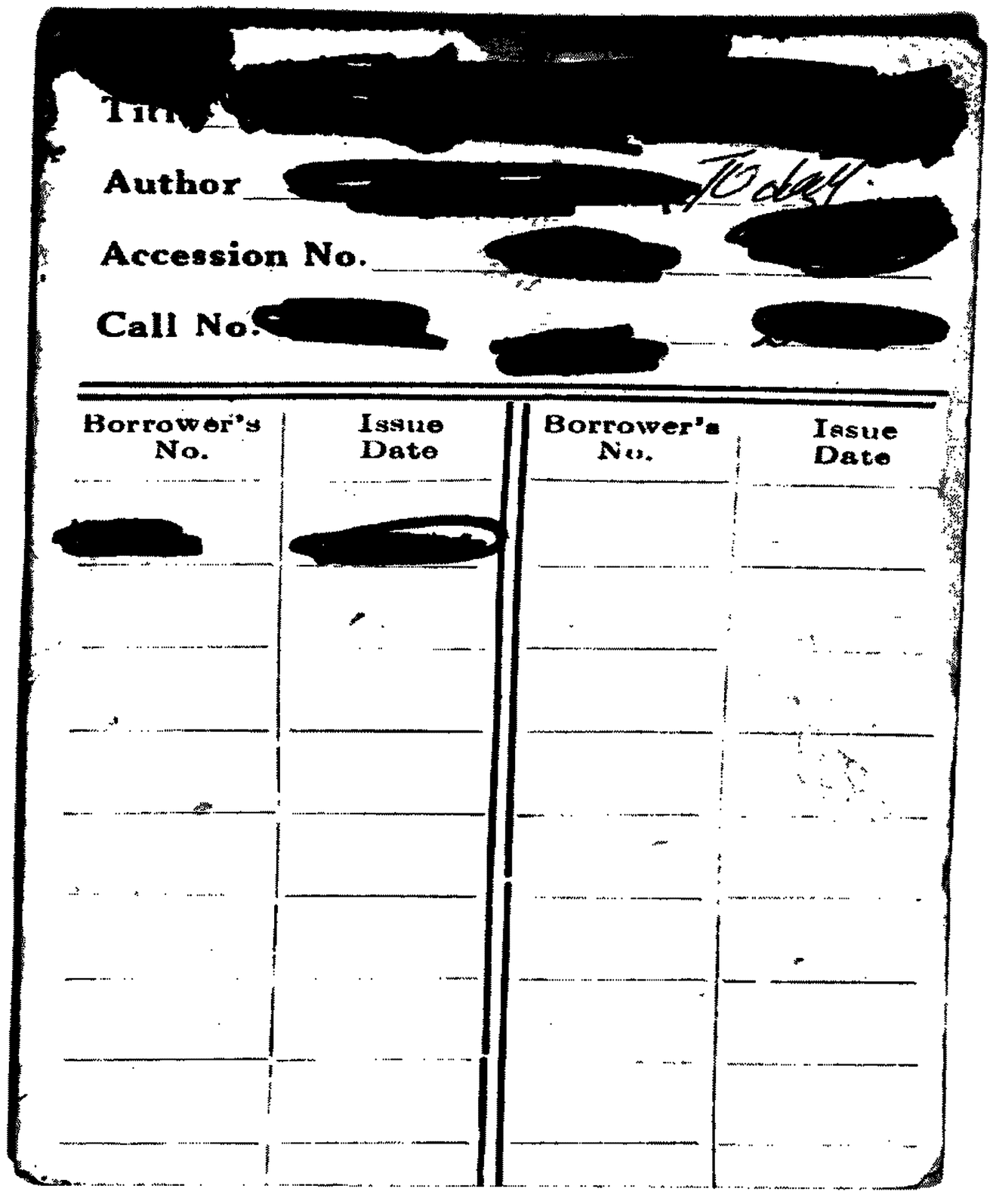
But it is perfectly well established in England that a claim founded on prescription and supported by evidence of modern user may always be defeated by showing that the right did not or could not, exist at any one given point of time within the period of legal memory which, according to English law,is now about 700 years.

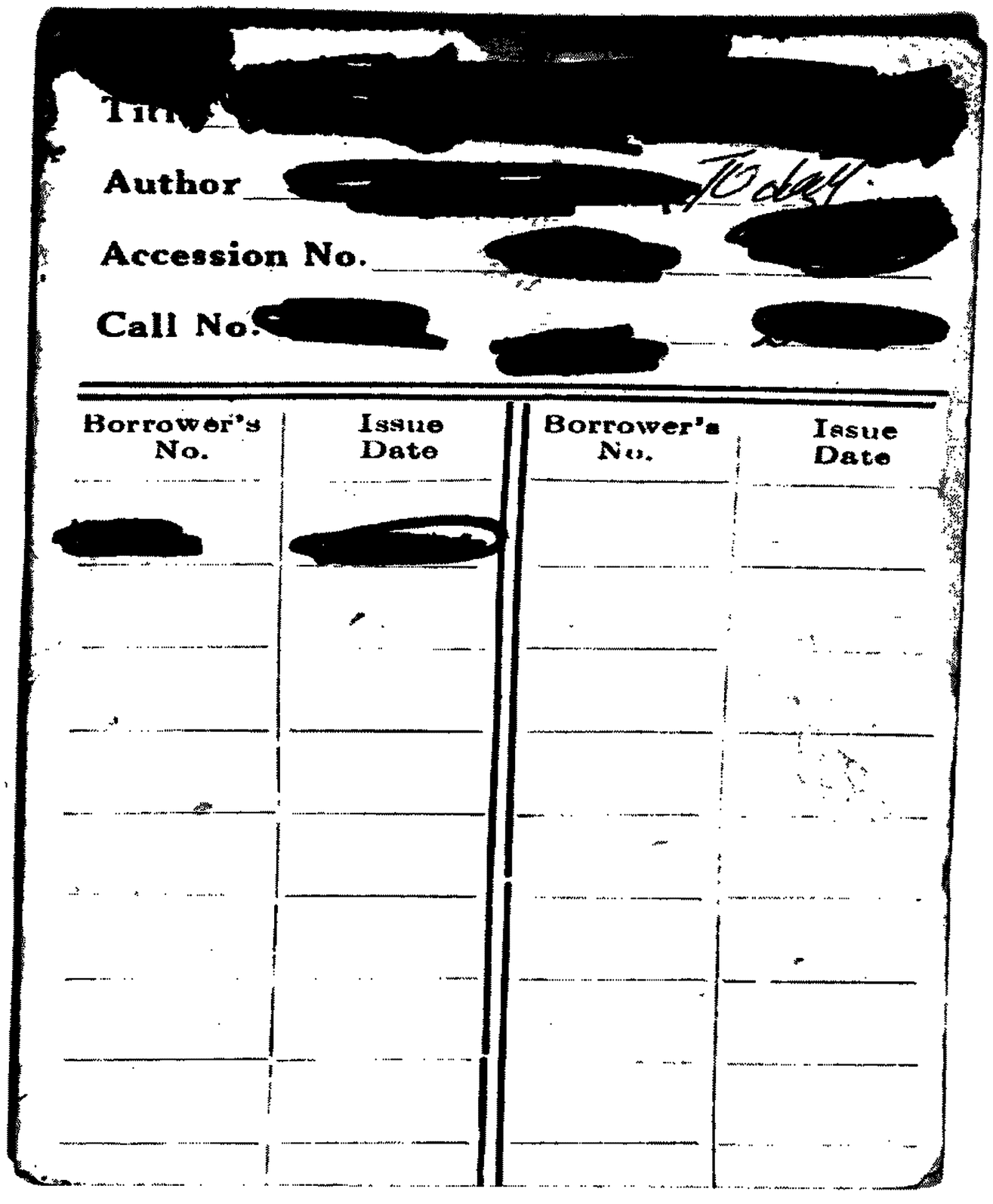
Now in India there was no examination of titles by the law officers of Henry II, so that no such prescription as that under the common law of England can arise. It follows that in India there is under the Common Law of England no possible prescription against the Crown. It is no doubt true that the English Courts did afterwards presume the existence of grants from user of 60 or 70 years. But this was not the common law of England. The legal fiction was moreover swept away by the passing of the Prescription Act 2 and 3, W. 4, Ch. 71 which, as Markley J., observed, has no application to this country. We are, therefore, of opinion that the issues framed by us for our decision must be answered in the negative. As we are unfortunately barred from deciding the rest of the appeal, we postpone the hearing of it to some early date hereafter. The costs of this hearing to be costs in the appeals.

N.K. *Order accordingly.*

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(4) [1883] 10 Cal. 214.
(5) [1875] 1 Bom. 7.
(6) [1889] 14 Bom. 213.
(7) [1909] 34 Bom. 618=5 A.C. 621=12 Bom. L. R. 34.
(8) [1901] 25 Mad. 457=12 M. L. J. 208.
(9) [1869] 3 B. L. R. 18.


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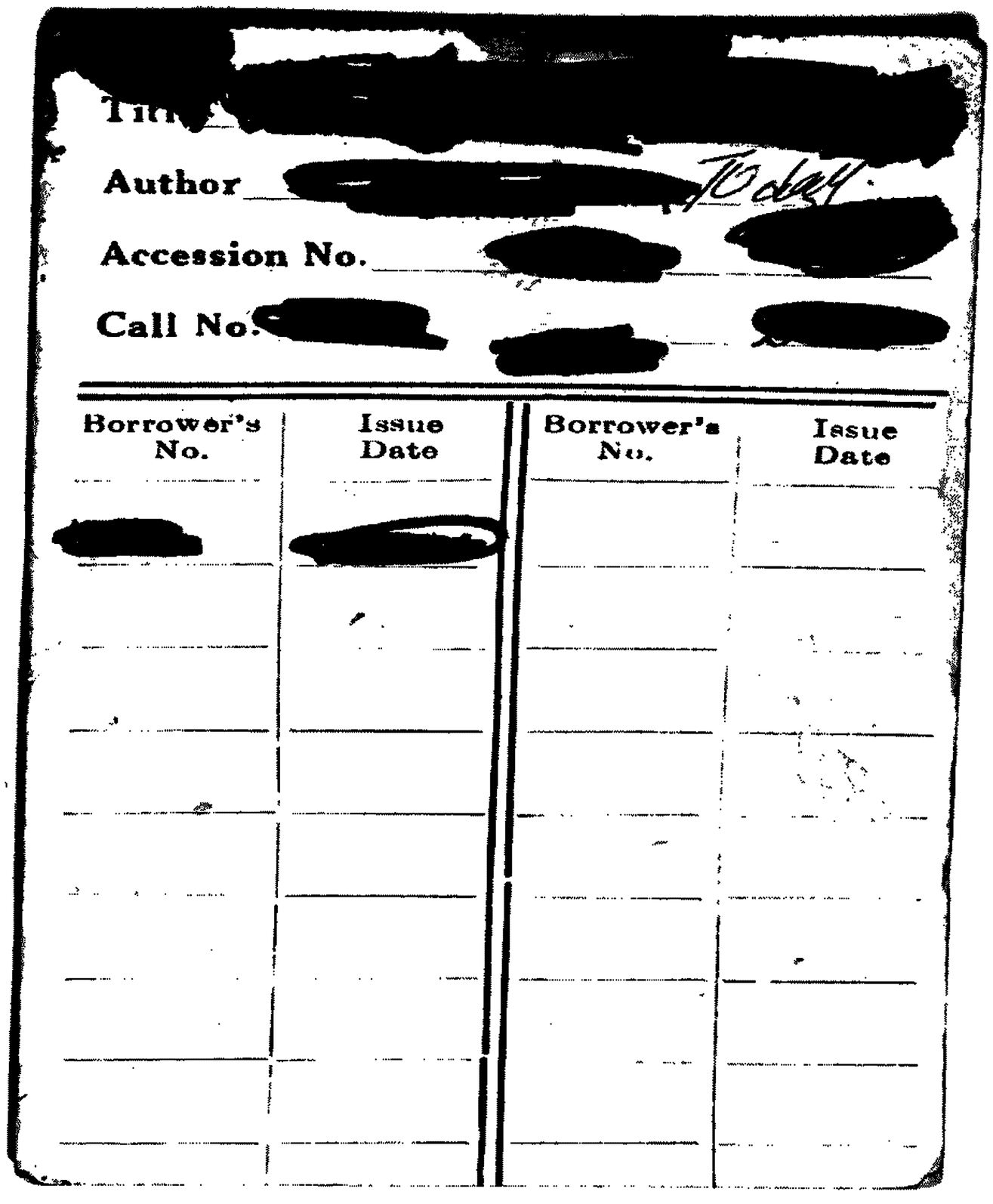

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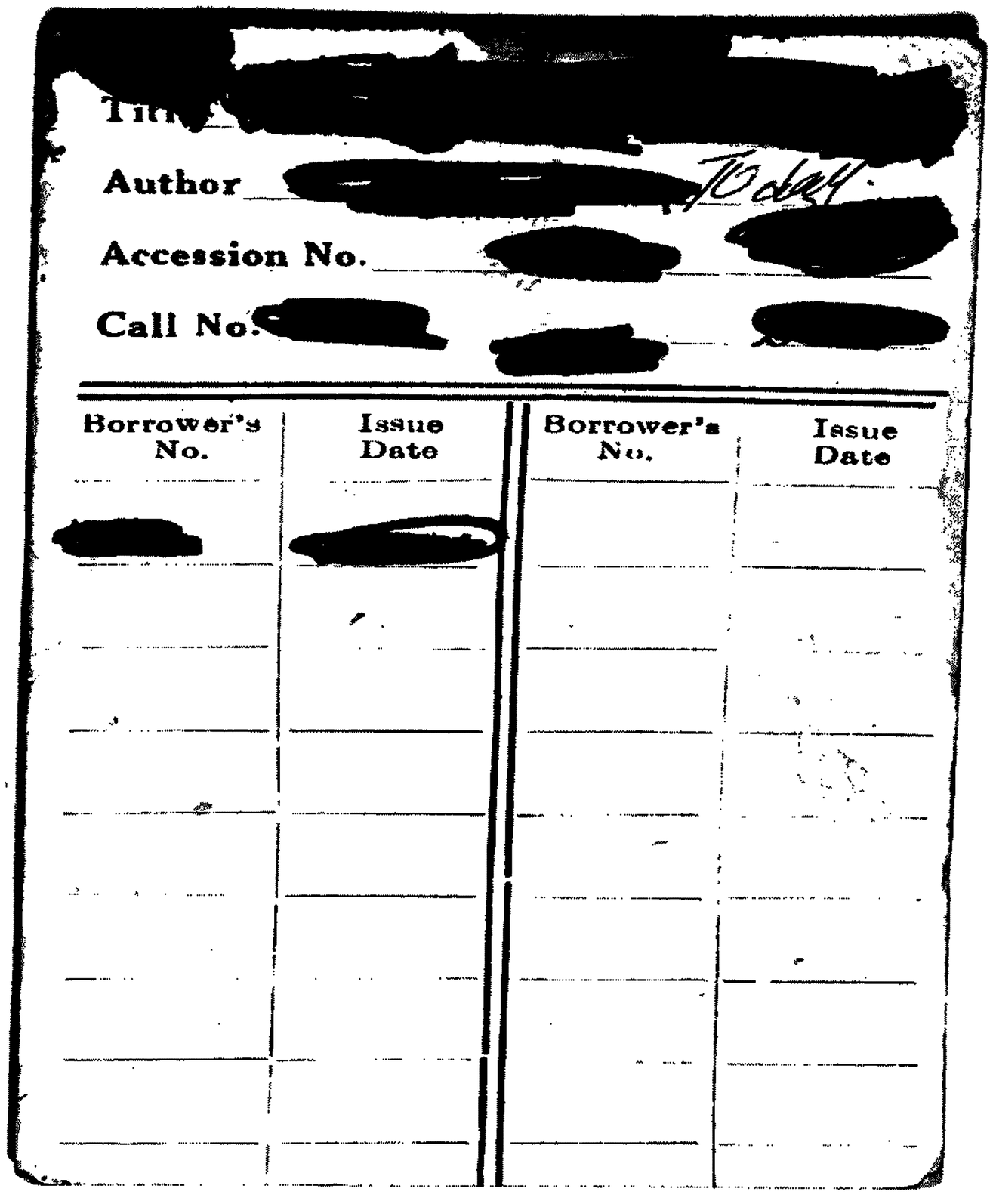

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