THE
MADRAS LAW JOURNAL

VOL.] JANUARY, 1929. [LVI

NOTES OF INDIAN CASES.

MARTIROSI *v.* SUBRAMANIAM CHETTIAR, I.L.R. 51 Mad. 103 : 54 M.L.J. 49 (F.B.).

The Full Bench had to consider in this case the question whether the Court could extend the time for making the award after the award is made. The question arose under the Arbitration Act. Though the language is slightly different from that used in the Civil Procedure Code, it does not seem to be materially different. Under the Civil Procedure Code of 1882 the Privy Council held in *Raja Har Narain Singh* v. *Chaudurain Bhagwant Kuar*[1] that after the making of the award the Court had no power to extend the time. The Civil Procedure Code has since, however, been amended. Whereas the old Civil Procedure Code said "If from want of necessary evidence or information or from any other cause the arbitrator cannot complete the award within the period specified in the order, the Court may if it thinks fit and from time to time enlarge the period for the delivery of the award or make an order superseding the arbitration." Schedule II, para. 8 of the present Code provides thus: "Where the arbitrator or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period or may make an order superseding the arbitration." Section 521 of the old Code prescribed that no award shall be valid unless made within the period allowed by the Court. It is on the construction of Sections 514 and 521 their Lordships of the Privy Council held that the Court had no power to extend the time for making the award after the award is made. Sch. II, para. 15 now prescribes that no award shall be set aside *inter alia* except as having been made after the expiration of the period allowed by the Court. The relevant provisions of the Arbitration Act

1. (1891) LL.R. 13 A. 300 : L.R. 18 I.A. 55 (P.C.).

are : Section 12.—The time for making the award may from time to time be enlarged by order of the Court, whether the time for making the award has expired or not. Section 13 (1).—The Court may from time to time remit the award for reconsideration of the arbitrators or umpire. Clause 2.—Where the award is remitted under Sub-section (1) the arbitrators or umpire shall, unless the Court otherwise directs, make a fresh award within three months. The questions the Court had to consider in this case were : (1) Whether under Section 12 the Court could extend the time after making the award, (2) Whether under clause 2 after three months' time has expired and after the award is made, the Court can extend time. Their Lordships held following the English cases that the Court could extend time even after the award is made. In the construction of an Act, which is *pari materia* with an English Act and is based substantially upon it, it is an approved rule of construction in India that the interpretation put upon it in England must also be taken to be the proper construction in India. The only difficulty in the way was the judgment of the Privy Council in *Raja Har Narain Singh* v. *Chaudurain Bhagwant Kuar*[1]. The inclination of opinion on the part of the referring Judges would seem to be that that ruling is no longer applicable even in cases governed by the Civil Procedure Code by reason of the changes introduced in the language of the section. Whereas Section 514 of the Civil Procedure Code of 1882 did not contemplate the extending of time after the expiry of the time fixed, the present Code expressly provides for such extension. This circumstance was one which weighed strongly with the English Court in *Lord* v. *Lee*.[2] Justice Blackburn as he then was puts the argument thus : "Suppose the arbitrator inadvertently to have neglected to enlarge the time, and several meetings to have been held in the interval before the omission is discovered; if the subsequent enlargement of the time had only the effect of a new submission, all the witnesses must be recalled and all the expense must be incurred once again. It happens in the present case that the award was made before the oversight was discovered and the order obtained. Surely it is a very salutary enactment which enables a Judge to cure a defect which he thinks a mere defect of form, and which the parties might have cured themselves. I am therefore clearly of opinion that the section gives power to

1 (1891) I.L.R. 13 A. 300 : L.R 18 I.A. 55 (P.C.).
2. (1868) L.R. 3 Q.B. 404 at 409.

the Judge to enlarge the term for making the award at any time, and under any circumstances in which he thinks there is good cause for his intervention, and the effect of the enlargement is the same as if it had been by the parties; it amounts to a ratification, and is as if the enlarged time had been originally in the submission." This argument would seem to apply to the Civil Procedure Code as it stands at present.

SONACHALAM PILLAI *v.* KUMARAVELU CHETTIAR, I.L.R. 51 Mad. 128 : 54 M.L.J. 8 (F.B.).

The Full Bench held in this case that the conclusion in a representative suit is binding as against the individual members of the class even though no leave was taken under Order 1, Rule 8. Once the view was held in Madras that even in cases where the karnavan is sued as such, without action being taken under Section 30, Civil Procedure Code (which corresponds to O. 1, R. 8) the judgment would not bind the other members. In the position taken by the Full Bench there is a considerable amount of risk of public interest suffering by individual negligence or default. But there are several safeguards. In such cases the Court might well insist upon the procedure of Order 1, Rule 8 being adopted. By a judicious exercise of its power of making parties, possibility of collusion might be excluded. Again, not all suits where parties have common interest are representative suits. The previous suit must be one in respect of a public or private right claimed in common for the previous parties and others. If the right claimed is one not claimed in common but is an individual right similar to that of others, the clause will not apply. No representative action will lie for instance to recover damages though the alleged ground of action is a common injury nor can any personal decree be passed against persons not parties *eo nomine*. *Sahib Thambi* v. *Hamid*,[1] *Sadagopa Chari* v. *Krishnama Chari*[2] and *Markt & Co., Ltd.* v. *Knight Steamship Company, Ltd.* *Sale & Fraser* v. *Knight Steamship Company, Ltd.*[3] In *Jenkins* v. *Robertson*[4] it was held that in a declaratory action in respect of a public right there can be no binding compromise. A different view is taken in *Krishnamachari* v. *Chinnammal*.[5] Their Lordships of the Privy Council leave the question open whether the proposition is not too broadly stated in

1. (1911) I.L.R. 36 Mad. 414 : 22 M.L.J. 109.
2. (1889) I.L.R. 12 Mad. 356.
3. (1910) 2 K.B. 1021.
4. (1867) L.R. 1 H. L. and Sc & Div. 117.
5. (1913) 24 M.L.J. 192.

Jenkins v. *Robertson*[4]. See *Abdur Rahim* v. *Syed Abu Mahomed Barkat Ali Shah*[6]. Their Lordships however seem to be clear that a suit for a declaration that the suit property is *wakf* property and not the personal property of the defendants is not a suit of a representative character and a compromise decree passed in such a suit is not binding. This decision would seem to overrule *Mahomed Amir* v. *Sumitra Kuar*[7] relied upon in the case under review. This fact cannot be said necessarily to affect the general conclusion but would seem to be sound in a contrary sense. S. 11, clause (*vi*) rightly speaking applies only to decisions of Courts and as such would exclude compromise decrees and the binding nature of compromise decrees would seem to depend on general principles rather than on Section 11. Viewed from that point of view, it is hardly a necessary inference from the fact that a person represents another, he should be entitled to compromise also. If he is otherwise authorised to compromise there may be nothing against the compromise being held binding because the action is a representative one. Whatever the case with compromise, it is the rule in England that the parties represented are not affected by the abatement of the suit by reason of the death or bankruptcy of the parties on record or by discontinuance by them. The same rule should apply to representative actions in this country whether authorised under Order 1, Rule 8 or otherwise.

GIRDHAR DOSS & Co. *v.* PARA APPADURAI, I.L.R. 51 M. 157 : 54 M.L.J. 316.

It was held by the Bombay High Court in an early case in *Shirekuli Timapa Hegda* v. *Mahablya*[8] that a clause of forfeiture in a decree passed on a compromise even could not be relieved against on the ground that the "doctrine of penalties is not applicable to stipulations contained in a decree". So far as compromise decrees are concerned this ruling has been dissented from in Madras and does not seem to be adhered to even in Bombay though it is expressly dissented from only in so far as it affects subsequent suits based on the compromise decree In this case, their Lordships held that that doctrine cannot apply to decrees proper and therefore the Court had no power to relieve. Fraud might be an exception but their Lordships had not to consider that aspect of the question.

---

4. (1867) L.R 1 H.L. and Sc. & Div. 117.
6. (1927) L.R. 55 I.A. 96: I.L.R. 55 C. 519. 54 M.L.J. 609 (P.C).
7. (1914) LLR. 36 A. 424. 8. (1886) I.L.R. 10 B. 435.

FULI BIBI *v.* KHOKAI MONDAL, I.L.R. 55 Cal. 712.

In this case two infants purported to sell their interests in certain lands, one of them conveying her interests herself and the other being described as a minor acting through her husband who was however not her guardian in law; and the present suit was brought by both of them to recover the properties sold from the vendee on the ground that they were minors at the date of sale and consequently it was void and conveyed no title. The principal question was, whether before recovering possession of the properties, the plaintiffs should be directed to repay the sale price they received. It was found that there was no fraud on their part by reason of any misrepresentation by them as to their age at the date of the conveyance. The learned Judge has held that the plaintiffs can recover the properties as the sale was void and that they need not repay the sale price which they got as a condition precedent to their obtaining the relief in the case. It is not clear from the report whether the plaintiffs asked for the cancellation of the sale-deed executed by them on the ground of its void nature. If they had asked for it, it seems fairly clear that the Court would have power under S. 41 of the Specific Relief Act to direct the return of the purchase money. There can be no doubt that they can ignore the sale-deed as it was void and were entitled to recover possession of the properties sold. If this were the course adopted by the plaintiffs, the terms of the section would not strictly apply, as the learned Judge has pointed out, though it may be a question whether the matter should be made to depend on a trick in pleading. In this connection reference may be made to *Limbaji Ravji* v. *Rahi*[1] where a sale was made on behalf of a minor by a person who was not his legal guardian and when a suit was brought to recover the property, a condition was imposed on the plaintiff to return the consideration money received by him. To a similar effect is the decision in *Kapura* v. *Hardit Singh*.[2] With regard to these cases, however, it must be observed that, strictly speaking, if the plaintiff seeks to recover possession ignoring the sale, he does not ask for any equitable relief and therefore the rule that he who seeks equity must do equity has no application; and any question of seeking equity would arise only if he asks for cancellation of the sale-deed. Even with regard to this rule of equity, Lord Justice Romer observed in

1. (1925) I.L.R. 49 B. 576.
2. A.I.R. 1923 Lah. 510: 75 I.C. 261.

Thurstan v. *Nottingham Permanent Benefit Building Society*[3] that it has no application to cases where the transaction has been declared by the legislature to be void. It may well be doubted when the statement of the rule by the learned Judge is consistent with the terms of section 41 of the Specific Relief Act read with section 39, if it is assumed that these sections only enact the English rules of equity and do not depart from them to any extent.

If, in the present case, the plaintiffs were guilty of a fraudulent representation as to their age, the learned Judge would apparently have directed the return of the purchase money. There is ample authority for this view. See *Mallacheruvu Raghavayya* v. *Mallacheruvu Subbayya*,[4] *Koduri Venkataramayya* v. *Thumuluri Punnayya*[5] and *Rang Ilahi* v. *Mahbub Ilahi*.[6] There are observations to the same effect by Lord Justice Romer in the case of *Thurstan* v. *Nottingham Permanent Benefit Building Society*[3] and also in *R. Leslie, Limited* v. *Sheill*.[7] If, as pointed out in the last case, a minor is not liable in damages for a fraudulent representation as to his age, it is open to question whether when he seeks to enforce a remedy at law, such as possession of land, he is bound to restore the purchase money and if so on what principle.

YACUBKHAN *v.* GULJARKHAN, I.L.R. 52 Bom. 219.

The learned Judges have held in this case following *Motilal* v. *Kasambhai*[8] that the definition of the term "attest" in the Transfer of Property Act as enacted by Act XXVII of 1926 is retrospective by reason of the provisions of Act X of 1927. It can hardly be denied that its retrospectivity was intended by the legislature, though in carrying out the intention the legislature has not been happy in the use of appropriate language. Indeed, the relevant provisions of the enactments are so confused that a Division Bench of the Madras High Court in *Palaniappa Chettiar* v. *Rajagopala Pandaraihar*[9] has gone the length of holding on an examination of their provisions that the legislature has not achieved its purpose and that the definition of the

3. (1902) 1 Ch. 1 at 12.
4. (1917) 7 L.W. 124.
5. (1925) 23 L.W. 521.
6. (1925) I.L.R. 7 Lah. 35.
7. (1914) 3 K.B. 607.
8. (1927) 29 Bom. L.R. 1334.
9. (1928) M.W.N. 425: 111 I.C. 407.

term "attest" in Act XXVII of 1926 has no retrospective operation notwithstanding the enactment of Acts X of 1927 and XII of 1927. A Full Bench of the Madras High Court has since held that the definition clause is retrospective in its operation, see *Veerappa Chettiar* v. *Subrahmania Aiyar*.[1] The learned Chief Justice has however not given any reasons for this view or cared to examine the reasons given by the learned Judges in *Palaniappa Chettiar* v. *Rajagopala Pandarathar*,[2] but has contented himself with the observation that this latter case was unreported and it was therefore unnecessary to express any opinion on its correctness. This observation of the Chief Justice is unintelligible as a decision does not derive its authority only when it is reported. Since then, however, the decision of the Division Bench has found its way into two legal journals. Again, the learned Chief Justice is not correct when he says that Odgers, J., had no doubt about the answer to the question, as that learned Judge had been a party to and held the contrary view in *Palaniappa Chettiar* v. *Rajagopala Pandarathar*.[3] It must however be recognised that the decision of the Full Bench is in accordance with *S. M. A. R. A. L. Firm* v. *R. M. M. A. Firm*[3] and the decision under notice and gives effect to the intention of the legislature. A further point decided by the Madras Full Bench and which has to be noticed is that the signature of the Registering Officer in the course of registration of a document may itself amount to attestation within the definition of the term, a view for which there is prior authority in *Radha Mohan Dutta* v. *Nripendra Nath Nandy*.[4]

JEWAN LAL DAGA *v.* NILMANI CHAUDHURI, I.L.R. 7 Pat. 305: 55 I.A. 107: 54 M.L.J. 325 (P.C.).

An agreement to execute a mortgage over specified properties to secure the true amount of the existing indebtedness between the parties, on a just and true account being taken, is according to the decision of their Lordships in this case, one capable of being specifically enforced. Nor is the fact that the plaintiff tendered a mortgage deed in which the amount of the mortgage is overstated by itself sufficient to deprive the plaintiff of all right to relief. The Court will in such circumstances ascer-

1. (1928) 55 M.L.J. 794 (F.B.).
2. (1928) M.W.N. 425: 111 I.C. 407.
3. (1927) I.L.R. 5 Rang. 772.
4. (1927) 47 C.L.J. 118: 105 I.C. 422.

tain the true amount due and settle the terms of the mortgage bond to be executed. It should be noticed that this in no way conflicts with the general statement of the law that the Court will not specifically enforce an agreement to lend or borrow. The English and Indian decisions are clear that where the amount has already been advanced in full, the Court will and must in proper cases grant a decree for specifically enforcing the agreement to give a mortgage. There has been a difference of opinion where only a portion of the agreed amount has been paid. The whole matter is fully discussed in the judgment of the Madras High Court in *Meenakshisundara Mudaliar* v. *Ratnasami Pillai*.[1]

Another important point is also decided by their Lordships in the case under notice. Their Lordships hold that documents which are not admissible in evidence can nevertheless be used by a witness while under examination to refresh his memory under S. 159 of the Indian Evidence Act, provided the terms of that section are satisfied. *See* on this point *Birchell* v. *Bullough*.[2] In *Banwari Lal* v. *Mahesh*[3] a witness was allowed to refresh his memory by reference to a horoscope as a record made by him, though it was not a probative document in itself.

---

1. (1918) I.L.R. 41 M 959 : 35 M.L.J. 489 2. (1896) 1 Q.B. 325.
3. (1918) L.R. 45 I.A. 284 : I.L.R. 41 A. 63 (P.C.).

TAMIZ-UN-NISSA *v.* SYED MUHAMMAD HUSAIN, I.L.R. 50 All. 306.

In this case a usufructuary mortgagee purchased the equity of redemption from one of the heirs as if it belonged solely to him. Another co-heir brought a suit for her share of the property and as the mortgagee omitted to raise the defence based upon his usufructuary mortgage a decree was passed in favour of the plaintiff for her share. On the basis of the decree, the Revenue Courts entered the name of the plaintiff in that suit and other co-heirs in the Revenue records and the mortgagee then brought a suit for the recovery of the property from all the co-sharers on the footing of the usufructuary mortgage. This suit was in the Sub-Court, whereas the former suit was in the Munsif's Court. The question was whether the previous suit barred the present. Their Lordships took the claim against each of the co-heirs as distinct and on that footing held that the suit in respect of the share if brought separately could be brought in the Munsif's Court and would have been barred by *res judicata* and consequently this suit was also barred. This case illustrates one of the difficulties presented by section 11, Civil Procedure Code. Somewhat similar questions arose in *Pathuma* v. *Salimanuna*[1] where the decision of the Munsif's Court as to the validity of the gift in a suit brought in respect of part of the land was held to bar a subsequent suit brought for the whole of the land in so far as the particular part in question in the previous suit was concerned. This view has been more recently accepted in *Raman* v. *Raman Bhattathripad.*[2] On a slightly different principle proceeds *Bhagwanbutti Chowdhrani* v. *Forbes,*[3] where it was held that the plea of *res judicata* cannot be defeated by combining the previous claim with another claim so as to change the Court. This case was distinguished in *Shibo Raut* v. *Baban Raut,*[4] where in a previous suit in respect of a part of the land the plaintiff in the second suit had been held to have no title, that decision was held not to operate as *res judicata* in a subsequent suit for joint possession of the latter's share in that and other lands on the ground that there was no joinder of causes of action in this case as in the previous and therefore no evasion and S. 11 should

1. (1884) I.L.R. 8 M. 83
2. (1915) 28 M.L.J. 184.
3. (1900) I.L.R. 28 C 78
4. (1908) I.L.R. 35 C. 353.

be given effect to. In *Ranganatham Chetty* v. *Lakshmi Ammal*[1] the principle of the decision in *Bhagwanbutti Chowdhrani* v. *Forbes*[2] is adopted to defeat the subsequent suit of the plaintiff in the High Court as regards the whole of the property because in respect of half of it it had been already decided in an earlier suit in the City Civil Court that the defendant and not the plaintiff was the owner because in so far as half was concerned, the suit was within the competence of the City Civil Court. White, C.J., says in respect of this point at p. 384: "It seems to me that there are two principles recognised in these authorities. One is the plaintiff cannot add causes of action to what I may call the original cause of action for the purpose of swelling the amount of valuation and then say, 'the original Court is incompetent to try this question.' That seems to be the principle on which the case of *Bhagwanbutti Chowdhrani* v. *Forbes*[2] is decided. The other principle is shown in *Pathuma* v. *Salimamma*,[3] *David* v. *Girish Chunder Guha*[6] and *Sheorajrai* v. *Kashinath*[7] and the principle there stated, as I understand it, is that for the purpose of dealing with this question of *res judicata*, it is open to the Court to split up, so to speak the causes of action in the subsequent suit and if it be found that one of the causes of action is the same as the cause of action relied upon in the earlier suit, then although taking all the causes of action together, the second suit may be said to be outside the jurisdiction of the original Court." Here His Lordship is referring only to the joinder of different causes of action. The case he had to deal with does not seem to be a case of a joinder of causes of action but rather like *Shibo Raut* v. *Baban Raut*[4] a cause of action and part of a cause of action. *Pathuma* v. *Salimamma*[3] would seem to proceed on a ground narrower than these as pointed out by Sadasiva Aiyar, J., in *Raman* v. *Raman Bhattathripad*[5]: "The distinction between the competency of a Court to decide on the subject-matter directly in issue and the competency of the same Court to decide finally all the questions of fact and law which have to be decided in order to arrive at the decision on the title to the subject-matter." The decisions on such questions of fact and law will not be *res judicata* if the subject-

1. (1884) I.L.R. 8 M. 83
2. (1915) 28 M.L.J. 184
3. (1900) I.L.R. 28 C. 78.
4. (1908) I.L.R. 35 C. 353
5. (1913) 25 M.L.J. 379
6. (1882) I.L.R. 9 C. 183.
7. (1884) I.L.R. 7 A. 247 (F.B.).

matter of the subsequent suit was beyond the jurisdiction of the Court which decided the first suit. Mr. Justice Mukerjee seems to think that some of the observations at any rate in *Pathuma* v. *Salimamma*[1] are based upon the law as it was understood to be under the Code of 1877. Thus the point can hardly be said to be beyond doubt.

ASHIQ HUSAIN *v.* CHATARBHUJ, I.L.R. 50 All. 328.

In this case a simple mortgage contained a stipulation that if the mortgagor transferred the property, the mortgagor should be at liberty to sue for the mortgage money immediately. The mortgagee brought the suit 12 years after one such alienation but within 12 years of the time fixed in the mortgage. The question was whether the suit was barred. Reliance was placed on *Shib Dayal* v. *Meharban*[2] and *Gaya Din* v. *Jhumman Lal*[3] which hold that where it is provided in the mortgage deed that if interest was not paid regularly the mortgagee should be at liberty to sue for both the principal and interest, limitation begins to run from the date of default in respect of interest. Their Lordships distinguish the case under review from the Full Bench cases on the ground that there the ground of action was peculiarly within the knowledge of the mortgagee whereas here the plaintiff had no knowledge of the alienation. This is undoubtedly a distinction on facts but hardly involves a difference in principle. If section 18 applied, that is to say, if knowledge of plaintiff's right was fraudulently withheld from him the cause of action might be put off, but where no such fraud is established it is difficult to see how the starting of limitation could be put off.

CHATARBHUJ *v.* HARNAND LAL, I.L.R. 50 All. 335.

In this case the High Court interfered with the order of the Lower Court refusing to appoint a guardian to a person who was alleged by reason of unsoundness or infirmity of mind unable to protect his own interests under section 151 of the Code of Civil Procedure. The Allahabad High Court having taken the view that section 115 does not apply to interlocutory orders is compelled to call in aid section 151 to interfere when there has been "abuse of process" as they call in interlocutory matters. The ground of interference was that the Court had considered

---

1. (1884) I.L.R. 8 M. 83.
2. (1922) I.L.R. 45 A. 27.
3. (1915) I.L.R. 37 A. 400 (F.B.).

itself bound by the finding of the District Court under the Lunacy Act that the party was not unable to manage his affairs by reason of unsoundness of mind. Their Lordships point out that the scope of Order 32, Rule 15 and of the Lunacy Act are not co-terminus in that the Lunacy Act has got to do only with incapacity to manage by reason of unsoundness of mind, while the Civil Procedure adds a further ground of incapacity to protect his own interest by reason of infirmity of mind whatever that may mean.

BALMUKAND *v.* TULA RAM, I.L.R. 50 All. 394.

The question in this case was whether the right to a share in the offerings at a temple is assignable. It is quite true, as their Lordships point out, that when the right to offerings is not connected with any religious office the objection of public policy to the transfer goes and the only question that remains is whether it is property at all to be assigned. It is difficult to assign a legal origin to the right to share in such offerings which is unconnected with an office and a permanent right (*Venkatarama Aiyangar* v. *Kasturiranga Aiyangar*[1]) whatever it may be as regards offerings at mosques. The offering is to the deity and it is difficult for any person to establish title thereto except as remuneration possibly for service as trustee or archaka. That is the view taken in *Kashi Chandra* v. *Kailash Chandra*,[2] *Sukh Lal* v. *Bishambar*,[3] *Puncha Thakur* v. *Bindeswari Thakur*[4] and *Puncha Thakur* v. *Bindeswari Thakur*[5] and that we think is the right view. If the right could be supported on some other legal basis unconnected with any office, then the only question would be whether it can be said to be property. If it is connected with some original right to the property there could be no doubt it would be property. Even otherwise, it would be some sort of customary right in the shrine and may be assignable. There are certain cases, for instance, *Kashi Chandra* v. *Kailash Chandra*,[2] which took the view that these offerings were voluntary and uncertain and therefore there could be no claim in respect of them but that view is not accepted in Madras in *Bheema Charyulu* v. *Ramanuja Charyulu*.[6]

---

1 (1916) I.L.R. 40 M. 212 at 219 31 M.L.J. 777 (F.B).
2. (1899) I.L.R. 26 C. 356
3. (1916) I.L.R. 39 A. 196
4. (1915) I.L.R. 43 C. 28
5. (1916) 37 I.C. 960
6. (1907) 17 M.L.J. 493.

RAMAPPA *v.* YELLAPPA, I.L.R. 52 Bom. 307.

In this case, the equity of redemption in certain properties under a possessory mortgage was vested in three brothers, two of whom agreed to sell the properties to the mortgagee but no registered sale-deed was executed. The other brother afterwards sued to redeem the entire properties and not merely his share in them and the mortgagee contended that by the doctrine of part-performance he had become the owner of the shares of the two brothers who had agreed to sell their interests and that therefore the plaintiff was entitled to redeem only his share of the properties. The learned Judges have upheld the defendant's contention. As pointed out by the learned Judges in this case, the rule of part-performance has been recognised by the Indian High Courts even with reference to the transfers which can only be effected in accordance with the formalities required by the Transfer of Property Act. This conclusion has been rested mainly on the observations of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli*[1] based on *Maddison* v. *Alderson*.[2] Had it not been for the recent decision of the Privy Council in *Arseculeratne* v. *Perera*,[3] it might not have served any useful purpose to point out the difference between the scope of section 4 of the Statute of Frauds and the sections of the Transfer of Property Act, that in the one case, the existence or validity of the contract does not require the formality of writing, but writing is only required for *proving* an existing and valid contract, *Leroux* v. *Brown*[4] and *Rochefoucauld* v. *Boustead*,[5] while in the case of transfers requiring certain formalities under the Transfer of Property Act, the transfers themselves cannot exist in law unless the formalities are complied with. The Ceylon ordinance in the case before the Privy Council required that no agreement for the sale, transfer or mortgage of land would be of force or avail in law unless it was in writing signed and attested by a notary and two witnesses. An agreement affecting land was purported to be made in writing but without the other formalities required by the ordinance and the doctrine of part-performance was invoked by the appellant and the decision in *Maddison* v. *Alderson*[2] was cited before their Lordships in support of the contention. But their Lordships held that the doctrine of part-performance with

1. (1914) I.L.R. 42 C 801: L.R. 42 I.A. 1: 28 M L.J. 548 (P.C.).
2. (1883) L R. 8 A.C. 467
3. (1928) A.C. 173.
4. (1852) 12 C B. 801.
5. (1897) 1 Ch. 196 at 207.

reference to section 4 of the English Statute of Frauds had no application to the stringent provisions of the Ceylon ordinance by which an agreement as to land was of no force or avail in law unless clothed in the formalities required by the ordinance. It may well be doubted whether the provisions of the Transfer of Property Act do not have the same legal effect as the provisions of the Ceylon ordinance. When therefore the question comes up for consideration in a later case, it is open to argument whether having regard to the decision of the Privy Council in *Arseculeratne* v. *Perera* the extension of the doctrine of part-performance to the cases of transfers falling under sections 54, 59, 118 and 130 of the Transfer of Property Act is not unwarranted.

BENOY KRISHNA MUKERJEE *v.* SATISH CHANDRA GIRI, I.L.R. 55 Cal. 720: 54 M.L.J. 423 (P.C.).

An appeal was taken in this case to the Privy Council against an interlocutory order appointing a receiver in the course of a suit pending in a moffussil court. That such an order is not a "final order" within the meaning of the expression as used in section 109, clauses (*a*) and (*b*) of the Civil Procedure Code is well settled and a party is not therefore entitled as of right for leave to appeal to the Privy Council under those clauses. See *Chundi Dutt Jha* v. *Pudmanund Singh Bahadur*,[1] *Mahomed Musaji Saleji* v. *Ahmed Musaji Saleji*[2] and *Magni Ram Bungar* v. *Sridhar Choudhury*.[3] A final order has been understood to mean an order which finally adjudicates any matter directly at issue in the suit in respect of the rights of the parties. *Secretary of State for India in Council* v. *British India Steam Navigation Company*.[4] Apparently, therefore, leave to appeal was given in the case under clause (*c*) of the section as being a case otherwise fit for appeal to His Majesty in Council. Their Lordships have clearly noticed the futility and even mischief of an appeal being taken to the Privy Council in interlocutory matters as a rule.

This decision is further useful as enunciating the conditions under which alone a receiver can be appointed pending a suit. Their Lordships draw attention to the undesirability of indulging in a discussion of the merits of the suit on the materials then available in an application for the appointment

1. (1895) I.L.R. 22 C 928.
2. (1911) 13 C.L.J. 507.
3. A.I.R. 1925 Pat. 173.
4. (1911) 13 C.L.J. 90.

of a receiver and therefore refrain from doing so. While no doubt in cases where the defendant is in possession of the suit properties under an apparent title, the Courts will expect the plaintiff to make out a fair case before dispossessing the defendant by the appointment of a receiver as distinguished from the class of cases where the properties are *in medio*, even a tentative expression of opinion on the merits of the suit by the court might as their Lordships observe be embarrassing to one or other of the parties at a later stage of the suit and should therefore be avoided.

PHANINDRA KRISHNA DUTT *v.* PRAMATHA NATH MALIA, I.L.R. 55 Cal. 748.

The learned Judges have, in the course of the judgment in this case, drawn pointed attention to the rules of procedure contained in rules 7 and 8 of Order 26 of the Civil Procedure Code which impose certain conditions before the evidence of a witness taken on commission can become evidence in the suit and the necessity for observing them. Once the Court has ordered the evidence of a witness to be taken on commission on being satisfied that it is a fit case for the issue of a commission, it is generally assumed that the evidence so taken will be evidence in the suit without any further formality and without any evidence that at the time of the trial, the case satisfies the requisites of Rule 8 of Order 26 and without the formality of reading the evidence so taken at the trial. Indeed, there are observations by learned Judges that it is not the practice in the moffussil Courts of Bengal to observe strictly the provisions of those rules. *Dhanu Ram Mahto* v. *Murli Mahto*[1] and *Man Gobinda Chowdhuri* v. *Shashindra Chandra Chowdhuri*.[2] If that was the practice, after the observations of the Privy Council in *Satish Chandra Chatterji* v. *Kumar Satish Kantha Roy*,[3] the Courts have to give effect to the rules of procedure contained in the Code and not treat them as "an idle formality." It may be noticed that ever since the Civil Procedure Code of 1859, provisions corresponding to Order 26, Rule 8 have been enacted in the Civil Procedure Codes of this country and a similar rule was in force in England at least from 1 William IV, Ch. 22, S. 10 which with some slight alteration is Rule 18, Order 37 of

1. (1909) I.L.R. 36 C. 566. 2. (1907) I.L.R. 35 C. 28.
3. (1923) 45 M.L.J. 363 (P.C.).

the Rules of the Supreme Court. Cf. *Duke of Beaufort* v. *Crawshay*.[4] But the more important question is what is to be the result if a witness or party is examined on commission and the party on whose behalf he is so examined declines to tender the deposition taken before the commissioner at the trial, though the conditions referred to in Rule 8 exist. Is it then open to the other parties to read it at the trial and thus make it evidence in the suit on the side of the party calling the witness? The practice on the Original Side of the Calcutta High Court seems to be that unless the party who called the witness tenders the deposition at the trial, it cannot become evidence in the suit and that it is not open to the other parties to tender the deposition in evidence. *Kusum Kumari Roy* v. *Satya Ranjan Das*[5] and *Hemanta Kumari* v. *Banku Behari Sikdar*.[6] Unless this rests on a rule of practice applicable to the Original Side of the Court, there does not seem to be anything in the Civil Procedure Code to prevent the other parties reading it in evidence provided, of course, the requisites of Order 26, Rule 8 are satisfied. We venture to think that the decisions in *Man Gobinda Chowdhuri* v. *Shashindra Chandra Chowdhuri*,[7] *Rajah Prithee Bullubh Pal Sreechundun Mari Sultan* v. *Hara Dhun Shome*[7] and *Dwarakanath Dutt* v. *Gunga Dayi*[8] have only to be understood in this light. There is also a direct decision to this effect of the Sind Judicial Commissioner's Court in *Chotumal Bulchand* v. *Lilaram Lakhmichand*.[9]

MUHAMMAD SHOAIB KHAN *v.* ZAIB JAHAN BEGAM, I.L.R. 50 All. 423.

The right of a Muhammadan widow to remain in possession of her husband's estate of which she has got into possession and the incidents of such right have been the subject of various decisions and the point that arose in this case was whether to have this right, she should have got into possession in the assertion of her right as creditor. Their Lordships say that it is not necessary—all that is required is that she should have got into possession without force or fraud.

---

2. (1907) I.L.R. 35 C. 28.
4. (1866) L.R. 1 C.P. 699.
5. (1903) I.L.R. 30 C. 999.
6. (1905) 9 C.W.N. 794.
7 (1874) 22 W.R. 331
8. (1872) 8 Ben. L.R. (App.) 102.
9. A.I.R. 1926 Sind 34.

THAKARDWARA PHERU MAL *v.* ISHAR DAS, I.L.R. 9 Lah. 588.

An idol under Hindu Law is no doubt a juridical person capable as such of holding property though it is only in an ideal sense that property is so held. It is clear however as pointed out by the Privy Council in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*[1] that possession and management of the dedicated property properly belongs to the shebait. A right of suit for protection of the idol's property is however vested in the shebait and not in the idol. In the later case of *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick*[2] their Lordships while discussing the true view in Hindu Law of a family idol speak of it "as a 'juristic entity' which has a judicial status with the power of suing and being sued." It is however clear that this can be the case only of the deity represented by the consecrated image. The building in which the idol itself is located or any other religious building alone cannot itself be regarded as a legal persona. Such a thing cannot be a plaintiff in an action, even if the plaint purports to be represented by a person describing himself as a manager. The building is itself the subject-matter of property and it is only the legal owner thereof who can institute a plaint in respect thereof as owner.

A religious *institution* may however stand on a different footing. As observed by West, J., in *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram*[3] "The Hindu Law, like the Roman Law and those derived from it, recognises not only corporate bodies with rights of property vested in the corporation apart from its individual members but also the juridical persons or subjects called foundations. A Hindu who wishes to establish a religious or charitable institution may, according to his law, express his purpose and endow it. . . . A trust is not required for this purpose." The conception of "corporations sole and aggregate" is not foreign to Hindu Law as shown by Justice Bashyam Aiyangar in his judgment in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami*,[4] although the analogy of a madhathipathi with a bishop as developed by the learned Judge has not been accepted as accurate in all respects. There have been differences of opinion as to what exactly should be regarded as the ideal person in the case of temples and mutts. It has been

1. (1904) L.R. 31 I.A. 203: I.L.R. 32 C. 129 (P.C.).
2. (1925) L.R. 52 I.A. 245: I.L.R. 52 C. 809: 49 M.L.J. 30 (P.C.).
3. (1887) I.L.R. 12 B. 247.
4. (1904) I.L.R. 27 M. 435.

suggested that the whole community for whose benefit the institution is founded and endowed should be regarded as the true legal persona. So far as temples are concerned it must be taken as well-established that it is the deity who is the juristic person. So far as mutts are concerned it has been suggested that the office of the spiritual preceptor is the true juristic person. The view has also been advanced that the objects for which the mutt is founded or the deity that is usually worshipped in the mutts or the mutt itself may well be regarded as the artificial persona recognised by the law. The Privy Council speak of the head of the mutt as the person in whom the whole assets are vested as the owner thereof in trust for the institution. See *Ram Parkash Das* v. *Anand Das*.[5] As regards what may be called charitable endowments as distinguished from religious endowments there has been very little judicial discussion as to what should be considered to be the true 'persona'. In an early case in *Parmanandas Jivandas* v. *Venayek Rao Wassudeo*[6] the Privy Council remark that "the true owners of the property given to the Dharmasala are the objects of the trust, *viz.*, the sadhus and the saints for whose benefit the fund was given in that case." In the case under review, the facts are not clear as to the exact nature of the "Thakardwara" which was put forward as the plaintiff in the action. If it was merely the building in which an idol has been installed and located, it is clear that the building cannot be regarded as a juristic person along with the deity. The judgment should not be taken to lay down that so far as religious endowments are concerned only an idol and a mutt can be taken to be established as juristic persons or that there cannot be any other kind of artificial persona recognised as such by Hindu Law.

---

5 (1916) L.R. 43 I.A. 73: I.L.R. 43 C. 707: 13 M.L.J. 1 (P.C.).
6 (1878) L.R. 9 I.A. 86: I.L.R. 7 B 19 (P.C.).

CHUNNA MAL-RAM NATH *v.* MOOL CHAND-RAM BHAGAT, L.R. 55 I.A. 154: I.L.R. 9 Lah. 510: 55 M.L.J. 1 (P.C.).

Section 63 of the Indian Contract Act is a deliberate departure from the rules of the English Common Law. Not only is no "consideration" necessary as has been laid down by all the High Courts, but even an "agreement" is, according to the decision of their Lordships in this case, not an essential condition. The contrary view of Jenkins, C.J., in *Abaji Sitaram Modak* v. *Trimbak Municipality*[1] is declared by their Lordships to be wrong. There need be no "accepted proposal" for the validity of a remission of performance by a promisee. In such a case where performance has been dispensed with, the promisee can no longer claim damages for non-performance of the promise.

In the particular case, the defendant's offer to deliver the goods packed in bales, instead of in tin-lined boxes was not accepted by the plaintiff who thereupon cancelled the contract. Their Lordships found it unnecessary to decide if the requirement as to packing in tin-lined boxes was a part of the description of the goods. If it were not, the plaintiff had no right to cancel the contract and having dispensed with performance as offered could not claim damages for non-delivery. If it were, the contract had become void under S. 56 as owing to the subsequent order of the Government prohibiting import of cotton goods packed in wood and tin cases. The plaintiff cannot in either view claim damages.

E. MYLNE *v.* T. KOIR, I.L.R. 6 Rang. 323.

This case affords a telling illustration of the mischiefs of uncertainty in the Law of Procedure. After the framing of the issues, and recording of some evidence led by the defendant—on whom the burden of proof lay—the suit was adjourned by the Court. On the adjourned date, the defendant was absent and his pleader asked for an adjournment, which was refused, and he withdrew from the case. The Judge proceeded with the trial, examined some witnesses for the plaintiff and later delivered judgment in plaintiff's favour on the merits. Failing in an application to set aside the *ex parte* decree, the defendant appealed to the District Court against the *ex parte* decree, as well as against the order refusing to set it aside. The appeal against the order was dismissed on the ground that the pleader having been present, the decree was not *ex parte*. The appeal against the decree was allowed and the suit remanded.

1. (1903) I.L.R. 28 B. 66.

Against this remand order, the plaintiff moved the High Court which held that the last adjournment having been made *suo motu* by the Court, Rule 3 of Order 17 will not apply, and that the pleader having withdrawn, the case fell under Order 17, Rule 2 and Order 9, Rule 6. In the result, the appeal was allowed and the defendant left without any remedy.

It does not clearly appear from the judgment if the appeal against the order refusing to set aside the *ex parte* decree was dismissed on the plaintiff's plea that Order 17, Rule 2 will not apply or the Court of its own accord found the point. If it were at the instance of the plaintiff that the appeal was dismissed, it is at least doubtful if the Court could have allowed the plaintiff to contend in the appeal to the High Court that O. 17, R. 3 did not apply but only O. 17, R. 2. He successfully caused the defendant's petition to be dismissed on that plea. Whatever may be said on that question, it is difficult to follow the learned Judge when he says "That Order, however, is not before me now". The powers of revision of the High Courts are very wide and the High Court can of its own motion act under Section 115, Civil Procedure Code, if it appears to it desirable so to do; and it is not necessary that it should be put into motion by the party aggrieved (See *Sri Krishna Thathachariar* v. *Singaracharia*r[1], *Puran Mal* v *Janki Pershad Singh*[2], *Golam Mahammad* v. *Saroda Mohan Maitra*[3], *Zamiran* v. *Fateh Ali*[4], *Debi Das* v. *Ejas Husain*[5] and *Chowdhury Ram Prasad Rai* v. *Mahesh Kant Chowdhury*[6]). The defendant by the District Judge's order got what he desired and it was not necessary for him to have preferred a revision against the order dismissing his appeal against the order refusing to set aside the *ex parte* decree.

It appears from the judgment that the prior adjournment was by the Court and not at the instance of the party. In that event, it is doubtful if Order 17, Rule 2 will apply. (See *Sreemutty Toolsy Money Dassee* v. *Sreemutty Prasad Money Dassee*[7]), though in several cases it has been assumed that it will. (Cf. *Bhatiley Chunilal* v. *Chakarpan*[8]; *Enatullah Basunia* v. *Jiban Mohan Roy*[9].)

---

1. (1881) I.L.R. 4 Mad. 217
2. (1901) I.L.R. 28 C 680.
3. (1900) 4 C.W.N. 695
4. (1904) I L R. 32 C 146
5. (1905) I.L.R. 28 All. 72
6. (1921) I L.R 1 Pat. 232.
7. (1898) 2 C.W.N. 490.
8. (1917) 42 I.C 945
9. (1914) I.L R 41 Cal. 956

THE SECRETARY OF STATE FOR INDIA *v.* VOLKART BROS., I.L.R. 51 Mad. 885 : 55 M.L.J. 646 (P.C).

In this case, the question was whether the assignee of the lessee's interest in a part of the lease-hold premises could sue to enforce in respect of that part, the covenant to renew the lease. There was considerable divergence of judicial opinion on this point in India. Their Lordships hold on the construction of the lease that the covenant was to renew the lease as a whole and could not therefore avail in respect of a part. Their Lordships leave the question open whether if all the persons interested were made parties and consented to the renewal, a renewal in respect of the whole could not have been enforced. In the case under review, it so happened that the assignee of the lease in respect of the other part had surrendered the lease in favour of the landlord. Their Lordships base their decision on the fact that the contract is a contract to renew the whole lease and not a contract to renew a part and such a contract according to their Lordships would not avail to each assignee of a part with respect to his part. Their Lordships adopt the reasoning of Mr. Justice Krishnan on this part of the case, viz., that "cases bearing upon the apportionment of rent or referring to covenants for repair are not in point as they are not *pari materia* with covenants to renew which create new rights." According to their Lordships the sole question is what is the contract—is it a contract to renew the lease in respect of the whole or is it a contract to renew the lease in respect of any part of it? If there is no contract to renew the lease for a part of the premises, then Section 14, 15 or 16 of the Specific Relief Act cannot save the situation and give the assignee a right to sue. If on the other hand the contract was a contract to renew in respect of each part, then those sections would have nothing to do with the case.

THIMMAPPA *v.* THIMMAPPA, I.L.R. 51 Mad. 967 : 55 M.L.J. 351 (F.B.).

The Full Bench holds in this case in accordance with the opinion of the other High Courts that section 162 of the Criminal Procedure Code prohibits the use of not only statements made to the Police in the course of investigation and reduced to writing but such statements whether oral or written. His Lordship Mr. Justice Jackson points out the obvious unsatis-

factory results of the section being so interpreted but his Lordship thinks with the others that that is the better construction of the section. Mr. Justice Ramesam in his judgment which is the judgment that gives the reasons in support of this view, adopts the view of Rutledge, C. J., in *King-Emperor* v. *Maung Tha Din*[1] as regards the possible constructions that are open on the wording of the section. He therein indicates agreeing with Rutledge,J., that the section admits of two possible constructions, viz., first, that it prohibits the use of the statements as well as the record—secondly, that it prohibits the use of written statements. A possible third construction is, we should think, that it prohibits the use of the statements as well as the record when such statements have been reduced to writing and not otherwise. If the statements have been reduced to writing, neither oral evidence of such statement nor the writing can be given in evidence, except in the manner and in the circumstances permitted by the section. If the statements have not been reduced to writing evidence may be given of statements made. This construction would justify the use of the words "or any record thereof" and would meet the criticism of Mr. Justice Jackson. In the use of such statements, the Police would not be in a better position than the accused inasmuch as their acceptance would depend upon the credibility of the witnesses and not upon the additional guarantee of a written record by an officer at about the time and where it is against the accused, the accused would be very much assisted by the fact of its not having been taken down by the Police at the time if really the statement was made as deposed by the witness later.

---

1 (1926) I L.R. 4 Rang. 72.

MUTHUSWAMI KAVUNDAN *v.* PONNAYYA, I.L.R. 51 Mad. 815: 55 M.L.J. 436.

A Hindu died leaving a stepmother. She took possession of the estate and spent certain amounts for the marriage of her daughters and paid certain of the debts of her husband and stepson. She claimed a charge in respect of those amounts. Their Lordships hold that she was not entitled to it though she might be entitled to claim the same personally from the heir and that Art. 61 would be the article applicable to her claim. They opine that these allowances could have been claimed by her in the suit against her by the reversioner. That it can be pleaded is the view of the Allahabad High Court in *Sat Narain* v. *Radha Kishan*. Their Lordships held in this case that the possession of the stepmother could not be held to be wrongful so long as the reversioners did not make a claim. Undoubtedly she had a right to be maintained out of it and have her daughters married out of it. If nobody came forward to assume charge of the property and also assume responsibilities in connection with it, there is much in reason to justify the view that it would be right on her part to take possession at least of so much of the property as was necessary for the purpose of meeting those legitimate expenses. The Hindu law contemplates coparceners being held liable for the debts of even women and slaves contracted for the necessities of the family. It is difficult to conceive of a situation in which they could be more properly held liable than the one like the present.

In re VISVANADHA RAO, I.L.R. 51 Mad. 1006: 55 M.L.J. 442 (F.B.).

Their Lordships of the Privy Council have declared the rights of individuals to carry processions in highways, etc., to be subject to the Magistrate's directions "such directions as the Magistrates may lawfully give to prevent obstructions of the thoroughfare or breaches of public peace." *Manzur Hasan* v. *Muhammad Zaman*.[1] Section 144, Criminal Procedure Code, is thus recognised as justifying Magistrates overriding private rights of parties in times of emergency but to allow the Magistrates to suspend and override such rights for an indefinite length of time by successive orders or the Local Government to do the same by a notification in the Gazette is in effect to allow

1. (1924) I.L.R. 47 All 151: L.R. 52 I.A. 61: 48 M.L.J. 23 (P.C.).

the Government to abdicate its natural function to enforce private rights. While the High Court may have power to restrain the Magistrate's extravagant action, it may not have the power to do so when the Local Government chooses to exercise the power whimsically or tyrannically. In certain circumstances the party may have a right of action against Local Government but short of that he does not seem to have any remedy. The point of extravagance which might justify the High Court in interfering with the action of the Magistrate would vary with individual Judges. So far as this case is concerned, it does not deal with the question but there seems to be however a difference of opinion—as to whether orders passed under this section are not merely administrative orders and as such whether it is not beyond the competence of the High Court to interfere with such orders.

HITENDRA SINGH *v.* MAHARAJA OF DHARBANGA, L.R. 52 I.A. 197: I.L.R. 7 Pat. 500: 55 M.L.J. 615 (P.C.).

Having regard to the very elaborate judgments of the High Court which is reported in *Hitendra Singh* v. *Maharaja of Dharbanga*[1] and to the difference of views among the learned Judges and having regard to the various aspects of the decision therein, it is much to be regretted that the judgment of their Lordships of the ultimate Court should be so meagre even on the one question which they find sufficient to decide. The extracts from the two earlier decisions of their Lordships do not advance the discussion any further, as their Lordships merely reiterate their earlier observations. It is not at all clear whether their Lordships intend to hold that the decision of the Madras High Court in *Bhujanga Rao* v. *Ramayamma*[2] is overruled by the decision of the Privy Council in *Surajmani* v. *Rabi Nath Ojha*[3]. It was so understood by the Madras High Court in *Ramachandra Rao* v. *Ramachandra Rao*[4], but this judgment itself was reversed by the Privy Council in their decision in *Ramachandra Rao* v. *Ramachandra Rao*[5] though on another point. On the question as to what exactly was the *ratio decidendi* of their Lordships' decision in *Surajmani's case*[3] their Lordships observe in the latter case "As some misapprehension appears to exist as to the effect of cer-

---

1. (1925) I.L.R. 4 Pat. 510
2. (1884) I.L.R. 7 M 387.
3. (1907) L.R. 35 I.A. 17: I.L R. 30 A. 84 · 18 M.L.J. 7 (P.C)
4. (1918) I.L.R. 42 M. 283: 36 M.L.J. 306.
5. (1922) L.R. 49 I.A. 129: I.L.R. 45 M. 320: 43 M.L.J. 78 (P C.).

tain decisions of the Board, and notably *Surajmani* v. *Rabi Nath Ojha*,[2] their Lordships think it desirable to remove this doubt, lest error should creep into the administration of the law in India with regard to the rights of a Hindu widow. In the case referred to, when originally heard before the High Court, it had been stated that under the Hindu Law in the case of a gift of immoveable property to a Hindu widow, she had no power to alienate unless such power was expressly conferred. The decision of this Board did no more than establish that that proposition was not accurate and that it was possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including, of course, the power to alienate, which the High Court had thought required to be added by express declaration." In view of the guarded statement as to the effect of the decision, it cannot be assumed that the decision in *Bhujanga Rao* v. *Ramayamma*[3] is wholly overruled. An estate of inheritance can be created in favour of a Hindu wife or widow by the terms of a gift of immoveable property by the husband though it may not be alienable. Heritability does not necessarily carry with it alienability. Although express power of alienation is not necessary still there must be words of sufficient amplitude in the terms of the gift itself to convey a right of alienation. In cases of ambiguity it is open to the Courts to rely on the personal law of the donee.

In the case under review, the question arose with reference to the construction of a deed of gift of immoveable properties (described as *hiba-bil-iwaz*) by a Hindu governed by the Mithila school of Hindu Law in favour of his wife. It was held by Das, J. in the High Court that, under the Mithila Law, a gift of immoveable property by the husband to his wife does not create an alienable estate in her, though the same may be heritable. He also held that the gift-deed itself did not confer on her an alienable estate. This view is rejected by the Privy Council which holds that the limitation on alienation by the Mithila law in the case of a gift by husband to wife applies exclusively to pure and simple gifts and not to gifts for consideration. Their Lordships also refer to Section 8 of the Transfer of Property Act in this connection. In the first place it is difficult to see what bearing the Transfer of Property Act of 1882 has with reference to the construction of the deed of gift which was of the year 1876. Secondly, their Lordships

2 (1884) I.L.R. 7 M. 387.
3. (1907) L.R. 35 I.A. 17: I.L.R. 30 A. 84: 18 M.L.J. 7 (P.C.).

have not apparently had in view the terms of section 2 of the Act which provides that the sections of the second chapter of the Act (sections 5 to 53) do not affect any rule of Hindu Law. It may be noted that Justice Seshagiri Aiyar relied on the terms of section 8 of the Transfer of Property Act in his judgment in *Ramachandra Rao* v. *Ramachandra Rao*,[4] but the Privy Council on appeal did not then consider that it affected the rule of construction with reference to gifts under Hindu Law. Their Lordships again do not refer to any authority for excluding gifts for consideration from the scope of the rule as stated

Nor is it clear if their Lordships intended to treat the transaction as really a sale having regard to their observation that a *hiba-bil-iwas* under the Muhammadan Law is treated as a sale and not as a gift. This latter statement again does not seem to be accurate if understood as applicable for all purposes. It may be that the particular decision on the terms of the document in question having regard to the surrounding circumstances is right, but the judgment of their Lordships is not illuminating and is likely to be misapplied. The statement of their Lordships in the concluding portion of their judgment "As they understand the Mithila Law, a simple and pure gift by the husband to the wife does not convey to her absolute ownership. She takes it only for her life without any right of alienation unless a power of alienation is expressly conferred on her" is again open to objection, as the qualification about express declaration of the power of alienation is opposed to their own decision in *Surajmani's case*[6] and to their clear statement of the effect of that decision in *Ramachandra Rao* v. *Ramachandra Rao*,[4] which must be equally applicable to all schools of Hindu Law.

It may be useful to add that the Privy Council recognise that under Hindu Law an estate may be heritable though not alienable. In the recent case of *Narsingh Rao* v. *Mahalakshmi Bai*[8] their Lordships quote with approval a passage from Mayne's Hindu Law and Usage, page 604, where the learned author discusses the nature of a saudayika gift of stridhanam properties. The further passage in the present edition of Mayne as to the correctness of *Bhujanga Rao* v. *Bhujanga Rao*[7] which differs from the previous edition on that point must, however, remain open to examination.

---

3. (1907) L.R. 35 I.A. 17: I.L R 30 A 84 18 M.L.J. 7 (P.C.).
4. (1918) I.L.R. 42 M. 283: 36 M.L.J. 306.
6. (1928) 55 M.L.J. 42 (P C.)
7. 9th Ed., 397 at 664 8th Ed., 397 at 542.

K. S. E. MOHAMED CASSIM AND OTHERS *v.* JAMILA BEE BEE, I.L.R. 6 Rang. 334.

In this case, the learned Judges had to consider the application of Art. 182 of the Limitation Act to proceedings by way of execution against a surety and they follow the case *Narayan* v. *Timmaya*[1] without any independent discussion. Though *Narayan* v. *Timmaya*[1] has not been overruled by either a Full Bench or a higher tribunal and several cases have also followed it (*Yusuf Ali* v. *Papa Miya*,[2] C.M.S.A. No. 62 of 1913* and *Wasir Bukhsh* v. *Hira Rani*[3]), it has not been uniformly followed either. (*Muhammad Hafiz* v. *Muhammad Ibrahim*[4], *Badruddin* v. *Muhammad Hafiz*,[5] *Langtu Pande* v. *Baijnath Saran Pande*[6] and *Honda Ram* v. *Firm Seth Kanwar Bhan-Sukh Nand.*[7]) In *Langtu Pande* v. *Baijnath Saran Pande*[6] Rustomji says (Limitation Act, 4th edition, p. 1038, footnote (i)) "it was assumed that an application against the surety would save time against the principal; apparently it was the case of a joint decree against the principal and surety." But it appears to be a case of a surety offered under section 336, Civil Procedure Code of 1882 (now sec. 55).

That the case does not fall within the words of Art. 182, *i.e.*, "a decree *passed* jointly" is conceded even in *Muhammad Hafiz* v. *Muhammad Ibrahim*,[4] but it is said that this is a case not contemplated by Explanation I to Art. 182. The Civil Procedure Code of 1908 was passed before the Limitation Act of that year and it may well be argued that if the legislature had intended to include the case of a surety (under section 145 of the Civil Procedure Code) in the Explanation to Art. 182, it would have said so. The Allahabad decisions discuss the question on general principles and it is open to question how far such discussion is permissible in construing an unambiguous section. There are some decisions also in Calcutta which seem to agree with the Allahabad decisions (see *Birendra Chandra Singha* v. *Tulsi Charan Ghose*[8]) except in cases where the surety makes himself liable, not for the performance of *the decree* but only for a fixed sum. It is difficult to see the distinction. There are several cases where a portion of the decree is joint and a portion several and though there is some apparent conflict in the deci-

1. (1906) I.L.R. 31 B. 50
2. (1923) I.L.R. 47 B. 778.
*(1914) M.W.N. (Jour.) 64.
3. (1921) 60 I.C. 265.
4. (1920) I.L.R. 43 A. 152 at 158.
5. (1922) I.L.R. 44 A. 743.
6. (1906) I.L.R. 28 A. 387.
7. (1922) 67 I.C. 301: A.I.R. 1922 Lah. 457.
8. (1924) 85 I.C. 657: A.I.R. 1926 C. 267.

sions as to whether it is *wholly* a joint decree or not, the better opinion seems to be that they are joint to the extent of the joint liability. (See *Nand Lal Saran* v. *Dharam Kirti Saran*,[9] *Kusaji* v. *Vinayak R. Parabhu*,[10] *Baroda Kinker Choudhury* v. *Babin Chandra Dutta*,[11] *Subramania Chettiar* v. *Alagappa Chettiar* by agent *Palaniappa Chetti*[12]).

The cases against *Narayan* v. *Timmaya*[1] argue (1) that an application against the judgment-debtor is a step-in-aid of the execution of the decree; (2) that *Narayan* v. *Timmaya*[1] is a case of a surety who had rendered himself liable even before the passing of the decree, for the due performance of the same; (3) that the decree does not distinguish portions of the subject-matter as payable or deliverable by the judgment-debtor and the surety respectively, but that it affects the judgment-debtor alone and only by reason of section 145 becomes executable against the surety; (4) that the Bombay High Court has distinguished *Narayan* v. *Timmaya*[1] in *Cholappa* v. *Ram Chandra*.[13] The first argument overlooks the fact that Art. 182, cl. (5) will come in only "where the application next hereinafter mentioned has been made" and that takes in Explanation I, in which case it will be begging the question at issue to say that an application to execute the decree (against the judgment-debtor) will avail as a step-in-aid as against the surety. Even in cases not coming under Explanation I, an application put in by the decree-holder against one of the judgment-debtors will be in aid of the execution of the decree but the question is if it will be so *against the others*. In some cases it has even been held that when mention is made of the surety's liability in the execution petition, but no relief is specially asked for against him, it will not avail to save limitation against him, *Honda Ram* v. *Firm Seth Kanwar Bhan-Sukh Nand*[7]; and it is so even though notice of such petition is served on the surety, for the notice only tells him that the judgment-debtor was being proceeded against, a matter of no concern to the surety. It is but fair that the surety must be informed that the decree-holder continues to look to him for payment and the delay in executing the decree against the judgment-debtor may mean additional burden thrown on the sureties, for, events not contemplated by the surety at the time he offered himself as surety may happen,

1. (1906) I.L.R. 31 B 50 7. (1922) 67 I.C. 301: A.I.R. 1922 Lah. 457.
9. (1925) I.L.R. 48 A 377. 10 (1898) I.L.R. 23 B. 478.
11. (1909) 11 C.L.J. 83. 12 (1906) I.L.R. 30 M. 268.
13 (1919) I.L.R. 44 B. 34.

thereby seriously jeopardising his remedies as surety against the judgment-debtor.

It is difficult to follow the second of the arguments summarised above. So long as the surety is not *eo-nomine* a party to the decree, all sureties must be proceeded against only under section 145, Civil Procedure Code, whether they became sureties before the decree or after it (*e. g.*, a surety in cases of arrest before judgment under O. 38, R. 2, C. P. C.).

There is much force in the third, but with due respect to the learned Judges, it does not meet the difficulty in the case. It cannot be denied that the surety is jointly and severally liable with the judgment-debtor and it is on that ground that it has been held that if a surety is a party to the suit and a decree is passed against him as well, he is a joint judgment-debtor within the meaning of Art. 182, Explanation I. (See *Yinke Supaya* v. *Maung Kin*,[14] *Honda Ram* v. *Firm Seth Kanwar Bhan-Sukh Nand*,[7] *Aya Ram Tola Ram* v. *Hit Ram Bhoj Raj*[15]). In an early case in *Hurkhoo Singh* v. *Baboo Ram Kishen*[16] the question was discussed on principle. (There was then no section corresponding to section 145, Civil Procedure Code). There a surety agreed that, on failure of the debtor to pay the debt, he would pay it and that it may be enforced in execution against him. The creditor tried to execute the decree against the surety more than three years after the decree, after exhausting all his remedies against the principal debtor. The learned Judges held that the surety's liability was a separate responsibility—not joint—and that the decree was barred as it was not kept alive against him (surety) by proceedings, irrespective of those taken against the judgment-debtor.

The contrast in Explanation I also is between a decree distinguishing portions of the subject-matter as payable or deliverable by each and a decree passed jointly against more persons than one. That indicates that where the decree does not distinguish portions of the subject-matter as respectively payable or deliverable by each, the decree is to be deemed to have been jointly passed against all of them. But this does not answer the difficulty of *Narayan* v. *Timmaya*[1], *viz.*, that it is not passed against them all. Section 145, Civil Procedure Code, only creates a statutory liability on the part of

1 (1906) I.L.R. 31 B 50
7. (1922) 67 I.C. 301: A.I.R. 1922 Lah. 457.
14. (1920) 60 I.C. 23: 3 U.B.R. (1920) 261.
15. A.I.R. 1928 Lah. 209. 16 (1866) 6 W.R. (Mis.) 44.

the surety to pay the decree amount, in execution of the original decree, thus obviating the necessity of a separate suit. (For a fuller discussion of the application to the Law of Limitation of the general doctrine that the surety's liability is ordinarily co-extensive with that of the principal, *see* 39 M.L.J. (Journal), p. 67.

The Allahabad view practically adds the words "deemed to be" before the words "passed jointly" in Art. 182, Expl. I. It is very doubtful if that course is permissible especially when the Limitation Act is later than the Civil Procedure Code.

The fourth argument only puts the third in another way. In *Cholappa* v. *Ram Chandra*[13] the question related to the starting point of limitation for an application to execute against the sureties a decree passed on appeal (see also *D. Manackjee* v. *R. M. N. Chettiar Firm*[17]). In holding that the date of the appellate decree is the starting point, the decisions proceeded on the theory that the security must be taken to have been given for the satisfaction of a permanent decree, and that the decision of the Court of last resort is the decision in the suit. In *Cholappa* v. *Ram Chandra*[13] the decision in *Narayan* v. *Timmaya*[1] was distinguished as having nothing to do with the case and cannot be taken as questioning the earlier case. (*See* also *Manackjee* v. *R. M. N. Chettiar Firm*[17] for the scope of the application of this doctrine.) The position of the surety during the pendency of the appeal when the principal debtor obtains a stay of execution of the decree is anomalous. All the while the decree may be executable against him but yet the limitation does not begin to run against him. (See *Parameswaran Nambudiri* v. *Seshan Pattar*[18] for a discussion as to how far the period which has to be deducted as regards one judgment-debtor should be excluded as regards other joint judgment-debtors also, though there was no obstacle for executing against the latter.)

One other argument deserves notice and that arises from the fact that the surety's liability is in *default of payment* by the judgment-debtor. In one case, the Lahore High Court has gone to the extent of holding that the executing Court should, before proceeding against the surety, satisfy itself that

1. (1906) I.L.R. 31 B. 50. 13. (1919) I.L.R. 44 B. 34.
17. (1926) I.L.R. 5 Rang. 492 at 496.
18. (1928) I.L.R. 51 M. 586: 55 M.L.J. 156.

the decretal amount could not be realised from the principal debtor and record a finding to that effect. (*The Firm Nandu Shah Jailal* v. *The Firm Amolak Ram-Hans Raj*[19]). The words in that case were "if it were not realised from the principal debtors" though the usual form is "in default". It is perhaps too much to rely on the difference in words. It cannot be disputed that the starting point is the date when the decree becomes operative and executable (*Rameshwar Singh* v. *Homeshwar Singh*[20]). The answer is given by Mr. Justice Devadoss in *Nawab Shuja-ul-mulk Bahadur* v. *Umir-ul-umra Bahadur*.[21] Where the decree does not specifically mention the period after which the decree becomes executable against a particular individual, the decree is deemed executable from the date on which it is passed, and when "a decree directs the principal debtor to pay the decree amount and that on the failure of the plaintiff to recover it from the principal debtor, he should be entitled to proceed against the surety, it cannot be said that the creditor has 12 years' limitation against the principal debtor and another 12 years against the surety."

As an answer to the question referred, it is difficult to reconcile the final judgment in *Nawab Shuja-ul-mulk Bahadur* v. *Umir-ul-umra Bahadur*[21] with the principle in *Rameshwar Singh* v. *Homeshwar Singh*[20]; but the decision itself if read with the decree (extracted on p. 862) is intelligible. The question contains the words "only on failure" whereas the decree merely says "on failure" and omits the emphasis suggested by the word "only". (*See* the judgment of Wallace, J. on p. 857.)

ROOP CHAND *v.* SARDAR KHAN, I.L.R. 9 Lah. 526.

A suit cannot be dismissed merely because one of the defendants was dead at the time of the institution of the suit. The name of the deceased person should be struck out and the case should proceed against the other defendants on record. It was no doubt held by the Madras High Court in *Veerappa Chetty* v. *Tindal Ponnen*[22] that such a suit must be regarded as a nullity where the *sole* defendant on record was dead at the

19. (1927) 102 I.C. 710.
20. (1920) L.R. 48 I.A. 17: 40 M.L.J. 1 (P.C.).
21 (1925) I.L.R. 48 M. 846 at 849: 49 M.L.J. 498.
22. (1907) I.L.R. 31 M. 86: 17 M.L.J. 551.

time of institution of the plaint and that the Court had no jurisdiction to amend the plaint by bringing the legal representatives on record. It is not clear from the decision whether their Lordships intended to make an exception in the case where a fresh suit would be barred against the legal representatives, in cases where the original defendant was impleaded as such, *bona fide* and in ignorance of his death. Whatever that may be, where there are several defendants on record, some of whom are alive at the institution of the suit, the suit cannot be regarded as a nullity. If owing to non-joinder of necessary parties the suit cannot go on against the other defendants alone, it will be open to the Courts to allow an amendment in proper cases. Section 153 of the Civil Procedure Code is sufficient authority for the said purpose. The later Full Bench decision of the Madras High Court in *Gopala Kristnayya* v. *Lakshmana Rao*[1] permits an amendment of the cause title in the case of an appeal memorandum even where *Kristnayya* v. *Lakshmana Rao* permits an amendment of the appeal.

---

1. (1924) I.L.R. 49 M. 18: 49 M.L.J. 590 (F.B.).

JOGI REDDI *v.* CHINNABBI REDDI, I.L.R. 52 Mad. 83: 56 M.L.J. 165 (P.C.).

This is a very curious case on the facts though by no means unusual, of two different families living together—in this case with this extra peculiarity that one of them was a Christian, pooling their resources together, acquiring properties together and meeting the expenses together after the fashion of an ordinary joint family. The facts were these: There were three Hindu brothers who were members of an undivided Hindu family. They had some property not of the best kind. They had a sister who married a Christian who had more property. On the death of the husband leaving a four year old son, the sister with her son came over to her brothers and lived with them, and the son after coming of age also continued to live with them. During this time parties put their income and their earnings together, made purchases of properties—met their common expenses after the manner of ordinary joint Hindu family. The question was, what is the proper inference to make? The High Court agreeing with the Sub-Court held that the proper inference was that the parties treated both the original contribution as well as the subsequent acquisition as common property and on that basis gave one of the brothers who sued one-fourth of the entire properties. The appeal to the Privy Council was confined to two items of properties—first, the property of the father inherited by the nephew; secondly, the undivided half of an uncle of the nephew purchased in the name of the nephew. Their Lordships held that on these facts, it could not be inferred that the nephew wanted to create an interest in the family in the former set of property or that the latter was intended to be for the benefit of all the co-owners. The main considerations that influenced their Lordships were: (i) the fact that the two families could not make a joint family, (ii) that the nephew was a Christian, and (iii) that for a considerable portion of time the joint living was going on, the nephew was a minor and as such there could be no creation of any interest in favour of the uncles during that time and continuance of the previous state of affairs was not therefore inconsistent with the non-creation of any such interest. As regards the purchased property the circumstance that it was purchased of the joint income was no doubt according to their Lordships a circumstance in favour of joint ownership but it raised only a rebuttable presumption and was excluded by circumstances which showed that the purchase was rather because the income of the nephew's properties was the more consider-

able. Their Lordships held that the finding of the Sub-Court as to the agreement on appeal though a finding of fact could not bind the Second Appellate Court as it was based on a wrong view of burden of proof.

WALLER *v.* WALLER, I.L.R. 10 Lah. 64.

Jurisdiction in divorce, at any rate for passing a decree of dissolution of marriage, is, according to English Law, now founded upon the domicile of parties. The Indian Divorce Act of 1869, however, proceeded upon the basis that jurisdiction depended upon residence. Some doubt had been cast upon this view by the decision in *Keys* v. *Keys*.[1] The actual question there was merely as to the extra-territorial effect of an Indian decree of divorce on parties not domiciled in India but merely resident there. It was held that such decrees for divorce are not valid in England but the question was also raised whether the Indian Act if it conferred jurisdiction based on residence alone apart from domicile was not *ultra vires* and invalid. Notwithstanding this subsequent decisions in India reiterated the older view that residence in British India was sufficient to found jurisdiction, though in some cases a distinction was made between a decree for judicial separation and one for dissolution of marriage. Even in England down to the decision in *Le Mesurier* v. *Le Mesurier*[2] it could not be said that the law was settled as finally laid down by the House of Lords. In this state of authorities, the Indian Divorce Amendment Act of 1926 (Act XXV of 1926) was passed by the Indian Legislature which now prohibits Indian Courts from passing or confirming a decree for dissolution of marriage where the parties are not domiciled in India. The English Parliament however proceeded on different lines and passed in December, 1926, the Indian and Colonial Divorce Jurisdiction Act permitting High Courts in India, in certain defined cases, to pass a decree for dissolution of marriage even where the parties are domiciled in England and Scotland provided they are resident in India. There is also a validating section (S. 3 of the Statute) which validates all decrees for dissolution of marriage passed by the Indian Courts provided the proceedings were commenced before the passing of this statute. It was held in the decision under notice that the clear intention of the Parliament to validate all such decrees passed before the 15th December, 1926, has been nullified as regards decrees not passed before

1. I.L.R. (1921) P. 204. 2. (1895) A.C. 517.

25th March, 1926, the date of passing of the Indian Act (XXV of 1926) as the English Act apparently proceeded in ignorance of the existence of the Indian Act. It is curious that the attention of the authorities in England was not drawn to the existence of the Indian Act, by the Government of India or the India Office

---

KAMAKHYA NARAYAN SINGH *v.* RAM RAKSHA SINGH, L.R. 55 I.A. 212: I.L.R. 7 Pat. 649: 55 M.L.J. 882 (P.C.).

It is important to note that the point of distinction between this decision and the set of decisions like *Maharaja of Jeypore* v. *Rukmini Pattamahdevi*[1] and *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[2] lies in the fact that in the latter class of cases the parties admit the continuing relationship of landlord and tenant throughout the material periods but only differ as regards the nature and incidents of the tenancy, its extent, duration, rights, etc. In the present case, their Lordships find as a fact on the entire evidence that there was no express or implied agreement between the parties after the determination of the original grant that a tenancy should continue from year to year. Their Lordships hold that no reliance could be placed on the terms of section 116 of the Transfer of Property Act either, for apart from the inapplicability of the sections 116 and 117 to the tenure in question, the evidence warranted an inference of an implied agreement to the contrary. The plaintiff never claimed or admitted the relationship of landlord and this fact differentiates the present case from the other decisions. The mere payment of rent for some time by the defendants was in the circumstances held to be not conclusive against them so as to make them tenants from year to year. It followed that the defence of adverse possession under Art. 144 of the Indian Limitation Act was open to them and the plaintiff's suit in ejectment consequently failed.

RAGHUBARDAYAL *v.* RAMDULARE, I.L.R. 6 Rang. 367.

This was a reference to a third Judge (Das, J.) on a difference between Carr and Pratt, JJ. All the Judges being agreed that, as held in *Nana Tawker* v. *Ramachandra Tawker*,[3] an undivided son excludes a divided son from inheriting to his father's self-acquisitions, the only question was if the plaintiff was divided from his father. To prove this reliance was placed

1. (1919) L.R. 46 I.A. 109: I.L.R. 42 M. 589: 36 M.L.J. 543 (P.C.).
2. (1923) L.R. 51 I.A. 83: I.L.R. 47 M. 337: 46 M.L.J. 546 (P.C.).
3. (1908) I.L.R. 32 M. 377.

on (i) The long separation between the father and the son, the son living in India and the father in a distant country Burma, (ii) The non-maintenance of filial relationship between them, and (iii) The failure of the son to join his father after his attaining majority. The majority hold that these circumstances will not suffice to deprive the plaintiff who was living away from his father of his share in the estate. That a heavy onus is thrown on the person pleading separation to prove it and that separate residence, separate acquisitions of property and cesser of commensality are all merely circumstances raising a presumption of separation cannot be denied. *Ganesh Dutt Thakoor* v. *Jewach Thakoorain*[1] and *Dhoorjeti Subbayya* v. *Dhoorjeti Venkayya*.[2] But reading *Mussumat Anundee Koonwur* v. *Khedoo Lal*[3] it looks as though the Judicial Committee might have accepted the circumstances in the case under review as sufficient to prove partition, if any foundation was laid to prove animus on the part of the father to be divided from the son. In *Kunwar Bahadur* v. *Madho Prasad*[4] it has been held that the fact that some of the sons lived away from the father while others lived with him would not deprive the sons who lived away from him of their share in his estate.

Though several cases have assumed the rule of preference of undivided to divided sons, it has been questioned by a Full Bench of the Madras High Court in *Vairavan Chettiar* v. *Srinivasachariar*[5] and may require reconsideration. The basis of the judgment in *Nana Tawker* v. *Ramachandra Tawker*[6] is that the dictum of the Mitakshara contained in Ch. I, S. 1, clause 27 and S. 5, clause 10 that the son has a right by birth in the property of the father whether ancestral or self-acquired has not been dissented from in *Balwant Singh* v. *Rani Kishori*[7] and that therefore succession to self-acquired property was by survivorship rather than by inheritance and he who took it by survivorship would exclude the divided sons. That basis is now held to be erroneous by the Full Bench in *Vairavan Chettiar* v. *Srinivasachariar*[5] and in the words of Sastriar, J., it will now be doubtful if "the imperfect right of the son in his father's self-acquisitions may have sufficient efficacy to entitle him to succeed to it to the exclusion of a divided son."

1. (1903) I.L.R. 31 C 262. 2 (1906) I.L.R. 30 M. 201.
3. (1872) 14 Moo I A. 412
4 (1918) 17 A.L.J. 151: 49 I.C. 620.
5. (1921) I.L.R. 44 M 499: 40 M.L.J. 481 (F.B)
6. (1908) I.L.R. 32 M 377.
7. (1898) L.R. 25 I.A. 54: I.L.R. 20 A. 267 (P.C.).

BAMA CHARAN DAS *v.* GADADHAR DAS, I.L.R. 56 Cal 21.

The question whether an appellate court can interfere with an order of the lower court setting aside an award, on an appeal against the decree of the lower court on the merits, is one which is settled in the affirmative by a long course of decisions since 1870 and the learned judges have in coming to this conclusion in the decision under notice rested themselves more on the rule of *stare decisis* than on a construction of the terms of section 105 (1) of the Civil Procedure Code and the rulings construing the same. There has been a great deal of conflict in the decisions of the various High Courts regarding the effect of the sub-section. The tendency in recent years has been to construe the expression "affecting the decision of the case" as meaning affecting the decision of the case on the merits, thus reading words into the section which are not there. It is also significant to notice that the language of the corresponding section of the Code of 1859 was "affecting the merits of the case" from which the legislature has departed in the later Codes, apparently with a view to widen the scope of interference of the appellate court with the decisions of the lower courts. Acting on the view that notwithstanding the change, the expression only means "affecting the merits of the case," all the High Courts excepting the Madras High Court have held that an order setting aside an *ex parte* decree cannot be questioned in an appeal against the decree on the merits; while the Madras High Court has recently drawn a distinction between various classes of orders setting aside *ex parte* decrees themselves to the effect that while some classes of orders setting aside *ex parte* decrees can be questioned in appeals against decrees passed on the merits, they cannot be questioned in other cases. See *Athamsa Rowther* v. *Ganesan*[1] and *Venkatanarasu* v. *Kotayya*.[2] It may well be doubted whether there is any warrant for this further distinction in the language of section 105 (1). If however a restricted meaning has to be given to the wording of section 105 (1) limiting it to cases where the decision of a case has been affected with reference to its merits, it is difficult to see how a distinction can be made between orders setting aside *ex parte* decrees, orders setting aside abatement on the one hand and orders setting aside an award as in the present case and in *Harbhajan* v. *Mewa Singh*.[3]

1. (1924) 47 M.L.J. 641. 2 (1926) 51 M.L.J 119
3. A.I.R. 1928 L. 753: 110 I.C. 748.

RAMESWAR KHERORIWALLA *v.* EMPEROR, I.L.R. 56 Cal 32.

In this case an application under section 491 of the Criminal Procedure Code was made to a Division Bench of the Calcutta High Court to release an accused who was charged only with bailable offences who had been enlarged on bail but was subsequently remanded by the order of a Judge presiding over the Criminal Sessions to custody for having tampered with the witnesses for the prosecution and the learned Judges without going into the legality of the remittal to custody rejected the application on the ground that his custody was ordered by a Judge and could not be gone into again by another bench of the same Court. Apparently the learned Judges were not clear about the correctness of the order of the Judge remitting the accused into custody in the face of the provisions of section 496 of the Code; otherwise, it is difficult to see why the application should not have been disposed of on the merits. It is also open to question whether the provision in section 561-A. of the Code saving the inherent powers of the High Court can be invoked as against the specific provision in section 496. Coming to the ground of decision itself, that the question had been dealt with by one Judge of the High Court and that another bench should not entertain a similar application, one may venture to doubt whether, if instead of being an application under section 491 of the Criminal Procedure Code, it had been one for a writ of *habeas corpus* to the High Court under its Common Law powers, it would have been an answer to say that the matter of detention was considered legal by another Judge of the same Court. Reference may be made in this connection to the recent decision of the Privy Council in *Eshugbhayi Eleko* v. *Government of Nigeria (Officer Administering)*[1] where the Lord Chancellor reviewed the nature of the writ of *habeas corpus* from the earliest times and laid down that notwithstanding its refusal by one of the Judges after going through the merits fully, the party has the right to go before every other Judge of the same Court and the latter is bound to go into the legality of the detention notwithstanding the previous order of the other Judge. It may be mentioned in this connection that the enactment of section 491 in the Criminal Procedure Code does not in any way affect the Common Law powers of the High Court in the matter of *habeas corpus*. Cf. *Mahomedalli* v. *Ismaiji Abdulali*.[2] It may be a question whether the question must be answered differently if the appli-

1. (1928) A.C. 459. 2. (1926) I L.R. 50 B 616.

cation is made under section 491 and not under the Common Law powers of the High Court. In any event it may be doubted whether even after this decision under notice, it may not be open to the party to bring up once more the legality of the detention for review before the High Court under its Common Law jurisdiction on a writ of *habeas corpus* relying on the exposition of the law in *Eshugbayi Eleko* v. *Government of Nigeria (Officer Administering)*[1] notwithstanding the decision of Buckland, J., and of the Division Bench.

HARI MOHAN DALAL *v.* PARMESHWAR SAHU, I.L.R. 56 Cal. 61.

The question that came up for decision in this case was whether time for an application for restitution under section 144 of the Code of Civil Procedure could be reckoned under Article 181 of the Limitation Act from the decree of the highest Court of appeal which affirmed the decree of the lower appellate Court which however reversed that of the first Court; and the majority of the Judges who took part in the decision held that as the applicant had the right to apply for restitution when the decree of the first Court was reversed by the lower appellate Court, time runs against him from the decision of the lower appellate Court under Art. 181 and that he cannot have three years under that article from the decree of the High Court affirming that of the lower appellate court. If the matter were to come up before the Madras or the Bombay High Courts the application would have been held to be in time under Article 182 (2) of the Limitation Act, as these Courts have held the view that an application for restitution under section 144 of the Civil Procedure Code is really of the nature of an execution application and as such is governed by Article 181. *Somasundaram* v. *Chokkalingam*,[2] *Unnamalai Ammal* v. *Mathan*,[3] *Panchapakesa Aiyar* v. *Natesa Pathar*,[4] *Kurgodigouda* v. *Ningangouda*[5] and *Hamidalli* v. *Ahmedalli*.[6] But the High Courts of Calcutta, Allahabad and Patna have held that an application for restitution is not in the nature of an application for execution and is therefore governed by Art. 181. See *Balmakund Marwari* v. *Basanta Kumari Dasi*,[7] where all the cases are collected and reviewed.

Even in this view, it is by no means clear that it necessarily follows that Art. 181 must be applied from the date of

---

1. (1928) A.C. 459.
2. (1916) I.L.R. 40 M 780
3. (1917) 33 M.L.J. 413
4. (1926) 51 M L J. 161
5. (1917) I.L.R. 41 B 625
6. (1920) I.L.R. 45 B 1137.
7. (1924) I.L.R. 3 Patna 371.

the decree of the lower appellate Court and that there is no scope for the rule that when an appellate Court passes its decree, it supersedes that of the lower appellate Court even though it is one of affirmance and that as a consequence time under Art. 181 might run from the decree of the final appellate Court. The learned Chief Justice would seem to think that this effect of the decision of the appellate Court is a metaphor and is apt to mislead one from strict legal notions. Reliance has also been placed by His Lordship on some of the observations of the Privy Council in *Juscurn Boid* v. *Pirthichand Lal Choudhury*[1] regarding the legal effect of the appellate Court's decision when confirming that of the lower court. We would venture to point that this metaphor as to the supersession of the decision of the lower court by that of the appellate court has the sanction of the Privy Council in the recent decision in *Jowad Hussain* v. *Gendan Singh*[2] and was given effect to with reference to Art. 181 of the Limitation Act itself. This decision is further of importance as the observations in *Juscurn Boid* v. *Pirthichand Lal Choudhury*[1] relied on by the learned Chief Justice were relied on by the appellant in that case but were not given effect to by their Lordships. In the case before their Lordships of the Privy Council, there was a preliminary decree in a mortgage suit which was affirmed on appeal and an application for final decree was made within three years of the decision of the appellate Court but more than three years from the date fixed by the first Court's decree. Their Lordships held that Art. 181 applied to the case and time ran from the decision of the appellate Court which affirmed the preliminary decree of the first Court. This view was further affirmed by the Privy Council in *Fitzholmes* v. *Bank of Upper India, Ltd.*[3] The same view had been taken by the Madras High Court in *Venkayya* v. *Sathiraju*,[4] where the observations of the Privy Council in *Juscurn Boid* v. *Pirthichand Lal Choudhury*[1] were noticed by the learned Judges. If this is the correct statement of the law, there can be no distinction in principle in the case of an application for restitution and we venture to submit that an application for restitution though governed by Art. 181 might not be out of time if it were made within three years of the final appellate decree but more than three years after the decree of the lower court which it affirmed.

1. (1918) L.R. 46 I.A. 52: I.L.R. 46 C 670: 36 M.L J 557 (P C.)
2. (1926) L.R. 53 I.A. 197: 51 M.L.J. 781 (P.C)
3. (1926) L.R. 54 I.A. 52: 52 M.L.J. 366 (P.C.)
4. (1921) I.L R. 44 M 714: 41 M.L.J. 117.

PINDEE *v.* U HPA, I.L.R. 6 Rang. 315.

From the report, it is difficult to gather the facts exactly but from the reference in the judgment to *Moreshwar Balkrishna* v. *Dattu*[1] it would appear that an unregistered or oral sale followed by possession was set up by the alleged prior vendee to defeat the title of a subsequent registered purchaser. At the same time, a lease back to the vendor appears also to have been set up, the vendor continuing to be in possession under that lease on the date of the subsequent sale. It must be pursuing the theory of the validation of title by part-performance with a vengeance to hold that when possession continues with the owner—though as a lessee—the subsequent purchaser must be taken to know the character of the possession in which the vendor holds it. The cases have loosely stated that the position of such a purchaser is as though a document in accordance with law were executed and registered but it will be reading much more into those judgments than was intended. The contention that as soon as the vendor is put in possession under the agreement to resell, he acquires an equitable title to the property and nothing that he might do afterwards could divest him of it, was recently negatived by a Bench of the Madras High Court in a considered judgment (*see* 55 M.L.J. (N.R.C.) 45).

MA MI *v.* MAUNG AUNG DUN, I.L.R. 6 Rang. 376.

In order to raise a loan of Rs. 1,000 *A* purported to sell his lands to *B* by an *ex facie* absolute conveyance and some time later when he needed more money, he got *B* to convey the lands to *C* with an oral agreement on the part of *C* that he should convey the lands back to *A* on certain terms. There was a similar agreement between *A* and *B* at the time of the purported sale by *A* to *B*. The learned Judges have held that *A* is not an actual party to the outright conveyance by *B* to *C* and as such can prove the oral agreement to resell the lands to him. The argument that in reality the parties to the conveyance are *A* and *C* and that *B* merely represented *A* in the transaction is noticed in the judgment, but says Justice Heald: "In a somewhat similar case, namely the case of *Maung Kyin* v. *Ma Shwe La*[2] their Lordships of the Privy Council have held that S. 92 of the Evidence Act did not apply." In narrating the facts of that case the Judge fails to note that there Myang (*A*) was not

1. (1888) I.L.R. 12 B 569.
2. (1917) L.R. 44 I.A. 236: I.L.R. 45 C. 320: 33 M L.J. 648 (P C).

a *party* to the later transaction between *B* and *C*, though the evidence showed that by that arrangement, *A* desired and obtained a reduction in the rate of interest. In *Talak Chand* v. *Atmaram*[1] where the part of *A* was to engross and attest the sale-deed, it was held that Maung Kyin's case did not apply to the facts therein and that *A* was barred from proving the oral agreement. In the case under notice, *A* though not *eo nomine* a party to the conveyance was the real party. The transaction originated from him and *B's* part was no more than to execute the conveyance *benami* for *A*. The effect of this view will be that the *real party* to the document can circumvent the provisions of S. 92 by putting it *benami* in another's name. An exception to S. 92 is made in S. 99 in favour of third persons (not parties to the instrument) in order that they might not be prejudiced by things recited in the document, contrary to the truth, through the ignorance, carelessness or fraud of the parties, and that principle cannot operate in a case where the third party has been the principal figure in the transaction. (*See* 35 M.L.J. (N.I.C.) 25 and 36 M.L.J. (N.I.C.) 11 for a criticism of Maung Kyin's case and *Ganu walad Ramji* v. *Bhau walad Bapuji*.[2])

The learned Judges distinguish *Maung Shwe Phoo* v. *Maung Tun Shin*[3] on the ground that "in that case the parties to the conveyance and to the alleged oral agreement were the same." *A* ostensibly sold certain properties to *B* with an agreement to resell and *B* in turn conveyed them to *C* by an outright conveyance. *A* brought the suit for a decree directing *C* to reconvey the property to him and made *B* also a party to that suit. The Judges held that the evidence adduced by *A* to show that the conveyance to *B* was only a conditional sale was obnoxious to the provisions of S. 92 of the Evidence Act. If *B* were not a party to the suit, the case would have been *ad idem* with Maung Kyin's case, which does not appear to have been cited before them.

JAGDEO NARAIN SINGH *v.* RANI BHUBANESHWARI KUER, I.L.R. 7 Pat. 708.

In this case, the filing of a list of witnesses in attendance, by a decree-holder, in connection with a petition by a judgment-debtor under Order 21, Rule 90 to set aside a sale was held

1. (1923) 25 Bom. L.R. 818
2. (1918) I.L.R. 42 B. 512.
3. (1927) I.L.R. 5 Rang. 644.

by their Lordships to amount to "an application to the Court to take a step-in-aid of execution" within the meaning of Art. 182, clause (5) of the Indian Limitation Act. The contention that there should be a pending execution application in which only there could be an application to take a step-in-aid is rejected. This view, though it is supported by the decision in *Kuppuswami Chettiar* v. *Rajagopala Aiyar*,[1] has subsequently been dissented from even in Madras in later cases. See *Krishna Pattar* v. *Seetharama Pattar*,[2] *Abdul Karim Sahib* v. *Lakshmanaswami*[3] and *Mathonkandi Kannan* v. *Thayyil Pakkutti Avvulla Haji*.[4] Still it may be a question whether the decision under notice has not gone to the extreme length inasmuch as there does not appear to have been an application that the Court should take some step-in-aid of execution. It would not be enough that a party takes some step towards execution. See *Rangachariar* v. *Subramaniam Chetti*,[5] *Raghunandhan Misser* v. *Kallydut Misser*.[6] The Madras High Court holds that an objection filed by a judgment-creditor objecting to the recording of satisfaction at the instance of a judgment-debtor cannot be regarded as a step-in-aid. The view adopted by the present judgment is that even a step taken by the decree-holder towards removing an obstacle in the way of further execution is a step-in-aid of execution. The Madras High Court is inclined to take a narrower view as it holds that an application to take a step-in-aid must be one which is *by itself* in furtherance of execution proceedings. In the present case the judgment-creditor must be taken to have made an oral application to the Court that the Court should take down the evidence of the witnesses mentioned in the list filed by him on the day of hearing. It is only in that view that the requirements of Art. 185, cl. (5) can be deemed to be satisfied.

HAZARIRAM *v.* KEDAR NATH MARWARI, I.L.R. 7 Pat. 726.

An attachment of a decree for money does not prohibit a transfer thereof but it does not follow therefrom, as the learned Judges assume, that the transferee decree-holder can apply for execution of the attached decree under O. 21, R. 16. O. 21, R. 53,

---

1. (1921) I.L.R. 45 M 466: 42 M.L.J. 303.
2. (1926) I.L.R. 50 M 49: 51 M.L.J. 480.
3. (1927) 27 L.W. 475.
4. (1926) 52 M.L.J. 1.
5. (1920) 12 L.W. 9.
6. (1896) I.L.R. 23 C. 690.

cl. (*b*) (ii) indicates that the attached decree can be executed only either by the holder of the decree in execution of which the attachment has been effected or by his *judgment-debtor*. The later term would ordinarily denote the decree-holder of the attached decree and will not include the transferee decree-holders who are not the judgment-debtors of the attaching decree-holder. The right of the transferee decree-holder to execute the transferred decree which ordinarily depends merely upon the general language of O. 21, R. 16 may well be taken to be not available in the case of a transferee of an attached decree for which a special provision is made in O. 21, R. 53 which should on general principles prevail over the terms of O. 21, R. 16. Similarly also the provisions of S. 146 will not avail the transferee decree-holder, as O. 21, R. 53 must be taken to provide otherwise and S. 146 is applicable only where the Code does not provide otherwise. In such cases the attachment must first be released before the transferee decree-holder can himself take proceedings to execute the decree.

The further observation in the judgment under notice that in the case of attachments of decrees the general provisions of S. 64 of the Code do not apply as the effect of the attachment is specially dealt with by O. 21, R. 53, cl. (*b*) which to that extent will be exclusive, is supported by the decision of the Full Bench of the Madras High Court in *Bhavirisetti Lakshminarasimham* v. *Vetcha Lakshminarasimham*.[1] The reference to O. 21, R. 16 in the second para. of the headnote is however an obvious mistake for O. 21, R. 53, cl. (6), Civil Procedure Code.

---

1. (1927) I.L.R. 50 M. 677: 53 M.L.J. 150 (F.B.).

AMMALU AMMA *v.* NARAYANAN NAIR, I.L.R. 51 Mad. 549.

Somewhat analogous to the case under review is *Vellayappa Mootham* v. *Krishna Mootham*[1] where it was held that members of ordinary Hindu family whether manager or otherwise cannot claim exemption from limitation on the ground that they have to sue themselves in part. The position of the karnavan is not that of trustee and even in the case of a trustee, it is doubtful if the correct view with respect to the Indian Limitation Act is not to hold that having regard to his position, a duty to account arises and in respect of which there is no limitation. Similarly in the case of executors. He has a duty to call in the assets and his failure to collect would give rise to a fresh cause of action. If he is the creditor he would be entitled to pay himself before the limitation period expires. One specific case that of administration being granted to the debtor is provided for by S. 9 of the Limitation Act. Where no similar provision is made in the case of executors it seems to be unjustifiable to give similar relief in such a case. So also, in cases where specific starting points for limitation are prescribed it seems to be difficult when suing in those forms of action to plead any exemption by reason of the right vesting in the person liable as trustee or executor or managing member. It is quite another question if the action is one for account which may arise on the termination of the relationship or to which no limitation might be applicable. The case might be different also where adverse possession is to be made out under the Statute. It is difficult to conceive of adverse possession when the person who is to vindicate the right is the same person as the one that is liable. In such a case there is full scope for the application of the doctrine that there is no adverse possession when both the person in default and the person entitled are the same. These questions may arise under Arts. 144, 124 or possibly under Art. 120. In *Palaniyandi Malavarayan* v. *Vadamalai Oodayan*[2] Mr. Justice Sundara Aiyar had to do with a case like that. It is a little more difficult question whether adverse possession which has once commenced will be terminated by such combination of capacities. There is no reason why it should not. It is not analogous to the case of a person who is in adverse possession becoming a co-owner in which case *Velayudham* v. *Subbaroya*[3]

1. (1917) 34 M.L.J. 32.
2 (1912) 18 I.C. 373.
3. (1915) I.L.R. 39 M. 879.

held that his adverse possession ceased but the Privy Council held to the contrary, *Varada Pillai* v. *Jeevarathnammal*.[4] A co-owner's case is not a case of a duty being owed. His is a case of presumption; his possession is presumed to be not adverse till the contrary is shown. In the case of persons in fiduciary position it is otherwise. Unless they are able to show that they set up adverse possession to the knowledge of the beneficiaries they cannot set up adverse possession. In some cases such as that of trustee and executor, it may be that they cannot at all set up adverse possession when once they accept the trust without giving up possession. Cf. *Srinivasa Moorthy* v. *Venkata Varada Aiyangar*.[5] In these latter cases, the correct position is to hold that adverse possession that has commenced will cease on the party claiming adverse possession accepting the position of a trustee or executor. It is at his option to accept that position or not. If he does, he loses the benefit of the adverse possession in his favour.

LANKA SANYASI *v.* LANKA LAKSHMAN NAIDU, I.L.R. 51 Mad. 763: 55 M.L.J. 374.

While agreeing with the view that a decree passed against a person sued as a minor after his coming of age without the fact of his majority being disclosed might not affect the decree, their Lordships hold at the same time that a compromise entered into by the guardian though with the sanction of the court will not bind the major defendant. The reason for the distinction is that though there is no duty cast upon the plaintiff to notify the fact of majority to the Court, that cannot prolong the authority of the guardian *ad litem* to bind the minor even after he has come of age. On a similar ground, their Lordships have held in *Tanguturi Jagannadham* v. *Seshagiri Rao*[6] and *Krishnaswami Aiyangar* v. *Soorikutti Ganapathi Aiyar*[7] that though failing to get a minor declared a major during execution is nothing more than an irregularity if, for instance, it becomes necessary to issue notice as for instance under Order 21, Rule 22 and notice is issued only to the guardian that is a very material irregularity and would afford ground for setting aside the sale if it takes place without notice to the minor who has attained majority. Of course, there may be other reasons for holding

4. (1919) L.R. 46 I.A. 285: I.L.R. 43 M. 244: 38 M.L.J. 313 (P.C.).
5. (1911) I.L.R. 34 M. 257: 21 M.L.J. 669 (P.C.).
6. (1916) 20 M.L.T. 479.
7. (1921) 14 L.W. 638.

the major bound by the conduct of his guardian which are in the nature of estoppel or acquiescence but apart from those circumstances, the proceeding by the guardian would not bind him. One such instance would be whether the person that enters into the compromise is the elder brother or father and manager of the family. In that case the compromise might bind him apart from his consent. Again, he might be aware of the steps taken by the guardian and yet not object to it. From this it might be inferred that he was a consenting party.

Another point that arose was whether if the compromise was bad against one of the defendants, it would be bad also against the other. *Jamna Bai* v. *Vasanta Rao*[1] seems to be clear on the point and justifies the answer in the negative given by their Lordships.

CHINNAPPA REDDY *v.* THOMASU REDDY, I.L.R. 51 Mad. 839.

The subject of consideration in this case is that ill-considered section 43 of the Provincial Insolvency Act supposed to be drafted for the benefit of the creditors but capable of doing the largest amount of mischief. The view taken in this case is that the section is mandatory and that the Court has no power to extend the time to apply for discharge by the insolvent. Their Lordships here make a distinction between the case of a debtor applying for discharge and a creditor or receiver so doing and are apparently prepared to concede a greater discretion in extension of time when the application is made on behalf of creditors but in either case they think, the application shall be made before the expiration of the period fixed for applying for discharge. Whether this view is sound or not, there is no doubt of the great hardship such a view might occasion to creditors. It would be possible to dishonest debtors by this means to effectively prevent applications under sections 53 and 54. If the view taken in *Jethaji Peraji Firm* v. *Krishnayya*[2] is correct, it may not prevent the consideration of applications already pending, but if no applications have been already made, the three months or two years' period prescribed by the Act for impeaching the alienation might have gone by and no application for the benefit of creditors on a fresh application to declare him an insolvent might be available. So far as limitation is concerned section 78 of the

1. (1916) L.R. 43 I.A. 99: I.L.R. 39 M. 409: 31 M.L.J. 28 (P.C.).
2. (1928) 29 L.W. 649.

Act might save creditors who have already proved their debts but in the case of others who may not have proved in the false security of a pending insolvency they might altogether lose their remedy. Thus the section would seem to be in many cases a powerful ally of dishonest debtors than a beneficent provision for the creditors. Section 43 can be used by overworked Courts to get rid of a lot of pending work—at any rate the temptation to do so is great and section 37 though available if wisely used to relieve the situation to certain extent, is not as largely used as is to be desired.

We agree with their Lordships Venkatasubba Rao and Reilly, JJ., who held in *Jethaji Peraji Firm* v. *Krishnayya*[1] that notwithstanding the use of the word "shall" in the section, the Court's discretion to extend the time even after the expiry of the time prescribed is not taken away. Their Lordships rely for the purpose upon *In re Lord Thurlow, Ex parte Official Receiver,*[2] a case under the English Bankruptcy Act and *Badri Narain* v. *Sheo Koer,*[3] a case under the Civil Procedure Code of 1882. In the latter case, the Privy Council held, on a construction of S. 549, Civil Procedure Code, which provided that "if security was not furnished within such time as the Court orders, the Court shall reject the appeal" that the Court had a discretion to extend time even after the time fixed has expired. See also *Rajab Ali* v. *Amir Hossein*[4] to the same effect. In *In re Lord Thurlow, Ex parte Official Receiver,*[2] notwithstanding a later provision in the Bankruptcy Act that in certain circumstances the Court *shall* adjudge the person an insolvent, the Court of Appeal held that the Bankruptcy Court had a discretion to extend time relying on an earlier section which gave it power to adjourn for good cause.

---

1. (1928) 29 L.W. 649.
2. (1895) 1 Q.B. 724.
3. (1889) L.R. 17 I.A. 1: I.L.R. 17 C. 512 (P.C.).

V.E.R.M. FIRM *v.* MAUNG PO KYONE, I.L.R. 6 Rang. 408.

We are unable to agree with the reasoning on which the learned Judge rests his conclusion that the party succeeding in a suit under Order 21, Rule 63 should by the decree therein be awarded his costs in the claim proceedings as well. In *Seshagiri Aiyar* v. *Marakathammal*[1] Justice Shephard refused to allow execution to be taken out for costs of the claim court on the ground that the decree in the suit had declared that the claim order shall have no effect. The learned Judge distinguishes *In re Raghunath Das* v. *Badri Prasad*[2] where the successful claimant had executed the order for costs and the Court later refused to order a refund of the same. In *Annamalai Desikar* v. *Govinda Rao*[3] it has been held by Devadoss, J., that the court has no power to award costs of the claim proceedings as the decree in the suit does not *in terms* vacate the order on the claim petition. This particular way of putting the matter is perhaps too technical, for it cannot be gainsaid that in substance the effect of the decree is to supersede the order on the claim petition (see *Kissori Mohun Roy* v. *Harsukh Das*[4]) and it has been held in *Subbarayadu* v. *Yerram Setti Seshasanti*[5] and *Sitalakshmi Ammal* v. *Krishnaswami*[6] that the words of section 144, Civil Procedure Code, are not confined to cases where restitution is claimed on the reversal of a decree in first or second appeal and if as the result in the ulterior proceeding it has been superseded, the money recovered under it ought certainly to be refunded. The Calcutta High Court has held likewise on the ground that the suit is not in any sense an appeal against the order on the claim petition but only for a declaration of the plaintiff's right. The decision under review proceeds on three grounds: (i) that the claim suit is in lieu of an appeal, (ii) that the result of the suit when it succeeds is to set aside the order in the miscellaneous proceedings, and (iii) that the practice in Upper Burma ever since 1905 has been in favour of the award of these costs. The last ground may be salutory, but the other two grounds call for some criticism. The learned Judge overlooks the obvious possibility that the decision in the claim suit is

1. (1895) 5 M.L.J. 252. 2. (1883) I.L.R. 6 A. 21.
3. (1923) 20 L.W. 557.
4. (1889) L.R. 17 I.A. 17: I.L.R. 17 C. 436 (P.C.).
5. (1916) I.L.R. 40 M. 299: 30 M.L.J. 366.
6. (1922) M.W.N. 186.

often arrived at on different materials from those placed before the court in the summary proceedings. It is not infrequently that the very same Judge arrives at different conclusions. The appellate court has always refused the costs of the appeal, though not of the lower court as well, when the appeal is decided on (i) additional or new evidence, or (ii) on wholly different grounds. It may well be that the decision in the claim proceeding is correct on the materials then before the court. It is one of the first and highest duties of all courts to take care that the act of the Court does no injury to any of the suitors; but when the statute limits the court's enquiry and consequently an erroneous conclusion is arrived at by the court, it cannot by any means be called an injury arising from an act of the court. In the claim stage the enquiry is limited to determining the question whether the objector has some interest in, or is possessed of, the property attached, while in the suit under Order 21, Rule 63 the enquiry gets extended to the determination of the right which the objector claims to the property in dispute (see *Ramaswami Chettiar* v. *Mallappa Reddiar*,[7] *Arunachalam Chetti* v. *Periasami Servai*[8]).

Notwithstanding the numerous decisions under the section, the exact nature of a suit under Order 21, Rule 63 can by no means be said to be clearly defined yet. The judgment of the Privy Council in *Phul Kumari* v. *Ghanshyam Misra*[9] may be said to be the pivot on which the later decisions have turned. Following the observations in that case a line of cases has held that the claim suit is a continuation of the claim proceedings and practically an appeal from the claim order (*Krishnappa Chetti* v. *Abdul Khader Sahib*,[10] *Rajamier* v. *Subramaniam Chettiar*,[11] *Venugopal Mudali* v. *Venkatasubbiah Chetti*,[12] *Khairulla* v. *Dhanrupmal*,[13] *Pratap Chandra Gope* v. *Sarat Chandra Gangopadhyaya*[14] and *Rajamier* v. *Subramania Chettiar*[15]) while other decisions have held that *Phul Kumari* v. *Ghanshyam Misra*[9] must be treated as an authority only for the actual decision in the case, namely, that the suit falls under sub-section (1) of Art. 17, Sch. II of

7. (1920) I.L.R. 43 M. 760: 39 M.L.J. 350 (F.B.).
8. (1921) I.L.R. 44 M. 902: 37 M.L.J. 546
9. (1907) L.R. 35 I.A. 22: I.L.R. 35 C. 202: 17 M.L.J. 618 (P.C).
10. (1913) I.L.R. 38 M. 535: 26 M.L.J. 449
11. A.I.R. 1928 M. 1201. 12. (1915) I.L.R. 39 M. 1196.
13. (1924) 22 N.L.R. 67 14 (1920) 25 C.W.N. 544.
15. (1928) M.W.N. 336.

the Court Fees Act (VII of 1870) as a suit "to alter or set aside a summary decision or order" (*Pethu Aiyar* v. *Sankaranarayana Pillai*[16] and *Subramaniam* v. *Narasimham*[17]). There is also the argument that oftentimes the suit is tried by a tribunal inferior to the executing court which pronounced the order in the claim proceedings and it will be too much to say that the inferior court hears an appeal from the superior court. In *Venugopal Mudali* v. *Venkatasubbiah Chetti*[12] the question arose as to the time from which limitation begins to run where a claim allowed by the High Court on the original side is dismissed by a Bench on appeal under the Letters Patent and a suit is then filed within a year from the date of the order of the Division Bench, but more than a year from the original order. Their Lordships point out that the suit is not to set aside the order passed on the claim petition by the single Judge, but it is to set aside the order of the Division Bench and hence limitation begins to run from the later order. Can it be said that the Judge in the original side when hearing the suit is either reviewing the appellate order or hearing an appeal against it.

It is observed in the case under notice that "any other view of the question would mean that there was no remedy for a wrongful order as to costs....." Such arguments have very often been summarily rejected. It is a well-recognised principle that no action will lie against a person for procuring an erroneous decision from a court of justice (*Rani Mina Kumari Dobi* v. *Surendra Narain Chakraverty*,[18] *Mohini Mohan Misser* v. *Surendra Narayan Singh*[19] and *Bachoo* v. *Velji Bhimsey & Co.*[20]) and costs where adjudicable upon, are not an element in calculating damages (*Chengalvaraya Mudali* v. *Thangatchi Ammal*[21]). In most of the cases referred to and followed in *Kumarappa Chetti* v. *Nga Pyi*[22] which has been the leading case in Rangoon on this question, the first court had no jurisdiction to adjudicate upon costs and hence the Civil Court finally trying the matter awarded costs of those proceedings as damages. But where as here, the court can adjudicate upon costs and does adjudicate upon it, it is very doubtful if

---

12. (1915) I.L.R. 39 M 1196
16 (1916) I.L.R. 40 M. 955: 32 M.L.J. 374.
17. (1928) 56 M.L.J. 489.
18. (1909) 14 C.W.N. 96.
19 (1914) I.L.R. 42 C 550
20 (1923) 25 Bom L.R. 595.
21. (1871) 6 M. H.C.R. 192.
22. (1904-6) 2 U.B.R. (Civil) 18.

that can be set aside except on an appeal or revision against that order.

HEM RAJ *v.* KRISHEN LAL, I.L.R. 10 Lah. 106 (F.B.).

There is now a sharp difference of view between the Bombay, Lahore and Rangoon High Courts on the one hand, and Madras, Calcutta and Allahabad High Courts on the other, on the point as to whether transfers which are within two years prior to presentation of a petition in insolvency but beyond two years from the date of the actual order of adjudication can be annulled under S. 53 of the Provincial Insolvency Act (V of 1920). This Full Bench and the Bombay decision in *Nagindas* v. *Gordhandas*[1] adopt the literal construction of the language of S. 53 and hold that such transfers cannot be annulled. Whereas the Madras and other Courts hold that S. 28, cl. (7) must be read with S. 53 and so read, the doctrine of 'relation back' is applicable to make such transfers come within the scope of S. 53. The argument for the respective contentions are set forth fully in this judgment and the leading judgment for the other view, *Sankaranarayana Aiyar* v. *Alagiri Aiyar*,[2] which was under the old Act (III of 1907) where the language was the same, and *Rangiah* v. *Appaji Rao*[3] which is a decision under the new Act. There is no doubt that the view which is laid down by the Madras decisions carries out the policy of the Legislature better but it must be admitted that the language used by the legislature is very unhappy more so as there has been a change of language in the next section. This is a matter for urgent legislative interference.

---

1. (1925) I.L.R. 49 B. 730 (F.B.).
2. (1918) 35 M.L.J. 296.
3. (1926) I.L.R. 50 M. 300: 51 M.L.J. 719.

SHIBBA MAL *v.* RUP NARAIN, I.L.R. 10 Lah. 132.

An order granting a stay of further proceedings in a mortgage suit, pending an appeal from the preliminary decree, has been held to be a judgment within the meaning of clause (10) of the Letters Patent of the Lahore High Court. An order of refusal to stay was also held by the Lahore Court to be a "judgment," *Firm Badri Das Janaki Das* v. *Mathanmal*.[1] The Madras High Court has however in its most recent judgment in *Nageswara Aiyar* v. *Ramanathan Chettiar*[2] taken an opposite view. It holds that no appeal lies under clause (15) of its Letters Patent against an order granting stay of further proceedings on terms, in an appeal against the preliminary decree in a mortgage suit. Although the judgment points out that the order sought to be appealed against was only a conditional order granting stay it would seem that the inclination of their Lordships is to hold that no appeal lies even if there were an absolute stay. The distinction suggested between orders refusing to stay execution and orders refusing to stay further proceedings does not seem to be very convincing. The judgment under review notices the dictum of the Privy Council as to the meaning of the word "judgment" in the Letters Patent, in the decision in *Sevak Jeranchod Bhogilal* v. *The Dakore Temple Committee*[3] and holds that this does not overrule the view taken by the High Courts in India as regards the meaning of the term in other clauses of the Letters Patent. The Privy Council dictum was fully considered by the earlier decision of the Madras High Court in *Govindaramanuja Pedda Jeeyangarlavaru* v. *Krishnamacharlu*,[4] which was a Letters Patent appeal against an order suspending an injunction decree of the Lower Court, pending an appeal therefrom and it was held that the dictum could not be taken to be a pronouncement impliedly overruling the long series of decisions of the various High Courts in the contrary sense. It may be pointed out in passing that the explanation of the difficulty felt by the learned Judges "as to why the Privy Council in that case, after holding that no appeal was competent not only heard it but accepted it" is to be found in the fact that the Privy Council merely hold that there is no right of appeal to His Majesty in Council on the merits of the orders but an appeal will lie on the ground that there was no right of appeal to the Lower Appellate Court. This is what they mean when they say "There is no right of appeal except on the sole ground that the judgments and decrees were incompetent." See *National Telephone Co.* v. *Postmaster-General*.[5]

1 A.I.R. 1922 Lah 185 2. (1928) 56 M.L.J. 197.
3. (1925) 49 M.L.J. 25 (P.C.). 4. (1926) 52 M.L.J. 161.
5 (1913) A.C. 546

MAHANTH MAHABIR DAS *v.* JAMUNA PRASAD SAHU, I.L.R. 8 Pat. 48.

A sanction of the Court granted under S. 29 of the Guardian and Wards Act (VIII of 1890) to an alienation of the minor's property by the guardian gives complete protection to the alienee and it is not competent to the minor to re-open the question of the necessity for the alienation and to call on the alienee to justify the same. The sanction of the Court does not merely shift the onus of proof on to the minor as held by the Madras High Court in *Nallakka Venkatasami* v. *Rajan Viranna,*[6] but it has the efficacy of being a sufficient justification of the alienation itself—see the later case of the Madras High Court in *R. M. Raman Chettiar* v. *Tiruchanasambandam Pillai.*[7] If the alienee is a party to any fraud on the Court in obtaining the sanction, then of course, a consent obtained under such circumstances can be ignored. In other cases, it is a sufficient protection to the alienee whether it is a case of sale or mortgage that a competent court has gone into the matter and decided that the alienation is proper. The observations of the Privy Council in *Ganga Pershad Sahu* v. *Maharani Bibi*[8] also support the same position. The decision under notice further holds that the failure to comply with the requirements of S. 31 and to recite in the order itself the necessity and advantage to the minor's estate which justifies the sale is a mere irregularity, at any rate in cases where there is a substantial compliance as, for instance, where the necessity is set out in the affidavits and petition praying for the sanction of the Court under S. 29 There seems, however, to be no warrant for the view of the learned Judges that where there is proof of legal necessity for the major portion of the consideration for a mortgage bond, the Court can presume legal necessity in respect of the small balance for which there is no actual proof. The judgment lays this down on the authority "of the latest decision of the Judicial Committee" but the exact reference is not given. If it is intended to refer to the decisions in *Sri Krishn Das* v. *Nathu Ram*[9] and *Niamat Rai* v. *Din Dayal*[10] it may be pointed out that those were cases of sales and not mortgages. In the case of sales, the question is "whether the sale itself is justified by necessity." So far as the mortgage is concerned, the necessity should be made out for the amount borrowed.

[END OF VOL. LVI.]

6. (1922) I.L.R 45 M. 429: 42 M.L.J. 333. 7. (1926) 51 M.L.J. 869.
8. (1884) L.R. 12 I.A. 47: I.L.R. 11 C. 379 (P.C.).
9. (1926) L.R. 54 I.A. 79: I.L.R. 49 A. 149: 52 M.L.J. 120 (P.C.).
10. (1927) L.R. 54 I.A. 211: I.L.R. 8 Lah. 597: 52 M.L.J. 729 (P.C.).