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AKKU PRALHAD *v* GANESH PRALHAD, I L R. (1945) Bom 216

With great respect to the three learned Judges who decided the case, it may be submitted that the rule of Hindu law governing the case lies the other way The question was whether a married woman who had formed an adulterous connection with another and lived as his mistress till his death and continued faithful to his memory thereafter can be regarded as an *avaruddha stri* entitled to maintenance against the estate of the paramour, it being found that the woman's husband was alive at the time of his death The legal implications arising from sexual relationship may depend on the woman's status, whether she is a *patni, avaruddha stri, bhujishya, vesya, swairini* or *sadharana stri* There is no express Smriti text specially providing maintenance to a concubine The rights of women other than wives to maintenance are deduced from two texts, of Katyayana and Narada respectively. According to Katyayana, " Heirless property goes to the king except what is required for *yoshit* (योषित्), servants and funeral rites of the deceased etc". Narada states " A king should give (when he succeeds as heir) maintenance to (स्त्रियः) the *women* of a person (who dies heirless) excepting a Brahmin". The terms *yoshit* and *stri* used in the texts, refer according to the Mitakshara, to *avaruddha* women belonging to the deceased. A text of Yagnavalkya[1] dealing with the fine imposable on a person having intercourse with women belonging to another (dasis) indicates the existence of a distinction between *avaruddha* women and the rest . The text is :

अवरुद्धासु दासीषु भुजिष्यासु तथैव च ।
गम्यास्वपि पुमान् दाप्यः पंचाशत्पणिकं दमम् ॥

—A fine of fifty panas is imposable in regard to intercourse with three types of women, *avaruddha stri, bhujishya* and such like women. The terms *avaruddha, bhujishya* etc. in the context are according to the Mitakshara but attributes of the word dasi : यदा दास्यः अवरुद्धा भुजिष्या वा भवेयुस्तदा. The particle *cha* (च) in Yagnavalkya's text indicates according to the Mitakshara, *harlots, swairinis, common women* and *bhujishyas* :

तथा च शब्दान् वेश्या स्वैरिणीनामपि साधारणस्त्रीणा भुजिष्या च ग्रहणम् ।

Having been kept by another they are as good as his wives—परपरिगृहीतवेन तासां परदारतुल्यत्वात्. Though the limits of the fine imposable under the text may be the same, the Mitakshara makes it sufficiently clear that among the dasis, there runs a clear distinction between *avaruddha* women and others. This is borne out by the definitions of *avaruddha* and *bhujishya*. The first of the terms refers to female slaves that are prohibited by the master from having sexual union with other men with an injunction (to prevent the possibility of lapse of service) to stay at home—गृह एव स्थातव्यम्. A *bhujishya* is, however, one who is

[1] II, 290.

restricted for enjoyment to a certain number of persons — पुरुषनियतपरिग्रह. In commenting on Yagnavalkya's text dealing with effects not available for partition, the Mitakshara cites a text of Manu[1] which says that "clothes, vehicles, ornaments, cooked food, water, women (स्त्रियः) etc are not liable to partition" and explains (स्त्रियः) as dasis—अवरुद्धास्तु पित्रा स्वैरिण्याद्याः समा अपि पुत्रैर्न विभाज्याः. This no doubt suggests the absence of any distinction between *avaruddha* women and other *dasis* but in the light of the comment on the text of Yagnavalkya adverted to earlier, the last observation should be confined to its context only. Slavery being abolished, the term *dasi* is now equated with a woman of the Sudra caste In view of the foregoing it is now unprofitable to speculate whether the terms "*yoshit*" and "*stri*" in the texts of Katyayana and Narada respectively would subsume concubines of any type at all. - In *Yashvantrav* v. *Kashibai*[2], Nanabhai Haridas, J, observed: "There are texts providing generally for '*women*' of deceased coparceners. It is under those texts that the widows of such coparceners are held entitled to be maintained by the survivors, and they lay down the condition of continued chastity. Whether those text-writers really intended to include in the expression '*women*' concubines or 'kept women' it is now unnecessary to speculate It suffices for us that commentators and judicial authorities have distinctly declared that they are so included But if they are so included, the restriction of continued chastity imposed by the text must equally apply to them, as otherwise they would be in a more advantageous position than the widows" After the ruling of the Judicial Committee in *Bai Nagubai* v *Bai Monghibai*[3], the condition as to residence with the paramour as a member of his household is not necessary and the only point of distinction between an *avaruddha stri* and a *bhujishya* is that the former is restricted to her paramour only while the latter is not so restricted. According to Lord Darling, the concubine (*avaruddha*) possesses a recognised status below that of wife and above that of harlot; "almost a wife, according to the ancient authorities, the distinction of the concubine from the harlots being due to a modified chastity in that she was affected to one man only although in an irregular union merely". If then according to the texts and decisions a concubine will be entitled to maintenance if she is an *avaruddha stri*, can a woman whose connection with her paramour has been adulterous right through be treated as an *avaruddha stri* where the concubinage has been open, exclusive, characterised by fidelity to the memory of the paramour after his death, and resulted in the birth of a child to him? A *swairini* is a woman who abandons her husband and goes to another man of her own varna out of love for him: स्वैरिणी—स्वैरिणी तु पतिं हित्वा सवर्णं कामतः श्रयेत्। The illicit connection is admittedly adulterous. But the learned Judges argue that if a common prostitute can at any time stick to one man and become an *avaruddha stri* the case of the *swairini* should be regarded as *a fortiori*. The argument is plausible but overlooks that the connection in the latter case constitutes a matrimonial offence. Secondly, it is said that when the husband allows his wife to live in adultery with her paramour so long that their connection may be deemed to be permanent, he must be taken to have *deserted* her and *connived* at her incontinence. The argument is with great respect not convincing. It is the wife that deserts the husband and forms an illicit connection. If the husband is sensitive and anxious to avoid publicity he might well abstain from prosecuting the paramour. Surely this cannot be regarded as the husband "allowing" his wife to live in adultery The Hindu law does not provide for divorce. The husband cannot do anything in the matter because the law provides no remedy before the civil Courts. To talk of the husband as "allowing" his wife to live in adultery or "conniving" at what she has done, is in the circumstances not correct. Thirdly it has been said that the fact that though a concubine may be a married woman when the connection begins she can still be a *dasi* and her son a *dasiputra* provided the connection has ceased

1. II, 119
2. (1887) I L R 12 Bom 26, See also *Bai Monghibai* v. *Bai Nagubai*, (1922) I.L R 47 Bom 401
3. (1926) L R. 53 I.A 153. I.L R. 50 Bom 604 (P.C.).

to be adulterous when the son is conceived (see *Tukaram* v. *Dinker*[1]), shows that the condition as to the connection being non-adulterous is one not imposed by the texts but only on grounds of morality and that too only when a son born of such intercourse claims a share of the putative father's property. It is difficult to follow the argument. Even if the rule be one imposed not by the texts but in the interests of morality it must operate where any claim is founded on such connection and it can hardly make any difference whether it is a claim for property by a son born of such connection or a claim for maintenance by the woman herself. Also the point of time with reference to which the nature of the connection has to be regarded is the time when the particular right may be deemed to have had a foundation. In a claim for a share of property by an illegitimate son the relevant point of time will be the period of his birth when he gets the requisite status ; if at that time the connection had ceased to be adulterous he could not with any show of reason be penalised for something which existed before his birth. Likewise in the case of a maintenance claim by a concubine, no matter what had happened earlier, if at the time of the paramour's death the connection was not adulterous, its previous character would be irrelevant The fourth argument is that the obligation to lead a chaste life after the paramour's death is not impossible of fulfilment even where in fact her husband is alive. The learned Judges remark : " It may be that the husband may file a suit for the restitution of conjugal rights after the death of the paramour, a contigency, which is, in the highest degree remote". The remoteness of the contingency cannot affect the question. The husband's right is a legally protected right and as such cannot be ignored as of little consequence. Fifthly, it has been remarked that the test whether the husband is alive or not at the date of the paramour's death is bound to create an anomalous sitution. In the language of one of the learned Judges · " If the husband dies one day *after* the paramour's death, then the mistress would not be entitled to maintenance : but if he dies one day *before* the death of the paramour, she would be so entitled, because on the day of the paramour's death the husband was dead and he ' was not alive during the whole period of her adulterous connection'. It is difficult to justify this distinction on any logical basis". This line of reasoning makes little allowance for the fact that till the death of the husband the marriage is legally subsisting and all the incidents attaching to a legal marriage, in favour of the husband, can be enforced by him. Another argument of the learned Judges is that equity at any rate would justify the claim of the woman to maintenance. Reliance is placed on an observation of Spencer, J , in *Rama Raja Thevar* v. *Papammal*[2] : " The question is not really so much one of the legal relationship between a man and a woman as of equity that a woman who has been kept for a number of years and given a position almost equal to that of a wife should not be left to starve after the death of the man who kept her" There seems little warrant to justify the application of equitable principles where the connection has been from beginning to end not immoral merely but illegal as well. Yet another argument is that two decisions of the Bombay High Court, *Khemkar* v. *Umiashankar*[3] and *Ningareddi* v *Lakshmawa*[4] had long ago decided, though the particular question was not directly in issue in those cases, that a permanently kept mistress would be eligible for maintenance even if her connection with the deceased paramour had been adulterous and that the repudiation of that view by Shah A C J and Crump, J., in *Anandilal Bhagchand* v. *Chandrabai*[5] was not justified. In *Khemkar* v. *Umiashankar*[3] the parties belonged to the Sompura Brahmin community, who now follow the trade of stone-cutters. The plaintiff, a married woman had deserted her husband and remarried another, the prior marriage being undissolved. On the death of the second husband a question arose as to her rights. The Court held that the second marriage having taken place during the subsistence of the first marriage was invalid and cannot give the woman any rights as a wife but that she will be entitled to maintenance from the estate of the deceased as his concubine. The facts do not disclose whether the

1. (1930) 33 Bom L R 289
2. (1925) L I R 48 Mad 805 49 M L J 348
3 (1873) 10 Bom H C R 381.
4 (1901) I L R. 26 Bom 163
5. (1923) I.L.R. 48 Bom. 203.

first husband was alive at the time of the paramour's death and the question whether that circumstance would have made any difference in the result can now be only a matter of speculation Anyway, the decision cannot be regarded as really helpful on the question. In *Ningareddi's case*[1] the parties were Sudras, and the woman had deserted her husband and lived as the paramour of another till his death. A gift of joint family property had been made by the latter to his mistress and on his death its validity was impugned. The Court held that the gift was untenable but that maintenance was payable to the woman out of the estate. In the course of his judgment, Crowe, J., observed : " There can be no doubt on the authorities that a concubine is entitled to maintenance though the connection was an adulterous one, provided that it was of a permanent nature". Here again it falls to be observed that there is nothing in the statement of facts to show that the connection which at its inception was adulterous had ceased to be so at the time of the paramour's death. In those circumstances, in *Anandilal Bhagchand* v. *Chandrabai*[2], the learned Judges felt that the matter had neither been directly nor conclusively decided by the two earlier cases, and after examining the texts and authorities they laid down that a concubine cannot claim maintenance as an *avaruddha stri* where her connection with the deceased had throughout been adulterous. In Mayne's Hindu law, 9th edition at p 450, it had been stated on the strength of the earlier Bombay decisions, that maintenance could be claimed in such a case, but in the 10th edition at p. 824 not only has that statement been omitted but *Anandilal's case* is referred to without any criticism. It is true that a wife who leaves her home for purposes of adultery and persists in following a vicious course of life cannot claim to be maintained or to be taken back, *Ilata* v *Narayana*,[3] *Debi Saran Shukul* v. *Daulata Shuklain*,[4] *Subbayya* v. *Bhavane*,[5] *Kandasami* v *Murugammal*[6]. Chandavarkar J., was no doubt inclined to hold that even such a wife would be entitled to some amount of maintenance, see *Parami* v *Mahadevi*[7], but this view has not been accepted. There can, however, be no doubt that if she repents, returns to purity and performs expiatory rights she will be entitled at least to bare maintenance, *Bommayya* v. *Hegade*,[8] *Ram Kumar Dube* v. *Bhagwanta*,[9] *Mt. Shibbi* v. *Jodh Singh*,[10] *Haji Saboo Siddhick* v. *Ayeshabai*[11], *Bhikubai* v *Hariba*[12] This is by virtue of the fact that unchaste life does not put an end to the marital tie with the result that the husband's obligation to maintain her is not extinguished but is only kept in suspense during her adulterous life. The obligation is personal. Also adultery is an offence in India and it will be rather strange if a right is founded and sustained on the basis of an act which constitutes an offence *Ex turpi causa non oritur actio.* In the absence therefore of any specific texts of Hindu law under which a *swairini* can be regarded at any time as an *avaruddha stri* there seems to be no warrant to uphold any claim for maintenance by her as against her paramour's estate It is true that in *Bai Nagubai* v. *Bai Monghibai*[13], the Privy Council refers to *Ningareddi's case*,[1] as one whose authority has not been questioned. This is no doubt true, but the real question is what it is that that case has decided As already pointed out the observation of Crowe, J., that a concubine is entitled to maintenance though the connection was adulterous cannot be read as meaning that she will be entitled to maintenance though the connection was adulterous all through, particularly as there was nothing to show that in that case the husband had survived the paramour." "P."

GOVIND BHAUSHET *v.* BHIKU MAHADEOSHET, I L R. (1945) Bom 10

One of the rules of Hindu law, a repeal of which was prominently urged before the Hindu Law Reform Committee, was that governing priority among daughters in the matter of inheritance to parents The decision under notice had to consider whether an unmarried daughter living as a permanently kept concubine of another

1. (1901) I L R. 26 Bom 163
2. (1923) I L R. 48 Bom 203
3. (1863) 1 M H C R. 372
4. (1917) I L R. 39 All 234
5. (1914) 24 I C. 390
6. (1896) I.L.R. 19 Mad 6
7. (1910) I.L R 34 Bom. 278.
8. (1914) 27 M.L J. 305.
9. (1934) I L R 56 All 392.
10. (1933) I L R. 14 Lah 759
11. (1903) L R 30 I A. 127 : I L R 27 Bom 485 (P C.).
12. (1925) I L.R 49 Bom 459.
13. (1926) L R 53 I.A. 153 : I.L.R. 50 Bom 604 (P.C).

cannot inherit the property of her father either to the exclusion of or along with his married daughter. The question was answered in the negative. The Mitakshara divides daughters into two classes for purposes of priority—unmarried (अनूढ) and married (ऊढ)—the rule being postulated that an unmarried daughter excludes a married daughter The preference is indicated on the authority of texts of Parasara and Devala The unmarried daughter is referred to therein as *kumari* (कुमारी) and *kanya* (कन्या) respectively The Mitakshara treats these terms as convertible with *anudha* The term *kanya* seems to signify two ideas One is that the girl is *ananya purvika* (अनन्यपूर्विका). Medhatithi's comment on Manu IX, 132 emphasises the fact that a *kanya* is one who has not been enjoyed by a man Secondly that the girl is under the protection of her father These ideas carry with them the further incident that the girl is fit for *kanya-pradana* according to shastraic rites. The married woman according to the texts of law is one that has been given in valid marriage by the performance of the necessary rites By reason of these distinguishing features each class of daughters has a distinctive status which, in *Tara* v *Krishna*[1], was characterised as *kanyavastha* and *bharyatwa* respectively It follows therefore than an unmarried daughter living as the concubine of a person is *prima facie* neither a *kanya* or a *kulastri* Again it may well be that under the scheme of the shastras such a daughter was not intended to be invested with heritable capacity since immorality on her part would have led to excommunication from caste and ostracism, marking her a *patita* and as such excluded from inheritance In view of the passing of the Caste Disabilities Removal Act (XXI of 1850), this disqualification can no longer operate Still the Courts might have refused to recognise the heritable capacity of such a daughter on the ground that the Mitakshare does not contemplate a right of inheritance for her, for whatever reason it may be and whether the reason has continued to be valid or not Having regard however to the fact that under the smriti texts it is the daughter as such that is mentioned, there would be slender warrant for restricting the meaning of the term to maiden and married daughters only It was for this reason that in *Advyapa* v. *Rudrava*[2], it was held that incontinence will be no bar to succession by a daughter and that to be qualified to inherit there is no rule that a daughter should be *avyabhucharini* or *sadhvi* No doubt that was a case of a married daughter living a life of immorality but the principle will equally apply to a case of a maiden daughter living such life Even if the heritable capacity of a maiden daughter leading a life of immorality be recognised, it would still be necessary to assess her position among the daughters of the deceased in regard to the regulation of priority. In *Tara* v. *Krishna*[1] a *murali*—a maiden dedicated to an idol—who had taken to a life of promiscuous intercourse claimed to inherit to her father in competition with married daughters of the deceased It was held that such a daughter was neither a *kanya* nor a *kulastri* and cannot take while a daughter of either class existed. Apropos of this conclusion a scholar wrote . " A *murali* is a female married to a deity when she was a virgin She has a legal status under Pancharatra Shastra and Shiva Agama She is a married woman for the purpose of inheritance Though she is allowed promiscuous intercourse to the extent defined by the Shastra, *viz* , Pancharatra, and Agamas, she is not a prostitute according to these laws . . . She is a married woman as females are in several countries, who are not prohibited from having promiscuous intercourse, as defined and permitted by their laws or customs. The *murali* in the Bombay case is a married daughter and not a prostitute as held by the Bombay High Court As such she was entitled to one third of the estate of the father"[4]. Even if a maiden dedicated to an idol is in a sense to be regarded as a married person, still it is clear that such terms as *kanya* or *barya* should in the context of the discussion relating to inheritance in the Mitakshara be understood in the popular sense (*lokaprasiddha*) and not in the technical (*paribhasika*)

1. (1907) I L R 31 Bom 495
2. (1879) I L R. 4 Bom. 104.
3. (1907) I L.R. 31 Bom. 495.
4 Dewan Bahadur Raghunath Rao, *Times of India*, 11th December, 1909.

sense. Nor can the text of Yagnavalkya[1] imposing a fine of 50 panams for intercourse with *avaruddha, bhujishya* and such women as explained in the Mitakshara that that is so since they are as good as other's wives (परपरिगृहीतत्वेन परदारतुल्यत्वात्) be understood as concerning anything other than *strisangrahana* or as conferring by implication on a maiden daughter dedicated to an idol or leading an immoral life as the exclusive mistress of any person the status of a wife. That the status of a daughter living in immorality is different from that of a *kanya* or a *kulastri* is clear also from a text of Vyaghra "In the case of sadharana stri there is no (such thing as) adultery, which is a term applicable to (a married woman) of (recognised caste) or the defilement of a *kanya*; or the defilement of one's preceptor's bed". There is no adultery in these cases because the woman is not married, nor is there *kanyadushana* because she is not a maiden. Thus the daughter who had taken to an immoral life and had never been married is neither a maiden nor a married woman and as such even if she has heritable capacity can take only in the absence of those classes in accordance with the maxim आगन्तूनामन्ते निवेशः. The only difference between the case under notice and *Tara* v *Krishna*[2] is that whereas in the latter case the daughter was a *murali* who had taken to a promiscuous life, in the former she had become a concubine in the permanent keeping of another even while she was a maiden On the reasoning indicated *supra* this can hardly affect the rule as to priority of succession as between the daughters of a deceased person "P."

VYAS JIWANLAL *v* THAKARDA RAMTUJI, I L.R (1945) Bom. 46

This decision deals with the interesting question whether and if so under what circumstances "bonus" could be regarded as "wages" and as such exempt from attachment in execution of a decree Section 60 (1) clause (*h*) of the Civil Procedure Code exempts from attachment or sale in execution of a decree the wages of labourers and domestic servants In the Payment of Wages Act (IV of 1936) it is stated in section 2 (*vi*) that "'wages' means all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied were fulfilled, be payable whether conditionally upon the regular attendance, good work or conduct or other behaviour of the person employed, or otherwise to a person employed in respect of his employment or of work done in such employment, and includes any bonus or other additional remuneration of the nature aforesaid which would be so payable and any sum payable to such person by reason of the termination of his employment." The definition contemplates that "wages" are remuneration payable in respect of employment to an employee under a *contract* of employment express or implied. Bonus also will fall within the ambit of the term if so payable It follows that any remuneration which may be paid independently of the contract of employment may not fall within the scope of wages. Section 2 (1) (*m*) of the Workmen's Compensation Act (VIII of 1923) states that "wages" includes any privilege or benefit which is capable of being estimated in money, other than a travelling allowance or the value of any travelling concession or a contribution paid by the employer of a workman towards any pension or provident fund or a sum paid to a workman to cover any special expenses entailed on him by the nature of his employment The latter definition does not mention that the remuneration payable should be under the terms of the contract of employment if it is to be regarded as wages. The term "benefit" may *prima facie* cover a bonus as well. These definitions being however in respect of special pieces of legislation, in assessing the scope of the term "wages" in section 60 of the Civil Procedure Code, light may have to be sought outside such legislation. While the dictionary meanings agree that wages are compensation paid to a hired person or employee for his services there is no unanimity regarding the meaning of the term "bonus" Thus while Wharton refers to "bonus" as an occasional extra dividend or a gratuity, Bouvier states that "bonus" is not a gift or gratuity but is paid for some services or consideration and is in addition to what would ordinarily be given. Adopting the definition of "bonus" as given in the New English Dic-

1. II, 290. 2 (1907) I.L R. 31 Bom. 495.

tionary, Stirling J, remarked in Re *Eddystone Mar Insurance*,[1] that " bonus " is " a boon, or gift over and above what is nominally due as remuneration to the receiver " The English view would thus seem to be that " bonus " is in the nature of a gift or gratuity and therefore proceeds altogether as a matter of grace on the part of the employer and not as a matter of right inhering in the employee In *Deane* v. *Wilson*,[2] where what was called a bonus was a sum per week additional to stated wages and was payable only when the person had been punctual and regular in attendance, it was held that it was not ' wages ' within the meaning of section 25 of the Truck Act which defined " ' wages ' as any money or other thing contracted to be paid, delivered or given as a recompense, reward or remuneration for any labour done or to be done, whether within a certain time or to a certain amount or for a time or for an amount uncertain " Except for the fact that the payment was conditional there seems to be no reason why the sum could not be regarded as wages particularly as it fell to be paid as an incident of the contract of employment. The argument that merely because a bonus was a conditional payment and might or might not be payable it could not be regarded in assessing the " remuneration " payable to an employee, was expressly rejected in *Skailes* v. *Blue Anchor Line, Ltd* [3]. The position is reinforced by the remarks of the Earl of Birkenhead in *Sutton* v *Attorney General*[4], where he observed " The term ' bonus ' may of course be properly used to describe payment made of grace and not as of right but nevertheless may also include, as here, payments made because *legally due* but which the parties contemplated will not continue indefinitely " It would thus seem that neither its conditional character nor the indefiniteness of the duration for which it may be paid would be material for determining whether the payment can be regarded as " remuneration " in respect of service ; and that the true test is whether it was altogether a matter of grace It would therefore be a question depending on the facts of each case In the case under review, on a representation made by the Textile Labour Association of Ahmedabad to the Ahmedabad Mill-owners Association that the wages of the employees were inadequate and that in view of the prosperity of the mills and of the hardships suffered by the employees due to the inadequacy of their wages in the abnormal economic conditions caused by the war the wages of the employees should be increased, an agreement was arrived at between the two bodies in January 1943, which recited, that in view of the exceptional circumstances in Ahmedabad it was decided to give all the employees of the Textile Mills, a regulated scale of bonus which in the first place will be based on the different kinds of work done by the employees and secondly will be regulated according to the number of days for which each employee worked in each calendar month. This was the scheme for the payment of the bonus Having regard to the fact that the payment is to be an additional remuneration to each employee and flows out of the contract of employment as modified by the subsequent agreement, neither the fact that the payment was only temporary and for an indefinite period nor the fact that it was conditional can detract from its character as " remuneration " for service and as such the sum payable will constitute " wages of labourers " within the meaning of section 60 of the Civil Procedure Code.

SHRIPAD APPAJIRAO *v* SECRETARY, THE SANIKATTA CO-OPERATIVE SALT SALE SOCIETY, LTD, I L R. (1945) Bom 209

This decision deals with the question as to when an agreement is one for stifling prosecution and would be opposed to public policy. The defendant's brother had misappropriated five consignments of goods entrusted to him for delivery by a Co-operative Society and absconded A complaint was lodged by the Society with the Police in regard to the matter. The defendant was a clerk in the Sub-Court at the place where the complaint had been filed He started negotiations with the Secretary of the Society. The latter refused to withdraw the complaint against the defendant's brother but ultimately agreed to give a letter to the District Superintendent of the Police stating that the Society had no objection to the dropping

1. (1894) W N 30
2. (1906) 2 I.R. 405.
3. (1911) 1 K B 360
4. (1923) 39 T L.R. 294.

of the case against the defendant's brother Thereupon a promissory note was executed by the defendant in favour of the Society to cover a part of the loss sustained by it and certain other items of consideration were also passed for recoupment of the loss The withdrawal of the prosecution was not permitted by the District Magistrate · The prosecution of the defendant's brother proceeded and resulted in his conviction The amount due under the promissory note being unpaid, the Society sued on the note It was pleaded that the note was given as part of the consideration for a promise by the Secretary of the Society to withdraw criminal proceedings against the defendant's brother If established, this would plainly afford a defence under section 23 of the Indian Contract Act. It was argued that there was no stifling of prosecution in this case, because, (*i*) the Secretary of the Society had *no power* to withdraw the complaint ; (*ii*) the Secretary had *in fact refused* to withdraw the prosecution ; (*iii*) the prosecution despite the letter of the Secretary to the District Superintendent of Police was in fact *proceeded with* and (*iv*) even if the parties had contemplated the withdrawal of the prosecution, at best it operated only as a *motive* that impelled the execution of thepromissory note but did not form part of the consideration therefor It is true that there is undoubtedly a distinction between the motive to a transaction and its object or consideration and it is not sufficient to avoid an agreement as being repugnant to public policy that the motive of the party undertaking the liability was the withdrawal of a pending criminal case If the undertaking is unenforceable it can only be, because the object or consideration for the undertaking or any part of it is opposed to public policy. As pointed out in *Sudhindra Kumar* v. *Ganesh Chandra*,[1] the test is whether it was a term, express or implied, of the bargain between the parties that a non-compoundable case should not be proceeded with In the words of Lord Atkin in *Bhowanipur Banking Corporation, Ltd.* v *Durgesh Nandini Dasi*,[2] " Proof that there has actually been a crime committed is obviously unnecessary But it is also of course necessary that each party should understand that the one is making the promise in exchange or part exchange for the promise of the other not to prosecute or continue prosecuting In all criminal cases reparation where possible is the duty of the offender, and is to be encouraged It would be a public mischief if on reparation being made or promised by the offender or his friends or relatives mercy shown by the injured party should be used as a pretext for avoiding the reparation promised On the other hand to insist on reparation as a consideration for a promise to abandon criminal proceedings is a serious abuse of the right of private prosecution The citizen who proposes to vindicate the criminal law must do so wholeheartedly in the interests of justice, and must not seek his own advantage. It only remains to say that such agreements are from their very nature seldom set out on paper. Like many other contracts they have to be inferred from the conduct of the parties after a survey of the whole circumstances." The question therefore is one of fact whether there was a promise not to prosecute or continue prosecuting. In *Jones* v. *Merionethshire Permanent Benefit Building Society*,[3] a prosecution for defalcation as against the Secretary of a Society had been threatened by the Society. The plaintiff undertook to make good the losses, the expressed consideration being a forbearance by the Society to sue the Secretary in respect of the loss caused Promissory notes were executed on that footing. In giving the notes the plaintiff's motive was to save the Secretary from prosecution and this was known to the Directors of the Society but there was no promise not to prosecute. In an action to set aside the notes as obtained for an illegal consideration Vaughan Williams, J., held that it was an implied term of the agreement that there should be no prosecution and hence the notes were unenforceable. This ruling was approved by the Privy Council in *Kamini Kumar Basu* v. *Birendra Nath Basu*,[4] and was fully considered in *Bhowanipur Banking Corporation Ltd.* v. *Durgesh Nandini Dasi*[2]. Also it is immaterial if in spite of the agreement the prosecution was actually conducted, for what is material is the consideration or object and not what happened subsequently.

1. A I.R. 1938 Cal 840
2. (1941) 2 M L J 726 (1941) L R 68 I A. 144 (P C.)
3. (1891) 2 Ch. 587 ; s c. on appeal (1892) 1 Ch 173
4. (1930) L R 57 I A. 117 59 M L J 82 (P.C).

RAMCHANDRA BALAJI *v* SHANKAR APPARAO, I L R (1945) Bom 353

In *Anant* v *Shankar*,[1] after observing that the fraction which is at any time employed to describe the quantum of interest of a male member of a Hindu Joint family does not represent his rights while the family is joint but the share which he would take if a partition were then to be made and that his interest is never static but increases by survivorship as others die and lessens as others enter the family by birth, adoption, etc; the Judicial Committee propounded the question "what principle requires that the death of the last surviving coparcener should prevent any further fluctuation of the interest to which he was entitled notwithstanding that a new male member has since then entered the family by adoption" Answering that there is none, the Privy Council approved the view of the Nagpur High Court in *Bajirao* v *Ramkrishna*[2] "We regard it as clear that a Hindu family cannot be finally brought to an end while it is possible in nature or law to add a male member to it The family cannot be at an end while there is still a potential mother if that mother in the way of nature or in the way of law brings in a new male member." Accordingly the Privy Council held overruling *Baloo Sakharam* v *Lahoo*[3], that the power of a widow of a predeceased coparcener to adopt to her husband does not come to an end on her son dying unmarried by reason that he was the sole surviving coparcener in the joint family and his property had vested in a person other than the adopting mother, and that the adoption must vest the property in the adopted son displacing any title based merely on inheritance from the last surviving coparcener Then the question arose whether the rule equally govern where the joint family is put an end to by partition among the surviving members and thereafter the widow of a predeceased coparcener adopts In Bombay, in a series of decisions it had been held that the adopted son cannot in such circumstances reopen the antecedent partition and claim his father's share In *Anant* v *Shankar*[1], the Privy Council had referred with approval to the ruling of the Madras High Court in *Veeranna* v *Sayamma*[4], which had held that an adopted son cannot question alienations made prior to the adoption by an intermediate full owner who had taken the property on the death of the adoptive father. The question thus narrowed itself to this, namely, whether a partition can be regarded as an alienation In *Sankaralingam* v *Veluchami*[5], such a contention was rejected. It was stated "The partition does not mean the extinction of the family The members of the family are still there and *so are the family assets*" And the learned Judges decided that a son adopted to a deceased coparcener is entitled to reopen a partition of the family properties effected by the surviving coparceners before the adoption took place This decision was referred to, seemingly with approval, by the Privy Council, in *Anant* v *Shankar*[1] The contrary view of the Bombay High Court is found in *Bammangouda Shankargouda* v *Shankargouda Rangengouda*[6], *Hirachand* v *Rowji Sojpal*[7], and *Irappa Lokappa* v *Rachayya Madiwalayya*[8] All these decisions had applied the principle laid down in *Baloo Sakharam* v *Lahoo*[3], that where at the time of the adoption the coparcenary had already become extinct, the adoption will not revive the coparcenary and enable the adopted son to claim his father's interest This Full Bench ruling was overruled by the Privy Council in *Anant* v *Shankar*[1], which, in effect, laid down that the existence of a coparcenary at the date of the adoption is not material for the validity of the adoption which falls to be decided altogether on grounds of spiritual benefit and that when once a valid adoption is made it cannot be denied effect, hence the rights of the adopted son would date back to the death of the adoptive father The reasoning being general, the principle will operate whether the termination of the coparcenary prior to the adoption had resulted either from the death of the sole surviving coparcener or by a partition effected among the surviving coparceners Nor does the

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1 (1943) 2 M L J 599 L R 70 I A 232 I L R (1944) Bom 116 (P C)
2 I L R. (1941) Nag 707, 718
3 I L R (1937) Bom 508 (F B)
4 (1928) 56 M L J 401 I L R 52 Mad 398
5 (1942) 2 M L J 678 I L R (1943) Mad 309 (F B)
6 (1943) 45 Bom L R 1021
7 (1938) 41 Bom L R 760
8 (1939) 41 Bom L R 1300

view in *Waman* v *Ganpat*[1], that a partition of the joint family property between coparceners of the family amount to a transfer within the meaning of the term in the Transfer of Property Act militate against the above conclusion For though a partition may be a transfer for purposes of the Act it may not amount to an *alienation* as contemplated in *Veeranna* v *Sayamma*[2], inasmuch as partition merely effects a change in the mode of enjoyment as between the parties to it of property which till then was being enjoyed jointly and to which they had already title

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PANDURANG BHAU *v* CHANGUNABAI, I L R (1945) Bom 487

This case also deals with a question of adoption, short and interesting A member of a joint and undivided Hindu family had died in 1932 leaving him surviving a widow and two sons The elder son died in 1933 leaving a widow and the younger son also died shortly afterwards Sometime later, the mother adopted a boy to her husband The question was, whether, in the circumstances, the adoption was valid In *Ramkrishna* v *Shamarao*[3], it had been held by the Bombay High Court that where a Hindu dies leaving a widow and a son, and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived This principle was approved by the Judicial Committee in *Amarendra Mansingh* v *Sanatan Singh*[4] While reiterating what has been characterised as the "conventional view" as to the religious efficacy of sonship, the Privy Council at the same time recognised that "there should be some limits to the exercise of the power of adoption, or at all events some conditions in which it would be either contrary to the spirit of the Hindu doctrine to admit its continuance or inequitable in the face of other rights to allow it to take effect" Such a situation was held to arise "where the duty of providing for the continuance of the line for spiritual purposes which was upon the father and laid by him *conditionally* on the mother has been assumed by the son and by him passed on to a grandson or to the son's widow" In such a case according to the Privy Council "the mother's power is gone." Two remarks fall to be made One is that the mother's duty to continue the line is not absolute but altogether *conditional* Secondly, that where the duty has been assumed by the son and passed on to a grandson or to his widow the mother's power is *gone* The reason is that when either the grandson or daughter-in-law has become burdened with the duty, an adoption by such person will satisfy not merely the spiritual requirements of the son but also of his father Whether an adoption is actually made is immaterial The responsibility having been definitely transferred by the law to the grandson or the son's widow there is no scope for the continuance of the power of adoption in the mother, as a sort of reserve in the background, analogous to that of a surety In that view it matters little whether there were more than one son left by the father It is true that in *Amarendra's case*[4], the Privy Council indicated that the test is "whether the conditions exist at the time of the son's death." To construe it as meaning "at the time of the death of the last surviving son" would be an extension. If at the time of the death of any of the sons, there is left by him either his own son or his widow, the mother's power to adopt perishes To talk of the determination of the mother's power it is not necessary that the power should have actually fallen to be exercised The power was all along there conditionally and because of the happening of an event, namely, the son dying leaving his own widow as a *means* to continue the line, the power is extinguished A case analogous to the case under review was that in *Anant Govind* v *Dnyaneshwar Balkrishna*[5]. There one *B* had died leaving a widow *Y* and two sons *V* and *A* The latter was married but had no issue He died on 2nd October, 1901, and his wife a few days later. The other son *V* died unmarried four or five years later Thereafter *Y* adopted The Bombay High Court held the adoption to be valid. The learned Judges held that the crucial point of time

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1 (1935) 37 Bom L R 925
2 (1928) 56 M L J 401 I L R 52 Mad 398.
3 (1902) I L R 26 Bom 526
4 (1933) 65 M L J 203 L.R 60 I A 242 : I L R 12 Pat 642 (P C)
5 I L R. (1944) Bom 218

was the death of *V* He had died unmarried and his mother was therefore according to them in a position to adopt to her husband It is open to doubt whether *V's* death was the moment to be considered in regard to the assessment of the mother's power to adopt If *A's* widow had adopted *Y's* power would have gone The fact that she had not done so is of little significance, for it was the existence of *A's* widow that put an end to *Y's* power In the case under review the elder son's widow was alive and it is not as if there was no method of continuing the line. In the circumstances, it is difficult to accept the view that the mother's power to adopt still exists

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NARASINJI VANNECHAND FIRM, GUNTUR *v* NARASAYYA, (1945) 1 M L J 312.

It is a question that frequently arises whether an auction purchaser can sue for refund of the purchase money or a proportionate part of it by the decree-holder, where, after confirmation of the sale it is decided in proceedings instituted by third parties that the judgment-debtor had no title to the properties sold in execution or to any portion of such properties Judicial opinion is not uniform In Madras and Lahore it has been held that the Court auction purchaser can sue for refund where the judgment-debtor's title to the properties has been found non-existent ; other High Courts have taken a different view Roman Civil Law always implied a warranty of title on the part of the vendor of land—*sive tota res evincatur, sive pars, habet regressum emptor in venditorem*[1] The English Common Law was different. There it was laid down that "if a man buy lands whereunto another had title which the buyer knoweth not, yet ignorance shall not excuse him By the civil law as observed by Sir Edward Coke, everyman is bound to warrant the thing that he sells or conveys, albeit there be no express warranty , but the common law binds him not, unless there be a warranty, either in deed or in law , for *caveat emptor qui ignoraie non debuit quod jus alienum emit*—let a purchaser who ought not to be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution "[2] Statute law like the Conveyancing Act, 1882 and the Law of Property Act, 1925, however provided that covenants of title are implied in a conveyance in England A similar provision is found in India in section 55 (2) of the Transfer of Property Act But there is no provision giving a warranty of title in regard to an auction sale Sections 257 and 258 of the Civil Procedure Code of 1859 gave the auction purchaser a restricted right of recovery The Code,—Act X of 1877,—contained a larger provision which was reproduced in the Code of 1882 (Act XIV of 1882) Section 315 laid down "When a sale of immoveable property is set aside under section 312 or section 313, or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase money from any person to whom the purchase money has been paid. The repayment of the said purchase money may be enforced against such person under the rules provided by this code for the execution of a decree for money" The first part clearly refers to the setting aside of the sale by the execution Court The next para does not refer to any section specifically and so it fell to be argued that it contemplated that a suit could be brought for the refund of the purchase money If it did not so contemplate the provision would be but a repetition of section 313 which also dealt with a sale being set aside on the ground that the judgment-debtor had no saleable interest It was consequently held that the latter part of the paragraph provided for a suit being brought for the refund of the purchase money Whether in doing so the Codes of 1877 and 1882 were introducing a new provision or were merely affirming what had been the true position at Common Law has been the subject

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1 Digest, 21, 2, 1 579-80, *see also Gwillim* v *Stone*, (1895) 2 Q B.
2 Broom's Legal Maxims, 7th Edn , pp 616

of conflicting dicta The conflict assumes importance by reason of the fact that in the Code of 1908 there is no provision corresponding to the second half of section 315 in favour of the auction purchaser In *Amarnath* v *Firm Chotelal*,[1] a Full Bench of the Allahabad High Court held that the auction purchaser's rights are now confined to Order 21, rule 91, that he has to apply thereunder to the execution Court within 30 days of the auction sale in accordance with Article 166 of the Limitation Act and that where he has made no such application and the sale has been confirmed under rule 92 the Code gives him no further right and if in a third party's action the judgment-debtor is declared to have had no interest in the property sold the auction purchaser cannot bring a suit for the recovery of the purchase money In *Amal Chandra Banerjee* v. *Ram Swarup Agarwalla*[2], Edgley, J , took a similar view He observed " The purchaser is restricted to his remedy by an application under rule 91 which must be made within thirty days from the date of the sale under Article 166 . . followed by an application under rule 93 which may be made within three years from the accrual of the right under Article 181 " He also agreed that " outside the provisions of the Code of Civil Procedure an auction purchaser has no right to recover his purchase money merely by showing that the judgment-debtor had no saleable interest " The Lahore High Court in its decision in *Mehr Chand* v *Mukhi Ram*[3], has inclined to a different view Jai Lal, J , observed " In the absence of a clear indication to the contrary it is not permissible to assert that section 315 created a substantive right in favour of the auction purchaser which did not originally exist On the other hand it is more in accord with the object of the code to hold that the section was intended to provide the auction purchaser with a summary remedy to enforce his rights which existed prior to its enactment, a kind of remedy which but for the section was not available to him " In this view the dropping of the second part of section 315 in the Code of 1908 will only mean that the auction purchaser cannot in summary proceedings obtain a refund of the purchase money outside the cases provided for in rule 92 and not that his right to bring a suit for the purpose would be barred In *Macha Goundan* v *Kottara Goundan*[4], a Full Bench of the Madras High Court after pointing out that the Civil Procedure Code is a code of adjective law and cannot create rights of action and that it would be unconscionable if the auction purchaser is not allowed to sue for refund of the purchase money where in proceedings outside rules 89, 90 and 91 of Order 21 it is found that the judgment-debtor had no saleable interest in the property sold, observed " Whatever might be the theory of law in the minds of the framers of the Code of 1859, it is now clear that the Legislature were unwilling to adopt the view in *Sowdaminee Chowdhrain* v *Kishen Kishore Poddar*[5], and of the law laid down in *Durab Ally Khan* v *The Executor of Khaja Moheeooddeen*[6], and they proceeded to frame the language of the corresponding section in the Codes of 1877 and 1882 on a different theory It is clear that this clause (section 315) recognises the right of an auction purchaser to obtain a refund of his purchase money if there is no saleable interest though there is no warranty of title What is meant is that though in a Court sale there is not such a warranty as to the extent of title as we find in a private transaction between a vendor and a purchaser still the code adopts the view that there is a limited warranty, *viz* , that the judgment-debtor possesses some little interest however small it may be If the judgment-debtor's interest turns out to be nothing the Court practically makes a promise that the decree-holder will have a refund of his purchase money This is the theory underlying section 315 If once such a right in the purchaser is recognised, on the principle that every right should be capable of being enforced by a suit, a regular suit lies to obtain a refund of the purchase money, but the Legislature proceeded to give a remedy in execution also under section 315 As already observed the right to obtain a refund being recognised by the Code, the remedy by way of suit exists not because the Code gives it but because every right

1 A I R 1938 All 593 (F B)
2 I L R (1939) 1 Cal 452
3 (1932) I L R 13 Lah 618 (F B)
4 (1936) I L R 59 Mad 202 69 M L J 750 (F B)
5 (1869) 4 Ben L R 11 (F B.)
6 (1877) I L R 3 Cal 806 L R 5 I A 116 (P C)

can be enforced by suit " According to the Full Bench, the present Civil Procedure Code only *limits* the rights of the auction purchaser to obtain refund *in execution* to cases where the sale is set aside by the executing Court under Order 21, rule 92. Where however the sale is set aside not by the executing Court but outside the execution proceedings the general remedy will still remain Which of these two views is to prevail might depend on the Privy Council Any way it may be remembered that the English theory in regard to this matter is *caveat emptor* and that where the purchaser relies on any warranty he should prove either agreement or statutory provision

Even if the correct view be that an auction purchaser can sue for a refund of the purchase money by the decree-holder where the sale is set aside in proceedings outside Order 21, rule 92, the question would still arise whether such refund could be claimed where the judgment-debtor is found to have had some interest in the property though it is not all the interest that was purported to be sold A negative answer has been afforded in the case under review though the reasoning in the Full Bench case of *Macha Goundan* v *Kottara Goundan*[1], that every right should be capable of being enforced by suit would equally apply even where there is a partial failure of consideration from the point of view of the auction purchaser The view taken in the case under review stands fully supported by authority In *Kunhammad* v *Chathu*[2], it had been held that where the judgment-debtor had some saleable interest in the property sold the Court has no jurisdiction to make an order under section 315 This was followed in *Sundara Gopalan* v *Venkatavarada Ayyangar*[3], which was a case of a suit by an auction purchaser for refund of a proportionate part of the purchase money on a declaration made in proceedings initiated by a third party that the judgment-debtor had no title to an item of the property sold. The same conclusion was reached in *Shanto Chandra Mukherje* v. *Nain Sukh*[4], *Sonaram Dass* v *Mohram Dass*[5], *Nagalinga Chettiar* v *Guruswami Ayyar*[6] The reason is that when the judgment-debtor has a saleable interest, however small, the purchaser at an execution sale purchases at his own risk and there being no warranty that the property will answer to the description given of it the purchaser is entitled to no relief, if the property does not correspond to the description

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PAPARAO *v* POLI NAIDU, (1945) 1 M L J 323

Section 55 of the Transfer of Property Act has two limbs specially directed at protecting the purchaser in regard to the title which the vendor is purporting to convey to him Sub-section 1 (*a*) lays down that the seller is bound to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover The provision contemplates a stage before the transaction of sale is completed and according to the concluding clause of the section an omission to make such disclosure is fraudulent Relief in respect of breach of the seller's duty thus rests on fraud It is therefore intelligible that where the buyer was already aware of the particular defect in title at the time of his purchase he cannot complain of non-disclosure by the seller and recover damages. It is equally intelligible that in such cases evidence to prove the knowledge of the buyer of the existence of an encumbrance not disclosed in the sale deed does not contradict, vary, add to or subtract from the terms of the sale deed and does not offend against section 92 of the Evidence Act The ruling in *Ramasubbu Iyer* v *Muthiah Kone*[7], that where the vendee buys property with full knowledge that the vendor has not got a good title he cannot be said to be defrauded by the vendor is thus consistent with section 55 (1) (*a*) The scope of the covenant of title set out in section 55 (2) of the Transfer of Property Act is altogether different. It provides that the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power

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1 (1936) I L R 59 Mad 202 69 M L J 750 (F B)
2 (1886) I L R 9 Mad 437
3 (1893) I L R 17 Mad 228 3 M L J 293
4 (1901) I L R 23 All 355
5 (1900) I L R 28 Cal 235
6 (1930) 59 M L J 232
7 A I R 1925 Mad 968

to transfer the same. The warranty of title which is thus implied is treated as if it had been a *term* in the contract It would therefore follow that section 92 of the Evidence Act would bar evidence to affect it, except by proof in the manner provided by the opening words of section 55, Transfer of Property Act, namely, by proving a contract to the contrary In the absence of any such contract the statutory covenant is as pointed out by Sulaiman, J , in *Muhammad Siddiq* v *Muhammad Nuh*[1], absolute and irrebuttable Even if the buyer was aware of any defect in the title at the time of his purchase he may under this covenant hold the seller responsible in damages, see *Ram Chunder Dutt* v *Dwarakanath*[2], *Basaraddi Sheikh* v *Enjaddi*[3], *Mahamed Ali* v *Venkatapathi*[4], *Mt Lakhpat Kuer* v *Durga Prasad*[5]. The implied covenant constitutes an absolute warranty and supersedes the rule of *caveat emptor*, see *Raghava* v. *Samachariar*[6], *Kanshi am* v *Jaimal Singh*[7]. The buyer's antecedent knowledge of the defect in title does not deprive him of his right to sue for damages, see *Subbaraya* v *Rajagopala*[8], *Adikesavan* v *Gurunatha*[9], *Parasurama* v *Muthuswami*[10], *Nawal Kishore* v. *Saryu*[11] If relief had been claimed and was dependent on proof of fraud then knowledge of the buyer would be relevant but where the relief is awardable on the footing of a convenant which the parties are deemed to have entered into there is no escape except by proof of a contract to the contrary Any suggestion to the centrary afforded by *Ramasubbu Iyers' case*[12] is not correct and the case under notice has justifiably dissented from such suggestion

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PERIAKARUPPAN CHETTIAR *v.* RAMASWAMI CHETTIAR, (1945) 1 M L J. 391 · I L R. (1945) Mad 742

As early as the days of Sir Edward Coke it had been well recognised that a " payment ought to be real and not in shew or appearance "[13] But it had also been held that a payment may be made by the mere transfer of figures in an account without any money passing, *Eyles* v *Ellis*[14], *Bedenham* v *Purchas*[15], *Hills* v. *Mesnard*[16] On these principles, the question frequently arose whether the periodical addition of interest to the capital and its being made to carry interest at the stipulated rate for the next period would amount to a payment of interest without leaving it outstanding In *Reddie* v *Williamson*[17], Lord Cowan had observed " The true view is that the periodical interest at the end of each year is a debt to be then paid and which must be held to have been paid when placed to the debit of the account as an additional advance by the bank" In *Inland Revenue Commissioners* v *Holder*[18], the claimants had guaranteed the payment of monies owing to a bank by a customer and had been called upon to pay the balance accumulated over a period of years, on the customer committing default The claimants paid the amount and sought refund of income-tax on so much of the sum paid as was said to constitute the interest on the advances made by the bank to the principal debtor The claim would be tenable only if the guarantors could be held to have paid to the bank any outstanding interest on the advances made by it to its customer. The question thus directly arose, whether the interest which as between the bank and its customer was capitalised in the case at the end of each half year and carried forward into the next half year as principal advanced, could still be regarded as accumulated interest paid by the guarantors In holding that it could not be so regarded, Romer L J , observed . " I am of opinion that having regard to the method in which, with the concurrence of the company the account was kept by the bank, the company must be deemed to have paid each half year the accruing interest by means of an advance made for that purpose by the bank to the company".

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1 (1930) I L R 52 All 604
2 (1889) I L R 16 Cal 330
3 (1898) I L R 25 Cal 298
4 (1920) 39 M L J 449
5 (1929) I L.R 8 Pat 432
6 (1914) 22 Ind Cases 42
7. (1923) 75 Ind. Cases 562.
8. (1915) I L R 38 Mad 887
9. (1917) I L R 40 Mad 338
10 (1925) 50 M L J 100
11 (1932) I L R 54 All 774
12 A I R 1925 Mad 968
13 Co Litt 209 b
14 4 Bing 112
15 2 B & Ald 39
16 10 Q B 266
17 1 Macph 228
18 (1931) 2 K B 81

This view was however rejected in *Paton* v. *Inland Revenue Commissioners*[1], where the fiction that in such cases the interest can by the mere process of being capitalised be said to have been paid was held to be without warrant Lord Atkin remarked : " The question is whether when the charges are added to the existing indebtedness at the end of one half year and the whole sum brought down as a debit item at the beginning of the next half year so that interest is charged on the last half year's interest, the charges have been paid. The ordinary man would, I think, say that so far from being paid they are added to the ordinary indebtedness because they are not paid, and I can see no reason why the law should say anything different". The observations in *Holder's case*[2] were not approved The English law would thus according to *Paton's case*[1] be in accordance with Sir Edward Coke's statement that payment must be *real* and not by way of show or appearance In India, it had been laid down that the mere carrying forward of the amount of a loan or deposit, with the interest due thereon, in the debtor's books though such entry is made in the presence of the creditor does not amount to a payment of interest, *Iccha* v *Natha*[3], *Kollipara v Maddula*[4] In *Kariyappa* v *Rachappa*[5] it was however held that where the interest was calculated up to the date of adjustment and the defendants debited the balance so found due in their books to the profit and loss account and credited it to the plaintiff's account as additional advances and corresponding credits and debits were made in the plaintiff's books, the adjustment being of a double character, it would amount to a payment of interest . This view may be regarded as proceeding on the theory of an agreement between the parties to so regard the interest, the adjustment being bilateral and not unilateral *In Palaniappa Mudaliar* v *Narayana Ayar*[6], the principle laid down in *Holder's case*[2], was followed by the learned Judges In view however of the non-acceptance of that principle by the House of Lords in *Paton's case*,[1] in the case under review *Palaniappa Mudaliar's case*[6] was considered to be no longer good law and it was laid down that the fact that interest was added periodically to the principal sum outstanding and made to carry interest at the stipulated rate cannot be deemed tantamount to payment of such interest

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RAMUDAMMA *v.* KASI NAIDU, (1945) 1 M L J. 396.

The rule of law is well established that it is entirely within the discretion of the civil Court to grant a decree for the restitution of conjugal rights It is equally well established that whatever cannot be the subject of an agreement between the parties cannot be the subject of arbitration Thus the question whether a marriage is null or whether a marriage should be dissolved cannot be referred to arbitration, see *Soilleux* v *Herbst*[7], *Bateman* v. *Ross*[8], *Hooper* v *Hooper*[9], *Wilson* v *Wilson*[10], *Besant* v *Wood*[11], *Hart* v *Hart*[12], *Calhill* v. *Calhill*[13] For, any agreement between the parties in regard to such matters would be opposed to public policy. In this context the question has occasionally arisen whether it will be open to a Court to refer to arbitrators any matter in dispute in a suit for restitution of conjugal rights Section 21 of the Arbitration Act, 1940, lays down . " Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference " As will be seen the language of the section is very wide and empowers the Court to refer " *any matter in difference*" between the parties to the suit to arbitration provided the parties are agreed The section reproduces in substance the provisions of para 1, schedule 2 to the Civil Procedure Code In *Malka* v *Sardar*[14], following an earlier decision of the Court in *Hira* v *Dina*[15], it was held that the question of restitution of conjugal rights cannot be referred to arbitration and the matter must be decided by the Court itself The

1 L R 1938 A C 341
2 (1931) 2 K B 81
3 (1888) I L R 13 Bom 338
4 (1896) I L R 19 Mad 340
5. (1900) I L R 24 Bom 493.
6 (1942) 2 M L J 753
7 (1801) 2 Bos & P 444
8. (1813) 1 Dow 235
9 (1860) 1 Sw & Tr. 602
10 (1848) 1 H L Cas. 538.
11 (1879) 12 Ch D 605
12 (1881) 18 Ch D 670
13 (1883) 8 A C 420
14 A I R 1929 Lah 394
15 37 P.R. 1895

same view had been taken in *Kalabatu* v *Prabhu Dial*[1], and *Nathu* v *Sarnum*[2]. In *Hira* v *Dina*[3]; the parties were minors and as the Court took the view that their interests were not properly safeguarded by the trial Court when it referred the suit to the decision of the arbitrators, the Court could naturally set aside the entire proceedings In *Rup Narain* v *Mt Nandrani*[4], the Chief Court of Oudh took the view that it would be competent to the Court to refer on agreement between the parties to the decision of arbitrators the question of restitution of conjugal rights. It was pointed out that it has nowhere been held that a suit for restitution of conjugal rights is not such a suit as comes within the purview of para 1 of schedule 2 of the Civil Procedure Code and cannot be referred to arbitration even where all the parties interested therein agree to have the dispute settled by arbitration, and that there is no provision of law excluding such suits from the scope of schedule 2 of the Code It was further pointed out that the function of the Court to grant or refuse to grant a decree for restitution cannot on reference to arbitration be said to be delegated to the arbitrators, inasmuch as the Court has ample powers to remit the award to the arbitrators for reconsideration or to refuse to make the award a decree of Court It would follow that in the absence of an express provision to that effect there is no reason for holding that para 1 of schedule 2 of the Code, and its present counterpart section 21 of the Arbitration Act does not empower the Court to refer to arbitration a matrimonial dispute forming the subject of a suit before it, where the parties desire such a reference The case under review has adopted this view and is thus in consonance with the view of the Oudh Chief Court though opposed to that found in the Lahore decisions

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JAGANNATH SOWCAR *v* SRIPATHI BABU, (1945) 1 M L J. 478

An interesting question bearing on the liability of a mortgagee in possession fell to be decided in this case A puisne mortgagee had gone into possession of the properties with the consent of the mortgagor undertaking to clear off prior encumbrances The arrangement was that "he should collect the rents and profits, pay all taxes and maintenance charges out of his collections and appropriate the surplus to the amount due under his mortgage" The mortgagee failed to clear off all the encumbrances and would not account A suit for redemption was thereupon filed by the mortgagor The mortgagee had paid off only one of the prior encumbrances and it was found that the monies collected by the mortgagee under the arrangement made when he went into possession were more than sufficient to meet all expenses and to pay him the amount due under his own mortgage In regard to accounting, the question arose whether any interest was allowable on the collections wrongfully withheld by the mortgagee The Interest Act has been held to leave it open to the Court to award interest where it would be equitable to recognise a claim therefor, see *Attikoya* v *Kunhikoya*[5] According to Halsbury's Laws of England (vol 23, p 176, 2nd edition) cases of mortgagor and mortgagee, and debtor and creditor where the former is in a fiduciary position to the latter are of that description It has been generally held in India that the mortgagee is liable to pay interest on the surplus amount in his hands though there are conflicting dicta regarding the point of time from which it is payable, whether from the time the debt arises or from the time of the filing of the suit for redemption, see *Haji Abdul Rahman* v *Haji Noor Mahomed*[6], *Bhaya Lal* v *Mohammed Hakim*[7], *Janoji* v. *Janoji*[8] In *Ismail Hasan* v *Mahdi Khan*[9], it is no doubt held that no interest is payable on the surplus amount which had been wrongfully retained by the mortgagee till the date of the institution of the suit This decision does not however allow for the fiduciary position analogous to that of a trustee which the mortgagee who has gone into possession with the consent of the mortgagor occupies. It is hardly open to doubt that the principles underlying sections 90 and 95 of the Trusts Act would be applicable to his case and the case under notice constitutes a clear recognition of such applicability

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1 (1918) 45 I C 163
2 A I R 1933 Lah 532
3 37 P R 1895
4 A I R 1934 Oudh 494 152 I C 90
5. (1939) 2 M L J 579 I L R (1940) Mad. 50
6 (1894) I L R 16 Bom 141
7 (1920) 57 I C 294
8 (1883) I L R 7 Bom 185
9 (1924) I.L R 49 All. 897.

MANICKA NADAR *v.* ARUMUGHA SUNDARA SATHIA GNANA PANDARASANNADHI, (1945) 2 M L J 7.

This case decides that, in respect of a usufructuary mortgage, the period fixed (or redemption must govern the rights and relations of parties in the absence of a contract to the contrary, and that if one party fails to fulfil the obligations imposed upon him the other party will have to pursue his remedies in damages only but cannot avoid the transaction itself On this matter there has been a certain amount of conflict of judicial opinion In *Subba Rau* v *Devu Shetty*[1], *A* had mortgaged his land to *B* for Rs 800 , under the terms of the mortgage *B* was to pay Rs 500 in discharge of a previous mortgage executed by *A* in favour of *C* and the rest of the consideration was to be adjusted for other purposes. *B* did not discharge the previous mortgage and *C* recovered the money from *A* It was held that, in the circumstances, *A* could cancel the contract of mortgage with *B*, owing to *B's* conduct, but subject to the repayment of the consideration he had from *B* with interest thereon and that it would not be open to *B* to treat the mortgage as one in force with all its stipulations operating to the extent of the consideration paid Muttuswami Ayyar, J , observed " Under section 39 of the Contract Act, the mortgagor was entitled to cancel the contract of mortgage on the ground that the mortgagee in contravention of his agreement incapacitated himself from performing it in its entirety " In *Narasimha Rao* v *Seshayya*[2] a similar view is to be found In that case, the transaction was by way of a usufructuary mortgage for 55 years and the mortgagee was to make certain payments to the mortgagor every year for beriz, *etc* The mortgagee who had gone into possession committed default and the mortgagor sued for redemption Devadoss, J , cited the observations of the Privy Council in *Bhaktawar Begum* v *Hussaini Khaunum*[3]—" Ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right to redeem can only arise on the expiration of the specified period But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property."—but went on to hold that " in a case like this, I think, a Court of equity ought to give relief to the mortgagor and allow him to redeem the property before the expiry of the term." The Allahabad High Court also took the same view in one of its decisions, *Chhotku Rai* v. *Baldeo Shukul*[4] In that case there was a mortgage by way of conditional sale for Rs 599-15-0 and the term was 10 years Only Rs. 50-15-0 was actually paid, the balance being left with the mortgagee for payment to prior incumbrancers This was not done The mortgagor sold the property and his assignee sued for redemption before the expiry of the ten year period It was held that on equitable grounds redemption should be allowed. The learned Judges said : " It seems to us that if under the circumstances of the present case the defendants . . are allowed to remain in possession of the property over the full period of ten years taking the profits and allowing the interest on the prior incumbrances to accumulate, the plaintiffs will be without any proper or effectual remedy It is doubtful whether a suit for damages could possibly be brought at the present time and at the expiration of the period of ten years it will only be an effectual remedy if the defendants . are sufficiently good marks for damages. We think that on equitable grounds the defendants not having performed what we deem to be a most essential part of the contract so far as they are concerned, the plaintiffs ought to be allowed to redeem the property before the expiration of ten years " *En passant* it may be mentioned that this ruling had failed to notice an earlier decision of the same Court to a contrary effect in *Rashik Lal* v *Ram Narain*[5] Redemption moreover was permitted on equitable considerations and on the principle of section 89 of the Contract Act. Both these grounds are thin and open to criticism In these cases the stage of contract is already passed and the transaction has resulted in a conveyance. Section 39 of

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1 (1894) I L R 18 Mad 126 (P C)
2 (1925) 48 M L J 363
3. (1914) 26 M L J 474 : I L R 36 All 195 (P C)
4 (1912) I L R 34 All 659
5 (1912) I L R 34 All 273

the Contract Act cannot therefore apply. In *Velayutha Chetty* v. *Govindaswami Nàicken*[1] it was pointed out that after conveyance the vendee is entitled to possession according to the Transfer of Property Act and the unpaid vendor has only a charge on the property, which however does not mean that if the vendee sues for possession it can be withheld until he pays the purchase money and that the vendor is entitled to retain possession It was also held that there is no scope for the application of any equitable doctrine in face of the clear provisions of the Act. The same conclusion was reached in *Krishnamma* v. *Mali*[2] where it was laid down that the unpaid vendor's lien is only a charge and not a possessory lien and that the Courts cannot give relief to mitigate or suspend the consequences laid down by the statute, the Transfer of Property Act. That it will make no difference if the conveyance is not a sale but only a mortgage is recognised in *Rashik Lal* v. *Ram Narain*[3] where it was held that if there was execution and registration of a mortgage, the fact that a part of the mortgage money as specified in the deed of mortgage has not been paid neither renders the mortgage invalid nor entitles the mortgagor to rescind it at his option It is true that under the Act in a sale, in the absence of a contract to the contrary, the ownership of property passes from the vendor to the vendee as soon as the sale deed is registered and that neither delivery of possession nor payment of price is a condition precedent. But the definition of a mortgage in section 58 shows that a mortgage is not a mere contract but is a conveyance of an interest in land It follows that no sooner a valid mortgage deed is registered, an interest in the mortgaged property vests in the mortgagee in the absence of a contract to the contrary, notwithstanding that the mortgage money has not been paid. Non-payment of the mortgage money does not render the mortgage invalid. Section 39 of the Contract Act can have no application for the simple reason that it deals with contracts only and not with transfers. In the absence therefore of a contract that no interest in the mortgaged property shall pass without the payment of the mortgage money it is difficult to accept the view propounded by Muttuswami Ayyar, J., in *Subba Rau* v *Devu Shetty*[4]. Section 4 of the Transfer of Property Act does not put an end to the vital distinction between a contract and a transfer of an interest in land, for it only enacts that the chapters and sections of the Act which relate to contracts shall be taken as part of the Indian Contract Act. More or less the same line of reasoning is adopted by the learned Judges in *Kandaswami Pillai* v. *Ramaswami Mannadi*[5] That was a case of lease and under the terms of the lease deed there was a demise of land and the lessee had undertaken to pay a debt of the lessor secured on the lands The lessee did not do so and the lessor had to execute a usufructuary mortgage to satisfy the debt. Thereupon the lessee brought a suit to recover possession of the land demised It was pointed out that a lease is not a mere contract but is the transfer of an interest in immoveable property and the right of the lessee to be put in possession arises from the words of the demise which imply that the right to possession is granted to the lessee and the lessor is not entitled to refuse to give possession unless the lease document provides that the lessee is not to have possession till the fulfilment of certain conditions precedent. The argument founded on the applicability of section 39 of the Contract Act was rejected on the ground that that section applies only to a state of things where there is a series of executory promsies on both sides and that so soon as one part of the obligation has been performed by a complete transfer of the property in question that section ceases to have any application. Adverting to the view found in *Chhotku Rai* v. *Baldeo Shukul*[6], Coutts Trotter, J., remarked : " all I can say is that I do not understand it as reported nor do I gather upon what principles the learned Judges proceeded." The conclusion in the case under review is in accord with the later pronouncements of the Madras High Court and the earlier ruling of the Allahabad High Court in *Rashik Lal* v *Ram Narain*[3].

1. (1910) I L.R 34 Mad 543
2. (1920) I L.R. 43 Mad 712.
3. (1912) I L R. 34 All. 273
4. (1894) I.L.R. 18 Mad. 126.
5. (1918) 36 M.L J. 313: I.L.R. 42 Mad. 203.
6. (1912) I.L.R, 34 All. 659.

NALLA GOUNDAR *v.* KRISHNASWAMI NAICKER, (1945) 2 M.L.J 133

The construction of clause (*b*) of section 74 of the Registration Act came up in this case which decided that the phrase " requirements of the law for the time being in force " in that clause has reference only to the requirements of the Registration Act or of any statutory provision which the Legislature has said shall be regarded as being supplemental to the Registration Act. It cannot be disputed that the words " law for the time being in force " are wide enough to take in any law which has reference to registration unless there is anything in the context to suggest a restricted meaning. No doubt section 4 of the Transfer of Property Act provides that " sections 54 paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908 " Such a provision can no more operate as a pointer that it is only laws declared to be supplemental to the Registration Act that are to be considered by the Registrar under section 74 (*b*) than the provision in section 4 of the Specific Relief Act, for example, that " except where it is herein otherwise expressly enacted nothing in this Act shall be deemed to affect the operation of the Indian Registration Act on documents " could be taken as laying down that where a rule of construction of that type is not expressly enacted in any enactment, its provisions shall be ignored by the Registrar even if they had advertence to registration of documents The reasoning of the learned Judges in the case under notice that the Registrar need not take into consideration the requirements specified in section 145 (2) of the Estates Land Act, since the Legislature, if it had intended to provide differently would have inserted a clause making that provision a supplemental provision of the Registration Act as it did in the case of the Transfer of Property Act, is not, with respect, either conclusive or compelling. The next argument of the learned Judges is that inasmuch as it may happen that the transferor may not join in the application for registration and the transferee may therefore have to move the Collector and obtain his orders, a period of more than four months might well elapse from the date of the transfer with the result that the Registrar will be precluded from thereafter receiving the document for registration. Two observations fall to be made. One is that the proceedings before the Collector being summary need not take much time Secondly, the possibility of hardship ensuing cannot justify an abridgment of the meaning of words, where no ambiguity exists. In the Registration Act itself, there are provisions employing similar language, where the *prima facie* construction would alone be the proper construction. Thus section 90 (1) (*c*) states that nothing in the Act shall be deemed to require the registration of any " documents which under any law for the time being in force are filed periodically in any revenue office " etc. It is clear that the expression " any law for the time being in force " will cover all laws whatever, whether made a supplemental provision of the Registration Act or not, if they had to do with the filing of documents in any revenue office periodically. Similarly the reference in section 39 to " the law in force for the time being as to summons " etc., will take in laws like the Civil Procedure Code though there may be no provision that the Civil Procedure Code is to be regarded as supplemental to the Registration Act.

The words " law for the time being in force " and similar expressions occur at different places in the Indian Contract Act and in other enactments and have come up for judicial construction. Section 21 of the Contract Act refers to mistakes as to " any law in force in British India." The words " any law " occur in section 23. Section 25 alludes to the " law for the time in force for the registration of documents." Section 28 uses the expression " any law in force for the time being as to references to arbitration " Likewise section 4 of the Trusts Act uses the words " any law." It can hardly be disputed that in all these cases the words will take colour from the context and will have to be understood in their plain and literal sense unless a different intention is expressed or is implicit. Turning to the decisions, the words " any law " in section 23 of the Contract Act have been held in *Ramamurthy* v. *Gopayya*[1] to cover the provisions of the Indian Limitation Act. But in *Hukum*

1. (1916) 31 M.L.J. 231 : I.L.R. 40 Mad. 701.

Chand Oswal v *Taharunnessa Bibi*[1], where the question was whether an agreement to give time for satisfaction of a judgment debt, entered into without the sanction of the Court, was opposed to section 257-A of the Civil Procedure Code and therefore void under section 23 of the Contract Act, it was held by Princep and Ghose, JJ, that " the words ' any law ' as mentioned in section 23 of the Contract Act, . . . refer to some *substantive* law, and not to an adjective law, such as the Procedure Code is." In *W W. Broucke* v. *Rajah Saheb Mohan Bikram Shah*[2], Chitty, J, remarked that the expression " requirements of the law for the time being " in section 74 of the Registration Act refer to requirements "in the manner generally prescribed by the Act." To take that observation as suggesting that it is only those provisions in enactments that are declared as supplemental to the Registration Act that should be regarded under section 74 will be a debatable inference. On a balance of consideration it looks as if the more satisfactory construction of the words " whether the requirements of the law for the time being in force have been complied with " in section 74 clause (*b*) would be " whether the requirements of *any law* which had reference to registration " have been complied with. It would, in that view, follow that the provisions of section 145 of the Estates Land Act also will have to be regarded by the Registrar under section 74 of the Registration Act.

SURYANARAYANA *v*, THE PROVINCE OF MADRAS, (1945) 2 M.L J. 237 (F.B)

Section 6 (1) of the Land Acquisition Act enacts that on being satisfied that any particular land is required for a public purpose the Provincial Government shall make a declaration to that effect provided the compensation to be awarded for the compulsory acquisition of such property is to be paid *wholly or partly* out of public revenues or some fund controlled or managed by a local authority. The expression " wholly or partly " has on more than one occasion come in for judicial construction. Not infrequently it has happened that out of the amount payable as compensation to the owner of the property, a trifling sum, such as one anna, is alone paid by the Government In such cases the question has arisen whether the acquisition is *bona fide* at all. The word ' part ' according to the Dictionary means "something less than the whole", "a portion," "a fraction," "a member or essential part of a whole." It would seem that an infinitesimal or small portion may not with propriety be regarded as " part." The word " particle " is used as appropriate to signify " a little part " or " a very small portion " If the word " partly " in section 6 is to be understood in the sense of the Dictionary exposition, the question mooted *supra* will be susceptible of a negative answer. In *Chatterton* v *Cave*[3], a case of copyright, involving the interpretation of the words " or part thereof," in the Dramatic Copyright Act, 3 and 4, Williams IV, c 15, section 2, Lord O'Hagan observed . " The question in every case must be one of fact . ' part ' is not necessarily the same as ' particle ' and there may be a taking so minute in its extent and so trifling in its nature as not to incur the statutable liability " And accordingly the House of Lords were disinclined to countenance a meaning that would make a part a particle and they observed that the words should be reasonably construed as meaning some part that was substantial and material.[4] More or less the same view was expressed by Collins, M R., in *London and India Docks Co.* v. *G E Railway & Midland Railway*[5], where he held that the words " part of a continuous line " of railway communication in section 25 of the Railway and Canal Traffic Act, 1888, does not mean " a mere infinitesimal part, but a part which would be *substantially* treated as a part of the transitus between two given places " The English decisions are thus in line with the Dictionary exposition of the term ' part.' In *Ponnaia* v *Secretary of State for India*[6] it was argued that the provision in section 6 of the Land Acquisition Act that the compensation should be paid wholly or partly out of public revenues was intended to be a test of the good faith of Government and that a payment of one anna out of a sum of Rs. 3,352-5-0, the compensation

1. (1889) I L R 16 Cal 504
2. (1909) 14 C W N 12.
3. (1878) 3 A.C. 483.
4. See also *Walter* .v *Steinkopff*, (1892) 3 Ch. 489
5. (1902) 1 K.B. 568 at 589.
6. (1926) 51 M.L.J. 338.

awarded, *i.e.*, 1/90000th part, by Government, was not a real and *bona fide* compliance with the terms of the section. The contention was upheld on the authority afforded by the English decisions. This view was however dissented from in *Senga Naicken* v *Secretary of State for India*[1], where also Government had paid only one anna out of Rs. 600 the amount awarded as compensation, from the public revenues. Odgers, J., remarked : " It is difficult to state where a ' particle ' would end and ' part ' would begin of this sum of Rs. 600. It is true an anna is a very small part of Rs. 600. But nevertheless it is a part." Madhavan Nair, J., the other learned Judge observed : " It is true that one anna is a small part of Rs. 600 , still it cannot be denied that it is part of that amount If one anna is not to be considered as a part of the amount for the purposes of this proviso, then how are we to find what portion of it will form a part of it to satisfy the meaning of the words in question in the proviso ? If the Legislature intended that a substantial portion of the compensation should be paid out of the public revenue then it would have used appropriate language to convey that idea " With great respect, the latter remark is almost like begging the question. According to the Dictionary, " if a very small part " as Odgers, J , and " a small part " as Madhavan Nair, J , described was alone paid, the appropriate word to be used is " particle," and it is only where something more than a " particle " was paid that it could be said to be paid in " part " out of the public revenues. Such user is also in consonance with the English precedents In the case under review the Full Bench preferred to affirm the view taken in *Senga Naicken's case*[1]. In the Full Bench case the Government had only contributed one anna to the compensation of Rs. 77-10-0 awarded. Notwithstanding this preference, there is much that can be said for the view that has been rejected.

ALI MAHOMED ADAMALLI *v.* EMPEROR, (1945) 2 M.L J. 356

This decision is yet another pronouncement by the Judicial Committee on the law of contempt. It is well settled that jurisdiction in contempt is special and extraordinary. The Court acts in *brevi manu* The exercise of the jurisdiction may be open to the charge of arbitrariness. In In re *Erlanger, Costa Rica* v. *Erlanger*[2], Sir George Jessell, M R , indicated that, since the remedy of committal for contempt of Court is arbitrary and unlimited, it should be most jealously and carefully watched and should only be exercised with the greatest reluctance and the greatest anxiety on the part of Judges to see whether there is no other mode which is not open to the objection of arbitrariness which can be brought to bear upon the subject. The reassurance by the Judicial Committee in the case under notice that "Their Lordships have no desire to lessen the standard of care and circumspection to be observed by all Courts before exercising their jurisdiction to commit for contempt " is entirely welcome. The qualification however which the Board has made will in a great measure leave a large margin of discretion to the Judges *Apropos* of the argument that the Court cannot commit for contempt if there is any other remedy, the Judicial Committee characterised it as novel and unsupported by authority. It is true that such an argument was urged in *R* v. *Almon*[3] but did not prevail. Their Lordships point out that the fact that there is another remedy available is no doubt a matter for the Court to consider when exercising its discretion whether to commit or not to commit, but will not affect the existence of such power or its exercise in a proper case, as where speed is desirable and there is necessity of ensuring that the orders of the Court are obeyed. Without in any way challenging the correctness of the statement as to the existence of the power, the matter may perhaps be put in a slightly different form, *viz.*, that the Court will not except in extraordinary cases permit the jurisdiction in contempt to be invoked where there exists another remedy. . Lawyers are for instance familiar with the principle that the Court will not issue writs in the nature of *certiorari* etc., in cases where another remedy may be open to the party to secure redress of his grievance. A similar self-imposed restraint

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1 (1926) 51 M.L J. 849 · I.L.R. 50 Mad. 308.
2. (1877) 46 L.J. Ch. 375 at 381, 382.
3. (1765) Wilm. 243 : 97 E.R. 94.

may operate in the field of contempt law as well. In the words of Lord Goddard in *Parshram Detaram Shamdasani* v. *King-Emperor*[1], "It is a power which a Court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised."

APPA RAO *v* GOPAL DOSS, (1945) 2 M.L.J. 363.

A short and interesting point fell to be decided in this case, namely, what difference exists between an authority to sell and an authority to find a purchaser conferred on an agent No doubt it would be primarily a question of construction of the actual terms of each power. There are however certain legal principles which come in handy in regard to the assessment of the question. It is settled law that an authority conferred in general terms is construed to permit acting only in the usual way and according to the ordinary course of business. It is equally settled that powers of attorney should be strictly pursued and are construed as giving only such authority as they confer expressly or by implication, see *Bryant* v. *La Banque du Peuple*[2]. An agent employed to find a purchaser has been held to have implied authority to describe the property and state to an intending purchaser any facts or circumstances which may affect its value, *Mullens* v. *Miller*[3]. Even an estate agent who is instructed to find a purchaser for a certain property will have no authority to enter into a contract for the sale of the property, because it is not usual for such agents to enter into contracts on behalf of their principals unless expressly authorised to do so, their duty being merely to submit to their principals any offers, which may be made to them, *Chadburn* v. *Moore*[4], *Hamer* v. *Sharp*[5], *Thuman* v. *Best*[6], *Prior* v. *Moore*[7], *Wilde* v. *Watson*[8], *Carney* v. *Fair*[9], *Lew cock* v. *Bromley*[10], *Keen* v. *Mear*[11]. As pointed out by Mookerji, J., in *Durga Charan Mitra* v. *Rajendra Narain Sinha*[12], there is a substantial difference between an authority to sell and an authority to find a purchaser: "authorising a man to sell" according to Buckley, J, means "an authority to conclude a sale. authorising him to find a purchaser means less than that— it means to find a man willing to become a purchaser, not to find him and also make him a purchaser," *Rosenbaum* v. *Belson*[13]. In the case under notice their Lordships found that the authority given to the agent was not to negotiate and refer back but to negotiate and complete the contract and in that view it was held that it would be competent to the agent to conclude the sale

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ABERNEATHY GREENWOOD *v.* HILDRED GREENWOOD, (1945) 2 M.L.J. 389.

In the words of the learned Chief Justice "this case is unparallelled and it raises an important question of law." Section 7 of the Divorce Act provides: "Subject to the provisions contained in this Act, the High Courts and District Courts shall in all suits and proceedings hereunder, act and give relief on principles and rules, which in the opinion of the said Courts are as nearly as may be, conformable to the principles and rules, on which the Court of Divorce and Matrimonial Causes in England for the time being acts and gives relief." Under section 19 of the Act, a petition praying that the petitioner's marriage may be declared null and void may be decreed on the ground that the former husband or wife of either party was living at the time of the marriage and the marriage with such former husband or wife was then in force. In the case under notice, the petition was by the wife and a declaration of nullity was sought on the ground that at the time of her marriage to the respondent on the 9th June, 1933, his first wife whom he had married on 10th September, 1913, was still alive and the marriage with her was subsisting. The burden of proof obviously lay upon the petitioner of establishing

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1. (1945) 2 M.L.J 109 (P.C).
2. (1893) A.C. 170.
3. (1882) 22 Ch.D. 194
4. (1892) 61 L.J. Ch. 674.
5. (1874) L.R 19 Eq. 108.
6. (1907) 97 L T. 239.
7. (1887) 3 T.L.R. 624.
8. (1878) 1 L.R. (Ir) 402.
9. (1920) 54 I.L.T. 61.
10. (1920) 37 T.L.R. 48.
11. (1920) 2 Ch. 574.
12. A.I.R. 1923 Cal. 57.
13. (1900) 2 Ch. 267.

these facts, *William Hudson* v. *Mrs. Webster*[1]. She failed to prove the facts. She however claimed that she could press into service the presumption arising under section 107 of the Evidence Act. According to that section, when the question is whether a person is alive or dead, and it is shown that the person was alive within 30 years, the burden of proving that the person was dead is on him who affirms it. In the case under notice, the first wife having been alive admittedly within 30 years, the burden of proving that at the time of his marriage with the petitioner she was either dead or that the marriage with her was not subsisting would therefore lie on the respondent. Since the Evidence Act is a code which not only defines and amends but also consolidates the law of evidence and applies to all judicial proceedings in or before any Court the rule in section 107 shifting the burden of proof will *prima facie* operate. Section 107 is however to be read subject to section 108 which lays down: "Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive the burden of proving that he is alive is shifted to the person who affirms it" In the case under review, it was found that the respondent had not heard anything of his first wife after 1923. There was a son of that marriage and at least for the sake of the boy the husband might be expected to hear from her had she been alive It was also clear that she had no other relatives In the circumstances it would be doing no violence to treat the husband as a person "who would naturally have heard of her," though she had left him of her own accord In the case under notice, the decision is not however based on this ground. It was held by the Court that the provisions of section 107 of the Indian Evidence Act must be ignored as it is in conflict with the provisions of the Divorce Act. It may, with respect, be pointed out that the position is debatable Granting of relief would no doubt depend on the substantive law. Declaration of nullity cannot be had unless the first wife was shown to be alive at the time of the second marriage But how is that fact to be established? It may be done either by direct testimony or by way of inference from admitted or proved facts Both ourses are permissible And it concerns the domain of adjective law. Such adjective law is provided in respect of "*all judicial proceedings in or before any Court*" by the Evidence Act (*see* section 1) No reservation is made in regard to divorce cases It is also well to remember that the Evidence Act is a later enactment. The fact that in English law there is no presumption corresponding to that in section 107 can hardly be material Even section 7 of the Divorce Act provides for relief being given "as nearly as may be" conformably to the principles and rules in England. The common law rule in England as to inadmissibility of the testimony of spouses as to non-access and consequent illegitimacy of the child has been considered in a number of decisions in Madras to be inapplicable in this country in view of the provisions of the Evidence Act, *John Howe* v *Charlotte Howe*[2], *Purna Hanumantha Rao* v. *Ramachandrayya*[3], *etc* And there is no reason why in the case of the provisions of section 107 of the Evidence Act a different course should be adopted and the section ignored because there is no rule in England corresponding to that section.

In re BHUPATHIRAJU RAMARAJU, (1945) 2 M.L.J. 407.

Section 114 of the Evidence Act lays down: The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct etc, in their relation to facts. Illustration (*a*) states that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless

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1. A.I.R. 1937 Mad. 565.
2. (1913) 25 M.L.J. 594: I.L.R. 38 Mad. 466 (F.B.).
3. (1944) 1 M.L.J. 285, see also *Mayandi Asari* v. *Samu Asari*, (1931) 61 M.L.J. 874: I.L.R. 55 Mad. 292.

he can *account* for his possession. The question that fell to be considered in the above case was whether such a presumption could be drawn against a born deaf and dumb mute who was found in possession of stolen goods shortly after the theft. It is clear that the presumption under the illustration can arise only if the person cannot account for his possession Accounting can be contemplated only where the person called upon to account is in possession of reasoning faculty If he cannot discriminate between right and wrong he cannot appreciate the significance of what he is required to account for In Coke on Littleton, 426, it is stated that a person born deaf and dumb, or born deaf and blind was to be presumed to be an idiot. Likewise in the *jus civile* it is laid down "' Lunatics too ; the deaf and the dumb, etc , must have curators given to them, for they cannot direct their own affairs " That ability to understand the questions put is a *sine qua non* to any inference being drawn from the conduct of the person interrogated adversely to him, is also consistent with section 118 of the Evidence Act, that a person will not be competent to testify if he is prevented from understanding the questions put to him or from giving rational answers by reason *inter alia* disease, whether of body or mind, or any other cause of the same kind It has been held that when a witness is so deaf and dumb that it is impossible to make him understand the question put to him he cannot be a competent witness, *Venkattan* v *Emperor.*[1] Where a person is born deaf and dumb it is not possible to communicate with him effectively and if he cannot understand what he is asked and therefore cannot afford any explanation it would altogether be contrary to the principles of natural justice to draw any inference against him The conclusion in the case under review that in the circumstances the conviction of such a person on a presumption of guilt cannot be supported is thus in full accord both with the principles of law as well as of natural justice

1 (1912) M W.N 100 · 14 I.C. 655.