THE
MADRAS LAW JOURNAL.

II] JULY [1938

NOTES OF INDIAN CASES.

NIRODE KALI RAY CHAUDHURI *v.* HARENDRA NATH RAY CHAUDHURI, I.L.R. (1938) 1 Cal. 280.

The questions in this case were whether an application under S. 47 of the Civil Procedure Code would lie in the case of an exonerated or a *pro forma* defendant seeking to set aside an execution sale of his property if his property had been sold as the property of the judgment-debtor and if it applied what would be the period of limitation applicable for such an application.

In this case, when the *pro forma* defendant's properties were attached as the properties of the judgment-debtor, the former put in a claim petition which was dismissed as unnecessarily delayed. It must be observed that when a party to the suit puts in a claim petition, it really falls under S. 47 of the Civil Procedure Code and not under O. 21, r. 58 of the Code. (*Sundaram Aiyangar* v. *Ramaswamy Aiyangar*[1].) Consequently no suit under O. 21, r. 63 is possible to set aside the order. The question therefore arose whether the suit which purported to be under O. 21, r. 63 after the execution sale and which prayed for a declaration that the property belonged to the plaintiffs and was therefore not liable to be sold in execution could be treated as an application under S. 47. Being a matter between the parties to the first suit and relating to the execution of the same, the suit could be treated as an application under S. 47 provided it was within the period of limitation for such an application. The suit was more than one month after the execution sale but within three years and it had therefore to be decided whether the article of the Limitation Act applicable in the case of such an application was Art. 166 or 181. The learned Judges have held that the proper article was Art. 181 and the suit could therefore properly be converted into an application under S. 47 of the Code. It is well settled that when an execution sale is without jurisdiction or

1. (1918) 35 M.L.J. 177 : I.L.R. 41 Mad. 955.

void, as distinct from being voidable, an application to set aside the sale is governed by Art. 181 and that Art. 166 has no application to the case. (See *Rajagopala Aiyar* v. *Ramanujachariar*[1], *Manmatha Nath Ghose* v. *Lachmi Debi*[2], *Ramanand Ganpat Rai* v. *Rakhal Mandal*[3] and *Ha We Gyan* v. *Maung Than Byu*[4].) If so, the question arises whether the sale of an exonerated defendant's property or of a *pro forma* defendant is void and the learned Judges have held that it is void and that consequently Art. 181 applies. This view of the learned Judges is supported by the decision of the Madras High Court in *Chengalraya Reddi* v. *Kollapuri Reddi*[5] where a similar view has been taken. In the latter case, the learned Judge held that time under Art. 181 would run from the date when the applicant was dispossessed from the property and not from the date of the execution sale itself.

It must however be noticed that when a third person's property has been sold as the property of the judgment-debtor, the execution sale has been held to be voidable and not void so far as the decree-holder is concerned and an application to set aside the sale has been held to be governed by Art. 166 of the Limitation Act and not Art. 181. (See *Muthukumarasamia Pillai* v. *Muthuswamy Thevan*[6], *Mundlapati Jagannadha Rao* v. *Rachapudi Basavayya*[7] and *Sripat Singh* v. *Naresh Chandra Bose*[8].) A distinction has however been made with regard to the effect of the sale on the third person whose property has been purported to be sold. So far as he is concerned the sale has been held to be a nullity (see *Sripat Singh* v. *Naresh Chandra Bose*[8]) with the result that an application by him to set aside the sale would be governed by Art. 181. Even on this distinction drawn by these decisions an application by a *pro forma* defendant or an exonerated defendant to set aside the execution sale of his property would be governed by Art. 181, as the sale so far as he is concerned would be a nullity. Consequently the decision of the learned Judges in this case and *Chengalroya Reddi* v. *Kollapuri Reddi*[5] would not be contrary to the decisions above referred to.

---

1. (1923) 46 M.L.J. 104: I.L.R. 47 Mad. 288 (F.B.).
2. (1927) I.L.R. 55 Cal. 96.
3. A.I.R. 1936 Pat. 496.
4. A.I.R. 1937 Rang. 126.
5. A.I.R. 1930 Mad. 12.
6. (1926) 52 M.L.J. 148: I.L.R. 50 Mad. 639.
7. (1927) 53 M.L.J. 255.
8. (1936) I.L.R. 15 Pat. 308: A.I.R. 1936 Pat. 97 (F.B.).

BHAGABAN DAS SHAH *v.* FIRST LAND ACQUISITION COLLECTOR OF CALCUTTA, I.L.R. (1938) 1 Cal. 400.

In this case, the Calcutta High Court has departed from the view which previously prevailed in that Court and held that a Collector's order refusing to refer a matter to the Court under S. 18 of the Land Acquisition Act is not subject to be revised by the High Court.

The revisional jurisdiction of the High Court was invoked under S. 115 of the Civil Procedure Code or under S. 107 of the Government of India Act of 1915; but since the coming into force of the Government of India Act of 1935, the High Court can no longer call in aid any provision of law other than S. 115 of the Civil Procedure Code by reason of S. 224 of the former enactment.

Thus the question resolves into whether the Collector refusing to refer a matter under S. 18 of the Land Acquisition Act is a Court within the meaning of S. 115 of the Civil Procedure Code and whether if so, he is a Court Subordinate to the High Court. Both these questions were answered in the affirmative by the Calcutta High Court in *The Administrator-General of Bengal* v. *The Land Acquisition Collector*[1] which was followed in *Krishna Das Roy* v. *The Land Acquisition Collector of Pabna*[2] and *Leah Elies Joseph Solomon* v. *H. C. Stork*[3]. The decision in *The Administrator-General of Bengal* v. *The Land Acquisition Collector*[1] and the reasoning underlying the same to the effect that a Collector was a judicial officer and a Court when acting under part III of the Land Acquisition Act as distinguished from part II of the Act was disapproved by the Bombay High Court in *Balakrishna Daji Gupte* v. *The Collector, Bombay Suburban*[4]. The Madras High Court originally held in *T.K. Parameswara Aiyar* v. *The Land Acquisition Collector, Palghat*[5] dissenting from an earlier decision in *Best & Co.* v. *The Deputy Collector of Madras*[6] that an order of the Collector was that of a Court and subject to the revisional powers of the High Court following *The Administrator-General of Bengal* v. *The Land Acquisition Collector*[1]. But the decision of the Madras High Court in *T.K. Parameswara Aiyar* v. *The Land Acquisition Collector,*

1. (1905) 12 C.W.N. 241.
2. (1911) 16 C.W.N. 327.
3. (1934) I.L.R. 61 Cal. 1041.
4. (1923) I.L.R. 47 Bom. 699.
5. (1918) 36 M.L.J. 95 : I.L.R. 42 Mad. 231.
6. (1916) 20 M.L.T. 388.

Palghat[1] was overruled by the Full Bench of that Court in *Abdul Sattar Sahib* v. *The Special Deputy Collector, Vizagapatam Harbour Acquisition*[2]. The Allahabad High Court in Full Bench has also taken the view in *Bhajani Lal* v. *Secretary of State for India*[3] that such an order of the Collector is not open to revision by the High Court. A similar view has been taken by the Lahore High Court in *Mushtaq Ali* v. *Secretary of State and another*[4] and by the Rangoon High Court recently in *M.H. Mayet* v. *The Land Acquisition Collector, Myingyan*[5]. On the other hand, the Patna High Court in *Saraswati Pattack* v. *The Land Acquisition Deputy Collector of Champaran*[6] and the Lucknow Chief Court in *Saiyid Ahmad Ali Khan Alawi* v. *Secretary of State for India*[7] have followed *The Administrator-General of Bengal* v. *The Land Acquisition Collector*[8] and held that the order of the Collector refusing to make a reference is revisable by the High Court. In this state of authority, the Calcutta High Court in the case under notice has gone back on the older view prevailing in that Court and come into line with the High Courts of Bombay, Madras, Allahabad, Lahore and Rangoon. As the matter primarily depends on the meaning of the word 'Court', it may not be inappropriate to quote the words of Lord Sankey, Lord Chancellor in delivering the judgment of the Privy Council in *Shell Company of Australia* v. *Federal Commissioner of Taxation*[9] where his Lordship at page 297 laid down certain negative propositions on the point:—

"1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another body."

In this connection, it must be noticed that the Madras High Court has held that the Collector under such circumstances is acting judicially though not as a Court while the High Courts of Bombay, Allahabad and Rangoon and the case of the Calcutta High Court under notice have held that he is only exercising administrative or executive functions in passing such an order. The difference is material because if it is a judicial order, the order may be brought up and quashed by the High Court under a *writ of certiorari* in a proper case, while if it is only an administrative order such a writ will not lie and even mandamus will not be available outside the Presidency Towns.

---

1. (1918) 36 M.L.J. 95: I.L.R. 42 Mad. 231.
2. (1923) 46 M.L.J. 209: I.L.R. 47 Mad. 357 (F.B.).
3. (1932) I.L.R. 54 All. 1085 (F.B.).
4. A.I.R. 1930 Lah. 242.
5. (1934) I.L.R. 12 Rang. 275.
6. (1917) 2 P.L.J. 204.
7. (1931) I.L.R. 7 Luck. 578.
8. (1905) 12 C.W.N. 241.
9. (1931) A.C. 275.

COMMISSIONER OF INCOME-TAX, MADRAS *v.* FLETCHER, (1938) 1 M.L.J. 502: L.R. 64 I.A. 323: I.L.R. 1938 Mad. 1 (P.C.).

This judgment of the Board is important in that it once again emphasises that before a tax can be properly levied under the Indian Income-tax Act, it must first of all be established that what is being sought to be taxed is 'income' and not 'a capital receipt'. It is only thereafter that the assessee has to establish any specific exemption under the provisions of the Act. The gratuity and bonus given from the Officer's Retiring Fund to the employee on his retirement was in this case accordingly held to be exempt from tax on the ground that it was not 'income'. The judgment sets out several considerations as to the nature and constitution of the Fund and the rules governing it which make it clear that the allotments made to the employee from and out of the fund were not in the nature of deferred salary for current services taxable as such.

It is noteworthy that their Lordships do not agree with the contention that the payment may be regarded as a commutation of pension under the exemption clause but rest their judgment solely and entirely on the broader ground that what was sought to be taxed was only a capital receipt. It is the view not only of Cornish, J., in the High Court judgment but Pandrang Row, J., also has taken the same view (*see* the last paragraph of the judgment in *The Commissioner of Income-tax, Madras* v. *Fletcher*[1]) though the other portion of the reasoning of the learned Judge has not been accepted.

The definition of salaries under the Indian Act which was relied on by the Income-tax department has no force or application to the facts of the case. This judgment must therefore be taken to have overruled the prior decision of the Madras High Court in similar circumstances, reported in *Balaji Row* v. *The Commissioner of Income-tax*[2]. The rules and regulations of the gratuity fund in the latter case were if anything more favourable for the view that what was being allotted was not 'salary' at all.

---

1. (1935) 69 M.L.J. 611: I.L.R. 59 Mad. 216 (F.B.).
2. (1934) 8 I. T. C. 80.

GOVINDA CHETTIAR *v.* UTTUKOTTAI CO-OPERATIVE SOCIETY, (1937) 1 M.L.J. 640: I.L.R. 1938 Mad. 63.

An order of a liquidator of a Co-operative Society under S. 45 (2) (*b*) of Act II of 1912 determining the amount of contribution passed against a past member was challenged by him in a civil suit on the ground that it was null and void as contravening S. 23 of the Act. This judgment decides that the court-fee payable is under Art. 17-A of the Madras Amendment and not under S. 7 (iv-A). The order though executable in the same manner as a decree is not by itself a "*decree* for the payment of money". So it was held that S. 7 (iv-A) could not apply. It is not however clear how the case came to be dealt with only under Act II of 1912. In Madras, Madras Act VI of 1932 had come into force in 1932 and the order in question was passed only in 1933. Under the new Act the governing section will be S. 47 (3) (*b*). The manner of execution of any order on a contributory is now by a requisition made by the Registrar to the Collector who will collect it in the same manner as arrears of land revenue. *See* S. 47 (3). There can be no doubt therefore that S. 7 (iv-A) can have no application at all.

Possibly in this particular case the liquidator had purported to pass the order under S. 42 of the Imperial Act as the winding up proceedings might originally have started before the new local Act came into force.

BHAGAT RAJ *v.* GARAI DULAIYA, I.L.R. (1938) All. 89.

Under Art. 23 of the Limitation Act (IX of 1908) the starting point in a suit for damages for malicious prosecution is "when the plaintiff is acquitted or the prosecution is otherwise terminated". In this judgment the Court holds that the date of the order of acquittal in proceedings started under S. 107 of the Criminal Procedure Code, which were however sought to be set aside by the prosecutor by a revision petition in a higher Court was not the starting point but it was only the date of the order dismissing the revision petition when the prosecution effectively terminated from which limitation commenced to run. A distinction is suggested as to the nature of the particular proceedings started in the Criminal Court under S. 107 of the Penal Code and other proceedings. A further distinction is thrown out between cases of orders of acquittal and orders of discharge which are sought to be appealed against or revised. (See *Madan Mohan Singh* v. *Ram Sundar Singh*[1].) Recently the Madras High Court, *Kulasekara Chetty* v. *Tholasingam Chetty*[2], has considered the matter elaborately and in a Full Bench judgment they have held that in all cases irrespective of the distinction suggested, the starting point is only when the prosecution can be said to be finally terminated and that is the date when the revision petition is thrown out by the superior Court. The earlier ruling to the contrary has been overruled.

RAM SARAN DAS *v.* BANWARI LAL, I.L.R. (1938) All. 148.

This decision holds that the Court cannot pass a personal decree under O. 34, r. 6, where there has been no actual sale of the hypotheca under O. 34, r. 5, even in a case where the mortgage had been found to be wholly void in a suit against the mortgagee, instituted by a son of the mortgagor. This view, we think, requires reconsideration. It was observed by the Madras High Court in *Periyasami Kone* v. *Muthia Chettiar*[3] that:

> If the mortgaged properties directed to be sold do not belong to the mortgagor, the mortgagee need not be compelled to resort to the farce of bringing them to sale and to undergo the useless delay involved in bringing

---

1. (1930) I.L.R. 52 All. 553. 2. (1938) 1 M.L.J. 344.
3. (1913) I.L.R. 38 Mad. 677.

them to sale, because it is an elementary principle of law that the Court will not do a vain thing nor will it compel a man to do a fruitless thing."

The case where the mortgage security itself is found to be void and the mortgage decree-holder is restrained by injunction from selling the hypotheca under the mortgage decree obtained by him, would stand on a similar footing as a case of a total want of saleable interest of the mortgagor in the hypotheca. The other High Courts have taken a different view from the one under notice. (*See* for instance *Adhar Chandra* v. *Swarnamoyi Dasi*[1].) The observations of the Judicial Committee in *Mt. Jeuna Bahu* v. *Rai Parmeshvar Narayan Mahtha Rai Bahadur*[2] would seem to indicate that the language of O. 34, r. 5 should not be strained and that a liberal construction should be favoured. Attention may also be drawn to the observations of Rankin, C.J., as to the scope and effect of O. 34, r. 6 in *Rai Saheb Sundermull* v. *John Carapiet Galstaun*[3] which are completely adopted by the Judicial Committee as sound and unexceptionable (*Rai Saheb Sundermull* v. *John Carapiet Galstaun*[3]). The learned Judge said that:

" The power of the Court to give personal relief does not depend upon O. 34, r. 6 which is a provision giving direction as to the time and manner and in which the relief is to be given."

In a recent Full Bench case *Palaniappa Chettiar* v. *Narayanan Chettiar*[4], the Madras High Court points out that a mortgagee's suit for sale may comprise two reliefs, one by way of sale of hypotheca and the other for personal relief against the mortgagor and that ordinarily the latter portion of the plaint claim is taken up for adjudication at the stage contemplated by O. 34, r. 6 and in appropriate cases the Court passes a decree on that part of the claim. It may therefore well be held that where a sale could not effectively take place, the Court can still take up for adjudication, the portion of the plaint claim that has not been dealt with so far and which is awaiting disposal and pass a decree personally against the mortgagors (in proper cases) under S. 68 of the Transfer of Property Act, even if O. 34, r. 6 is not strictly applicable. (See *Roshan Din* v. *Thakar Das*[5].)

---

1. A.I.R. 1929 Cal. 121.
2 (1918) 36 M.L.J. 215 : 29 C.L.J. 443 : I.L.R. 47 Cal. 370 at 374 (P.C.).
3. (1931) 62 M.L.J. 170 (P.C.).
4. (1935) 69 M.L.J. 765 : I.L.R. 59 Mad. 188 (F.B.).
5. A.I.R. 1935 Lah. 536.

CHHUTTAN LAL *v.* DWARKA PRASAD, I.L.R. (1938) All. 192.

Proceedings by way of revision petition to the High Court are included in the term 'civil proceeding' in S. 14 of the Indian Limitation Act. The revisional jurisdiction is really a part of the appellate jurisdiction. A Full Bench of the Madras High Court has recently held that even for purposes of Art. 182 (2) an application to 'revise' a decree or order of a Subordinate Court is "an appeal" *Chidambara Nadar* v. *Rama Nadar*[1]. There are earlier decisions of the same Court that the time taken for presenting a revision petition can be deducted under S. 14 itself. *See* for instance *Venkatrangayya Appa Row* v. *Murala Sriramulu*[2] and *Siddalingana Gowd* v. *Bhimana Gowd*[3].

SYED SABIR HUSAIN *v.* FARZAND HASAN, (1938) 1 M.L.J. 458: L.R. 65 I.A. 119: I.L.R. 1938 All. 314 (P.C.).

The question in this case was whether the British Indian Courts should enforce or not the rule of Mahomedan Law (Shiah School) to the effect that the father of an infant bridegroom who at the time of the marriage was indigent and had no means to pay, would be personally liable for the payment of the stipulated amount of the dower and that on his death his estate would be liable in the hands of his heirs. The Privy Council hold that the rule in question is a matter 'regarding marriage' within the meaning of the Bengal Civil Courts Act (XII of 1887). The Act for Madras also uses similar language. The specific enumeration of 'dower' in later enactments along with marriage is not an argument to the contrary. Quoting from their earlier judgment in *Hamira Bibi* v. *Zubaida Bibi*[4] their Lordships observe that the passage quoted shows how Mahomedan texts and the principles of the Mahomedan Law have been applied to determine every facet of the law of dower among Mahomedans and that it is impossible to contend successfully that dower is a mere matter of contract governed only by the general law of obligations.

---

1. (1937) 1 M.L.J. 453: I.L.R. (1937) Mad. 616 (F.B.).
2. (1912) 17 I.C. 593.
3. (1934) 68 M.L.J. 487.
4. (1916) 31 M.L.J. 799: L.R. 43 I.A. 294: I.L.R. 38 All. 581 (P.C.).

Dower is an essential incident under the Mussalman Law to the status of marriage.

The more important question on which the Board differed from the High Court was whether the rule in question postulating personal liability of the father of the infant bridegroom was a rule of substantive Mahomedan Law or as the High Court held a mere canon of interpretation, or a rule of construction or a rule of evidence. In the latter case the British Indian Courts cannot give effect to the same. The Judicial Committee hold that it is undoubtedly a rule of substantive law and that a doctrine which enlarges the right of the wife or improves her security in respect of dower, cannot be ignored as otherwise it would be mutilating the substantive rights of parties as envisaged by the Mahomedan Law.

This liability of the father of the bridegroom and his estate, is nevertheless not a joint liability along with that of the husband but only an alternative one if at all. The wife could not claim a decree against both. Further their Lordships hold that the liability should be apportioned severally against the heirs (proportionate to their shares of inheritance) in cases where the claim is laid against the estate after the death of the father of the bridegroom.

The judgment is important as re-establishing the right to their respective personal laws of Hindus and Mahomedans which has been a fundamental feature of the judicial system as administered by the British rule.

MAHAMMAD HOSAIN *v.* JAMINI NATH BHATTACHARJYA, I.L.R. (1938) 1 Cal. 607.

The question considered in this case is one which has come up frequently before the Courts after the recent amendment of the Transfer of Property Act, namely, whether S. 53-A of the Transfer of Property Act is retrospective in its operation. The learned judges have held that the section applies even to transactions which took place prior to the 1st April, 1930, if they are sued on later than that date. In other words, they have held that the section is retrospective in its operation.

The correct answer to the question depends on the right construction of S. 63 of the Transfer of Property Amendment Act of 1929. This section provides that in respect of certain specified sections they are not retrospective and that in respect of the other sections they do not apply to proceedings pending on the 1st April, 1930. Broadly speaking the learned Judges have inferred from these two provisions, that as regards these other sections, they are retrospective in their operation and would consequently apply if the suits are brought later than the 1st April, 1930. This construction of S. 63, if correct, should apply to all the other sections of the Transfer of Property Amendment Act which have not been specifically referred to in it, as for example to the amendments introduced in Ss. 52, 92, 100 and 101 of the Transfer of Property Act. So far as these sections are concerned the weight of authority except in the Allahabad High Court is to the effect the amended sections are not retrospective in their operation. See *Lakshman Mahadev* v. *Ramachandra Kisan*[1], *Harlal* v. *Lala Prasad*[2], as regards S. 52. Vide *Srinivasa Naidu* v. *Damodaraswami Naidu*[3], *Lakshmi Amma* v. *Sankara Narayana Menon*[4], *Bank of Chettinad, Ltd.* v. *Maung Aye*[5], *Jagdeo Sahu* v. *Mahabir Prasad*[6] and *Lakmichand* v. *Janardhan*[7], as regards amended S. 92, vide also *Chhaganlal Sakharam* v. *Chunilal Jagmal*[8], as regards the amendment to S. 100. To the contrary effect is the decision of the Full Bench of the Allahabad High Court under Ss. 92 and 101 of the Act in *Tota Ram* v. *Lal Ram*[9].

1. A.I.R. 1932 Bom. 301. 2. A.I.R. 1931 Nag. 138.
3. A.I.R. 1938 Mad. 779.
4. (1935) 70 M.L.J. 1 : I.L.R. 59 Mad. 359 (F.B.).
5. 1938 Rang. L.R. 430 ; A.I.R. 1938 Rang. 306 (F.B.).
6. (1933) I.L.R. 13 Pat. 111.
7. A.I.R. 1932 Nag. 154. 8. A.I.R. 1934 Bom. 189.
9. (1932) I.L.R. 54 All. 897.

The reasoning of the Full Bench decision of the Allahabad High Court has been canvassed and not followed by the Madras High Court in *Lakshmi Amma* v. *Sankara Narayana Menon*[1], referred to above and *Srinivasa Naidu* v. *Damodaraswami Naidu*[2], and the Full Bench of the Rangoon High Court in *Bank of Chettinad, Ltd.* v. *Maung Aye*[3].

Coming to S. 53-A itself with which the decision under notice is concerned, it is not materially distinguishable from the other sections referred to above, though in some decisions a distinction has been sought to be made. See *Bank of Chettinad, Ltd.* v. *Maung Aye*[3]. Even with regard to this section the weight of authority seems to be against its retrospective operation. It is necessary in this connection to draw pointed attention to the decision of the Patna High Court in the latest case of *Jagdamba Prasad Lalla* v. *Anadi Nath Roy*[4], where the point has received the fullest discussion and where the learned judges have differed from the decision under notice. The Madras High Court has always taken the view that the section has no retrospective operation (*Kanji and Moolji Brothers* v. *Shanmugam Pillai*[5], *A. Muthuswami Aiyar* v. *P. B. Loganatha Mudali*[6] and *Kotireddi Kotareddi* v. *Koonam Sivaram Reddi*[7]). The Patna High Court has as shown above come to the same view differing from their prior expression of opinion in *Wakefield* v. *Kumar Rani Sayeeda Khatun*[8]. The Nagpur High Court has taken the same view in *Hari Prashad* v. *Hanumantrao*[9]. To the same effect is the view of the Bombay High Court in *Suleman Haji Ahmed Umar* v. *P. N. Patell*[10], *Cooverjee* v. *V. T. Co-operative Society*[11]. The Lahore and Allahabad High Courts have taken a contrary view in *Benarsi Das* v. *Ali Muhammad*[12] and *Shyam Sundar Lal* v. *Din Shah*[13], without a full consideration of the question and the authorities.

Turning to the rule of interpretation adopted by the learned Judges in the case under notice, we venture to submit that the

---

1. (1935) 70 M.L.J. 1 : I.L.R. 53 Mad. 359 (F.B.).
2. A.I.R. 1938 Mad. 779.
3. 1938 Rang.L.R. 430 : A.I.R. 1938 Rang 306 (F.B.).
4. A.I.R. 1938 Pat. 337.
5. (1932) 63 M.L.J. 587 : I.L.R. 56 Mad. 169.
6. A.I.R. 1935 Mad. 404.
7. (1936) 71 M.L.J. 639.
8. (1936) I.L.R. 15 Pat 786 : A.I.R. 1937 Pat. 36.
9. A.I.R. 1937 Nag. 74.
10. A.I.R. 1933 Bom. 381.
11. A.I.R. 1935 Bom. 91.
12. A.I.R. 1936 Lah. 5.
13. A.I.R. 1937 All. 10.

correct rule is that unless by express mention or inevitable implication, we have to come to a conclusion that an enactment is retrospective in its operation, a statute is only prospective. Where as under S. 63 of the Transfer of Property Amendment Act of 1929, the section is silent as to the retrospective operation of the unenumerated sections, the true rule is that they are only prospective and not retrospective. The decision of the House of Lords in *James Gardner* v. *Edward A. Lucas*[1], bears a strong resemblance to the cases under S. 63 and they should be decided accordingly as having no retrospective operation. Reference may also be usefully made in this connection to the observations in *Bourke* v. *Nutt*[2] and In re *Athlumney*: Ex parte *Wilson*[3].

All this conflict would have been avoided if the legislature which was assisted in this piece of legislation by an expert committee of lawyers had used clearer language in S. 63 of the Amendment Act.

BENGAL NAGPUR RAILWAY COMPANY, LTD. *v.* RATANJI RAMJI, L.R. 65 I.A. 66: (1938) I.L.R. 2 Cal. 72: (1938) 1 M.L.J. 640 (P.C.).

There has been a great deal of conflict between the various High Courts in India and some times between different benches of the same High Court on the question whether interest is payable by way of damages for the wrongful detention of money due to the plaintiff, apart from the provisions of the Interest Act. The Madras High Court has generally taken the view that barring the special circumstances in which interest is payable under the rules of equity and the express provisions of the Interest Act, interest is not payable for unlawful detention of money in cases where there is no express or implied contract to that effect or no trade usage exists. (*Kamalammal* v. *Peeru Meera Levvai Rowthen*[4], *Kandappa Mudaliar* v. *S. R. Muthuswami Ayyar*[5], *Raja Ram Doss* v. *Krishna Chandra Deo*[6]). A single Judge of that Court recently took a different view in *Muthuswamy Pillai* v. *Veeraswamy Pillai*[7]. The Patna High Court has after a full discussion of the authorities

1. (1878) 3 A.C. 582.
2. (1894) 1 Q.B. 725 at 741.
3. (1898) 2 Q.B. 547 at 551 & 552.
4. (1897) 7 M.L.J. 263: I.L.R. 20 Mad. 481.
5. (1926) 51 M.L.J. 765: I.L.R. 50 Mad. 94 (F.B.)
6. (1933) 65 M.L.J. 620: I.L.R. 57 Mad. 205.
7. (1935) 70 M.L.J. 433.

taken the same view as the Madras High Court in *J.H. Pattinson* v. *Srimati Bindhya Debi*[1]. The Calcutta High Court has taken a contrary view in its recent decisions in *Bengal Nagpur Railway Company* v. *Ratanji*[2] and *Khetra Mohan Poddar* v. *Nishi Kumar Saha*[3]. The Lahore High Court has taken the view of the Madras and Patna High Courts in *Kirpal Singh* v. *Jiwan Mal*[4], though the proposition is broadly stated in *Piare Mohan* v. *Gopal Lal*[5] and *Gujranwala Municipality* v. *Charanji Lal*[6], that interest is allowable in cases of illegal detention of money. Conflicting views have been expressed on this question in the Allahabad High Court in *Lalman* v. *Chintamani*[7] and *Jwala Prasad* v. *Hoti Lal*[8], on the one hand and *Anrudh Kumar* v. *Lachhmi Chand*[9] and *Abdul Jalil* v. *Mohammad Abdul Salam*[10], on the other. In this state of uncertainty, this decision of their Lordships of the Privy Council has appeared none too soon. Having regard to the importance of the question, it is useful to state briefly the effect of their Lordships' decision. Their Lordships have held that the broad proposition that interest is allowable by way of damages for the wrongful detention of money is not correct. In the absence of an express or implied contract to pay interest or a usage of trade to that effect, interest can be claimed only under the Interest Act. The proviso to the section of the Act refers to cases where a rule of equity is invoked by establishing a state of circumstances which attracts the equitable jurisdiction of the Court as in the case of the non-performance of a contract of which equity can grant specific performance. S. 73 has been held merely to declare the common law rule as to damages for breach of contract and not as giving any right to interest not given by the common law. It is however necessary to observe that the divergence of judicial opinion on this question is largely based on the moral injustice of not allowing interest to a person who has been deprived of the use of his money. This state of things has been remedied in England by the legislature enacting S. 3 of the Law Reform (Miscellaneous Provisions) Act of 1934. It is time that a similar provision is enacted in this country to remedy the injustice.

---

1. (1932) I.L.R. 12 Pat. 216
2. (1934) I.L.R. 62 Cal. 175.
3. (1917) 22 C.W.N. 488.
4. (1927) I.L.R. 8 Lah. 524.
5. A.I.R. 1935 Lah. 552.
6. A.I.R. 1935 Lah. 685.
7. (1918) I.L.R. 41 All. 254.
8. (1924) I.L.R. 46 All. 625.
9. (1928) I.L.R. 50 All. 818.
10. A.I.R. 1932 All. 505.

MAHOMED YUSUF *v.* ABDUL MAJID, I.L.R. (1938) 2 Cal. 162.

In this case, Mr. Justice Lort-Williams has expressed doubts on the view that the High Court has the power to revise the decisions of the Presidency Small Causes Courts under S. 115 of the Civil Procedure Code, though he ultimately followed the decision of the Bench of the Calcutta High Court in *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* and *Kalooram Sitaram* v. *Ram Chunder Haribux*[1] to the effect such decisions are revisable under S. 115. In the view of the learned Judge in this case, the High Court has power only to issue the prerogative writs such as *certiorari* or prohibition in respect of the proceedings and decisions of the Presidency Small Causes Courts under S. 223 of the Government of India Act, 1935 which has reproduced the provisions of S. 106 (1) of the Government of India Act of 1915 and S. 9 of the High Courts Act of 1861. We must observe that doubts have been expressed on the question of the applicability of S. 115 to the decisions of the Presidency Small Causes Courts by Beaman, J., in *Ismalji Ibrahimji Nagree* v. *N. C. Macleod*[2].

The answer to the question whether the decisions of the Presidency Small Causes Courts are revisable by the High Court depends on whether the Presidency Small Causes Court is subordinate to the High Court within the meaning of S. 115, Civil Procedure Code. There is no substance in the suggestion that the applicability of S. 115 has been excluded in the case of Presidency Small Causes Courts by reason of S. 8, because the latter section only enacts that the other provisions of the Code do not extend to any suit or proceeding in any Presidency Court of Small Causes and S. 115 does not relate to any suit or proceeding in that Court but in the High Court. There is also authority for this view in *P. Ramaswami Naidu* v. *Venkataramanjulu*[3] which was affirmed in *Venkataramanujulu Naidu* v. *Ramaswami Naidu*[4]. If therefore S. 115 has not been excluded in respect of the decisions of the Presidency Small Causes Courts, it has to be read with S. 3 of the Code which enacts that every Court of Small Causes is subordinate to the High Court; and a Presidency Small Causes Court is undoubtedly a Court of Small Causes though not

1. (1913) I.L.R. 41 Cal. 323.
2. (1906) I.L.R. 31 Bom. 138.
3. (1914) 26 M.L.J. 467.
4. (1915) 29 M.L.J. 353.

constituted under the Provincial Small Causes Court Act. For the same reason as the one stated above with regard to S. 115, the operation of S. 3 has not been excluded by S. 8 of the Civil Procedure Code. From the above, it seems to follow that a decision of the Presidency Small Causes Court is revisable by the High Court. Further, S. 6 of the Presidency Small Causes Court Act provides that a Presidency Small Causes Court is subject to the superintendence of the High Court under the Civil Procedure Code. It is difficult to see how a Court is subject to the superintendence of another without being subordinate to the latter. If full effect is given to the above provisions, it is unnecessary to go into the old enactments constituting the Supreme Courts and the High Courts and the despatch of Sir Charles Wood for holding that the High Court can issue only the prerogative writs to the Presidency Courts of Small Causes. Coming to the Indian authorities on the question of the applicability of S. 115, they are clear and unbroken in all the High Courts. In the Calcutta High Court itself we have *Haladhar Maiti* v. *Choytonna Maiti*[1], *Sarat Chandra Singh* v. *Brojo Lal Mukerji*[2], *Ramadhin Bania* v. *Sewbalak Singh*[3], *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* and *Kalooram Sitaram* v. *Ram Chandur Haribux*[4] and *Bhudhu Lal* v. *Chattu Gope*[5]. So far as Madras is concerned we have *P. Ramaswami Naidu* v. *Venkataramanjulu Naidu*[6], *Venkataramanujulu Naidu* v. *Ramaswami Naidu*[7], *Nagoor Meeran Sahib* v. *Sookulal Sowcar*[8] and *Rangiah Naidu* v. *Rungiah*[9]. The Bombay High Court has taken the same view in *Ismalji Ibrahimji Nagree* v. *N. C. Macleod*[10] and *S. A. Ralli* v. *Parmanand Jewraj*[11]. In the light of the above, it is doubtful whether even the Privy Council will take a different view on the question.

BAIDYA NATH BASAK *v.* ONKER MULL MANICK LAL, I.L.R. (1938) 2 Cal. 261.

In this case there was a monthly tenancy of a plot of land and it was provided that the lessees would give khas possession to the lessors within seven days. On the assumption that

1. (1903) I.L.R. 30 Cal. 588.
2. (1903) I.L.R. 30 Cal. 986.
3. (1910) I.L.R. 37 Cal. 714.
4. (1913) I.L.R. 41 Cal. 323.
5. (1917) 21 C.W.N. 654.
6. (1914) 26 M.L.J. 467.
7. (1915) 29 M.L.J. 353.
8. (1915) 18 M.L.T. 254.
9. (1908) I.L.R. 31 Mad. 490; 18 M. L. J. 480.
10. (1906) I.L.R. 31 Bom. 138.
11. (1889) I.L.R. 13 Bom. 642.

it provided for a seven days' notice to quit, the question was whether the notice should terminate with the end of a month of the tenancy or not. The learned Judge held the view that the notice should terminate with the end of a month of the tenancy differing from two decisions of the Lahore High Court in *Rure Khan* v. *Ghulam Muhammad*[1] and *Ram Nath* v. *Badri Nath*[2].

It may be observed that the present case was governed by S. 106 of the Transfer of Property Act while the Lahore cases were not decided under the Act, as the Transfer of Property Act was not extended to the Punjab. This circumstance however would not make any difference for the purpose of the decision of the question. If the Transfer of Property Act had no application to the case, the rules of English Common law would apply, as embodying the rules of justice, equity and good conscience. *Waghela Rajsanji* v. *Shekh Masludin*[3]. In this respect, however, the provisions of S. 106 do not in any way differ from the English law. It was held as early as *Doe* v. *Donovan*[4], by Lord Mansfield, C.J., that in the case of a yearly tenancy with a provision for a notice to quit at a quarter's notice, the quarter should expire with the year of the tenancy. This view was followed by the Divisional Court in *Dixon* v. *Bradford and District Railway Servants' Coal Supply Society*[5]. This decision of the Divisional Court has been followed by Panckridge, J., in the present case for holding that the week's notice should expire with the end of the month. This rule of English law or the decisions were apparently not brought to the notice of the learned Judges in the Lahore High Court who held the contrary view in the cases referred to above. If however the provision in the lease deed was to the effect that it was subject to seven days' notice at any time to terminate the lease, under the English law or under the Transfer of Property Act, the seven days' notice need not expire with a month of the tenancy. See *Soames* v. *Nicholson*[6] following *Bridges* v. *Potts*[7]. The reason of the rule is that there should be no ambiguity about the provision for termination of the tenancy, and it would be inconvenient to one or both the parties

1. A.I.R. 1924 Lah. 643. 2. A.I.R. 1928 Lah. 348.
3. (1887) L.R. 14 I.A. 89: I.L.R. 11 Bom. 551 at 561 (P.C.).
4. (1809) 1 Taunton 555: 127 E. R. 949.
5. (1904) 1 K.B. 444. 6. (1902) 1 K.B. 157.
7. (1864) 17 C.B. 314: 144 E.R. 127 (N. S.).

if the lease is terminated at any time; but if however it is clearly and explicitly stated that it could be terminated at any time as in the last two cases, it would be given effect to. It would therefore seem that the view of the learned Judge in this case is to be preferred to that of the learned Judges in the Lahore cases.

KUNJA BEHARY CHAKRAVARTY *v.* KRISTO DHONE MAJUMDAR, I.L.R. (1938) 2 Cal. 361.

In England, varying tests have been applied as to the nature of the additional evidence which would justify the ordering of a new trial whether in the County Courts or the High Court. In the House of Lords in *Brown* v. *Dean*[1], Lord Loreburn L. C., with whom the other Law Lords except Lord Shaw concurred, laid down that the evidence should be of a conclusive nature. Lord Shaw on the other hand held that it would suffice if the evidence was material and so clearly relevant as to entitle the Court to say that that material and relevant fact should have been before the jury in giving its decision. These differing opinions have been considered in later English Cases and by the Privy Council on appeal from the Supreme Court of Shanghai, *The King* v. *Copestake*[2] and *Hip Foong Hong* v. *H. Neotia & Company*[3] and their general effect seems to approximate to the view of Lord Shaw in the above case. This is also the view of the learned Judges in the case under notice in granting a review in this country. It may however be mentioned that the terms of O. 47, r. 1 of the Civil Procedure Code are specific in this respect and are not in *pari materia* with S. 93 of the County Courts Act or O. 39 of the rules of the Supreme Court for granting a new trial. That is why the Madras High Court in *Srinivasa Iyengar* v. *The Official Assignee of Madras*[4] referring to *Brown* v. *Dean*[5] hold that in matters of granting review in this country on the ground of the discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time when the decree or order was passed, the decision of the House of Lords is not binding on us.

---

1. (1910) A.C. 373.
2. (1927) 1 K.B. 468.
3. (1918) A.C. 888.
4. (1927) 52 M.L.J. 682: I.L.R. 50 Mad. 891.
5. (1910) A.C. 373.