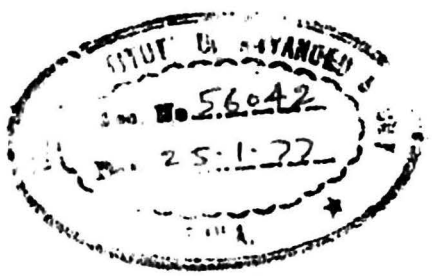

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Rutledge, C. J. and Brown, J.

First Appeal No. 236 of 1928, Decided on 30th January 1929, against the judgment of original side in Civil Regular No. 364 of 1926.

Abdur Rauf Chowdry—Appellant.

v

N. P. L. S. P. Chettyar Firm—Respondents.

Transfer of Property Act, S. 52 — Rangoon Municipal Act (6 of 1922), S. 192 — Mortgage not notified to corporation — Property sold for default in payment of property-tax—Purchaser even after institution of suit on mortgage gets it free from mortgage — Lis pendens does not apply—Burma Land and Revenue Act (2 of 1876), S. 47.

A mortgagee who had given no notice of his mortgage to the municipal corporation filed a suit on his mortgage. In the meanwhile the property was sold under Burma Land and Revenue Act, S. 47 by the corporation after due notice to the mortgagor, for non-payment of property taxes. Mortgagee joined the auction purchaser as defendant.

Held : that the property was sold free from the mortgage because the tax in respect of which the default was made was a property tax and the corporation were entitled to put into force the summary method given in the Lower Burma Land and Revenue Act against the immovable property itself, which was quite independent of any remedy against the defaulter personally : *A. I. R.* 1927 *Rang.* 289, *Appr.*

Held further: that the doctrine of lis pendens does not apply to this case at all, as it would indeed be a dangerous extension of the doctrine to hold that neither Government nor a local body could recover its taxes or rates from a defaulter so long as a law suit was pending between the defaulter and some of his other creditors.

K. C. Bose—for Appellant.

S. C. Das—for Respondents.

Judgment.—This is an appeal from the judgment and decree of the original side of this Court. The facts are as follows:

By a registered deed (Ex. B), dated 7th December 1922, one Ma Aye Nu alias Fatima Bi Bi mortgaged to the respondent firm for Rs. 3,000, premises known as No. 190, F Street, Tatmye Quarter, Rangoon. The mortgagee did not give any notice of his mortgage to the Rangoon Corporation. The mortgagor made default in paying the property-taxes from the second quarter of 1925 to the fourth quarter of 1926. After due notice to the mortgagor, the premises were proclaimed for sale by Ex. 2, dated 9th April 1927, which stated that the sale would take place on the spot on the morning of 26th April 1927. The proclamation is stated to be under S. 47, R. 95, Direction 175 of the Lower Burma Land and Revenue Act, 1876. The proclamation further stated that

"the right offered for sale will be free from all encumbrances created over it, and from all subordinate interests derived from it, except such as may be expressly reserved by me at the time of sale."

The bailiff of the corporation conducted the sale, which was knocked down to the appellant for Rs. 700 on 26th April.

We may here note that the respondent filed his mortgage suit against the mortgagor and her husband on 22nd July 1926. If he had made any enquiry he would have found that the taxes had not been paid on the mortgaged premises for over a year, and, by not having given notice of his mortgage to the corporation, the latter had no means of giving him notice of the mortgagor's default. After the sale the respondent amended his plaint, joined the auction-purchaser and pleaded fraud and collusion, while the auction-purchaser became the benamidar of the mortgagor.

The learned trial Judge makes an initial mistake in the beginning of his judgment by saying that the appellant "was the purchaser of the property at a Court auction sale." If this had been an ordinary Court auction sale, all that could be sold in execution was the right, title and interest of the judgment-debtor. On the face of the record, this was not a Court auction sale at all, but a sale under S. 47, Lower Burma Land and Revenue Act, which provides a summary method of proceeding against the land itself where the revenue officer finds that there exists any permanent, heritable, and transferable right of use and occupancy by selling it at a public auction. By S. 194 (1), Rangoon Municipal Act, 1922

"any arrears of tax or any fee or other money claimable by the corporation under this Act may be recovered as if they were arrears of land revenue."

Cases have arisen in which the Courts have refused to construe similar words as giving a local body or the income-tax authorities the right to resort to the summary method by the sale of immov-

able property for the recovery of dues of a personal nature.

On this question we have been referred to a lucid judgment of Chari, J., in the case of *R. M. V. V. M. Chettyar Firm* v. *M. Subramaniam* (1). On p. 466 (*of* 5 *Rang.*) the learned Judge after reviewing a number of a cases, observes:

"I am, therefore, of opinion that, so far as "property-taxes," as defined in S. 80, City of Rangoon Municipal Act, are concerned, it is open to the properly authorized officer of the municipality to direct the recovery of arrears in the manner prescribed by Ss. 46 and 47, Burma Land and Revenue Act, and that, to a sale held under these sections the provisions of S. 48 of the Act will apply. I am strengthened in the conclusion I have arrived at by the fact, to which my attention has been drawn by the learned advocate for defendant 2, that the provisions of the Burma Municipal Act and the Burma Town and Village Lands Act whereby lands paying municipal taxes are exempted from land tax, in lieu of the capitation-tax, show that the municipal "property-taxes" were meant as a kind of substitute for land tax, and that the legislature intended to put the municipal "property-taxes" in the same position as land taxes."

We are of opinion that the view is correct. The learned trial Judge bases his judgment in the main on the doctrine of lis pendens. We do not consider that the doctrine applies to this case at all. It would, indeed, be a dangerous extension of the doctrine to hold that neither Government nor a Local body could recover its taxes or rates from a defaulter so long as a law suit was pending between the defaulter and some of his other creditors. For the reasons already given we are of opinion that when as in this case the tax in respect of which the default is made is a property tax the corporation are entitled to put into force the summary method given in the Lower Burma Land and Revenue Act against the immovable property itself, which is quite independent of any remedy against the defaulter personally.

The only question remaining is: Has the respondent established fraud and collusion on the part of the auction-purchaser and the mortgagor? In our opinion he has completely failed. The only witness called on his behalf is his clerk, Shanmugam. In examination-in-chief he says:

"I think she, (the mortgagor), had purchased it in the name of defendant 4. I say this because defendant 4 is related to defendant 1."

(1) A. I. R. 1927 Rang. 289=5 Rang. 458.

In cross-examination he admits that he does not know personally how defendants 1 and 4 are related; that he has no personal knowledge about the sale of the house by the corporation; and that he has no witnesses to show that the house was purchased by defendant 1 in the name of defendant 4. The appellant denies that he is in any way related to the mortgagor or her husband. He admits that she occupies one of the rooms of the building and pays him Rs. 15 a month as tenant. The corporation bailiff, Maung Aung Hla, who held the auction sale, states that the house was an old house, worth about Rs. 1,000. Accepting this as the value of the house, Rs. 700, at an auction sale for non-payment of rates, seems to be a very fair price.

The appellant states that he went to Pazundaung on the morning of the auction casually and there saw a man beating a gaung. This is not very likely ; and, if the respondent had had any evidence connecting the appellant with the mortgagor, this would be of some weight. But in the absence of any such evidence, and in view of a reasonable price having been paid, this admission is quite inadequate to base a finding of fraud and collusion. There is no reason whatever for thinking that there had been collusion on the part of the officers of the corporation. They had been more than usually forbearing in respect of their unpaid taxes. The respondent's clerk admits that in other cases his firm had given the corporation notice of their mortgages, and, in our opinion, they have only themselves to blame for not doing so in this case and for not making any enquiry as to whether the rates were being paid. We accordingly allow the appeal and dismiss the suit, so far as the appellant is concerned, with costs in both Courts.

Appeal allowed.

Rutledge, C. J. and Brown, J.

First Appeals Nos. 160 and 162 of 1928, Decided on 22nd May 1929.

Ma On Kyi and *another*—Appellants.

v.

Ma Thaung May and *another* — Respondents.

Buddhist Law — (Burmese) — Adoption — Monk.

A mutual adoption by persons who have no bond either by relationship or in any other way is impossible.

A Burmese Budhist monk cannot adopt.

Zeya—for Appellants.
Ba Maw—for Respondent.

Judgment.—These are two appeals from a judgment of the Additional District Judge at Pyapon dismissing the plaintiff-appellants' suits. The plaintiffs minors claim certain property as theirs by reason of the fact that they were adopted with the right to inherit by one U Zawtipala, a rahan and Ma Thaik, deceased, by adoption deed. Appellants' advocate admits that the adoption of young children by a Burmese Buddhist monk is invalid but contends that the joint adoption by Ma Thaik is quite legal. The adoption deed (Ex. A) in the case of Ma On Kyi runs as follows :

" When monk U Wizaya of Rangoon said to monk U Zawtipala, resident of Bhamo Ywa Kyaung: It is very difficult for me alone to bring up the girl Ma On Kyi, whom I have in turn obtained outright and brought up I wish you to bring her up, jointly with Dayakamagyi Ma Thike, resident of Bhamo village, mutually adopt Ma On Kyi to inherit both good and bad inheritance and execute the deed in the house of Ma Thike at Bhamo village. "

(Sd.) U. Wizaya.

The other deed (Ex. B) runs as follows :

" This deed is executed on a Zayat in the compound of Obo Kyaung Thayettaw Taik, Rangoon in respect of a girl on the 8th Waning, Pyathe 1284, as follows : The surviving mother Ma Mai Mya after the death of her husband Maung Hmyin, says to Ko Po Kyin, the husband and Ma Hmen, the wife, residents of No. 57, 11th Street, Rangoon : " As it is too burdensome for me, who am a woman to bring up my natural daughter, please bring up the said child for good as your daughter. Having undertaken that hereafter there shall be nobody who will claim to take back the child : the child was delivered in the presence of local elder, Saya Ba and witnesses Ma Kwe Ma, Daw Ii, Ko Ba Thaw, Ko Po Myin, and Ma Hmon, those who had asked for the child for good, delivered the child to U Zawtipala, resident of Bhamo Ywa Kyaung, Moulmeingyun Town, Myaungmya District and Ma Thike resident of the same village, with consent for adoption with the right of inheriting : writer U. Zawtipala.

The monk U. Zawtipala gave evidence at the trial. It appears that he had adopted a number of children, mostly females but they had died before reaching maturity. Ma Thaik was no relation of his but was a supporter and is referred to as a " Soon-ama. " According to the evidence on behalf of the plaintiff U Zawtipala, though a Phongyi had inherited his share of family property, which was undivided and he was paid by other members of the family his share of the income of the property and at any rate in the latter years either brought paddy land in Ma Thaik's name on behalf of the minors or gave money to Ma Thaik with which to purchase land for the minors. We have already mentioned that Mr. Zeya admitted that it is impossible for a Burmese monk to adopt children. We agree that, bound as a monk is by the Vinaya, such a proceeding is quite impossible. It is admitted that the two minor children were entrusted to Ma Thaik's care and lived with her. The adoption deeds have never been signed by Ma Thaik and the plaintiff's evidence represented her as having no property of her own and being maintained by U Zawptipala. The adoption from the deeds on the face of it looks as if it were a mutual adoption, but such a one would be impossible since there seems to have been no bond either by relationship or any other way between U Zawtipala and Ma Thaik. In fact, Ma Thaik seems to have been used by the Phongyi as an agent or servant. He could not keep the female children in his kyaung, or kyangdaik and according to his own statement he employed Ma Thaik and supported her as his agent or employee in looking after the two little girls. There is no evidence before us that Ma Thaik of her own volition ever wished to adopt the two girls as her daughters with a view to inherit. In fact we have never come across a case, where two persons unconnected with each other either by relationship or marriage purported to adopt and became the parents of minor children. The only question argued before us was that of the adoption of the two minor appellants by the late Ma Thaik. An issue was framed namely : " was Ma Thaik a trustee or benamidar of the plaintiff? " This was not argued probably for the reasons given on p. 3 of the judgment appealed from, which shows that the appellants' advocate in the trial Court abandoned the plea that the properties in dispute belong to the minor

appellants absolutely in their own right and that Ma Thaik was only their trustee or benamidar. The learned Judge goes on to say :

" He prays only for a declaration that the properties belong to the plaintiffs as the sole heirs of the deceased Ma Thaik, being her adoptive daughters. There is therefore no necessity for us now to give a decision on the fourth issue. "

The position then is that the plaintiffs have failed to establish that they were adopted with a right to inherit by Ma Thaik. It is also clear that while U Zawtipala purported to adopt them, in fact he could do nothing of the kind. That being the case, their suit was rightly dismissed by the trial Court. These appeals are dismissed with costs.

Appeal dismissed.

Brown, J.

Special Second Appeal No. 585 of 1928, Decided on 8th May 1929.

Ko Maung Nge—Appellant.

v.

Lalmaw—Respondent.

Civil P. C., S. 11—*Decree-holder applying for execution of preliminary mortgage-decree — Judgment-debtor not objecting to executability of decree and allowing it to be satisfied to certain extent—Judgment-debtor cannot be said to admit that decree could be executed to any larger extent.*

Although orders in execution proceedings operate as res judicata, nevertheless the fact that execution has been ordered as regards a certain sum does not operate as res judicata with regard to the amount due under the decree.

Where a decree-holder applied for execution of a preliminary mortgage decree for a certain amount and the judgment-debtor did not raise objection that the decree was not executable at all and allowed it to be satisfied to a certain extent, it cannot be said that the judgment-debtor admitted that the decree could be executed to any larger amount so as to hold that the executability of the whole decree had been adjudicated upon.

P. K. Basu—for Appellant.

S. Ganguli—for Respondent.

Judgment.—In Suit No. 196 of 1925 of the Township Court of Toungoone U. Tha Maung sued for a decree for Rs. 572-8-0 with costs and interest against the respondent, Lalmaw. He set forth in his plaint that his debt was secured by a mortgage but that the mortgaged property had already been sold for default of payment of fishery revenue. He asked not for a mortgaged decree but for simple money decree. A written admission was filed on behalf of the defendant, and the Judge passed judgment to the effect that

"There will be a preliminary mortgage decree for Rs. 572-8-0 with costs and interest at the stipulated rate from the date of the suit till the date of payment, payable within six months from this date against the defendants."

An ordinary preliminary mortgage decree was drawn up. The amount payable under that decree was shown to be Rs. 500 as principal, Rs. 162-8-0 as interest and Rs. 63 as costs, and the total was stated to be Rs. 825-8-0. The date of the decree was 17th June 1925. On 19th June 1925 U Tha Maung filed an application for execution. In his application he stated the amount of the decree was Rs. 572-8-0 and the costs were Rs. 56-4-0. As a result of his application he realized a sum of Rs. 450 on 30th July 1925. Nothing further seems to have happened for over two years until on 10th September 1927, the present appellant Maung Nge filed an application for execution as transferee of the decree from U Tha Maung. In his application, he showed the amount due under the decree to be the same as on the previous application of U Tha Maung. This application was ultimately infructuous owing to the failure of both sides to appear on a day on which the case was fixed for hearing. On 3rd November 1927, the transferee of U Tha Maung filed another application for execution and in that application he showed the amount due as Rs. 662-8-0 for principal and interest and Rs. 63 costs. The judgment-debtor contended that the decree had been satisfied in full. The trial Court at first held in favour of the transferee. The judgment-debtor appealed to the District Court and that Court ordered further enquiry to be held. The Court held further enquiry and again passed orders that the decree had not been fully satisfied and was executable. The judgment-debtor appealed again to the District Court and the learned Judge of that Court then for the first time discovered that the actual decree was not one which could be executed at all. That he was correct in this view, there can be no doubt.

The decree is not a decree for the payment of money, but merely an ordinary preliminary mortgage decree. It is clear that it is incapable of execution. In view of this finding the District Court set aside the order of the trial Court directing execution against the judgment-debtor. Against this order the present appeal has been filed. It is not contended that the decree is in fact capable of execution but it is contended that in view of the previous proceedings and in accordance with the general principles of res judicata, the judgment-debtor cannot now raise this question. The provisions of S. 11, Civil P. C., do not specifically apply to execution proceedings, but it is settled law that the general principles of res judicata must be followed in dealing with such proceedings. The contention before me is that in the execution proceedings of 1925, the judgment-debtor might have opposed the execution on the ground that the decree was not executable at all, and that as he did not raise this contention and as the decree was actually executed it must be held that it had been finally decided by that Court that the decree was capable of execution. The difficulty in upholding this contention seems to me to lie in the interpretation of the effect of the previous order for execution. In the 1925 proceedings the application shows that there was a money decree for Rs. 634-4-0. But it is clear that the decree-holder himself has not claimed that the Court decided that that was the amount to be executed. He himself now claims that the decree was for Rs. 725-8-0 and in the circumstances I do not see how it can be held that the effect of the previous decision was that the decree was executable for any specific amount. It was not in fact executable at all. The judgment-debtor by his action allowed it to be satisfied to the extent of Rs. 450 ; but it cannot be contended as a result of that that he admittsd that it could be executed to any larger amount. If the principle of res judicata were applied at all, I think it is clear that the plaintiff would be limited to claiming Rs. 634-4-0 less the amount already executed.

There is authority for the view that although orders passed in execution operate as res judicata nevertheless the fact that execution has been ordered as regards a certain sum does not operate as res judicata with regard to the amount due under the decree, and the amount actually due under the decree in the present case is precisely nil. It does not seem to me that the previous proceedings really decided as between the parties anything more than that the sum of Rs. 450 could be realized under that decree. That being so, the question as to whether the decree is further executable has not been adjudicated either directly or impliedly, and I do not think that the principle of res judicata can be applied in this case. The appellant's remedy, if any, would appear to be to take steps to have a proper decree drawn up. I dismiss this appeal with costs.

Appeal dismissed.

Chari, J.

Special Second Appeal No. 548 of 1928, Decided on 25th April 1929.

(*Maung*) *Ba Than* and *another*—Appellants.

v.

(*Maung*) *Sein Win* and *another*—Respondents.

Evidence Act, S. 116 — Rights of vendors of plaintiff extinguished by adverse possession by defendant—Defendant, after purchase of land by plaintiff taking his permission to occupy land—He is not estopped from pleading acquisition of title by adverse possession—Adverse Possession—Defendant in possession of plot of land for nearly 15 years prior to its purchase by plaintiff—It will be assumed, in suit brought to eject defendant, that his possession was adverse till date of conveyance to plaintiff in absense of evidence that such possession was permissive.

Where the rights of the vendors of the plaintiff had become extinguished by adverse possession of plot of land by defendant for more than 12 years, the defendant will not be estopped from pleading acquisition of title by adverse possession and denying plaintiff's title to plot even though the defendant, after purchase of the plot by the plaintiff had obtained his permission to occupy the plot.

Where the defendant was in possession of a plot of land for nearly 15 years prior to the purchase of the land including the plot by the plaintiff and where there was no evidence that the possession of the defendant was permissive, in a suit brought by the plaintiff after purchase to eject the defendant, it will be assumed that possession of the defendant was adverse till the date of the conveyance to the plaintiff : *Special Second Appeal No.* 121 *of* 1916, *Rel. on.*

E. Villa—for Appellants.
S. Ganguli—for Respondents.

Judgment.—The plaintiffs in the original suit sued to eject the defendants from a small portion of land, measuring. 04 acre, forming part of a larger plot of land which they had purchased from Po Kyaw and Daw Hnit. The map shows that this portion of the land is abutting on the creek and is presumably used by the defendants as a dwelling site. The trial Judge gave a decree in favour of the plaintiffs in the suit, whose case was that after he had purchased the land, the defendants obtained their permission to occupy this land. The learned Township Judge believed the evidence on this point and though he was of opinion that the defendants had been living in the suit land for over 15 years, since it had been proved beyond all reasonable doubt that the defendants asked the plaintiff's permission, their subsequent possession would not be adverse to the plaintiffs, however long the defendants may be in possession. He therefore held that the defendants could not claim adverse possession, even if they had been occupying the land for over 12 years. I am not sure what the learned Judge means exactly by these remarks, but in the result he gave a decree in favour of the plaintiffs, as I have stated above. The matter was taken up in appeal to the District Judge, who held that the defendants had been in possession of the land for over 15 years and that they could claim to have been in adverse possession, and, therefore the plaintiff's suit must fail. He therefore allowed the appeal and dismissed the plaintiff's suit. The plaintiffs come up to this Court in second appeal. Their evidence is not of a very high quality that the defendants did ask for permission from the plaintiffs to occupy the land. What really happened possibly is that the plaintiffs having bought the land told the defendants that they had become the owners of the land and wanted to remove their house, and the defendants possibly had replied that they would do so next year or so. I have doubts whether anything more transpired, but assuming that the evidence on this point is as found by the Township Judge, the question still remains whether the possession of the defendants is on that account permissive and whether their seeking permission of the plaintiffs estops them in denying the plaintiff's title and asserting their own title to the land. There is ample evidence and I am on this point in agreement with the District Judge that the defendants had been in possession of the land for nearly 18 years. That is for nearly 15 years prior to the purchase of the land by the plaintiffs. It is not alleged that their possession originally started permissively. Though the presumption of law is that every possession starts legally, where a plaintiff wants to establish that the defendant's original possession was permissive it is for him to prove this allegation and if he fails to do so, it will be presumed that the possession was adverse : see *Maung Gri* v. *U Shwe Gyo* (1). It must be therefore assmumed in the absence of any evidence to the contrary that the possession of the defendants was adverse till the date of the conveyance in favour of the plaintiffs. Ma Hnit, one of the persons who conveyed the land, states that the defendants built the house because the land was their own. This is possibly an error because the land clearly forms part of the holding sold by her and her husband to the plaintiffs, but the defendants themselves state what is probably true that they never asked anybody's permission when they built the house on the land.

It is in accordance with probability because in places like the place in question where the land is very cheap, no one ever thinks of asking anybody's permission when he builds a house on a portion of the land. If an objecting landlord takes steps to eject him from the land, he would be thought to be very unneighbourly. If the defendants had been in possession of the land prior to the purchase of the land by the plaintiffs for over 12 years, then the rights of the vendors of the plaintiffs whatever they were had become extinguished by operation of S. 28, Limitation Act. The result would be that at the time of the date of the sale, the vendors of the plaintiffs had no right, title or interest in the land. Any statement by the defendants, therefore must have been made based upon a mistake and misconception of the legal rights of the plaintiffs, and such an admission could not operate as an estoppel,

(1) Special Second Appeal No. 121 of 1916, Decided by Maung Kin, J.

nor could the permission if any by the plaintiffs to the defendants estop them under S. 116, Evidence Act, from denying the plaintiff's title. They would undoubtedly be licensees but they sought the license under a mistake. Therefore even assuming that the plaintiff's evidence on this point is true, it is still open to the defendants to plead that they acquired title by adverse possession, and on the evidence it must be held as the District Judge held that they had so acquired title to the land. The appeal is therefore dismissed with costs.

Appeal dismissed.

Heald and Mya Bu, JJ.

Civil Misc. Appeal No. 55 of 1928, Decided on 30th January 1929, against order of Dist. Court, Tharrawaddy, in Civil Misc. No. 99 of 1926.

K. P. S. P. P. L. Firm—Appellants.

v.

C. A. P. C. Firm—Respondents.

Burma Courts Manual, Para. 307 *(A) I — Provincial Insolvency Act* (5 *of* 1920), *Ss.* 56 (2) *b*, 41 *and* 61—*No commission on realization by sale of mortgage money—Proceedings do not necessarily end—Discharge of insolvent does not affect Court's power of distributing assets.*

In Burma the receiver is not entitled to commission on the amount of the mortgage money realized by the sale of the mortgaged property : *A. I. R.* 1928 *Rang.* 23, *Foll.*

An order under S. 41 does not necessarily put an end to the proceedings in the insolvency : *A. I. R.* 1925 *Rang.* 105, *Foll.*

The insolvency Court undoubtedly has power to give directions as to the distribution of the assets among the creditors who have proved in the insolvency. The discharge of the insolvent does not put an end to the Court's power to give such directions : *A.I.R.* 1925 *Rang.* 105, *Rel. on.*

B. K. B. Naidu—for Appellants.

Venkatram—for Respondents.

Judgment.—The present parties are creditors of one Kyin Sein, who was adjudicated insolvent on his own petition in Civil Misc. Case No. 99 of 1926 of the District Court of Tharrawaddy. The insolvent possessed only the following properties :

(1) A house at Tharrawaddy.

(2) Two holdings of paddy land said to be Nos. 33 and 35 of 1925-26 of Thanatpyit kwin, measuring together 37-67 acres.

(3) Two holdings of paddy land said to be Nos. 33 and 35 of 1925-26 of Tawyagon kwin, measuring together 22·99 acres.

(4) Two holdings of paddy land said to be Nos. 52 and 53 of 1925-26 of Ashe kwin, measuring together 29·00 acres.

The M. T. T. K. M. M. S. M. A. R. Chettyar Firm proved in respect of a first mortgage over the house for Rs. 8,152-15. The K. P. S. P. P. L. Firm, who are the present appellants, proved in respect of a second mortgage on the house and the lands in Thanatpyit kwin for Rs. 7,917. The M. L M. R. M. Firm proved in respect of a first mortgage on the lands in Thanatpyit kwin and a first mortgage on holding No. 52 in Ashe kwin for Rs. 7,307-4. The C. A. P. C. Firm, who are the present respondents, proved in respect of an only mortgage on the lands in Tawyagon kwin and on holding No. 52 in Ashe kwin, and a second mortgage on holding No. 52 in Ashe kwin for Rs. 6,557-8. There were other creditors whose debts were unsecured. By an oversight the C. A. P. C. Firm, that is the present respondents, were omitted from the schedule of creditors. The receiver sold all the properties free of mortgage, as shown below :

		Rs. a.p.
(1)	The house for	8,635 0 0
(2)	,, Thanatpyit paddy lands for	10,900 0 0
(3)	,, Tawyagan ,, ,, ,,	620 0 0
(4)	,, Ashe kwin ,, ,, ,,	1,150 0 0
		21,305 0 0

From this amount the receiver deducted Rs. 1,065-4 as his commission, leaving for distribution Rs. 20,239-12. That amount was divided among the creditors as follows :

		Rs. a.p.
To the	M.T.T.K.M.M.S.M.A.R. Firm	8,203 4 0
,,	K.P.S.P.P.L. ,,	4,439 4 0
,,	M.L.M.R.M. ,,	7,597 4 0
		20,239 12 0

The C. A. P. C. Firm, who received nothing, naturally complained and the Court said that because the lands which were mortgaged to them and were not mortgaged to any of the other creditors had been sold for Rs. 1,770, they were entitled to recover that amount from the K. P. S. P. P. L. Firm who had taken the money out of Court. The K. P. S. P.

P. L. Firm appeals against that finding on grounds that the insolvency Court had no jurisdiction to decide in insolvency proceedings such a question as that arising between them and the C. A. P. C. Firm, that if it had such jurisdiction generally, it had no such jurisdiction at the time when the order was made because an order for the discharge of the insolvent had already been made, that the application of the C. A. P. C. Firm was res judicata by reason of the rejection of similar applications made at earlier stages of the proceedings and that on the merits the C. A. P. C. Firm was not entitled to recover the sum of Rs.1770 from them.

There is clearly no force in the first of these grounds because the insolvency Court undoubtedly has power to give directions as to the distribution of the assets among the creditors who have proved in the insolvency. Similarly, there is no force in the ground that the discharge of the insolvent put an and to the Court's power to give such directions. It was said in the case of *Rowe and Co. Ltd.* v. *Tan Thean Taik* (1) that :

"One of the main objects of every adjudication of an insolvent is to make his estate divisible amongst the creditors and it must often occur that valuable assets are still in the hands of the Official Assignee and in process of realization for that purpose at the date when the insolvent applies for his final discharge,"

and we agree with the conclusion of the learned Judge in that case that an order under S. 41 of the Act does not necessarily put an end to tee proceedings in the insolvency. We have no doubt that in this case the Court still had power to make the order against which appellants appeal. There is clearly no question of res judicata. It is true that respondents had made various prior applications for the proceeds of the sale of the properties mortgaged to him, but there was no final order adjudicating on their claim before the order which is under appeal. As for the merits, it is clear that appellants' case has no merits of any sort. The sum of Rs. 1,770 mentioned in the lower Court's order represents the sale proceeds of the Tawyagon lands aud of both the holdings in Ashe kwin. The Tawyagon lands were mortgaged only to respondents and as the sale proceeds of those lands were insufficient to satisfy respondents' mortgage respondents were clearly entitled to the whole of those sale proceeds, none of the other creditors having any interest of any sort in them. The amount of those sale proceeds was Rs. 620. As for the Ashe kwin lands respondents held a first mortgage over holding No. 53 and a second mortgage over holding No. 52, the M. L. M. R. M. Firm having a prior mortgage over holding No. 52. The M. L. M. R. M. Firm's first mortgage over holding No. 52 was satisfied by the sale of the Thanatpyit lands, which were also included in their mortgage, without recourse to the sale proceeds of holding No. 52. and therefore the sale proceeds of holding No. 52 as well as those of holding No.53 were wholly available for satisfaction of respondents' mortgage debt. Appellants held no mortgage over any of the lands which were mortgaged to respondents and in respect of which respondents claim the sale proceeds, and since those sale proceeds were insufficient to satisfy respondents' mortgage debt, neither appellant nor any other creditor had any rights in respect of them.

The only matter in which the lower Court's order was mistaken is that it ordered appellants to pay the gross sale proceeds to respondents, disregarding the fact that the receiver had already taken his commission out of them. The order must therefore be varied by deducting from the sum of Rs. 1,770 the amount of the receiver's commission on the sale of these properties. That commission amounted to Rs. 88-8 and therefore the sum payable by appellants to respondents is Rs. 1,681-8.

The receiver had, however, no right to any commission : vide the ruling of this Court in the case of *R. M. M. Chettyar Firm* v. *U Hla Bu* (2) and the rules contained in para. 307a (1) of the Burma Courts Manual, and therefore he must refund to respondents the sum of Rs. 88-8 which he has wrongly taken. On application by any of the other creditors who are interested in the matter he should be made to refund the balance of his commission so far as such commission was not paid in respect of the surplus of sale proceeds over the mortgage debt due on the particular lands sold.

(1) A. I. R. 1925 Rang. 105=2 Rang. 643.

(2) A. I. R. 1928 Rang. 28=5 Rang. 623.

We note that the conduct of the insolvency proceedings in the lower Court reflects no credit on either the Court or the receiver. The Court clearly framed the schedule of creditors carelessly, since it omitted to notice that respondents had proved their mortgage debt and it failed to enter them in the schedule, and both the Court and the receiver seem to have been entirely ignorant of the provisions of S. 47, Insolvency Act, and of the fact that the receiver is not entitled to commission on the amount of the mortgaged money realized by the sale of the mortgaged property.

In the result the order of the lower Court is varied by the substitution of the amount Rs. 1,681-8 for Rs. 1,770 as payable by appellants to respondents and by the addition of an order for the payment of Rs. 88-8 by the receiver to respondents. In view of the fact that the grounds for the alteration of the order were not mentioned by appellants in the appeal, appellants will pay respondents' costs in this Court, advocate's fee to be five gold mohurs.

The respondents have filed a cross-objection claiming that the Court ought to have allowed them interest on the amount awarded. The learned Judge in the lower Court considered respondents' claim to interest and rejected it, and we are of opinion that in refusing interest he exercised a right discretion, because respondents were negligent in not seeing that they were brought on to the schedule of creditors. They were present at the sale and raised no objection to the sale of the properties, which were mortgaged to them, free of their mortgage. We therefore dismiss the cross-objection without orders for costs.

Order varied.

Otter and Heald, JJ.

Letters Patent Appeal No. 111 of 1928, Decided on 25th February 1929, against Judgment of Doyle, J., in Special Second Appeal No. 95 of 1928.

Thein Pe and *others*—Appellants.

v.

J. P. De Souza and *another*—Respondents.

Contract Act, S. 73 — Person engaged as teacher by month — No provision for notice to leave — Contract can be terminated by one month's notice.

Where a person is engaged as a teacher by the month and there is nothing in the agreement, providing for notice to leave on either side, the contract would be terminated by a reasonable notice and one month's notice is reasonable : *Allen : In the matter of*, (1910) *K. B.* 397; 13 *Bur. L. T.* 168, *Rel. on.*

E. Maung—for Appellants.

Ba Thein—for Respondents.

Judgment.—This is an appeal under the Letters Patent which arises under the following circumstances. The plaintiff who is a school master brought a suit against the members of the National School Committee of Einme, claiming damages for wrongful dismissal. The learned Sub-Divisional Judge was of opinion that the plaintiff had been engaged on a month to month contract and awarded him one month's salary by way of damages. The District Judge, however seems to have agreed that the plaintiff was engaged upon a monthly basis, but he was of opinion that six months' salary would be a reasonable compensation for his dismissal. Upon appeal to this Court, the learned Judge appears to have agreed with the finding of the two lower Courts as to the terms upon which the plaintiff was engaged but he said that he was not prepared to disagree with the "opinion of the lower appellate Court that six months' salary in lieu of notice is not excessive." He subsequently granted a certificate enabling an appeal to be made to a Bench of this Court. The respondent entered into the service of the appellants on or about 26th July 1926. On 15th October of that year, he received a letter terminating his employment, "within one month" from his date and offering to pay the sum of 225/- being as we understand it 150/- by way of salary for that month and the balance 75/- being in respect of fifteen days in October. The respondent refused to accept this offer and wrote on 22nd October claiming 3757/- and included in this sum was 3600/- as damages consequent upon his dismissal. The first question to be determined is : What was the agreement for the hiring of the respondent? We need say no more than that we agree that he was employed by the month at a salary of 150/- per month. It is clear that there was nothing in the agreement

(which was a verbal one) provided for notice to leave on either side, nor was there any evidence at the trial of the existence of any custom in such a case. As had been laid down, therefore, in a number of cases, the contract would be terminated by a reasonable notice. Upon this point, we need only refer to the case of *In the matter of the African Association, Ltd.* and *Allen* (1) *A David* v. *St. Anthony's High School* (2) a decision of the Chief Court of Lower Burma, apparently upon a somewhat similar facts. In the latter case [following *M. E. Moola* v. *K. C. Bose* (3)] the learned Judge thought that thirty days wages was sufficient. In the present case, the respondent was engaged by the month, and in the absence of special agreement, it seems to us reasonable that he should be given one month's notice. We observe he was not turned out forthwith. He had an opportunity while still keeping his appointment to look for other work. We have no doubt that the committee have acted reasonably and the appeal is therefore allowed. As the appellants have been all along willing to pay 225/- mentioned in their notice respondent must pay the costs of the appellants in all Courts.

Appeal allowed.

(1) [1910] 1 K. B. 397=79 L. J. K. B. 259=26 T. L. R. 234=102 L. T. 129.
(2) [1920] 13 Bur. L. T. 168.
(3) [1916] 8 L. B. R. 420=33 I. C. 981=9 Bur. L. T. 63.

Brown, J.

Second Appeal No. 434 of 1928, Decided on 30th January 1929, against judgment of Dist. Judge, Insein, in Civil Appeal No. 22 of 1928.

Gunnu Meah—Appellant.

v.

A. Rahman—Respondent.

Civil P. C., Sch. 2, Para. 15—Arbitration — Suit for enforcement of award — Signature of party may not estop him from disputing correctness — Civil P. C., Sch. 2, Para. 20 and S. 100—Suit for enforcement of award praying also that award be filed—Second appeal lies.

The mere signature by a party to an award does not necessarily in all cases estop him from afterwards disputing the correctness of the ward: *A.I.R.* 1923 *Rang.* 187, *Dist.*

Where a plaint was headed "Suit valued at Rs. 86 for enforcing an award" and ad valorem Court-fees had been paid accordingly, though at the conclusion of the plaint there was a prayer that the award may be ordered to be filed, but the prayer further asked that a decree be passed in accordance with its terms.

Held: that there was a suit for the enforcement of the award and not an application to file an award before the trial Judge and that a second appeal did therefore lie: 7 *Bur. L. T.* 279, *Ref.*

N. N. Sen—for Appellant.

Bhattacharyya—for Respondent.

Judgment.—The appellant, Gunnu Meah, filed a suit in the Township Court of Insein for the enforcement of the terms of an award directing the defendant to convey a certain house to the plaintiff. The plaint set forth that the matter was referred to an arbitration consisting of Mahomedan elders of Insein and that an award was made by them on 25th August 1927. The defendant, while not denying that the matter had been referred to arbitration, pleaded that the award was invalid as it had not been signed by all the arbitrators and also that the award was bad on the ground of misconduct and corruption of the arbitrators. The written statement did not specify what the misconduct and corruption complained of were. Evidence was called to show that the arbitrators refused to examine two of the witnesses named by the defendant.

The trial Court held that the arbitrators to whom the matter was referred consisted of some 30 persons and that only 12 of these persons signed the award. The Court, further, held that the arbitrators had refused to examine witnesses named by the defendant. The suit was therefore dismissed. The findings of fact by the trial Court were accepted by the lower appellate Court, which dismissed the appeal; and the present appeal has been filed under the provisions of S. 100, Civil P. C.

A preliminary objection has been taken on the part of the respondent to the effect that no further appeal lies. It is contended that there was no suit to enforce an award but that in fact the matter before the Court was an application to file an award under the provisions of para. 20, Sch. 2, Civil P. C. If that contention is correct, then no second appeal would lie; but I do not think that the contention can be upheld. The distinction between an application to file an

award and a suit to enforce an award is pointed out in the case of *Nga Hla Gyaw* v. *Mi Ya Po* (1). In the present case the plaint is headed "Suit valued at Rs. 86 for enforcing an award" and ad valorem Court-fees have been paid accordingly. It is true that at the conclusion of the plaint there is a prayer that the award may be ordered to be filed; but the prayer goes on to ask that a decree be passed in accordance with its terms for the conveyance of the said house to the plaintiff. The plaint was accepted as a plaint in a suit and appears to have been treated as such throughout.

I am of opinion that there was a suit for the enforcement of the award before the trial Judge and that a second appeal does therefore lie. But in this second appeal questions of fact cannot be raised and it has not been contended before me that the findings that only some of the arbitrators signed the award and that the witnesses were not all examined can be challenged. The only point argued on behalf of the appellant is that the respondent signed the award himself and is therefore now estopped from challenging its validity.

I have been referred on behalf of the appellant to the case of *U Gunawa* v. *U Pyinnyadipa* (2). In that case there had been a reference to arbitration and there had been an irregularity in the proceedings in that at one of the sittings of the arbitrators when witnesses were examined one of the arbitrators was absent. This was the second of the three sittings and no objection was taken at the time, nor was it raised in the pleadings of the case. It was held that by continuing the proceedings without objection to this irregularity, the parties must be held to have condoned the irregularity and could not seek to set aside the award on the ground of that irregularity. I do not think that that decision is very relevant to the present case.

The whole arbitration in the present case was conducted at one sitting. There was no evidence to show that the respondent condoned any irregularity during the course of the arbitration proceedings. It was when proceedings were all concluded and the award had been delivered, that his signature was appended to the award. It was stated in *U Gunawa's* case (2)

> "a party having knowledge of an irregularity cannot lie by without objection and take his chance of an award in his favour and then, when he finds that the award has gone against him, seek to set it aside on the ground of the irregularity to which he failed to object."

The signature of the respondent in the present case was appended when the terms of the award were known to him and there was no question therefore of his taking a chance that the award would be in his favour. His case is that he was practically compelled to sign the award. I am not satisfied that his mere signature of the award necessarily removes all objection to the irregularity in the award. The chief difficulty in the way of the plaintiff seems to me to be this, that there is no mention in the pleadings of the defendant having signed the award at all. The suit is based on the award itself and not on any agreement by the parties whereby they mutually accepted the award. The question therefore of the acceptance of the award by the defendant was not in issue. If both parties to the award signed the award after it was delivered it may be that a suit could be filed to enforce the terms of the award on the ground that there was a definite contract by the parties by virtue of their signatures; but this was not the case for the plaintiff here and I am not prepared to hold that the mere signature by a party to an award necessarily in all cases estops him from afterwards disputing the correctness of the award. In all the circumstances of the case I am not satisfied that there is sufficient ground for interference. I therefore dismiss this appeal with costs.

Appeal dismissed.

(1) [1914] 2 U. B. R. 26=27 I.C. 31=7 Bur. L. T. 279.
(2) A. I. R. 1923 Rang. 187=1 Rang. 15.

Rutledge C. J. and Brown, J.

First Appeals Nos. 207 to 209 of 1928, Decided on 4th January 1929, against judgment of original side in Civil Regular Nos. 353, 398 and 399 of 1927.

E. M. Joseph and *others*—Appellants.

v.

Samsunder and *others*—Respondents.

Registration Act, Ss. 2 & 17(2),(v)—Landlord's letter to tenant informing him "As long as you occupy room we shall not ask you to vacate it" does not amount to lease or agreement to lease and is exempt from registration.

In a suit for specific performance on the basis of an oral agreement to lease, the plaintiff filed a letter written to him by the landlord. The letter recited "This is to inform you that as long as you occupy the room. . . . . we shall not ask you to vacate the said room the rent of which will be Rs. 5 per day."

Held : that the letter did not operate as a lease or an agreement to lease. It was a unilateral letter which at the most gave right to obtain another document, the formal lease. It was therefore exempt from registration under S. 17 (2) (v), and so could be admitted in evidence though unregistered; *A. I. R.* 1927 *Rang.* 169; and *A.I.R.* 1925 *Cal.* 1087, *Dist.*

Banerji—for Appellants.
Paget—for Respondents.

Judgment.—The property in dispute in these three appeals consists of three rooms, Nos. 3, 4 and 5 of house No. 68, Fraser Street, Rangoon. The house in question is part of an estate of which the beneficial owners are the four appellants. The four appellants are brothers and appellant 1, E. M. Joseph, is trustee for the management of the estate. The rooms in question have for some years been occupied by the respondents as tenants. The respondent, Dwarka Prasad has occupied room No. 3, Samsunder and Dwarka Prasad have occupied room No. 4 and Samsunder has occupied room No. 5. Appellant 1 as trustee of the estate brought three ejectment suits in the Small Cause Court against the respondents.

It is alleged by the respondents that during the pendency of these suits an agreement was come to whereby they were to be permitted to continue in occupation for the rest of their lives on the payment of Rs. 5 per day rent and of a lump sum of Rs. 1,000 salami for each room This agreement was never reduced to the form of a legal document, and the respondents sued for specific performance of the agreement. As a result the ejectment suits in the Small Cause Court were dismissed.

The appellants, whilst admitting that there was some discussion as to a settlement and admitting that the salami of Rs. 1,000 for each room was actually paid to them, deny that there was ever any definite agreement as to a lease. The trial Court has granted a decree for specific performance in each case and it is against these decrees that these three appeals are filed.

The first question for consideration in these appeals has reference to certain letters written by three out of the four appellants. That these three appellants signed those letters is admitted; but it is argued on their behalf that the letters contain on the face of them an agreement to lease, that they are, therefore, compulsorily registrable under the Registration Act and that as they have not been registered they cannot be accepted in evidence. The letter to Dwarka Prasad reads as follows:

"Sir, This is to inform you that as long as you occupy room No. 3 of house No. 68, Fraser Street, Rangoon, we shall not ask you to vacate the said room the rent of which will be Rs. 5 per day from 1st February 1927. You are not to sub-let the premises."

The letter to Samsunder with regard to room No. 5 is couched in similar terms and the letters to Dwarka Prasad and Samsunder jointly with regard to room No. 4 is also similarly worded except that the last sentence "You are not to sublet the premises,' is omitted.

In accordance with the definition given in S. 2 (vii), Registration Act, the term "lease" includes an agreement to lease, and under S. 17 of the Act a lease of immovable property for any term exceeding one year requires registration. The letters in question state the amount of rent and also declare that the appellants do not propose to evict the respondents.

We have been referred on behalf of the appellants to the case of *Ramjoo Mahomad* v. *Haridas Mullick* (1). In that case the defendant had written to the plaintiff a letter in which he said that he agreed to take a certain house on lease and set forth the terms under which he agreed to accept the lease and the plaintiff in reply wrote a letter to the defendant in which he said that he confirmed the defendant's letter. As a result of these two letters the plaintiff occupied the premises and paid the rent agreed on. Some 18 months later a notice was served on him to quit and he then brought a suit for specific performance. It was held that the letters in question amounted to a present demise of the premises and were compulsorily registrable. We do not, however, think that that case is analogous to the case before us. In one letter in that case there was

(1) A. I. R. 1925 Cal 1087=52 Cal. 1695.

a definite statement of an agreement to take the premises on lease subject to definite terms set forth in the letter and in the letter in reply there was a definite acceptance of the offer and the parties had acted on the letters as creating a lease for 18 months after the letters were written. The letters in the present case do not show any mutual agreement. They do not on the face of them contain any agreement at all. The three plaintiffs merely state in them that they will not ask the respondents to vacate the rooms. There is no mention whatever in the letters of the payments of salami and the letters are entirely unilateral letters. It seems to us clear that the letters were never really intended in themselves to operate as a lease or an agreement to lease, but that they contemplated execution of a formal agreement at a late stage. Formal assent to a proposal is clearly required before there can be any binding agreement. That assent is not contained in the letters at all and if these letters can be said to create a right at all, it seems to us, that was merely a right to obtain another document which would, when executed, create a lessee's interest in the property and that, therefore, the letters were exempted from registration under the provisions of S. 17 (2) (v), Registration Act,

We have been referred also to a case of this Court *Maung Ba Sein* v. *Maung Htoon Shwe* (2). but there again the document which was held to be compulsorily registrable was a formal document which set forth definite agreements by both landlord and tenant. We are of opinion that the letters in question have rightly been admitted in evidence by the trial Judge. It remains then to be considered whether the plaintiffs did in fact establish that a definite contract to enter into a lease was made. (Here the judgment discussed evidence and concluded as below). The learned trial Judge appears to have given the decree in somewhat too vague terms but we consider that he was right in granting a decree for specific performance and the orders we are passing are substantially in favour of the respondents. They must therefore be allowed their costs. We alter the decree of the trial Judge in each case to a decree that the defendants or defendant 1 on their behalf shall execute a lease in favour of the several plaintiffs, the conditions of the lease to be that a rent of Rs. 5 a day be paid, that the lease shall continue for the lives of the plaintiffs, that the plaintiffs shall have no power to sublet the premises. The defendant-appellants shall pay the costs of the respondents in both Courts in all the 3 cases.

Decree altered.

(2) A. I. R. 1927 Rang. 169=5 Rang. 95.

Brown, J.

Second Appeal No. 532 of 1923, Decided on 8th January 1929, against judgment of Dist. Court, Bassein, in Civil Appeal No. 78 of 1928.

Ma Shin—Appellant.

v.

Maung Han and *others*—Respondents.

Civil P. C., S. 11, Expln. iv — Plaintiff and defendant in present suit being co-defendants in former suit—Plaintiff in former suit claiming partition on basis of agreement — Present plaintiff admitting his claim but suit dismissed on ground that other defendants in that suit treated land as their own and that agreement for partition was not proved — Plaintiff in present suit alleging that land was jointly owned by her husband and defendant 1 who transferred it with condition to repurchase — Defendant 1 repurchasing it—Plaintiff claiming half share on payment of half purchase money — Present suit was not barred by res judicata.

The plaintiff as well as defendants in the present suit was co-defendants in a former suit, in which the plaintiff sued for partition of land on the basis of an agreement to that effect. The plaintiff in the present suit admitted the claim of the plaintiff in that suit but the suit was eventually dismissed on the ground that the other defendants were dealing with the land as their own and that the contract of partition was not proved. The present plaintiff alleged in the present suit that the land really belonged to her husband and present defendant 1 but was transferred by them with a condition to purchase and claimed that as defendant 1 had purchased it, she was entitled to half share on payment of proportionate price money. The defendants contended that as this ground of defence was not raised by the plaintiff in the former suit, the present suit was barred by res judicata.

Held : that as the relief claimed by the plaintiff in the former suit was entirely independent of the present claim, the raising of which in the former suit could have made no difference to the decision in the former suit, and as also it was not necessary to decide in the former suit the question raised in the present suit, the present suit would not be barred:

by the principle of res judicata : *A. I. R.* 1925 *Rang.* 228, *Rel. on.*; and *A. I. R.* 1923 *Rang.* 239, *Expl.*

S. C. Das—for Appellant.

Thein Maung—for Respondents.

Judgment.—In Civil Regular No. 42 of 1927 of the Sub-Divisional Court of Kyonpyaw one Maung Aung Ban and two others sued the parties to the present appeal and one other for specific performance of a contract. Their allegation was that the land in suit had originally belonged to the parents of the plaintiffs and of all but one of the defendants. About 1914, the present respondent, Maung Han, and Maung Nge, the husband of the present appellant, Ma Shin, of on behalf of all the heirs made over the land in satisfaction of a mortgage debt, reserving the right of repurchase. About four years later, with the consent of all the heirs, Maung Han and Maung Nge repurchased the land on behalf of all these heirs, and it was agreed amongst the heirs, that, when the purchase money was repaid to Maung Han and Maung Nge the land would be divided amongst all the heirs. They, therefore, asked for a partition of the land on payment of their proportionate shares.

The present appellant, Ma Shin, admitted the plaintiffs' claim in that suit, but the suit was contested by the present respondents, Maung Han, Maung Myan and Po Hla. The suit was eventually dismissed. It was held that Maung Han and Maung Myan had been dealing with the land as their own. As regards the alleged promise to partition the land at the time of repurchase, the finding was somewhat vague; but apparently it was held that the contract was not proved. In the present case Ma Shin has sued the three respondents with regard to the same piece of land. She now says that the land in question was purchased by her husband, Maung Nge, and Maung Han from a Chettyar firm; and that, in 1914, Maung Nge and Maung Han mortgaged the land to Po Hla. Later on they transferred the land outright to Po Hla with an option of repurchase.

In the year 1919 this option of repurchase was exercised by defendant 1, Maung Han. Maung Nge has since died and Ma Shin claims that Maung Han must be held to have repurchased for himself and for Maung Nge. and she asks for half of the land on payment of half the purchase money Rs. 920.

The suit is contested by Maung Han and Maung Myan and has been dismissed on a preliminary point. The trial Court has held that the suit is barred by the principle of res judicata on account of Civil Regular No. 42 of 1927, and this decision has been upheld on appeal by the District Court. It is against this decision that the present appeal has been filed.

The learned District Judge was of opinion that the case now set up by the appellant was a case which ought to have been set up as a ground of defence in the earlier suit. It is difficult to see how the present case would have been a good defence to the earlier suit. The question in that suit was whether the plaintiffs had the right to obtain a share in the land by virtue of a contract entered into by them and the other heirs. Ma Shin's present case is that the land actually belonged to her husband and to Maung Han, and it is on that ground that she is now claiming a share. But this case is not necessarily inconsistent with the case set up by the plaintiffs in the former suit. Even if the land were actually owned by Maung Nge and Maung Han only that fact would not necessarily negative the possibility of a contract whereby they agreed to partition the land on payment of the proportionate shares by the other heirs. Further, the District Judge does not seem to have given sufficient attention to the fact that in the former suit the contesting parties were Maung Aung Ban and two others on one side and all the present defendants on the other :

The conditions requisite for an adjudication to be res judicata as between co-defendants were discussed in the case of *Ma Tok* v. *Ma Yin* (1). It was there laid down that the following conditions should be fulfilled before the principle of res judicata could apply:

(i) that there should be a conflict of interest between the co-defendants;

(ii) that it should be necessary to decide on that conflict in order to give the plaintiff relief appropriate to his suit, and

(iii) that the judgment should contain a decision of the question raised as between the co-defendants.

(1) A. I. R. 1925 Rang. 228=3 Rang. 77.

Now, there is a conflict in the present case between the persons who were co-defendants in the earlier suit; but in that suit the relief claimed by the plaintiffs was based on an alleged contract which is entirely independent of the claim now put forward by Ma Shin. Their success depended on whether they could prove that contract. A decision on the points now raised by Ma Shin could have been of no avail whatsoever to them in that suit, and the raising of the present claim by Ma Shin could have made no difference whatsoever to the decision of the earlier case. It was not necessary to decide this point in the earlier suit; nor can the judgment either directly or impliedly be held to contain a decision of the question now raised.

I have been referred on behalf of the respondents to the case of *Maung No* v. *Maung Po Thein* (2). In that case the following observations by a Bench of the Calcutta High Court in an earlier case were quoted with approval with reference to Expln. 4, S. 11, Civil P. C. :

"A matter which ought to be raised but which as matter of fact is not raised in a suit cannot be decided in specific terms in that suit. But this fact cannot be fatal to the plea of res judicata, for in that case it is obvious that Expln. 2 (of S. 13 of the former Code) would be meaningless. We must take it therefore that if the effect of the decision in a former suit is necessarily inconsistent with the defence that ought to have been raised but has not been raised, that defence must under S. 13 be deemed to have been finally decided against the person who ought to have raised it."

With these remarks I entirely agree. But they do not seem to me to be of any assistance to the respondents in the present case. The decision in the former suit was to the effect that the plaintiffs in that suit had failed to prove their rights as heirs on a contract to a share in the land. It is quite impossible to hold that this decision is necessarily inconsistent with the case now put forward by Ma Shin. It is true that when the claim of res judicata is based on Expln. 4, S. 11 it is not necessary that there should have been any express decision on the matter which ought to have been made a ground of defence or attack. But for the provisions of the sections to be operative at all, the issue, or the matter in issue, must have been heard and finally decided in the earlier case; that is to say, the decision in the earlier case must have been such as to imply an adverse finding on the matter which ought to have been made a ground of defence or attack. These conditions are not fulfilled in the present case; and, in my opinion, the present suit is not barred as res judicata.

It has been suggested by the learned advocate that when Ma Shin was examined as a witness in the earlier case her statements were not entirely consistent with the case she now puts forward; but I am not now concerned with the merits of her present case. The sole question for decision at present is whether the suit is barred as res judicata, and on that point I must hold that the appellant is entitled to succeed. I, therefore, set aside the judgments and decrees of the lower Courts and direct that the suit be reopened and and tried on its merits by the trial Court. The appellant will be entitled to a refund of the Court-fees paid by her in this Court and in the District Court. The balance of her costs in the District Court and in this Court will be paid by the respondents.

Suit remanded.

(2) A. I. R. 1923 Rang. 239=1 Rang. 363.

Pratt, J.

Second Appeal No. 99 of 1928, and Civil Revn. No. 142 of 1928, Decided on 24th January 1929, against order of Dist. Judge, Mandalay, in Civil Appeal No. 68 of 1928.

Ramdas—Appellant.

v.

Kannamal—Respondent.

Civil P. C., Ss. 151 *and* 115—*Non-appealable order in execution without jurisdiction likely to cause judgment-debtor irremediable injury—High Court should interfere under S.* 115 — *Ss.* 51 *and* 47 — *Order of committal to jail passed without jurisdiction — Objection to its legality not taken—No appeal lies—O.* 21, *R.* 22 *—Execution after one year — Notice to judgment-debtor essential unless reasons for not issuing notice are recorded — Failure to record reasons renders proceedings void.*

Where the existence of a non-appealable order on execution, from which an appeal was filed may do the judgment-debtor an irremediable injury, since he was never given any opportunity of showing cause against execution and the whole of the proceedings were without jurisdiction the case is one where the unusual course of interfering under the revi-

sional powers conferred by S. 115 should be taken.

An order committing a judgment-debtor to jail was passed without jurisdiction. But no objection was made to the committal to jail and the question of its legality was not then raised :

Held : that the order was not under S. 47 and, therefore, not appealable.

When execution is saken out after one year from the date of the decree it is compulsory under O. 21, R. 22, to issue a notice to show cause to the judgment-debtor before ordering his arrest. If no such notice is issued, under Sub-S. (2) Court can issue process, for reasons to be recorded, if it considers issue of notice would cause unreasonable delay or defeat the ends of justice. But if Judge records no reasons for issuing process and overlooks the provisions of R. 22, the failure to issue notice to the judgment-debtor is not a mere irregularity but a defect which goes to the very root of the proceedings and renders them void for want of jurisdiction : 44 *Cal.* 954, *Foll.*

Sanyal—for Appellant.

Tha Kyaw—for Respondent.

Judgment.—In Civil Execution Case No. 37 of 1928, of the Township Court, Amarapura, orders were passed on 26th March 1928, committing the judgment-debtor to jail. Execution was taken out over one year from the date of the decree and it was, therefore, compulsory under O. 21, R. 22 to issue a notice to show cause to the judgment-debtor before ordering his arrest. It is common ground that no such notice was issued.

The District Court on appeal held that the failure to issue notice was merely an irregularity which did not vitiate the subsequent arrest. Sub-S. (2) allows the Court to issue process for reasons to be recorded without first issuing notice, if it considers issue of notice would cause unreasonable delay or defeat the ends of justice. The Judge recorded no reasons for issuing process and obviously overlooked the provisions of R. 22, O. 21. Under the circumstances the failure to issue notice to the judgment-debtor was not a mere irregularity, but a defect which goes to the very root of the proceedings and renders them void for want of jurisdiction as was laid down in *Shayam Mandal* v *Satinath Banerjee* (1). There is a consensus of opinion on this point in the High Courts. There can be no doubt that the order for arrest of the judgment-debtor and all the proceedings in execution were void in consequence of the initial failure to issue notice.

For the decree-holder in this Court, however, the objection has been taken that no appeal lies against the order in question, which was passed under S. 51 and cannot be considered as a question arising between the parties to the suit in which the decree was passed relating to the execution or satisfaction of the decree. It is contended accordingly that no appeal lies. This contention must prevail. No question arose between the the parties for determination. No objection was made to the committal to jail and the question of its legality was not then raised.

Had the judgment-debtor at the time challenged the jurisdiction of the Judge to pass orders in execution, then the order deciding the question of jurisdiction would have been an order under S. 47 and would have been appealable. I hold, therefore, that no appeal lies and the appeal is dismissed, but as the point should have been taken in the District Court there will be no order for costs. It is conceivable, however, that the existence of the order on execution may do the judgment-debtor an irremediable injury, since he was never given any opportunity of showing cause against execution. As the whole of the proceedings were without jurisdiction the case is one where I feel bound to take the unusual course of interfering under the revisional powers conferred by S. 115. The order appealed against is, therefore, set aside. I notice, the decretal amount was subsequently paid into Court. By consent it will remain there for a reasonable time, say one month from receipt of this order, to enable the decree-holder to take fresh proceedings by way of execution, if he wishes to do so.

Order set aside.

(1) [1917] 44 Cal. 954=24 C. L. J. 523=38 I. C. 493=21 C. W. N. 776.

Percival, J. C., and Rupchand, A. J. C.

Second Appeal No. 7 of 1926, Decided on 24th January 1929.

Nainomal—Appellant.

v.

Bashomal Sanwaldas—Respondent.

Compromise — Plaintiff, uncle of defendant passing deed of gift of property to him — Suit brought to cancel deed compromised providing plaintiff should recover property if he paid certain sum to defendant and if not his rights over property should cease — Such compromise supersedes deed of gift.

A plaintiff, who was the uncle of the defendant, passed a deed of gift of property in his favour on condition of his receiving maintenance. A suit brought to cancel the deed was settled by a compromise which provided that if the plaintiff paid certain amount to the defendant, he should recover the property and become its owner, and that if the money was not paid, he should cease to have any right over the property.

Held : that the compromise superseded the deed of gift and a suit brought for maintenance on the strength of the gift deed was not maintainable.

Dipchand Chandumal—for Appellant.
Srikrishindas H. Lulla—for Respondent.

Judgment.—In this case, the plaintiff, who is the uncle of the defendant, passed a deed of gift in favour of the defendant and it is contended that one of the terms of the deed of gift in respect of the house was that the defendant should maintain the plaintiff. The suit in the original Court was for maintenance being Rs. 1,000. The Joint Sub-Judge of Shikarpur decreed the suit in favour of the plaintiff. On appeal to the District Judge this decree was reversed on the ground that there had been a suit to cancel the gift, and that suit had been settled by a compromise which in superseded the deed of gift. The compromise provided that the plaintiff should pay Rs. 2,125 to the defendant within five months: and that if he paid this amount he should recover the property from the defendant and become the owner thereof. But if he failed to pay the amount within five months, the defendant was to remain the absolute owner of the house in question and the plaintiff's rights were to cease. It is true that in the first Court the question of the compromise superseding the gift was not expressly brought out. At the same time, the third issue was:

"Whether the suit is not maintainable on the strength of the gift deed." If therefore, it is held that the compromise superseded the deed of gift, it follows that the suit was not maintainable. In regard to the compromise the learned District Judge has observed as follows:

"It was clear on the terms of that compromise that no future rights or obligations based on the gift deed were kept alive between the parties beyond what was provided in the compromise itself. There is not a word about future maintenance for the plaintiff even if he failed to pay the stipulated amount, and in case the defendant became the absolute owner of the property. To my mind it is clear that the effect of that compromise was to render the original deed of gift simply non-existent, and to make the mutual rights of the parties dependent solely on the terms of that compromise between them."

It is contended by the learned pleader for the appellant that the effect of the

compromise was simply that, if the money was not paid, the defendant should remain the owner: but that at the same time he should remain liable to maintain the plaintiff. It seems to me that this is a contention that the compromise should stand good, and that at the same time part of the deed of the original gift, should stand good; which contention cannot be accepted. It appears therefore that the view taken by the learned District Judge is correct. The suit was for cancellation of the deed, and the plaintiff with his eyes open agreed to cancel the deed; and the simple agreement was that, if certain money was paid, he should obtain the house in question, and that, if the money is not paid, he should cease to have any right over the house. I agree therefore that the view taken by the learned District Judge, that the compromise superseded the deed of gift, and that the plaintiff is not entitled to maintenance. It appears, however, that the plaintiff has to a certain extent suffered hardship, as the defendant, who is his nephew has failed to maintain him. It may be noted that in the deed of gift it was not directly stated that the maintenance should be paid, but it contained a moral obligation that the defendant should pay the maintenance. For these reasons, we are of opinion that this appeal should be dismissed, but that each party should bear his own costs throughout. The order of attachment is cancelled.

Appeal dismissed.

Percival, J. C., and Rupchand, A. J. C.

First Appeal No. 36 of 1928, Decided on 24th January 1929.

Jiwandas Virbhandas—Appellant.

v.

Khemchand Ramdas—Respondent.

Civil P. C., O. 21, R. 29 — Revision — Civil P. C., S. 115—O. 21, R. 40 — Judgment-debtor applying to Court after issue of warrant without notice and before his arrest to enquire into his pauperism—S. 151 does not apply as he can still surrender himself in Court and move it to pass order under R. 40 (3) — O. 47, R. 1 — Ex parte order not operating as res judicata can be reviewed by successor of Judge making it—Civil P. C., S. 11.

Security for the full amount of the decree under O. 21, R. 29, being within the discretion of the Court, High Court will not interfere in revision, unless the discretion was improperly used.

Where a judgment-debtor against whom a warrant is issued applies to the Court for an enquiry into his pauperism after the issue of a warrant against him without notice and before he is arrested, it is not necessary to invoke the provisions of S. 151, as it is still open to him to surrender himself in Court and then to move it to pass an order under R. 40 (3).

Where the order is an ex parte order issued without hearing the opposite party, it cannot operate as res judicata and can be reviewed by the successor of the Judge who made such ex parte order: *A. I. R.* 1921 *P. C.* 11, *Dist* :

Dipchand Chandumal—for Appellant.
Kimatrai Bhojraj—for Respondent.

Rupchand, A. J. C. — The facts leading up to this appeal are somewhat as follows : The plaintiff-respondent obtained a decree against the defendant-appellant for Rs.5,500 odd on the strength of certain hundis executed by him in their favour. The defendant in his own turn filed a suit against the plaintiff for settlement of partnership accounts and valued his suit for the purposes of Court-fees at Rs. 5,100. The second suit is pending in the Court of the First Class Sub-Judge, Shikarpur. The plaintiff applied for execution of his decree for Rs. 5,500 and on certain statements made ex-parte, he was able to induce the then presiding Judge to issue a warrant against the defendant without notice. The defendant then put in an application purporting to be one under O. 21, R. 40 and S. 151, Civil P. C., requesting the Court to stay the warrant pending an inquiry into his pauperism. He alleged that besides his claim for settlement of partnership accounts against the plaintiff on which he expected to get a decree for a very large sum he had no other property and was not in a position to pay the decretal debt. On that application, the learned Judge passed the following ex parte order :

"Issue notice to the other side. Pay costs. Hearing 12th December 1927. If security for appearance is given, warrant to be stayed."

At a subsequent hearing, the learned Judge recorded some evidence adduced by the defendant and then adjourned it to 1st May 1928. On that day his successor passed the following order :

"Pleaders of the parties heard. O. 21, R. 40, Civil P. C. does not apply because no notice under O. 21, R. 37, Civil P. C., has been issued nor the judgment-debtor has been arrested under a warrant of this Court. Under O. 21, R. 29, Civil P. C., I order that security be given of the decretal amount within 7 days when proceedings will be stayed."

Now it is against that 2nd order that the present appeal has been filed. The first point argued by the learned pleader is that the learned Judge had no jurisdiction to review the order passed by his predecessor which operated as res judicata. He has relied upon the ruling in *Hook* v. *Administrator General of Bengal* (1). The obvious answer to that argument is that the first order was an ex parte order issued without hearing the opposite party and that it could not therefore operate as res judicata.

The next argument urged by him is that O. 21, R. 40, Civil P. C., provides only for two cases where the Court can hold an enquiry into pauperism of a debtor: first, where a notice is ordered to issue and the judgment-debtor appears in answer to that notice, and 2ndly, where a warrant is issued and the judgment-debtor is brought under arrest in execution of the warrant. It is said that there is a third case where a judgment-debtor against whom a warrant is issued applies to the Court for an enquiry into his pauperism after the issue of a warrant against him without notice and before he is arrested as in the present case and that there is no express provision in that behalf the provisions of S. 151 apply. But again this argument is not based on any substantial foundation. In such a case it is open to the judgment-debtor to surrender himself in Court and then move the Court to be released pending proof of his poverty. That being so there is no occasion for invoking the provisions of S. 151, Civil P. C.

We are not prepared to hold that the learned Sub-Judge was in error in holding that in the circumstances of this case where the appellant had not surrendered himself in Court the provisions of O. 21, R. 40 applied or that S. 151, Civil P. C. could be invoked. It is still open to the judgment-debtor, if so advised, to surrender himself before the learned Sub-Judge and to move him to pass an order under Cl. (3), R. 40, O. 21, Civil P. C.

The third point urged by the learned pleader is that the learned Judge was in error in asking for full security to be given under O. 21, R. 29. Now again there is in the first place no appeal provided by the Code against that order and in the second place, it was discretionary with the learned Judge to order that security should be given for the full amount of the decree and no grounds whatsoever exist for our holding that the learned Judge had so improperly exercised his discretion as to call for an interference. The appeal is therefore dismissed with costs.

Appeal dismissed.

(1) A. I. R. 1921 P. C. 11=48 Cal. 499=48 I. A. 187 (P.C.).

Percival, J. C., and Rupchand, A. J. C.

Misc. Appeal No. 33 of 1925, Decided on 22nd January 1929.

(*Pir Sidik*) *Mohomed Shah*—Appellant.

v.

Nihalchand and *others*—Respondents.

Civil P. C., Sch. 2, Rr. 1 and 2 — Court has no jurisdiction to refer disputes on award made by arbitrator outside Court so as to modify award.

When an award is made by arbitrator outside Court and afterwards an application is made to the Court under R. 20 to file the same, the Court has no jurisdiction to refer the disputes on the award to arbitration so as to modify the award inasmuch as it cannot itself do so, but has either to order the award to stand filed and to pass a decree in accordance with it or to order that the application to file an award be dismissed: *A. I. R.* 1925 *P.C.* 293, *Rel. on.*

Dipchand Chandumal—for Appellant.
Tolasing K. Advani—for Respondents.

Judgment.—The facts of this case are somewhat complicated. It appears that there were several disputes between three different sets of parties referred to as Banias, Othas and Pirs. The Othas and the Pirs claimed to be owners of certain agricultural land. They had disputes inter se as to their respective shares. Pending settlement of those disputes the Othas had leased an eight anna share in the land to the Banias and the Pirs had likewise given a lease of the remaining eight annas share to them. Some of the Othas executed a mortgage in favour of the Banias. They also borrowed certain money not secured by any mortgage. The litigation between the Othas and the Pirs resulted in the Othas getting six annas and ten pie share in the land. Thereafter they disturbed the possession of the Banias and subsequently transferred their six annas and ten pie share which they had succeeded by establishing in litigation to the Pirs. At that time the lease of the Banias was still continuing and the Pirs were anxious to get back the land and to have the unexpired portion of the lease cancelled. On the other hand, the Banias were anxious to get compensation for disturbance of possession and also further compensation for the cancellation of the lease. They also wanted payment of their secured and unsecured claims, against the Othas. The parties entered into one single reference for settlement of all those disputes in favour of one Walabdas who passed an award dated 29th January 1923.

According to that award he ordered that the unexpired period of the lease be cancelled and awarded a sum of Rs 15,000-0-0 from the Othas and the Pirs jointly as compensation both for disturbance of their possession during the continuance of the unexpired period of the lease which was cancelled. He also passed an award against the Othas for Rs. 3,500-0-0 in respect of the mortgage and for Rupees 5,000-0-0 in respect of the money claim. An application was made by the Banias to the Court under Sch. 2, R. 20, Civil P. C., for filing the reference and the award and for a decree being passed in terms thereof. Several objections were filed to the maintainability of the application and the validity of the award. On the date fixed for hearing all the parties except one Ibrahim, defendant 3 in the case who is an "Otha" put in a petition to the Court asking that their disputes be referred to the arbitration of Messrs. Gopaldas and Motiram who were acting as pleaders for them in those proceedings. This petition is in the ordinary form as prescribed and inter-alia recites as follows:

> "The parties who are all interested in the disputes have agreed to refer the matter to the arbitration of Messrs. Gopaldas and Motiram, pleaders, who will have power to confirm, modify, or alter the award in any manner they think just and proper. Defendant 3 is given up for the purpose of this reference."

On that petition the Court passed the following order:

> "Parties agree to the reference. Suit is referred to arbitrators. Award due on 25th August (1914)."

The arbitrators passed an award holding that the first award be filed subject to certain modifications namely that the amount of Rs. 15,000-0-0 Rs. 3,500-0-0 and Rs. 5,000-0-0 be reduced to Rs. 8,200-0-0 3,200-0-0 and Rs. 2,750-0-0 respectively. They also allowed certain instalments to the Othas and the Pirs which were different from those provided in the first award. Several objections were filed against this second award which have all been disallowed and the Court has passed a decree in terms of the first award as modified by the second award. It is against that decree that the Pirs have come to us in appeal. Now one of the main objections urged on behalf of the Pirs is that assuming that a petition to file an award under R. 20, Sch. 2, Civil P. C., is a suit within the meaning of R. 1 of that Schedule and that disputes arising in proceedings filed under the provisions of R. 1, the only award which the arbitrators could have passed in pursuance of the mandate issued to them by the Court was either to hold that the first award was valid and the decree should follow thereon or to hold that the application to file the reference and the award should stand dismissed. It has been urged that notwithstanding the wide powers conferred on the arbitrators by the parties to alter or amend the 1st award, the arbitrators had no jurisdiction to exercise such powers while acting under the reference issued by the Court and the Court

had likewise no jurisdiction to order that the 1st award as modified by the arbitrators do stand filed in these proceedings.

Now no doubt it lies ill in the mouth of the Pirs to raise this objection when they find that the second award is not so beneficial to them as they expected But the objection raised by them relates to jurisdiction of the Court and of the arbitrators to pass a decree in terms of the modified award and if that objection is well founded, we are afraid, we must give effect to it. Now the question of the scope of the authority of an arbitrator appointed by the Court under the provisions of R. 1 of Sch. 2, recently came up for consideration before their Lordships of the Privy Council in the case of *Ram Protab Chamria* v. *Durga Prosad Chamria* (1). In that case a suit had been brought on the original side of the Calcutta High Court, praying for a dissolution of a family partnership and accounts. During the pendency of that suit, the parties to the suit and one other person entered into an agreement for the settlement of all matters in dispute amongst themselves, that is to say, not only matters in suit but certain other subsidiary matters. They further agreed to accept whatever the arbitrators might decide with respect to the said disputes. In pursuance of that agreement they applied to the Court for an order of reference and praying in effect that the matters alluded to, in the agreement, arrived at, by them outside Court should all be referred to the arbitrators in accordance with its terms. On that petition, the Court passed the usual order to the effect that all matters in difference and others between the parties to the suit be referred to the persons named as arbitrators in the petition. The arbitrators sent in an award in Court which dealt with matters which were the subject-matter of the suit and also other matters. The award was held to be "otherwise invalid" within the meaning of Cl. 15 of the schedule. In dealing with the effect of the order of reference made by the Court and the jurisdiction of the arbitrators to make an award in pursuance thereof their Lordships have said :

"In their Lordships' judgment the decision of this appeal really turns upon the effect of that order properly interpreted.It was an order made in pursuance of Ss. 1 and 2 of Sch. 2 to the Civil P. C., 1908, and in the exercise of a power thereby given to the Court to refer to arbitration matters in difference in a suit defined by itself in the order of reference. It is incumbent upon arbitrators acting under such an order strictly to comply with its terms. The Court does not thereby part with its duty to supervise the proceedings of the arbitrators acting under the order. An award made otherwise than in accordance with the authority by the order conferred upon them, is, their Lordships can not doubt, an award which is "otherwise invalid" and which may accordingly be set aside by the Court under S. 15 of the same schedule."

If we examine the facts of the present case in the light of these observations what do we find? Had the disputes not been referred to arbitration the only legal order which the trial Judge could have passed was either to order the award to stand filed and a decree be framed in accordance therewith or to order the application to file the award be dismissed. It was not open to the trial Judge to vary the award, or to modify the award and pass a decree in terms of the modified award. If that be so, can it be said that the trial Judge had jurisdiction to issue a mandate to the arbitrators giving them jurisdiction to adjudicate upon points which he himself could not adjudicate in view of the nature of the proceedings which were then pending before him ? If he had no power to do so the consent of the parties either made outside Court or contained in the petition filed before the learned Judge asking him to refer the disputes to arbitration was of no avail. It is to be noted that the mandate issued by the learned Judge to the arbitrators is that the " suit is referred to them" that is to say, the points in dispute in the suit and nothing more. That the award can be modified or that it should be modified in that suit was not a point in dispute in the suit.

We think that the award cannot, therefore, be maintained as a valid award made in pursuance of the limited mandate issued by the Court to the arbitrators. It was argued in the lower Court that the award should be treated as an award made in pursuance of an oral reference made outside Court and be accepted as an adjustment of the disputes of the parties under O. 23, R. 3, Civil P.C.

(1) A. I. R. 1925 P. C. 293=53 Cal. 258=53 I A. 1 (P.C.).

This argument also found favour with the learned Judge below. He has said :

" assuming the agreement to be invalid as a reference it can still take effect as an agreement or lawful compromise by parties to abide by the decision of a third party."

He has relied upon the case of *Rajkumar Lal* v. *Bulak Miyan* (2), where the reference and the award in respect of certain execution proceedings were upheld as an adjustment. It would appear that in that case the judgment-debtor was arrested in execution proceedings on 8th January 1916, but he was released on his furnishing security. On 7th February 1916 the decree-holder and the judgment-debtor put in a joint petition stating that the disputes between them have been referred to three persons named in the petition. On 18th February 1916 these persons gave an award to the effect that the judgment-debtor should pay Rs. 83 to the decree-holder on the following day, and in the event of the decree-holder declining to accept it, the money be deposited in Court. On the following day the decree-holder put in a petition asking that the proceedings in execution might be pressed. The judgment-debtor then offered to pay the sum of Rs. 83 in Court and contended that the decree-holder could not recover anything more than that amount.

Now the facts as stated above are quite consistent with the reference and the award having been made outside Court. If that be so, there was no objection to the award being pleaded as an adjustment and no question would arise as to its being in excess of the mandate issued by the Court. The only point discussed in the case is whether the award could be pleaded as an adjustment in execution proceedings. The obvious answer to the argument of the learned Judge is that the arbitrators have not proceeded on an alleged oral reference outside Court but on the mandate issued by the Court and that it is, therefore, not open to any of the parties to plead that it is so based ; and we are not prepared to treat the award as based on any such oral reference. It is worthy of note that though the award which was the subject-matter of the appeal before their Lordships of the Privy Council was a fair and equitable award and there was a prior agreement in writing dated 11th May 1922 outside Court which was made between the parties to the suit and other parties who were not parties to the suit that the disputes between them be referred to arbitration, still no attempt was made to support the award on the ground that the prior agreement and the award constituted a valid adjustment of the suit.

In view of our finding on this main objection it is not necessary for us to go into the question whether the disputes arising in proceedings instituted under R. 20, Sch. 2 could be the subject of a valid reference under R. 1 or not and we wish to express no opinion on that point or on the further question whether in the circumstances of the present case respondent Ibrahim was a party interested in the subject-matter of the reference and could be given up for the purpose of the reference. It is no doubt true that a good deal is to be said in favour of the Banias. They have been kept out of their money for a long time and were it not for the fact that the Pirs and the Othas consented to refer the points in dispute to the pleaders of the parties and expressly empowered them to modify or alter the award, the objections filed by them against the first award would have been disposed of about four years ago. It has been urged and not without some reason that the Othas and the Pirs wanted a reduction of the amount awarded against them by way of equitable relief and that it was for that purpose that they induced the Banias to refer but subsequently raised certain technical objections in order to put off payment and to get further reduction and that they should not be permitted to do so. We are afraid that we cannot accede to this argument. All that we are prepared to do to help the Banias is to give directions so as to safe-guard their interests in the event of the Court holding that the first award was a valid award and one which should be filed under R. 21. We are told that the stay of execution of the decree was disallowed and it is likely that the Banias have been able to recover a portion of the amount due to them. If that is so we think that one of the conditions which

(2) [1917] 3 Pat. L. W. 146 = 42 I. C. 467.

we should impose is that the Othas and the Pirs should not get restoration of this money without giving security and that in the event of such security not being furnished the amount, if restored by the Banias should remain in Court pending the disposal of the objections to the first award. The other direction which we propose giving is to request the Judge below to dispose of the objections to the first award at as early a date as possible.

We have noticed that defendant 3 was given up in consequence of the second award. He is not now before us. We do not, therefore, wish to say any thing which might prejudice him. But we have no doubt that the learned Judge after due notice to defendant 3 will consider whether he still continues to be on the record for the purpose of the first award. With regard to costs, we think it is a fit case in which we should mulct the Pirs and the Othas with all costs throughout. We accordingly set aside the decree of the lower Court and direct the lower Court to proceed with the objections filed to the first award and we order that the Pirs and the Othas except defendant 3 should pay all costs of the lower Court and this Court upto date.

Decree set aside.

Rupchand, A. J. C.

Suit No. 612 of 1926, Decided on 18th February 1929.

Rambhabai—Plaintiff.

v.

Doongersi Nagji and *others*—Defendants.

Hindu Law—Maintenanee — Coparceners of different branches of joint family do not continue to be responsible for maintenance of widows of other branches though they separate without their consent—Widow instituting suit before partition for charge on property for her maintenance — Lis pendens applies to subsequent partition — Transfer of Property Act, S. 52 (Obiter).

The right of evidence is a right to a provision for residence and is included in the general right of maintenance : 4 *S. L. R.* 278, *Foll.*

Coparceners belonging to different branches of the joint family do not continue to be responsible for the maintenance of widows and of persons, who are entitled to a share belonging to another branch even though they do not make provision for them at the time of partition or obtain their consent to it : 35 *Mad.* 147, *Expl.*

Where a widow of a coparcener has instituted a suit for a declaration that her right of maintenance should be made a charge on the joint family property before partition, the doctrine of lis pendens would apply, and any partition which takes place subsequent to the institution of her suit cannot affect her right.

L. P. Ferro—for Plaintiff.

Kimatrai Bhojraj—for Defendants.

Judgment.—This is a suit in forma pauperis. The plaintiff is the widow of one Raghunath Nagji. She claims in this suit certain past maintenance and a declaration that she is entitled to future maintenance which should be made a charge on the joint family property and that she is entitled to reside in the family house. Defendant 1 is her husband's brother. Defendants 2 and 3 are his sons. Defendants 5 to 7 are the cousins of defendant 1 and their sons. Defendants 8, 9 and 10 are widows belonging to the same family. The plaintiff has based her case on the plea that all the defendants form members of a joint Hindu family and possess joint family property which has descended to them from a common ancestor, and that, therefore, she is entitled to a decree against all of them. The plaintiff has further claimed the return of her ornaments valued at Rs. 3,000. The defendants have inter alia contested her claim on several grounds. Their case is that defendant 1 and his cousins severed their joint family tie in the year 1906 and that after that date they messed and lived separately and carried on a separate business. In 1913 they executed a deed of release reciting the family history up to that date. According to that deed of release defendant 1 alone is liable to maintain the plaintiff.

From 1923 to 1924 or thereabouts, defendant 1 and the other defendants continued as tenants-in-common of certain ancestral properties. In that year defendant 1 and his cousin Tejsi who carried on business in partnership sus-

tained heavy losses. They received monetary help from the defendants Tikamji and Khimji and in consideration of such help they executed a deed of conveyance transfering their right, title and interest in the family property, which had up to that date remained undivided in favour of Tikamji and Khimji. The defendants deny that she deposited any ornaments with them, and say that the plaintiff is in possession of those ornaments and other property from which she can maintain herself and that her right for maintenance, if any, is against Doongersi only, and that she can not claim any relief against any of the other defendants or against the family property which has been validly transferred.

The following issues have been raised by the Court :

(1) " Was there on or about 3rd December 1906, a partition of joint family property as alleged in para. 6 of written statement of defendants 4 to 10 ?

(2) Has the family dwelling house referred to in para. 10 of the plaint become the sole and absolute property of defendants 4 and 6 for reasons alleged in para. 8 of the written statement of defendants 1 to 10 by virtue of alleged conveyance of 31st May 1922 ?

(3) What is the effect of the aforesaid two transactions on plaintiff's right of maintenance and residence ?

(4) Is the plaintiff entitled to a right of residence in the house referred to in para. 10 of the plaint ?

(5) Is the plaintiff entitled to receive maintenance and if so, at what rate and from whom ?

(6) What amount, if any, is the plaintiff entitled to recover on account of arrears of maintenance and from whom ?

(7) What amount, if any, is the plaintiff entitled to recover and from whom on account of her pilgrimage, funeral and other death expenses ?

(8) What is the amount of debts, if any, which the plaintiff has incurred ?

(9) Is the plaintiff entitled to a chargs on the property mentioned in para. 10 of the plaint on account of various sums claimed by her ?

(10) Did the plaintiff deposit ornaments mentioned in the schedule to the plaint or any of them with defendants 4 to 6 and what is the value thereof ?

(11) If so, what relief is she entitled to in respect of them ?

(12) What relief, if any, is the plaintiff entitled to ?

(13) General."

There is hardly any dispute about the facts which have been conclusively proved by documentary evidence. It appears from the recitals contained in the deed of release that one Umersi died about 60 years ago. He had seven sons, namely, Morarji, Nagji, Thakursi, Veiji, Ramji, Anandji and Jethabhai. Morarji, died about 22 years ago leaving his son Tikamji defendant 4 in the suit. Tikamji's son is Moolji defendant 5. Nagji died about 32 years ago leaving two sons Rughnath and Doongersi. Rughnath died about 25 years ago and the plaintiff is his widow. Doongersi is defendant 1 and his two sons are defendants 2 and 3. Thakursi died about 45 years ago leaving a son Jivraj, who separated from his brother prior to 1906 and whose heirs are not on the record. Velji died leaving no issue. Ramji left two sons Tejsi and Jadhowji. Tejsi died in 1925 leaving a widow defendant 10, and a son defendant 7. Jadhowji died about 20 years ago leaving his widow Jivibai, defendant 9. Anandji died about 25 years ago leaving as his widow defendant 8. Jethabhai died about 22 years ago leaving a son Khimji defendant 6.

After the severance of the joint family tie between the different branches of the family, Doongersi and Tejsi carried on business in partnership in Khataoo Makan Cloth Market in the name of Nagji Umersi, while Khimji and Tikamji carried on business in partnership in sundries in the name of Morarji Umersi, and also in cloth in the same name. The release deed Ex. 10/1 expressly provides that Doongersi has been and shall continue to pay Rs. 10 per month to the plaintiff for her maintenance. It has been proved by the evidence of Doongersi and the rent-book kept by him on behalf of himself and his tenants-in-common, that from 1906 to 1913 the amount of maintenance paid by him to the plaintiff was debited to his own personal account. He states that he likewise maintained the plaintiff up to 1922 when his business failed, and the entries for that period were in a book kept by Tejsi which is missing. For the purpose of

proving that even after the execution of the release deed the defendants continued separate, entries have been put in from the account of the parties from 1913 right up to 1924, to show that the firm consisting of Doongersi and Tejsi had monetary dealings with the firm of Tikamji and Khinji, and that in 1924 Tikamji and Khimji helped Tejsi and Doongersi with large sums of money, a part of which they borrowed from the banks. On 30th May 1922, Doongersi and Tejsi executed a sale-deed for the sum of Rs. 1,35,000 conveying half share in the properties owned by them as tenants-in-commons, to their cousins Tikamji and Khimji. It has been proved from the entries in the books that over and above this amount for which they sold their half share they are liable to Tikamji and Khimji for a further sum of about Rs. 35,000. Against this mass of evidence, we have only the word of the plaintiff that all the defendants continued as members of the joint Hindu family up to the date of suit and continued to maintain her out of the joint funds. It is, therefore, abundantly clear that the plaintiff can not succeed on the case as set up by her in the plaint. Her suit for maintenance as against the joint family property is, therefore, liable to be dismissed in limine.

Certain points have, however, been urged on her behalf. I shall deal with them though they do not strictly arise on the pleadings. It is contended in the first place that as the plaintiff's husband died at a time when all the defendants formed members of a joint Hindu family, her claim for maintenance and residence was a charge upon the family property, at least in the sense that it was incumbent upon the members of the different branches of the joint family property to maintain her so long as they remained joint and at the time of partition either to make due provision for her maintenance or at any rate to obtain her consent to a partition which made no such provision but provided that only one member of the joint family should maintain her. My attention has been invited to the case of *T. Subbarayadu Chetti* v. *T. Kamalavalli Thayaramma* (1), and to the passage of West and Buhler at p. 791, which has been referred to in that case. Now there can be no doubt that so long as the family continues to be joint, a widow of a coparcener has to look up to the manager of the family for her maintenance. It is therefore open to her to enforce her right against any part of the joint family property in the hands of such manager. In that sense her right is enforceable against the whole family property and against every member of the family who claims a joint interest in such property. Where she has instituted a suit for a declaration that her right of maintenance should be made a charge on the property before partition, the doctrine of lis pendens would apply, and any partition which takes place subsequent to the institution of her suit cannot affect her right. It is no doubt true that in the above case their Lordships did not proceed on the doctrine of lis pendens but on certain general principles discussed therein. But it is worthy of note that the learned Chief Justice was careful in stating that he preferred to deal with the facts of that case which had actually arisen and that he was not prepared to go into the further question as to the effect of a partition taking place before the institution of a suit by the widow for a declaration of her right of maintenance and residence. That case is therefore no authority for the proposition that there is an obligation upon the members of the joint family belonging to different branches to make due provision for the maintenance and residence of the widow of a coparcener of one of the branches. The passage in West and Buhler reads as follows :

" Other liabilities, that is provision for the maintenance or portions of persons not entitled to shares, may be distributed by agreement amongst the cosharers. But the estate at large is liable at least in the hands of the members of the family making a partition and coparceners who desire to limit their responsibilities must obtain the assent of the persons mentioned. "

Though this passage is entitled to great weight, it does not expressly provide that the responsibilities of one branch continue for the maintenance of the widows of another branch. Further-more it does not appear to be supported by any authority either from the Hindu texts or from the case law. If this passage is intended to mean that coparceners belonging to

(1) [1912] 35 Mad. 147=21 M.L.J. 493=10 I.C. 347=(1911) 2 M.W.N. 148.

different branches continue to be responsible for the maintenance of widows and of persons who are entitled to a share belonging to another branch, unless they make adequate provision for them or obtain their consent, I am of opinion that it cannot be accepted as sound law, and is one which is likely to lead to anamolous results. For instance where a coparcener dies leaving a widow and a son, it is somewhat difficult to see how his brothers can compel the son to make separate provision for the maintenance of the widow as a condition precedent to effecting a partition on pain of rendering themselves liable to the widow at a future date in the event of her son getting bankrupt. Again it is difficult to see how coparceners belonging to one branch can be compelled to make provision for the maintenance of a person who is congenitally deaf and dumb and who is living jointly with his own brother, both brothers belonging to different branches, and to run the risk of maintaining such person in the event of his brother becoming a bankrupt notwithstanding the fact that the partition effected by them was absolutely fair and square. It is hardly necessary to develop this point any further as it would appear that the plaintiff knew for no less than 18 years that Doongersi had separated from his cousins and she remained content to receive her maintenance from him. It is not open to her now to contend that as her assent was not obtained to the partition, the members of the different branches continue to remain liable for her maintenance. If she objected to the arrangement made for her, it was her duty to have sued for declaration of her rights at once and probably her maintenance would have been made a charge on the share of Doongersi in the ancestral property. Not only did she remain silent but received increased allowance from Doongersi in subsequent years. She is clearly estopped from falling back on the members of other branches after Doongersi has become a pauper.

The next point urged is with regard to her right of residence. My attention has been invited to a passage in Gour's Hindu Law, p. 481, S. 84, and the commentaries thereon. It has been argued that as the plaintiff was living in the family house up to the date of the sale to the knowledge of Tikamji and Khimji, her right of residence cannot be defeated by the sale to them of the right, title and interest of Doongersi. On the other hand, my attention has been invited to a decision of this Court on its High Court side in the case of *Thanwerdas* v. *Mt. Vani* (2), which has been followed with approval by this Court on its High Court side in *Kawalmal* v. *Issribai*, *A. I. R.* 1926 *Sind* 135. In the case of Thanwerdas, Pratt, J. C., said :

> " The right of residence is therefore a right to a provision for residence and is included in the general right of maintenance. Like the right of maintenance it is an equitable and not a legal right . . . It is an equity binding on the conscience of the coparceners, but it may be defeated by bona fide alienation which is not so justified or which is merely a pretext to shuffle off the obligation of maintenance. In the case of an improper alienation the equity is enforceable against the alienee under the same conditions that apply to any other equity i. e., the transferee takes subject to the equity unless he has taken for value and without notice of the right. This is the law laid down in *Lakshman* v. *Satyabhamabai* (3) and now codified in S. 39, T. P. Act. "

Whatever may be the law in force outside Sind, I am bound to give effect to this ruling. If the right of residence of the plaintiff is included in her general right of maintenance, it would appear that unless it could be proved that the transfer by Doongersi of his interest in the family property was a mere pretext to shuffle off the obligation of her maintenance or was not otherwise bona fide, she has no right of residence either. If that be so, there is no doubt that in this case there is no question that the alienation was in no way brought about with the object of defeating her rights. It was a bona fide alienation made at a time of great need when on account of the fluctuation in exchange, Doongersi and Tejsi had suffered heavy losses in their trade and were obliged to transfer their property to avoid insolvency. It is no doubt true that Doongersi still continues to live in the family house and receives an allowance of Rs. 100 from Tikamji and Khimji who are both well off. But Tikamji and Khimji have done this out of charity, and as a matter of fact, out of the same motives they have throughout the suit offered to maintain the plaintiff.

(2) [1910] 4 S.L.R. 278=10 I.C. 985.
(3) [1877] 2 Bom. 494.

but under the evil advice of her brother she has refused to accept their offer and has insisted upon her legal rights, if any, being declared by the Court. Every endeavour made in Court to make her realize her position has failed, and though I regret very much that my decision might result in her having to depend for her maintenance on the charity of others, I am afraid I cannot help it. I hold that she has no right to reside in the family house as no part of it belongs at present to Doongersi. The plaintiff's right to her maintenance by Doongersi depends on his being in possession of ancestral property. If the plaintiff failed to sue for a charge being created on such property before it was sold in payment of Doongersi's debts, the plaintiff is without any remedy and her suit must fail. She has claimed maintenance at the rate of Rs. 100 per month and has claimed certain other large sums of money. As evidence has been led on those points, I propose to deal with them.

It appears that though up to 1913 the plaintiff received only a sum of Rs. 10 per mensem from Doongersi, her maintenance was increased from time to time and in 1924 it was increased to Rs. 25 per month. The cost of living is at present somewhat less. A sum of Rs. 20 per month would at present be ample for her; she is expected to cook for herself, and though one of the witnesses said that she would require a person to buy foodstuffs for her and that this would cost her Rs. 10 per month, I am inclined to the view that she can easily arrange to get her foodstuffs without any such charge. The witnesses called on her behalf seemed to be inclined to exaggerate the cost of expenses, but on the whole I am inclined to the view that Rs. 20 would be sufficient for her maintenance. I am also inclined to the view that she would require Rs. 5 more to secure a room for herself to live in.

With regard to her claim for expenses of pilgrimage, I think there is no evidence to show that there is any obligation on a widow to go on pilgrimage more than once. She has admittedly been to pilgrimage on one occasion, and therefore she is not entitled to a further provision in that behalf.

With regard to provision being made for her funeral caste feast, I think it is clear from the evidence that this is not obligatory and that she is not entitled to the same.

With regard to the return of her ornaments, it is sufficient to observe that except her own word, there is no evidence to prove that she handed over ornaments to any of the defendants and they have denied receipt thereof. I hold that she has failed to prove that she entrusted the ornaments to the defendants. I shall now proceed to record my findings on the issues:

Issue 1:—In the affirmative;

Issue 2:—In the affirmative;

Issue 3:—The effect of these two transactions is that the plaintiff's right, if any, for maintenance was against the property allotted to defendant 1 at the partition and that all that she is entitled to in respect of her claim for residence is a fair allowance for getting on rent a house to live in;

Issue 4:—In the negative.

Issue 5:—The plaintiff is not entitled to receive maintenance as her suit is for maintenance and subsequent to the sale by Doongersi there is no evidence to show that there is any part of the ancestral property from which she could receive an allowance. (Part 2):

That if she has any right to receive any maintenance including residence, it is at the rate of Rs. 25 per month and from defendant 1;

Issues 6 *to* 8:—As there is no property in the hands of defendant 1 and as the plaintiff has no right to fall back on the property of defendants 3 and 4, no finding is necessary on these issues.

Issue 9:—In the negative;

Issue 10:—In the negative;

Issue 11:—In the negative;

Issue 12:—The plaintiff is entitled to no relief.

Issue 13 :—The plaintiff's suit is dismissed.

As the defendants do not press for costs, I make no order as to costs.

Suit dismissed.

Percival, J. C., and Rupchand, A. J. C.

First Appeal No. 113 of 1925, Decided on 1st February 1929.

Dayaram Gidumal—Appellant.

v.

Nabibux and *others*—Respondents.

Contract Act, S. 74—S. 74 does not penalize party making concession to debtor by accepting smaller sum than due if paid in strict conformity to concession — Consent decree providing, in default of payment by defendant on certain date of smaller sum than due, defendant to pay larger sum claimed and due to plaintiff — Time is whole consideration of such contract and such decree cannot be penal.

Section 74 does not penalise a party who is prepared to make a concession in favour of his debtor by accepting a smaller sum than is due to him provided it is paid in strict conformity of the concession shown to him.

Where a consent decree provides that in default of payment by the defendant on certain dates of a certain smaller sum of money than is claimed to be due, the defendant shall pay to the plaintiff the larger sum claimed and which is really due plus the costs of the suit with interest at 9 per cent. per annum. Time is not only the essence of such contract but it is also its whole consideration and such decree cannot amount to a penalty which means something which the debtor is to pay over and above his original liability as a punishment : *Thompson* v. *Hudson*, (1869) 38 *L. J. Ch.* 431; *Ex parte Burden, In Re Neil*, (1881) 16 *Ch. D.* 675, *Rel. on*; *A. I. R.* 1924 *Pat.* 387, *Cons.* and *not Foll.*; 8 *M. I. A.* 239 *Dist.*; *Ford* v. *Earl of Chesterfield*, 105 *R. R.* 201; *A. I. R.* 1928 *P. C.* 27, *Ref.*; 10 *Cal.* 305 (*P. C.*), *Expl.*

Dipchand Chandumal—for Appellant.
Chubermal Valiram—for Respondents.

Rupchand, A. J. C.—This appeal arises in execution proceedings of a consent decree which provides as follows:

"1. That the defendant do pay to the plaintiff Rs. 5,000-0-0 on account of the entire claim and costs in two equal instalments, the first being payable on 15th January 1924, and the 2nd on 15th January 1925. That in case of default in the payment of any of the instalments the defendants do pay to the plaintiffs the whole amount of claim viz., Rs. 9,000-0-0 and costs of the suit amounting to Rs. 729-6-9 with interest at 9 per cent. per annum."

The trial Court held that the defendants had made default in payment of the first instalment, and that the payments made by them to plaintiff 3 of Rs. 2,000-0-0 on 2nd February 1924 and Rs. 500-0-0 on 11th February 1924, towards the first instalment were not only out of time, but were not a valid discharge of their liability to pay the amount to the plaintiffs who were jointly entitled to receive the same; but held that as the decree provided for a penalty, it was open to the Court to relieve the defendants of such penalty. The defendants having paid the second instalment in time during the pendency of these proceedings, the Court ordered the defendants to pay an additional sum of two third of Rs. 2,500-0-0 with interest due thereon to plaintiffs 1 and 2 in full satisfaction of their decree.

The main point raised before us is whether the decree provides for a penalty. Now, there is a broad distinction between an agreement which provides that in default of payment of a certain amount on a particular date or dates, the defaulting party shall pay a much larger amount than is admittedly due by him, and an agreement which provides that in default of payment on certain dates of a certain smaller sum than is admitted to be due or is claimed to be due, the defaulting party shall be liable to pay the larger sum admitted or claimed to be due. In the former case, the provision for payment of the larger sum is clearly in the nature of a penalty. In the latter case, where the larger sum is admittedly due the agreement to enforce the payment of such sum does not come within the purview of that expression. It would appear that where a larger sum is claimed, but not admitted, the question whether such larger sum was agreed to be paid in the event of default is a penalty or not would greatly depend upon the nature of such claim and on what transpired at the time of

the agreement to accept the smaller sum in satisfaction thereof.

The leading English case on this point is *Thompson* v. *Hudson* (1). In that case, *H* was indebted to *T* and *S* on several accounts to ascertain which three separate suits were pending against him. In one suit a final decree was made fixing the liability of *H* on one account and ordering him to pay by a day named. *H* wanted further time and it was agreed between him and *T* and *S* that the terms of the order as to payment should be varied, *H* agreeing not to appeal against the final decree already made, to admit the amounts claimed in the other two suits, and on a certain day to pay a fixed sum and to execute a mortgage, for securing payments in a particular manner of another sum; and *T* and *S* agreed thereupon to take a lesser sum than they claimed with a proviso that if *H* made any default they should be at liberty to recover their whole debt. He carried out his agreement in part and made default in payment of the amount due by him according to the manner stipulated and on *T* and *S* enforcing payment of the full amounts claimed by them pleaded that the proviso in that behalf was a penalty which could not be enforced in equity. That proviso was in the following terms;

"In case Lord Downe, or the defendants shall not pay and secure the said sums to the plaintiffs in manner aforesaid, or if a good and satisfactory mortgage shall not be executed to the plaintiff for the said sum of £ 25,613 15s. and interest, or if the defendants shall fail in performing all or any of the stipulations on their part hereinbefore contained, then the plaintiffs shall be at liberty to recover the said principal sums, interest and costs decreed or claimed to be due to them in the said several suits, and to adopt all such proceedings in the said several suits or otherwise for aiding their recovery of their said several claims as they may be advised."

It was held that the plea that the said proviso was in the nature of a penalty could not be sustained. At p. 441 Lord Westbury has observed as follows:

"In answer to the questions which they were required to answer in the chambers of the Master of the Rolls they thought that it was very rational and very right to say, if a creditor, tells his debtor: 'provided you pay me half the debt, or two-thirds of the debt, on an appointed day I will release you from the rest' and will accept the money so paid in discharge of the whole debt, but if you do not make payment of it on that day, then the whole debt shall remain due to me and I shall be at liberty to recover it'. There would be no doubt at all that the proposition was both reasonable and accordant with common sense. But the principal has not been accepted by the two tribunals before which the case has been heard. "The Master of the Rolls appears to have thought that the residue of the debt in the case I have put would be converted into a penalty, and that the penalty could not be enforced. It is impossible to hold that money due by contract can be converted into a penalty. A penalty is a punishment, an affliction, for not doing something. But if a man claims to be entitled to receive at a future time, on the default of his debtor, that which he is now entitled to receive it is impossible to understand how that can be regarded as a penalty. I have not, therefore, the least hesitation in stating that, if the Master of the Rolls is rightly reported, there was a strange confusion at the moment prevailing in his Lordship's mind, and that it could not have been present to him at the moment when he delivered his judgment that the rest of the debt still remained due by contract, and that what was due by contract could not be a penalty."

At p. 435 the Lord Chancellor has said:

"It is equally clear on the other hand that where there is a debt actually due, and at the time when the debt becomes due and is not paid, an agreement is entered into for granting to the debtor further indulgence, and the creditor is willing to allow him certain advantages and deductions from that debt as well as to extend the time for its payment, if adequate and proper security in the mind of the creditor be afforded him as his part of the bargain in respect of which he is to make these concessions then it is perfectly competent for the creditor to say: "If the payment be not made mode et forma as I have stipulated, then forthwith the right to the whole original debt shall revert to me, and it shall be open to me to proceed and to exercise all those powers which I have for compelling payment of the original debt; in other words, I am entitled to be replaced in the position in which I was when this agreement which has been broken was entered into. Therefore, as far as the law of the case is concerned, there can be no difficulty in the matter."

In this case *H* was disputing the validity of the final decree passed in one suit and the amount claimed in the other two suits, but in consideration of the agreement to pay a small sum on certain conditions he waived his right to file an appeal in the suit which was decreed and submitted to decrees for the sums claim

(1) [1869] 38 L. J. Ch. 431=4 H. L. 1.

ed in the other two suits, and he was made to pay the said sums.

In the later case of *Ex parte Burden In re Neil* (2) a creditor who had issued a debtor's summons in respect of a judgment debt of £344 agreed to accept a cheque for £105 and three bills of exchange for £50 each accepted by a third party, and on payment of the cheque and bills in due course to give a receipt in full settlement of the judgment debt, but that in default of payment of any or either of the cheque or bills, the creditor was at liberty to proceed for the full amount. The Court consisting of James Cotton and Lush, L. J. J., unanimously held that the creditor was entitled to proceed for the full amount. Cotton, L. J. expressed his view thus :

"It is said that the provision for the revivor of the original debt is in the nature of a penalty. I know of no case in which the equitable doctrine about penalties has been applied to a case in which a creditor agrees to reduce the amount of his claim on certain conditions but that on the failure of the debtor to fulfil any one of those conditions the original rights of the creditor shall revive, and in my opinion the doctrine ought not to be applied to such a case."

Lush, L. J., has expressed the same view in different terms as follows :

"Is there any equitable ground for relieving the debtor? It has been argued that the provision for the revivor of the debt is a penalty. I understand penalty to be something which a debtor is to pay over and above his original liability, as a punishment. But that is not so in the present case."

It would follow from both these cases that where a party claims to be entitled to receive a larger sum which is really due to him, in the event of default in payment of the smaller sum which he has agreed to take subject to certain conditions, the claim for money really due to him cannot be converted into a penalty which means something which the debtor is to pay over and above his original liability as a punishment, and no such question can therefore arise.

Now, it is no doubt true that S. 74, Contract Act, has done away with the distinction between a penalty and liquidated damages, but there is nothing in that section or in the illustrations thereto to show that it was ever intended to lay down any different law than was laid down in the two cases cited above, and to penalize a party who was prepared to make a concession in favour of his debtor by accepting a smaller sum than was due to him provided it was paid in strict conformity of the concession shown to him.

Our attention has been invited to *Mt. Nand Rani Kuer* v. *Durga Das Narain* (3), where a compromise decree provided that if the defendant paid to the plaintiff Rs. 1,000-0-0 immediately and Rs. 12,000-0-0 on or before 31st March 1923, the claim of the plaintiffs would be discharged in full, but that on failure to pay the above instalments, the plaintiff would be entitled to realize her full claim for Rs. 20,989-9-0 with costs and future interest, the defendants had made default in payment of Rs. 12,000-0-0 on the due date, the Court condoned the delay.

It appears that the attention of their Lordships was not drawn to the above decisions. The judgment is a short one and all that it says on this point is :

"On the other hand, it seems to be now settled that where the agreement is for the payment of money on a prescribed date, and that upon default of payment on that date money or land is to be forfeited, time is not of the essence of the contract."

Now, these observations are perfectly correct, and perfectly intelligible, if they are applied to a case where the party in default is made to pay a larger sum than is due by him. But with all respect, I fail to see how time could be treated to be a non-essential term in the contract in the case where the creditor agrees to forgo part of his admitted claim provided he gets the lesser sum on a particular date. In such a case time is not only the essence of the contract, but the whole consideration of it. It is in consequence of the promptness of payment of a part of the debt at once that the creditor agrees to forgo the remainder, and it is not a case in which equity relieves against time, for if it did, it would be

(2) [1881] 16 Ch. D. 675=29 W. R. 879=44 L. T. 525.

(3) A. I. R. 1924 Pat. 987=2 Pat. 906.

volating its rules, as per Master of the volls in *Ford* v. *Earl of Chesterfield* (4).

Our attention has also been invited to the case of *Ram Gopal Mookerjea* v. *Samuel Masseyk* and *Thomas J. Kenny* (5); but in that case the point which their Lordships were required to adjudicate upon, was whether there had been any failure by the respondents in the substantial performance of the contract and if there had been any default to whom such default was attributable (p. 258). In that case the offer of payment had been made in time by the respondents but it was urged before their Lordships that that offer was no valid offer on three grounds: first, that the offer did not include the interest which ought at that time to have been paid, second, that the person to whom money was offered had no authority to receive money on behalf of the appellant, and third, that the respondent was bound to seek out the appellant on the date of payment and to tender him the exact amount and interest then due (p. 259). As to the first objection their Lordships observed that the omission to include interest arose from a misapprehension of the ambiguous words of the agreement, and that such omission was not the reason why the money was refused. As to the second objection, their Lordships observed that they were by no means satisfied that the person to whom the money was tendered had no authority to receive the money As to the third, it was said that there seemed to have been uncertainty on both sides as to the place where the ikrarnamah was to be produced and the money paid. After discussing the evidence their Lordships held that they were satisfied that there was a bona fide endeavour on the part of the respondent fairly to perform his agreement.

The case of *Ford* v. *Earl of Chesterfield* (4), was cited before their Lordships as good authority but an attempt was made to distinguish it on the ground that in the case before their Lordships a third person had undertaken the liability of the debt and to incur the penalty. But the judgment of their Lordships of the Privy Council is silent on that point. It cannot therefore for a moment be suggested that the principle laid down in *Ford's* case was considered as inapplicable to India.

The case of *Rai Balkishindas* v. *Raja Run Bahadursing* (6), is an authority for the proposition that a penal clause contained in a consent decree may be relieved by the Court, though it does not so expressly decide, and proceeds upon that assumption. But it goes no further and if carefully analysed, it, on the contrary, helps the plaintiffs to a certain extent. In that case certain instalments were allowed on certain conditions. Art. 2 of the solehnamah provided for payment of interest at eight annas per cent. and further provided for the amounts paid being appropriated in a certain manner and how they were to be paid. The third article which is the important one ran as follows:

"If the first instalment be not paid on 30th Bhadon 1281 Fasli, the two consecutive instalments be not paid, then the plaintiff shall have the power to take out execution of the decree and realize his entire decretal money with interest at the rate of one rupee per cent. per mensem from defendants and their properties. In case of default, the decree-holder shall be entitled to take out execution, and realize interest on the entire decretal money from the date of such default to that of realization, at the rate of one rupee per cent. If the first instalment be not paid on 30th Bhadon 1281 Fasli, then the decree-holder shall have the power to realize the principal with interest at the rate of one rupee per cent. per mensem from the date of this solehnamah, to which your petitioners, defendants, shall have no objection. If at any time within the term defendants desire to pay any sum over and above Rs. 30,000-0-0 the plaintiff shall have no objection to receive the same."

In dealing with the effect of these different clauses in the decree, at p. 165 it is said:

". . . their Lordships are of opinion that the construction of the decree was substantially correct, though they do not concur with the High Court that the payment of a double rate of interest was in the nature of a penalty. The solehnamah was an agreement fixing the rate of interest, which was to be at the rate of 6 per cent under certain circumstances, and 12 per cent. under others."

And at p. 170 it is said:

(4) 105 R. R. 201.
(5) [1860] 8 M. I. A. 239=2 W. R. 43 (P.C.).
(6) [1884] 10 Cal. 305=10 I.A. 162=13 C.L.R. 392=4 Sar. 465 (P.C.).

"It is scarcely necessary to refer to the argument that the stipulation for payment of interest at 12 per cent. per annum upon the whole decretal money was a penalty from which the parties ought to be relieved. It was not a penalty, and even if it were so, the stipulation is not unreasonable, inasmuch as it was a mere substitution of interest at 12 instead of 6 per cent. per annum in a given state of circumstances."

It would, therefore, appear that the mere fact that a higher rate of interest was provided by a consent decree, would not necessarily render the payment of such higher rate a penal rate. Different clauses of the decree must needs be construed as a whole; *Bissessar Das Daga* v. *Emanuel Vas* (7). If both the clauses of the decree in suit are construed together, it would appear that it was intended to provide that there was to be a decree for the whole amount due with interest and costs, but that if Rs. 5,000-0-0 was paid in certain instalments no further sum was to be recovered and that it proceeded on the admission that the sum claimed was really due to the plaintiffs.

No attempt has been made to prove that Rs. 9,000-0-0 was not the sum really due or that the claim in suit was exaggerated and so excessive that the respondents could not possibly have agreed to a decree for that amount except on the basis of the excess over Rs. 5,000-0-0 being by way of a penal provision for non-payment of the amount really due by the defendants on the dates stipulated by them. On the contrary, it would appear that the sum of Rs. 9,000-0-0 was approximately the amount justly due by the defendants and that the defendants were securing a substantial concession by agreeing to pay the sum of Rs 5,000-0-0 promptly. A reference to the pleadings makes it abundantly clear that the minimum sum which the plaintiffs bona fide believed to be due was Rs. 9,000-0-0. They had asked for a decree for this amount or such further sum as was found due to them. The respondents were the accounting parties and had suppressed their books. A commissioner had been appointed to ascertain what amount should be decreed to the plaintiff, and there was a chance of the defendants being made to pay more than Rs. 9,000-0-0. Lastly the defendants 2 were minors, and the Court's sanction was duly obtained before the compromise decree was passed. It is hardly believable that the Court agreed to be a party to a consent decree which rendered the minors liable to a penalty of paying about Rs. 5,000-0-0 on a just claim of an equal amount, unless the amount justly due was paid in two equal instalments within a period of about eighteen months from the date of the decree which was 15th May 1923. If, on the other hand, it is borne in mind that as the defendants were agriculturists and the recovery of the money under the provisions of S. 29, Deccan Agriculturists Relief Act, would mean any amount of delay in its recovery, the plaintiffs were prepared to make a substantial reduction of the amount due provided the defendants paid the sums agreed upon on the stipulated dates. I am of opinion that on a true construction of the decree read as a whole, and in the light of the other circumstances of the case, the decree was not a penal decree and that it could not therefore be relieved against, and the decree of the lower Court cannot therefore be maintained. The defendants have paid Rs. 2,500-0-0 to plaintiff 3 and have deposited a further sum of Rs. 2,500 0-0 in Court. The share of the plaintiff 3 in the full amount decreed is over Rs. 3,000-0-0. The defendants are therefore entitled to full credit for Rs. 2,500-0-0 paid to plaintiff 3, the plaintiffs being at liberty to settle their equities inter se.

I hold that plaintiffs 1 and 2 are entitled to proceed with the execution application under O. 21, R. 15, Civil P. C., for recovery of the full amount of Rs. 9,000-0-0 and costs as provided in the decree less Rs. 2,500-0-0 paid to plaintiff 3 and Rs. 2,500-0-0 and such further sum as has been deposited in Court with interest at the stipulated rate, such interest being charged on the sums actually due from time to time. I would accordingly allow this appeal and order the learned Judge below to deal with the execution application according to law and in the light of the above findings. Taking into consideration all the circumstances of this case, I would order that each party should bear his own costs throughout.

Percival, J. C.—I concur.

Appeal allowed.

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