CIVIL REFERENCE

Before Bhandari, C. J., and Falshaw, J.

THE COMMISSIONER OF INCOME-TAX, DELHI, AJMER, RAJASTHAN AND MADHYA BHARAT, DELHI,—
Petitioner

versus

TEJA SINGH,—*Respondent*

Civil Reference No. 15 of 1953

1954

Nov., 4th

Income-tax Act (XI of 1922)—Sections 18A(3) and 28(1)—Whether a person who fails to comply with sections 18A(3) can be punished under section 28(1)—Interpretation of statutes—Taxing statutes—Rules of interpretation stated

Held, that a person who fails to comply with the provisions of section 18A(3) cannot be punished under the provisions of section 28.

Held also, that if a statute enumerates the circumstances under which liability to punishment is to arise, it can arise only if those circumstances exist and in no other. Where a statute imposes a tax which is in effect a penalty it should be strictly construed; if it is capable of two reasonable but contradictory constructions, one in favour of the tax-payer and other in favour of the State then the contruction which operates in favour of the tax-payer should be preferred. The Court should be slow in enlarging the scope of a provision by implication or analogy; and if a well-founded doubt arises whether a particular act is or is not an offence, the doubt should, if possible, be resolved in favour of the tax-payer.

property situate in India but the preambles to the various Acts which have been enacted in this behalf make it quite clear that this was done with the object of safeguarding the property belonging to persons who had migrated to Pakistan and who were not in a position to look after it themselves. Every Custodian was empowered to carry on the business of the evacuee, to take action for the recovery of monies due to the evacuee and for payment of debts due from the evacuee, to make contracts in the name of the evacuee and to institute, defend or continue any legal proceedings on behalf of the evacuee. He was at liberty to grant or cancel leases of evacuee property but was expressly forbidden from selling any immovable property or any shop or business establishment or any undertaking belonging to an evacuee except under orders of the Provincial Government. It was not till the year 1954 that the Central Legislature enacted "The Displaced Persons (Compensation and Rehabilitation), Act, 1954", a measure which constituted for the first time a compensation pool which was to consist of evacuee property acquired by it on payment of compensation, of certain balances lying with the Custodians, of certain contributions made by the Central Government, and of such other assets as were to be prescribed by rules made under the Act. Government reserved to themselves full power to acquire or not to acquire any evacuee property for the purpose of this pool. The size and capacity of this pool were completely unknown and could be varied from time to time. No particular person was entitled to a particular share in the pool; he was entitled to receive only such proportion of his verified claim as was admissible to him under the rules framed by Government. He was not concerned with the size of the pool or with what was taken out of it or what was put into it. Government alone were under an obligation to see that the size of the pool was sufficiently large to enable them to meet their obligations. In these circumstances, it is idle to contend that the rights of the petitioner have been prejudicially affected by

In the matter of Shri Ishar Singh, Grover v. Union of India, etc.

Bhandari, C.J.

reason only of the fact that some evacuee property has been released under the provisions of section 16. The petitioner has, in my opinion, no right whatsoever in evacuee property, and if he has any such right, the right is very remote. Courts are extremely reluctant to invalidate legislation when the petitioner's right is considered to be remote. Thus in *Fairchild* v. *Hughes* (1), a voter sought unsuccessfully to enjoin the Secretary of State from proclaiming ratification of the Nineteenth Amendment, and in *Massachusetts* v. *Mellon* (2), the interest of a tax-payer of the United States in the funds of the federal treasury was held too minute and conjectural to justify him in contesting an Act of Congress authorising distribution of public funds. Moreover, the petitioner is neither a member of the class to which preferential treatment has been accorded nor a member of the class to which such treatment has been denied. It seems to me, therefore, that it is not open to him to come forward and plead the cause in a case in which he has no direct interest. One who does not belong to the class that might be injured by a statute, cannot raise the question of its invalidity (*Red River Valley National Bank* v. *Graig* (3), *Darnell* v. *Indiana* (4), *Standard Stock Food Company* v. *Wright* (5), and *Oliver Iron Company* v. *Lord* (6).

Again, it is contended on behalf of the petitioner that he has come to this Court not under the provisions of Article 32 of the Constitution for the enforcement of fundamental right but under the provisions of Article 226 for the issuance of an appropriate writ. According to him, the language of Article 226 is much wider than that of Article 32, for the expression "for any other purpose" appearing at the end of the Article empowers a person to ask for a writ not only for the enforcement of any of the rights conferred by Part III but also for challenging the validity of a statutory enactment. In any case, it is contended, a writ can be

(1) 258 U.S. 126
(2) 262 U.S. 447
(3) 181 U.S. 548
(4) 226 U.S. 390
(5) 225 U.S. 540
(6) 262 U.S. 172, 180

granted *ex debito justitiae* to quash proceedings which the Court has power to quash. Our attention has been invited to *Queen* v. *The Justices of Surrey* (1), *The King* v. *The Groom* (2), and *King* v. *Richmond Confirming Authority* (3). In the first of these cases the learned Judges observed as follows:—

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> "I entirely concur in the proposition that, although the Court will listen to a person who is a stranger, and who interferes to point out that some other Court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that is not *ex debito justitiae*, but a matter upon which the Court may properly exercise its discretion, as distinguished from the case of a party aggrieved, who is entitled to relief *ex debito justitiae*, if he suffers from the usurpation of jurisdiction by another Court."

These authorities can be of no help to the petitioner. In the first place, these observations were made in connection with an application for the issue of a writ of *certiorari*. This writ issues out of a superior Court and is directed to the Judge or other officer of an inferior Court requiring him to transmit to the Superior Court the record of the proceeding pending in the inferior Court. These observations cannot be regarded as a guide in the present case, for no matter is pending in an inferior Court, and no application has been made for the removal of that matter to this Court. In none of three cases mentioned above was the validity of an Act challenged by a stranger.

For these reasons, I am of the opinion that the petition ought to be dismissed. I would order accordingly.

FALSHAW, J.—I agree.

Falshaw, J.

(1) (1870) 5 Q.B. 466
(2) (1901) 2 K.B. 157
(3) (1921) 1 K.B. 248

CIVIL REFERENCE

Before Bhandari C.J. and Falshaw J.

THE COMMISSIONER OF INCOME-TAX,—*Petitioner*

versus

S. B. RANJIT SINGH,—*Respondent*

1954

Dec., 9th

Civil Reference No. 4 of 1953

Indian Income-tax Act (XI of 1922)—Sections 11(4) and 10(2)(v)—Applicability of, to hotel premises let out complete with furniture and fittings—Roadways and spaces for the parking of cars—Whether part of the business premises—Expenditure incurred on resurfacing the approach roads to the hotel—Whether covered by the tern "current repairs" or is in the nature of capital expenditure—Section 66—Point not raised before the Income-tax Appellate Tribunal—Whether can be allowed to be raised in he High Court.

The assessee had leased out his premises known as Imperial Hotel, New Delhi, complete with furniture, crockery and fittings for a period of 20 years with effect from 1939. In the year of account (1945-46), the asessee claimed the sum of Rs. 24,904, on account of costs of resurfacing the approach roads as expenditure on current repairs. The Income-tax Appellate Tribunal allowed it as such. At the instance of the Commissioner of Income-tax the Tribunal referred the following question of law to the High Court: —

> "Whether in the circumstances of the case the cost of relaying the cement approach road to the Imperial Hotel, New Delhi, in the year of account 1945-46, was incurred in respect of current repairs to the Hotel premises and is allowable as a deduction under section 12(4), read with section 10(2)(v) of the Indian Income-tax Act".

Held, that on the facts of this case the resurfacing of the whole of the roadways of the hotel had become necessary on account of several years' wear and tear and neglect and so the cost of relaying the cement approach road to the Hotel in the year of account 1945-46, was incurred in respect of "Current repairs" to the hotel premises and is allowable as a deduction under section 12(4) read with section 10(2)(v) of the Indian Income-tax Act.

Held, that a sum can be allowed as the cost of repairs and can be held not to be a capital expenditure in spite of the fact that the expenditure in a particular year happens to be particularly heavy on account of the fact that it is

undertaken to remedy the effect of several years of wear and tear or neglect, and also in spite of the fact that such expenditure may not be necessary for some time to come after the repairs have been effected.

Held, that section 12(4) is applicable to income from a lease of business premises complete with furniture and fittings and the assessee is entitled to the benefit of the relevant provisions of section 10 of the Income-tax Act. It is wrong to say, in the circumstances, that the assessee is running the Imperial Hotel as business, or that his leasing the premises is a business activity.

Held, that in the case of a business of the nature of a hotel and restaurant business, roadways and spaces for the parking of cars are an essential part of the premises.

Held, that the High Court will not allow a new point to be raised before it which was not raised before the Appellate Tribunal and which is not covered by the question framed by the Tribunal and referred to the High Court for decision.

Ratan Singh v. *The Commissioner of income-tax, Madras* (1), *Ramkishan Sunderlal* v. *Commissioner of Income-tax, U.P.* (2), In re *L. H. Sugar Factories and Oil Mills Limited* (3), *Samuel Jones and Co. (Devonvale), Ltd.* v. *Commissioners of Inland Revenue* (4), *Commissioner of Income-tax and Excess Profits Tax, Madras* v. *Siri Rama Sugar Mills, Ltd.* (5), and *Rhodesia Railways, Ltd.* v. *Income-tax Collector, Bechuanaland Protectorate* (6), referred to.

Civil Reference under Section 66(1) of the Indian Income-tax Act XI of 1922 made by the Income-tax Appellate Tribunal (Delhi Bench), for decision of the following question of law by the High Court:—

> *"Whether in the circumstances of the case the cost of relaying the cement approach road to the Imperial Hotel, New Delhi, in the year of account 1945-46, was incurred in respect of current repairs to the Hotel premises and is allowable as a deduction under section 12(4) read with section 10(2)(v) of the Indian Income-tax Act?'*

A. N. KIRPAL and D. K. KAPUR, for Appellant.

K. R. BAJAJ and J. L. BHATIA, for Respondent.

(1) 2 I.T.C. 294
(2) 19 I.T.R. 324
(3) 21 I.T.R. 325
(4) 32 Tax Cases 513
(5) 21 I.T.R. 191
(6) 1 I.T.R. 227

undertaken to remedy the effect of several years of wear and tear or neglect, and also in spite of the fact that such expenditure may not be necessary for some time to come after the repairs have been effected.

Held, that section 12(4) is applicable to income from a lease of business premises complete with furniture and fittings and the assessee is entitled to the benefit of the relevant provisions of section 10 of the Income-tax Act. It is wrong to say, in the circumstances, that the assessee is running the Imperial Hotel as business, or that his leasing the premises is a business activity.

Held, that in the case of a business of the nature of a hotel and restaurant business, roadways and spaces for the parking of cars are an essential part of the premises.

Held, that the High Court will not allow a new point to be raised before it which was not raised before the Appellate Tribunal and which is not covered by the question framed by the Tribunal and referred to the High Court for decision.

Ratan Singh v. *The Commissioner of income-tax, Madras* (1), *Ramkishan Sunderlal* v. *Commissioner of Income-tax, U.P.* (2), In re *L. H. Sugar Factories and Oil Mills Limited* (3), *Samuel Jones and Co. (Devonvale), Ltd.* v. *Commissioners of Inland Revenue* (4), *Commissioner of Income-tax and Excess Profits Tax, Madras* v. *Siri Rama Sugar Mills, Ltd.* (5), and *Rhodesia Railways, Ltd.* v. *Income-tax Collector, Bechuanaland Protectorate* (6), referred to.

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> *"Whether in the circumstances of the case the cost of relaying the cement approach road to the Imperial Hotel, New Delhi, in the year of account 1945-46, was incurred in respect of current repairs to the Hotel premises and is allowable as a deduction under section 12(4) read with section 10(2)(v) of the Indian Income-tax Act?'*

A. N. KIRPAL and D. K. KAPUR, for Appellant.

K. R. BAJAJ and J. L. BHATIA, for Respondent.

(1) 2 I.T.C. 294
(2) 19 I.T.R. 324
(3) 21 I.T.R. 325
(4) 32 Tax Cases 513
(5) 21 I.T.R. 191
(6) 1 I.T.R. 227

JUDGMENT

Falshaw, J.

FALSHAW, J. This reference has arisen out of the assessment of Sardar Bahadur Ranjit Singh for the assessment year 1946-47, account year ending 31st March, 1946. Besides carrying on business activities and possessing other sources of income the assessee is the owner of the premises in New Delhi known as the Imperial Hotel which he leased out complete with furnishings and fittings to the Company known as the Associated Hotels of India, Limited, in August, 1939 for a period of 20 years at an annual rent of 50,000. In the account year in question the approach roads or drives had fallen into such a bad state that it was found necessary to repair them, and the repairs took the form of resurfacing with concrete the whole of the roadways, totalling more than one furlong in length. This resurfacing cost Rs. 24,904 and in his return the assessee sought to deduct the whole of this amount, under the heading of his income from the Imperial Hotel, on account of repairs. The Income-Tax Officer held that the whole expenditure could not be allowed in one year and that it should be spread over 10 years and allowed a deduction of Rs. 2,472 on this account.

The assessee appealed to the Appellate Assistant Commissioner regarding a number of points in the assessment order including this item, regarding which, in his grounds of appeal, he simply raised the objection that the Income-Tax Officer had erred in spreading the repair charges of Imperial Hotel amounting to Rs 24,904 over 10 years. After considering the matter the Appellate Assistant Commissioner added back even the sum of Rs. 2,472 allowed by the Income-Tax Officer, and held that the whole of the outlay on relaying the roads was a capital expenditure.

This matter was again raised by the assessee in his appeal to the Tribunal, which held that the

case fell within section 12 (4) read with section 10 (2) (v) of the Act and that the expenditure on the roads must be allowed in full. On this the Commissioner of Income-Tax preferred an application under section 66 (1) and the Tribunal has framed the following question for our consideration :—

> "Whether in the circumstances of the case the cost of relaying the cement approach road to the Imperial Hotel of New Delhi in the year of account 1945-46 was incurred in respect of current repairs to the Hotel premises and is allowable as a deduction under section 12 (4) read with section 10 (2) (v) of the Indian Income-Tax Act?"

Section 12 deals with income from other sources, i.e. sources other than salaries dealt with in section 7, interest on securities in section 8, income from property in section 9, profits and gains of business in section 10, and capital gains in section 13. Sub-section (4) of section 12 provides—

> "Where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture, he shall be entitled to allowances in accordance with the provisions of clauses (iv), (v), (vi) and (vii) of subsection (2) of section 10 in respect of such buildings."

Sub-section (2) of section 10 deals with allowances to be deducted from profits or gains of business, profession or vocation and clause (iv) reads—

> "in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores, used for the purposes of the business, profession or vocation, the amount of any premium paid ;"

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and clause (v) reads—

> "in respect of current repairs to such buildings, machinery, plant or furniture the amount paid on account thereof."

The finding of the Tribunal in favour of the assessee is based first of all on the applicability of section 12 (4) which was held to cover the case of a lessee of property like the Imperial Hotel, which was in fact constructed as a hotel, and, after being run by the assessee himself for some time, was leased as a going concern with furniture, fittings, crockery, etc., to the present lessee. Having found this item of the assessee's income to fall under section 12 (4), the Tribunal held that the resurfacing of the roadways appurtenant to the hotel buildings amounted to current repairs within the meaning of section 10 (2) (v), since the repairs had become necessary in the ordinary course of the user of the premises and the premises were still in use. The argument put forward on behalf of the income-tax authorities and rejected by the Tribunal was that the resurfacing of the roadways could not be called 'current repairs' on the ground that presumably the roadways would not need any further repairs for some years.

The learned counsel for the Commissioner has argued before us that the case was not covered by sections 12 (4) and 10 (2) (v) at all, since in no sense of the word is an approach road or drive a building. A roadway of any kind certainly does not appear to fall under the definition of 'building' given in any standard dictionary and it was argued that the fact that in these sub-sections the word 'buildings' was strictly to be construed as buildings and nothing else was supported by the fact that section 9 relating to income from property did refer to 'any buildings or lands appurtenant thereto'. It is pointed out that the allowance for repairs in sub-section (1) (i) where the owner is responsible for repairs to property occupied by a tenant is one-sixth of the annual rent

or in other words two months' rent. It is also contended that even if section 12 (4) and section 10 (2) (v) are applicable the resurfacing of the whole of the roadway in the the hotel premises cannot be regarded as 'current repairs'.

On the other hand the learned counsel for the assessee has attempted to put forward a case which does not appear to have been raised before the Tribunal, which presumably decided the matter in his favour on the grounds which were urged before it. This case is that this item of the assessee's income is neither from property under section 9, nor from other sources under section 12 but is ordinary income from business and therefore is covered by section 10 (2) (xv)—

> "Any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such business, profession or vocation."

This argument is based on the fact that in the assessment order of the Income-Tax Officer the accounts relating to the Imperial Hotel are shown as dealt with under the heading of business and the fact that this was also included in the assessee's excess profits tax assessment for the same year. This is printed at pages 19 and 20 which, however, does not make it at all clear that this particular item had been included. At the same time the fact that the Appellate Tribunal thought it necessary to add at the end of its order that consequential modifications were to be made in the excess profits tax assessment appears to show that this was so, there being two appeals of the assessee before the Tribunal—one under the Income-tax Act and one under the Excess Profits Tax Act.

Since, as I have said above, the matter was presumably decided by the Appellate Tribunal in the assessee's favour on the pleas and arguments advanced on his behalf at the hearing of the appeal, and since the case all along appears to have

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been that the amount should be allowed as the cost of repairs, which must have been under section 12 (4) read with section 10 (2) (v), since obviously he could not claim more than two months' rent for all the repairs done by him to the premises if his claim fell under section 9, it seems to me very doubtful indeed whether the assessee should be allowed at this stage to set up an altogether new case. Indeed I would go further and say that in my opinion even if this item in his income was shown as having been dealt with under the heading of business in the assessment order, this was entirely wrong and the matter should have been dealt with under income from other sources, since I have no doubt whatever that section 12 (4) is applicable to income from a lease of property of this kind i.e. business premises complete with furniture and fittings. It would in my opinion be quite wrong to say that the assessee is running the Imperial Hotel as a business, or that his leasing the premises is a business activity. He has in fact leased it for 20 years, and one of the terms of the lease is that he will not enter into the hotel business himself in Delhi during the term of the lease. I accordingly hold that this item of the assessee's income has been placed in the correct category by the Appellate Tribunal, i.e. it is under section 12 (4) and he is entitled to the benefits of the relevant provisions of section 10.

The next question is therefore whether the roadways which the assessee has resurfaced can be regarded as buildings within the meaning of sections 12 (4) and 10 (2) (v). Here again I cannot help feeling that an entirely new point has been raised by the learned counsel for the Commissioner, since from the order of the Appellate Tribunal it would appear that the only arguments urged before it on this aspect of the case were on the point whether the expenditure on the resurfacing of the roadways was a capital expenditure, as held by the Appellate Assistant Commissioner, or covered by the term 'current repairs' as found by the Tribunal, and there is nothing in the order

to suggest that any argument was advanced on behalf of the income-tax authorities that the expenditure was not incurred on the buildings leased. The use of the words 'hotel premises' in the question framed by the Tribunal confirms that there was no dispute between the parties before it that the roadways were regarded as being attached to or possessing a part of the buildings, and it certainly cannot be denied that in the case of a business of the nature of the hotel and restaurant business roadways and spaces for the parking of cars are an essential part of the premises. In my opinion in order to decide the matter on this part of the argument of the learned counsel for the Commissioner it would be necessary to reframe the question which the Tribunal has referred to us. In the circumstances I do not feel any more inclined to allow an altogether new point to be raised on behalf of the Commissioner, which is not covered by the question framed, than I am to allow the assessee to argue the case on matters which have never been raised before.

I would therefore confine myself to answering the question whether the expenditure incurred on resurfacing the approach roads to the hotel is covered by the term 'current repairs' or is in the nature of a capital expenditure.

The case law on the point does not appear on the whole to be very helpful, since most of the cases decided under section 10 (2) (v) appear to have been concerned with machinery and plant rather than with buildings, and, as is often the case, the general principle deducible from the reported cases is that the decision must depend on the circumstances of each case. This is summed up in the words used by Trotter, C. J., and Beasley, J., in *Ratan Singh* v. *The Commissioner of Income-Tax, Madras*, (1).—

> "The question whether the substitution and renewal of old and worn out parts of a machine is capital expenditure or current repair is one of degree, depending upon the circumstances of each case."

(1) 2 I.T.C. 294

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Falshaw, J.

In *Ramkishan Sunderlal* v. *Commissioner of Income-Tax, U.P.*, (1), Malik C. J., and Bhargava, J., held, in the case of a flour-mill where Rs. 1,554 had been spent on replacing some cables, this being one-third of the total value of all the cables in the mill, that the amount thus spent could not be regarded as current repair and could not be deducted under section 10 (2) (v). The view taken by the learned Judges was that the meaning of 'current repairs' was restricted to petty repairs usually carried out periodically and would not include a repair or renewal costing a large sum of money which had to be spent after the machine had been run for a number of years.

I am not at all sure that I entirely agree with this view if it means that the only test is that a particular item of expenditure must be one which is constantly recurring and not one which may only recur after a few years and it seems to me that other factors must also be taken into consideration.

The same two learned Judges were also responsible for the decision in *re. L. H. Sugar Factories and Oil Mills Limited* (2), in which they held that the expenditure incurred in the re-roofing of labourers' quarters by using new tiles in place of old ones was neither a revenue expenditure nor an expenditure in respect of current repairs, and it was not therefore an allowable deduction. It does not appear to have been disputed that the roofs in question were merely restored to their original condition and again the sole criterion appears to have been that this particular expenditure was not likely to arise again for some time.

On the other hand there is a decision of the Lord President and two Lords of the Court of Session of Scotland *in Samuel Jones & Co. (Devonvale), Ltd.* v. *Commissioner of Inland Revenue* (3), which relates to the case of a paper

(1) 19 I.T.R. 324
(2) 21 I.T.R. 325
(3) 32 Tax Cases 513

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(1) 19 I.T.R. 324
(2) 21 I.T.R. 325
(3) 32 Tax Cases 513

factory the chimney of which had fallen into a dangerous condition, with the result that the assessee Company had demolished the chimney and replaced it with a new one. The question was whether the expenditure incurred on this was an admissible deduction spent on account of a repair or whether it was a capital expenditure. It was found as a fact that the new chimney was not an appreciable improvement over the old chimney, and it was held in these circumstances that the whole cost of replacing the chimney, including the cost of removing the old chimney, was an admissible deduction. The ratio decidendi appears to have been that the factory as a whole was a unit and that by the renewal of the chimney the factory was not improved. It must, however, be stated that the question whether this would be covered by the term 'current repairs' was not specifically considered.

The term 'current repairs' was also not under consideration in the case *Commissioner of Income-Tax and Excess Profits Tax, Madras*, v. *Sri Rama Sugar Mills, Ltd.*, (1), in which the replacing of an old boiler by a new one was under consideration, the boiler being one of three used in the factory. This case was under section 10 (2) (xv) and the question was whether the cost of replacing was a capital expenditure or a revenue expenditure, and it was held by one learned Judge that it was a capital expenditure and by the other that it was a revenue expenditure. The former decision prevailed as the decision of the Court as being that of the Senior Judge, there apparently being no rule in the Madras High Court for reference to a third Judge.

The case in which the facts appear to be most analogous with those of the present case is a decision of the Privy Council in *Rhodesia Railways, Ltd.* v. *Income-Tax Collector, Bechuanaland Protectorate* (2). This was the case of a railway on which in the year in question what

(1) 21 I.T.R. 191
(2) 1 I.T.R., 227

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are described as "heavy repairs" had been carried out to the track affecting a mileage of 74 miles out of the total length of 394 miles. On a stretch of 34 miles the whole track had been replaced with new rails and new sleepers, the rails being of the same weight as those originally laid there many years before, while for 40 miles of the track the old rails were relaid but the whole of the sleepers were replaced. It was held by their Lordships that the sum expended was not an expenditure of capital nature and that it was expended for the repairs of the property occupied for the purpose of trade and was rightly deductible from the income assessable to income-tax. The following passage from the judgment delivered by Lord Macmillan is of interest :—

> "The periodical renewal by sections of the rails and sleepers of railway line is in no sense a reconstruction of the whole railway and is an ordinary incident of the railway administration. The fact that the wear although continuous is not, and cannot be, made good annually does not render the work of renewal when it comes to be effected necessarily a capital charge. The expenditure here in question was incurred in consequence of the rails having been worn out in earning the income of previous years on which tax had been paid without deduction in respect of such wear and represented the cost of restoring them to the state in which they could continue to earn income. It did not result in the creation of any new asset ; it was incurred to maintain the appellants' existing line in a state to earn revenue. The analogy of a wasting asset which appears to have affected the minds of the Special Court has really no application to such a case as the present. Nor do their Lordships agree that expenditure in order to form a

permissible deduction must be incurred in the production of the actual year's income which is the subject of the assessment, if by this it is meant that the benefit of the expenditure must not extend beyond the year of assessment, for very many repairs have the result of enabling the income to be earned in future years as well as in the year in which they are effected. In the case of *Ounsworth* v. *Vickers Ltd.* (1), where the expense of dredging a channel and constructing a deep water berth which was undertaken in connection with the launching of a specially large vessel was disallowed as a charge against income. Rowlatt, J., a very experienced authority on all income-tax questions, expressed his agreement with the view that 'assuming that dredging the channel is income expenditure if the respondents dredged year by year, it is none the less income expenditure because the dredging was not done for a year or two because it was not worth while to do so and was only done when it was seriously required to get rid of the mischief which had been growing all the time and which, theoretically, ought to have been kept down coincidently with its growth."

The principle deducible from these decisions is that a sum can be allowed as the cost of repairs and can be held not to be a capital expenditure in spite of the fact that the expenditure in a particular year happens to be particularly heavy on account of the fact that it is undertaken to remedy the effect of several years of wear and tear or neglect, and also in spite of the fact that such expenditure may not be necessary for some time to come after the repairs have been effected.

It seems to me that these principles ought to be applied to the facts of the present case, in

(1) (1915) 3 K.B. at p. 267

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Falshaw, J.

which obviously the resurfacing of the whole of the roadways of the hotel had become necessary on account of several years' wear and tear and neglect, and I am inclined to agree with the view of the Appellate Tribunal that the fact that further repairs may not be necessary for some time to come makes no difference. I would accordingly answer the question framed for our consideration in the affirmative and allow the assessee his costs from the Commissioner. Counsel's fee Rs. 250.

Bhandari, C. J.

BHANDARI, C. J. I agree.

REVISIONAL CIVIL

Before Bhandari C.J. and Falshaw J.

DURGA PARSHAD,—*Petitioner*

versus

BIMLA DEVI AND OTHERS,—*Respondents*

Civil Revision No. 159-D of 1953

1954

Dec., 10th

Code of Civil Procedure (V of 1908) Order 41—Limitation Act (IX of 1908) Section 5—Certified copies of the judgment and decree misplaced by the lawyer's clerk and appeal filed without them—Fresh copies obtained later and filed—Appeal when presented—Appeal filed beyond limitation—Appellate Court whether competent to condone the delay.

Order 41 of the Code of Civil Procedure requires that every memorandum of appeal should be accompanied by a copy of the decree appealed from and of the judgment on which it is founded.

Held, that a memo of appeal which is not accompanied by these two documents cannot be said to be properly presented and if these documents are put in court on a later date the appeal must be deemed to have been properly presented on the later date.

Held also, that it was within the competence of the Senior Sub-Judge in exercise of the powers conferred upon him by section 5 of the Limitation Act to extend the period of Limitation and to condone the delay which had been occasioned.

Petition under Act XIX of 1947, for revision of the order of Shri Mehar Singh Chadda, Senior Sub-Judge,

Delhi, dated the 9th May, 1953, reversing that of Shri P. N. Thukral, Sub-Judge 1st Class, Delhi, dated the 22nd February, 1952, and granting a decree for ejectment in favour of plaintiffs-appellants and against the respondent and ordering that the respondent shall vacate the premises within six months and hand over the possession to the plaintiffs.

RADHEY MOHAN LAL, for Petitioner.

G. R. CHOPRA, for Respondent.

JUDGMENT

BHANDARI, C. J. Two points arise for decision in the present case, viz., (1), whether it was within the competence of the Senior Subordinate Judge to condone the delay which was occasioned in the presentation of the appeal and (2) whether there is sufficient material on the file to justify the conclusion that the plaintiffs are unable to find suitable accommodation for themselves. Bhandari, C. J.

The facts of the case are simple and not seriously in dispute. One Ram Kumar, who was the owner of a certain house situate in Delhi, died some time ago, leaving behind him a widow and two sons. On the 10th July, 1951, the widow and her sons brought a suit for the ejectment of the tenant but the suit was dismissed on the ground that they did not require the premises for their own use. The Senior Subordinate Judge, however, allowed the appeal and decreed the plaintiffs' suit. The tenant is dissatisfied with the order and has come to this Court in revision.

The first point for decision in the present case is whether the lower appellate Court was justified in extending the period of limitation and entertaining the appeal even though it was presented after the expiry of the period of limitation. The plaintiffs' suit was dismissed on the 22nd February, 1952. They applied for a copy of the decree and of the judgment on which it was based on the 1st March 1952 and the copies were actually supplied to them on the 22nd March, 1952. Unfortunately the lawyer's clerk misplaced the copies and, as the period of limitation was about to expire, presented the memorandum of

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appeal without those copies on the 4th April 1952. He obtained fresh copies of the documents in question and produced them in Court on the 17th April along with an application under section 5 of the Limitation Act for an extension of the period of limitation. The Senior Subordinate Judge recorded the statements of witnesses and having come to the conclusion that the delay in filing the necessary documents was occasioned by circumstances beyond the plaintiff's control extended the period of limitation and entertained the appeal.

Mr. Radhe Mohan Lal, who appears for the defendant in the present case, contends that it was not within the competence of the Senior Subordinate Judge to entertain a time-barred appeal and cites the case of *Shangara Singh and others* v. *Imam Din and others,* (1), in support of this contention. In this case, a learned Judge of the Lahore High Court expressed the view that section 5 contemplates an appeal, application for review of judgment or for leave to appeal or any other application to which section 5 may be made applicable and an appeal there means an appeal that is to be instituted for the first time and not an appeal which has already been instituted but is amended later on account of any defect having been noticed in the memorandum of appeal.

I regret I find myself unable to concur in this contention. Order 41 of the Code of Civil Procedure requires that every memorandum of appeal should be accompanied by a copy of the decree appealed from and of the judgment on which it is founded. The memo of appeal which was presented in the present case on the 4th April 1952 was not accompanied by these documents and the appeal cannot therefore be said to have been properly presented. These documents

(1) A.I.R. 1940 Lah. 314

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I regret I find myself unable to concur in this contention. Order 41 of the Code of Civil Procedure requires that every memorandum of appeal should be accompanied by a copy of the decree appealed from and of the judgment on which it is founded. The memo of appeal which was presented in the present case on the 4th April 1952 was not accompanied by these documents and the appeal cannot therefore be said to have been properly presented. These documents

(1) A.I.R. 1940 Lah. 314

were put in Court on the 17th April 1952 and the appeal must accordingly be deemed to have been properly presented on that date. It is obvious in the circumstances that although the memorandum of appeal was filed in Court on the 4th April 1952, a proper appeal was presented for the first time after the period of limitation had expired. There can be no manner of doubt that it was within the competence of the Senior Subordinate Judge in exercise of the powers conferred upon him by section 5 of the Limitation Act to extend the period of limitation and to condone the delay which had been occasioned.

Mr. Radhe Mohan Lal admits that there is abundant material on the file to justify the conclusion that the plaintiffs require the premises for their own use but he contends that there is nothing on the record to indicate that they have not been able to secure other suitable accommodation for themselves. This contention too appears to me to be wholly untenable. Bimla Devi plaintiff has come into the witness-box to state that after the death of her husband she was unable to live either in the house of her father or in that of her father-in-law as the children in the house were constantly quarrelling with her two children. She stated further that although she endeavoured to look for accommodation for herself, she was unable to find any. Her statement in this behalf is fully corroborated by that of her father who has stated on oath that he looked for a house for her but was unable to find one.

For these reasons, I would uphold the order of the Senior Subordinate Judge and dismiss the petition presented by the tenant. There will be no order as to costs. The petitioner will be allowed a period of one month within which to vacate the premises occupied by him.

FALSHAW, J. I agree. Falshaw, J.

APPELLATE CIVIL

Before Khosla and Kapur JJ.

BIJJA SINGH AND OTHERS,—*Defendants-Appellants*

versus

MAYA CHAND AND OTHERS,—*Respondents*

Regular Second Appeal No. 326 of 1949

1954

Dec., 23rd

Custom (Punjab)—Succession—Jats of village Jawan, Sonepat Tehsil of District Rohtak—Whether the rule of Pagwand or Chundawand, applicable.

Held, in a case of Jats of Sonepat Tahsil of Rohtak District that the succession to the estate of the last male holder was governed by the rule of Pagwand, which is the general Custom of the Punjab and even according to the Riwaj-i-am of Rohtak District answer to question No 44 the ordinary rule of succession is the same.

Regular Second Appeal from the decree of the Court of Shri Guru Datt, Additional District Judge, Rohtak, dated the 30th day of December, 1948, affirming that of Shri Gian Das Jain, Sub-Judge, 1st Class, Sonepat, dated the 8th March, 1948, granting the plaintiffs a decree for 53/72 share of the property in suit jointly with defendants. The plaintiffs shall have share about the houses partitioned after obtaining the joint possession and leaving the parties to bear their own costs. The appellate Court ordered the contesting defendant to pay costs to plaintiffs in both courts.

S. C. MITTAL, for Appellants.

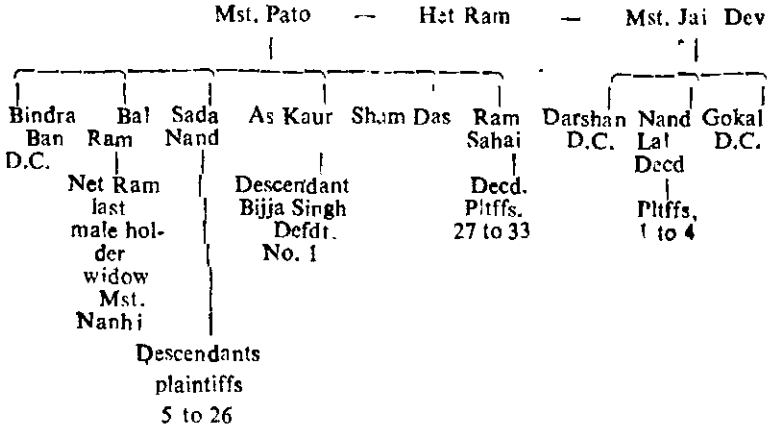
D. N. AGGARWAL, for Respondents.

JUDGMENT

Kapur, J.

KAPUR, J. In this appeal by Bijja Singh defendant against an appellate decree of the Additional District Judge, Rohtak, confirming the decree of the trial Court decreeing the plaintiffs' suit the question involved is whether the parties are governed by the rule of *pagwand* or *chundawand*.

The parties are Jats of village Jawan in the Sonepat Tehsil of Rohtak District and their relationship will be shown from the following pedigree-table :—



The last male holder of the property in dispute which is a house was Net Ram. On his death it was succeeded to by Mst. Nanhi, his widow and on the succession opening out the revenue authorities applied the rule of *chundawand* and excluded the children of Jai Devi. The plaintiffs have brought a suit for possession of their share of the land and the house alleging that they are governed by *pagwand* and not by *chundawand*. The trial Court held that the share of the plaintiffs in the property in dispute was 53/72 and granted a decree for that share and the finding as to the rule applicable was upheld by the appellate Court.

The general custom of the Punjab is in favour of *pagwand*, and even according to the *riwaj-i-am* of Rohtak District the ordinary rule of succession is *pagwand* as is shown by question No. 44. It is also significant that on the death of Het Ram, the ancestor, the property did not devolve according to the rule of *chundawand* and at no stage during the various successions which opened out on the death of several of the descendants of Het Ram did the *chundawand* rule apply. The appellant, however, referred to and relied on two judgments, Exhibits D.1 and D.2.

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The former is a Chief Court judgment in which the rule of *chundawand* was applied, but this was based on the ground that the property of the ancestor had been divided according to that rule. No instances are given and the *Riwaj-i-am* has not been discussed and this instance is neither sufficient to rebut the general custom or the custom in the *riwaj-i-am* of the District nor is it an authority for the proposition that in this particular area the rule of *chundawand* prevails.

In Exhibit D. 2 it was only an incidental remark that the parties were governed by *chundawand* rule. This question does not seem to have been in dispute and it is not an adjudication on the question of custom. These are the only two instances which have been relied upon by the defendant.

There is no other reliable evidence which is relevant to the issue. I would therefore dismiss this appeal but leave the parties to bear their own costs in this Court.

Khosla, J.

KHOSLA, J. I agree.

APPELLATE CIVIL

Before Khosla and Kapur JJ.

MESSRS RAM GOPAL DULA SINGH,—*Defendants-Appellants*

versus

SARDAR GURBUX SINGH AND OTHERS,—*Respondents*

Regular First Appeal No. 86 of 1951.

1954

Dec., 27th

Hindu Law and Transfer of Property Act (IV of 1882)—Section 6—Spes Successionis—Whether transferable—Transfer of right of expectancy for consideration—Estate vesting in the transferor—Contract, whether becomes enforceable—Transfer of Property Act (IV of 1882)—Principles of—Whether applicable to Punjab.

Held, that a right of expectancy or *spes successionis* is non-transferable both in accordance with the principles of Hindu Law as well as under section 6(a) of the Transfer of Property Act and, therefore, the contract transferring the right of expectancy, even if for consideration, does not become enforceable in equity on the estate vesting in the transferor of the right of expectancy.

Held, that although the Transfer of Property Act, 1882, is not applicable to the Punjab, the principles of this Act are applicable because they are based on justice, equity and good conscience. It is only the rules of procedure which are not applicable.

Case law reviewed.

First Appeal from the decree of Shri Hira Lal Jain, Sub-Judge, 1st Class, Amritsar, dated the 2nd day of March 1951, passing a preliminary decree for the partition of share of the property in suit in favour of the plaintiff against all the defendants Nos. 1 to 10 and also a preliminary decree for rendition of accounts in favour of the plaintiff against defendants 1, 7, 8, 9 and 10 in respect of the income and expenditure regarding the property in suit. The plaintiff's share therein is 1/2, the other half share with respect of Amritsar property belongs to defendants Nos. 7 and 8 and concerning the Jagraon property the defendants 9 and 10 are entitled to ½ share from the date of sale thereof to them by the defendants Nos. 7 and 8 and the defendants Nos. 7 and 8 are entitled to ½ share thereof until the sale of it by them to the defendants 9 and 10 and leaving the parties to bear their own costs.

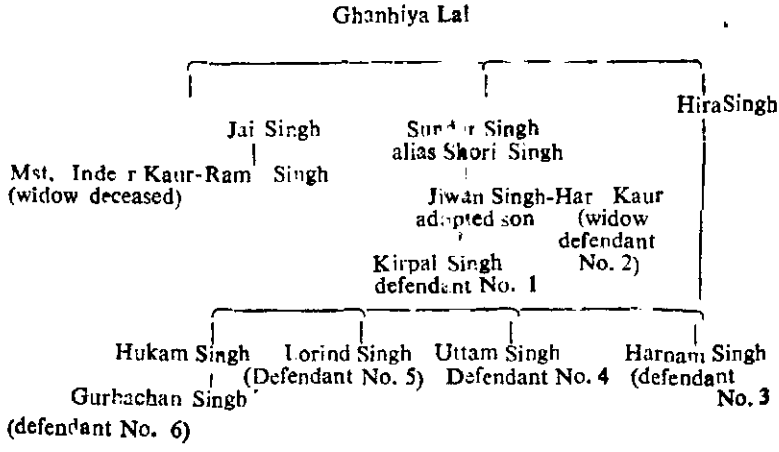
K. L. GOSAIN and A. N. GROVER, for the Appellants.

F. C. MITTAL and D. R. MANCHANDA, for the Respondents.

JUDGMENT

KAPUR, J. This is a defendant's appeal against a judgment and decree of Mr. Hira Lal Jain, Subordinate Judge, first Class, Amritsar, dated the 2nd of March, 1951, decreeing the plaintiff's suit for possession by partition of the property in dispute with costs. Kapur, J.

The following pedigree-table will be helpful in understanding the facts of the case:—



sold their half share in these properties to defendants Nos. 7 and 8 and the other half was sold by Kirpal Singh son of Jiwan Singh to Madan Lal Ram Gopal on the 7th October 1947, and on the 17th October 1948, Ram Gopal and Dula Singh defendants Nos. 7 and 8 purchased the other half from Madan Lal-Ram Gopal and thus they claim to have become the owners of the whole of the property in suit. The plaintiff has brought a suit for possession by partition of the half share of the entire property and for rendition of accounts relating to the income of the entire property as from the 27th of March, 1944, up to the date of the suit which was the 24th of January, 1950. The plaintiff has alleged that Jiwan Singh sold all his rights which he expected to get on the death of Mst. Indar Kaur for a valid consideration by three deeds of sale which I have already given and that the defendants were not allowing the plaintiff the full benefit of his share and therefore he claims partition of the property by metes and bounds and separate exclusive possession of his half share thereof. He has also alleged that he was in possession of a portion of the property in dispute and was "co-sharer in the rest".

The defence was that the plaintiff was not in possession of any portion of the property and therefore the suit was defective in form and the valu of the suit had not been correctly fixed nor had the court-fee been properly paid. It was also pleaded that the plaintiff had no right to sue as all he purchased was a *spes successionis* which is illegal. The defendants also pleaded estoppel. After replication the Judge stated several issues. The value of the property in suit as determined by the commissioner is Rs. 56,350 but it appears that the objection regarding court-fee was given up by counsel for defendants Nos. 7 and 8.

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The trial Court found that the plaintiff was in exclusive possesion of a portion of the property, that he was owner of the half, that the transfer of the property in favour of Jiwan Singh by Jiwan Singh, adopted son of Shori Singh, was valid, that the plaintiff was not estopped by his conduct and he was entitled to accounts and that the share of the plaintiff and the defendants is half and half. The defendants have come up in appeal to this Court.

The first question to be determined is as to the applicability of the rule in the Full Bench decision of the Lahore High Court in *Asa Ram* v. *Jagan Nath* (1), where it was held if the plaintiff alleges that he is in joint possession and the Court finds that allegation to be untrue then ordinarily the suit will be dismissed solely on the ground that the plaintiff being out of possession is not entitled to sue for partition without asking for possession of the property in dispute, and reference was there made to the judgment of Rankin C.J. in *Nandala Mukherji* v. *Kalipada Mukherji* (2). The possession of the plaintiff is based on his claim that he is in possession of a portion of House No. 1229/8 in Kucha Gandanwala, Namak Mandi, Amritsar, through a tenant Mohan Singh P.W. 1 and through Sham Singh P.W. 3 who is a tenant of a portion of the same house in the groundfloor and it was admitted by him that the rest of the house is in possession of defendants Nos. 7 and 8. Mohan Singh has executed a rent deed in plaintiff's favour Exh. P. 1 of the 6th of January, 1950, the suit having been brought on the 24th January, 1950, In cross-examination the plaintiff has admitted that tenants who were in possession under Mst. Indar Kaur continued to remain in possession and no new tenant

(1) I.L.R. 15 Lah. 531 (F.B.)
(2) I.L.R. 59 Cal. 315

was introduced and Sham Singh, P.W. 3 who is alleged to be in possession on behalf of the plaintiff of a portion of the groundfloor of house No. 1229/8 was an old tenant. A suit was brought in regard to a will which Indar Kaur had made and the present plaintiff applied on the 3rd March, 1945, to be made a party to those proceedings and he admits at page 27 line 8 that at that time he was not in possession of any portion of the property and when the Subordinate Judge refused to make him a party and he went up in revision to the Lahore High Court which was dismissed on the 18th April 1947, he was even then not in possession of any portion of the property. He further states that he took possession on the 15th October, 1949, of a portion of this house which was lying vacant and locked it up. At that time he was working as an assistant (a superior clerk) at Simla, dealing with N.C.C. and that he came to Amritsar after taking leave, but he could not give the date when he was on leave and he had given the key of the lock to Hira Singh, a relative of his who is alive and has not been produced as a witness. It was Hira Singh who gave this portion on rent to Mohan Singh, P.W. 1, and informed the plaintiff by post, but this letter has not been produced.

Mohan Singh has appeared as a witness and claims that he is in possession by virtue of Exh. P. 1 of the 6th of January, 1950. He is the Chief Goods Clerk at Amritsar, and he proves Exh. P. 1, the rent deed, and states that he made the payment of advance rent to Hira Singh who is a nephew (sister's son) of the plaintiff and that the plaintiff is not living at Amritsar, but is at Simla. His cross-examination shows that he knew the plaintiff in Simla, where his son is also employed, and he stated that he was posted in Amritsar in November, 1949, and was living in a house outside

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Chatiwand Gate. When cross-examined further he was unable to give the exact location of the house which he states he had taken on rent from the plaintiff. His ration card which he had at the time he states he took the house on rent still shows him as residing outside Chatiwand Gate although he states that he left that house a year ago. He also had a sister and members of her family residing in a portion of this very house and they have got ration cards, but those ration cards have not been produced to show that the witness is actually residing in the house that he claims he is residing in and even his sister sometimes lives in Simla, and sometimes lives in Amritsar. From the testimony of the plaintiff and the witness P.W. 1 Mohan Singh I do not think it is established that Mohan Singh was in possession of a portion of the house in dispute on behalf of the plaintiff when the suit was brought.

Then there is Sham Singh, P.W. 3 who, according to the plaintiff, was an old tenant under Mst. Indar Kaur. The plaintiff claimed that at the time of the suit he was the tenant of the plaintiff. No rent deed was executed by this witness in favour of the plaintiff and he executed a rent deed in regard to the groundfloor in February, 1950, during the pendency of the suit. On the 8th July 1949, a decree in regard to a portion of the present house in suit was passed against him in favour of Lorind Chand who is defendant No. 5 and the present defendants made an application for ejectment against him on the basis of that decree and order of eviction has been passed against him. He is not a disinterested witness and I am unable to believe that he was a tenant of the plaintiff at the time when the suit was brought.

From this evidence I am unable to conclude that the plaintiff is in possession of a portion of

the property. The property in dispute was in possession of the receiver from the 16th October, 1945, to the 22nd June 1948, when possession was delivered to defendants Nos. 1, 7 and 8 which is shown by the statement of Amin Chand Khanna, Official Receiver, Amritsar, D.W. 3. I am of the opinion, therefore, that the evidence of possession of the plaintiff is very meagre and is insufficient to sustain the finding given by the learned Judge that the plaintiff is in possession of the portion which he claims he is in possession of and as he is not in possession of any property and his suit is for partition it should on the rule laid down in *Asa Ram* v. *Jagan Nath* (1), be dismissed. But plaintiff's counsel submitted that really it is a suit for possession and not merely for partition. If that was so, the sole dispute should have been confined to the amount of court-fee payable and not whether the plaintiff is in possession at all. In my opinion the rule is applicable and the suit should be dismissed on that ground alone.

The second question that arises for decision is as to what was sold to the plaintiff and whether the plaintiff has any right to claim possession. In the suit as laid it is alleged that Jiwan Singh purchased from Jiwan Singh son of Sundar Singh a right of expectancy which is clear from the averments in paragraph No. 4 of the plaint which I quote *in extenso*—

> "Jiwan Singh referred to in para No. 3 above absolutely sold all his rights which he expected to get on the death of Shrimati Indar Kaur, widow of Ram Singh aforesaid, pertaining to property, detailed in the heading above for lawful and valid consideration, by means

(1) I.L.R. 15 Lah. 531

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of three sale deeds in favour of Sardar Jiwan Singh, father of the plaintiff, as detailed below:—

One-fourth share (½ share of 1/2 share) of the entire property in suit by means of sale deed dated the 15th February, 1914, registered on the 16th February, 1914, in lieu of Rs. 925, one-eighth share (½ share of the remaining share) by means of sale deed dated the 13th September 1914, registered on the 17th September, 1914, in lieu of Rs. 400 and one-eighth share (his remaining share) by means of sale deed, executed and registered on the 21st September, 1914, in lieu of Rs. 400. Thus Jiwan Singh, father of the plaintiff-aforesaid became the sole owner of the share of the property of Jiwan Singh, son of Sundar Singh. Sardar Jiwan Singh, father of the plaintiff, died in 1921. The contesting plaintiff is his only son. heir and representative. All the three sale deeds are attached herewith."

There is no other claim in the plaint as far as I can see. In the replication also the position taken in the plaint in regard to the sale of expectancy is reiterated. Plaintiff's Advocate made a statement on the 21st December, 1950, where he said—

"The transfer of one-half share of the house in dispute was made by Jiwan Singh son of Sundar Singh in favour of Jiwan Singh, adoptive father of the plaintiff, in the year 1914, during the lifetime of Indar Kaur, but after the death of her husband Ram Singh."

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Thus at no stage of the pleadings was it the case of the plaintiff that anything more than a mere right of expectancy had been transferred to the plaintiff or his predecessor-in-interest.

Thus what was transferred was a right of expectancy or *spes successionis* which both in accordance with the principles of Hindu Law as well as under the Transfer of Property Act, section 6 (a) is non-transferable. But then it is contended in appeal before us that the Transfer of Property Act is not applicable to the Punjab and even though a right of expectancy may not be transferable the contract becomes enforceable in equity on the estate vesting in the transferor of the rights of expectancy if the transfer is for consideration. Several cases were relied upon but I am unable to hold that this is so.

As this is a question of some importance it is necessary that the law relating to this should be discussed at some length. It is true that the Transfer of Property Act is not applicable to the Punjab but even the Lahore Judges were not in accord as to what is exactly the meaning of this, but there is no disagreement as to the principles of the Transfer of Property Act being applicable to the Punjab because they are based on justice, equity and good conscience. It is only the rules of procedure which are not applicable. See *Punjab National Bank, Ltd.* v. *Jagdish Sahai and others,* (1). In some cases it had been held that it is the rules laid down in the Act as amended in 1929, which are applicable; see *Tulsi Ram and others* v. *Thakar Dass-Madan Mohan Lal,* (2). *In Kader Moideen* v. *Nepsan and others,* (3), it was contended before the Privy Council that the principles of the

(1) A.I.R. 1936 Lah. 390
(2) 38 P.L.R. 76
(3) 25 I.A. 240

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Transfer of Property Act should be followed in preference to English practice. As to this the Privy Council said that they were not prepared to dissent from this contention, but they expressed no final opinion on this.

The rule as to the inalienability of expectancy interests was laid down by the Privy Council in *Sham Sunder Lal and others* v. *Achhan Kunwar and another* (1) where Lord Davey said that such a reversioner could not by Hindu Law make a disposition of or bind his expectant interests or his "future rights". Relying on this pronouncement Maclean C.J. and Banerjee J. in *Nund Kishore Lal* v. *Kanee Ram Tewary* (2), were of the opinion that the interests of a Hindu reversioner expectant upon the death of a Hindu female could not be validly mortgaged. Delivering the judgment of the Privy Council in *Venkatanarayana Pillai* v. *Subbammal*, (3), Mr. Ameer Ali was of the opinion that although on the death of a female owner inheritance to the reversioner opens out and the one most nearly related to the last full owner becomes entitled to possession but in her lifetime the reversionary right is a mere possibility or *spes successionis*.

In *Amrit Narayan Singh* v. *Gaya Singh* (4), Mr. Ameer Ali observed that a Hindu reversioner during the lifetime of a female owner holding a life estate has no right or interest in *praesenti* and he has nothing to assign or to relinquish or to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere *spes successionis*, and if he is a minor his guardian cannot bargain with it on his behalf or bind him by any

(1) 25 I.A. 183 at p. 189
(2) I.L.R. 29 Cal. 355
(3) I.L.R. 38 Mad. 406
(4) I.L.R. 45 Cal. 590 at p. 603

contractual engagement in respect thereto. This question arose in the following circumstances. On the death without issue of a Hindu leaving a widow, a daughter and his daughter's son, a minor, the widow obtained possession of her husband's property against the opposition of the agnates. On her death a dispute arose with the agnates as to the right of the daughter to succeed. The matter was referred to arbitration, but before the arbitration took place a compromise was entered into in which the husband of the daughter acted for her and her infant son, the effect of which was to completely extinguish the reversionary interest of the minor in regard to his grandfather's estate, and an award was made in accordance with the compromise and a decree was made in spite of the opposition of the daughter. The daughter died and after her death the minor son brought a suit to set aside the arbitration proceedings together with the compromise and award as being fraudulent and for a declaration that he was not bound by them, and it was held that until the death of the daughter the minor son had no right or interest in the property which could be the subject of bargain. Relying on these judgments the Division Bench in *Annada Mohan Roy* v. *Gour Mohan Malik* (1), held that the interest of a reversioner under Hindu Law is a mere chance of succession and cannot form the subject of any contract, surrender or disposal. At page 541 Mookerjee, A., C.J., observed as follows—

> "We must accordingly take it as settled by the decisions of the Judicial Committee that the interest of a Hindu reversioner is an interest expectant on the death of a qualified owner; it is not a vested interest, it is a *spes successionis* or a mere

(1) I.L.R. 48 Cal. 536

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chance of succession, it cannot be sold, mortgaged, assigned or relinquished, for a transfer of a *spes successionis* is a nullity and has no effect in law.

Continuing the learned Judge again said at page 542—

> "There can, in our opinion, be no doubt that according to the decisions of the Judicial Committee, so long as the estate is vested in the female heirs, the interests of the reversioner is a mere chance of succession which cannot form the subject of any contract, surrender or disposal. This view is now generally accepted in nearly all the Indian High Courts."

And then the learned Judge has given a list of cases where this was followed. The learned Judges then considered the effect of section 6 of the Transfer of Property Act and also the English cases *Holroyd* v. *Marshall* (1), and *Tailby* v. *Official Receiver* (2), and at page 546 the learned Acting Chief Justice referred to the doctrine that though the assignment was of a defective title, yet as the assignor afterwards acquired a good title, the Court would make that good title available to make the assignment effectual, and observed—

> "But this principle plainly has no application where the contract of assignment refers to property which has been expressly rendered inalienable by the Legislature."

(1) (1861) 10 H.L.C. 191
(2) (1888) 13 A.C. 523

In this very case *Annada Mohan Roy* v. *Gour Mohan Mullick* (1), the learned Judges after referring to various Hindu Law tests said at page 555—

> "The Hindu jurists do not appear to have ever contemplated the transfer of mere chance or possibility of succession, which, as is abundantly clear from numerous passages of the Dayabhaga, was not property (Dayabhaga, Chap. 1. paras, 13, 14, 15, 18, 19, 26, 30, 38, 39 and 42). These passages show that the expectant interest of a son, in other words, what has been called, not very felicitously, 'the inchoate right of inheritance created by birth' is not property; while the father lives, no property is vested in the sons, and they have no ownership which could form the subject of partition which is in essence a form of alienation. There is thus no ground to hold that the claim of the plaintiff, tested by Hindu Law, apart from the provision of section 6 of the Transfer of Property Act, can be seriously entertained."

Thus it is quite clear that neither under section 6(a) of the Transfer of Property Act nor under the provisions of Hindu Law, apart from the provisions of the Transfer of Property Act, is such a right alienable, or transmitable, nor can it form the subject-matter of a valid contract, and if it cannot form the subject-matter of a contract it cannot be enforced.

This case *Annada Mohan Roy* v. *Gour Mohan Mullick* (1), was taken to the Privy Council and is reported as 50 I.A. 239, and the judgment of the

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Calcutta High Court was upheld. After referring to *Harnath Kaur's case* (1), their Lordships posed the question (at page 244) whether, either under the Transfer of Property Act or under the Hindu Law applying to purchases of expectations of inheritance, there is any ground upon which these contracts can be supported, and their lordships answered this question in the following words at the same page—

> "Dr. Abdul Majid has developed these points and his points appear to be two, setting aside for the moment the Transfer of Property Act, upon the ground that it deals with an actual transfer or conveyance and not with a contract to transfer. It is contended that there is nothing in the reason of the thing to prevent two parties, who are concerned in which these parties were concerned, from entering into a contract for the future sale of future expectations. It is admitted that there is no authority to be found anywhere which supports the view that such a contract is possible."

No doubt it is true that a reference was then made to two cases which dealt with the prohibition under the Transfer of Property Act, but in my opinion it cannot be said that the Privy Council has in any way disagreed with the Calcutta High Court in regard to such contracts being unenforceable under Hindu Law or have cast any doubt on what was stated by the Board in *Harnath Kaur* v. *Indar Bahadur Singh* (1).

Reference may now be made to *Harnath Kaur* v. *Indar Bahadur Singh* (1). In that case a Hindu reversioner got a decree declaring that a will

(1) 50 I.A. 69

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(1) 50 I.A. 69

authorizing the widows of the last male holder of an Oudh estate to adopt, was invalid. Prior to this he purported to sell half the estate in consideration of Rs. 25,000 advanced to him and the sale deed declared that when he (the reversioner) succeeded he would put the vendee in possession. After the death of the widow and the death of the vendee, the latter's widow brought a suit for possession or in the alternative to recover the money. It was held that there was no effectual transfer since the vendor had only an expectancy but that the money advanced could be recovered. At page 74 Sir Lawrence Jenkins, after referring to the finding of the Courts below that such a transfer was inoperative as at its date the reversioner had no interest capable of transfer but merely an expectancy, said:—

> "It cannot be disputed that, according to the ordinary Hindu Law, this is the true view".

and the widow did not succeed in getting possession of the half estate although the reversioner had come into possession but a decree for the return of the money advanced was given by the Privy Council applying section 65 of the Indian Contract Act.

In *Bhana and another* v. *Guman Singh and others* (1), it was held that an agreement by which the reversioners of a Hindu widow agreed not to force their right to sue for a declaration that a gift of property made by the widow was not binding upon them, did not require compulsory registration. At page 386 the Court said that the reversioners had no transferable right, title or interest in the property during the lifetime of the widow. This was a case under Hindu Law and no mention is made of the Transfer of Property Act.

(1) A.I.R. 40 All. 384

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I shall now deal with cases which have arisen in the Punjab. The earliest case to which reference may be made is *Tota and others* v. *Abdulla Khan and another* (1). Chatterji, J., in his referring order at page 302 said that mere possibilities of succession are not capable of alienation but sales of them are not illegal, and at page 304 he said that under Hindu Law the interest of a reversioner is not capable of alienation and he referred to *Kunj Koonwar* v. *Komal Koonwar* (2), *Ram Chandra Tantrodas* v. *Dharmo Narain Chukerbutty* (3), and *Ram Achhan Kaur* v. *Thakur Das* (4). Sir Charles Roe C.J. gave the leading judgment and he said that no outsider could be introduced to challenge an alienation made by a widow and therefore, the right of a reversioner to alienate his right of succession could not be transferred to an outsider, nor could such an outsider challenge a widow's alienation. The learned Judge also said that the principles of Hindu Law have some bearing on the point as also the principles which underlie the Transfer of Property Act, and Reid J. specifically held that the principles contained in section 6(a) of the Transfer of Property Act embodied the spirit of the customs which limit the powers of alienation in the Province, and Clark J. was of the opinion that the power of a reversioner to transfer his reversionary right is opposed to the principle of Tribal Law of the Punjab, and the exercise of the power, at least "till recent times, is almost unknown". The Court therefore dismissed the suit of the alienee of reversionary rights who had challenged the alienation made by the widow in possession.

(1) 66 P.R. 1897
(2) 6 W.R. 34
(3) 15 W.R. 17
(4) I.L.R. 17 All. 125 at pp. 132 and 150

In *Malik Ala Bakhsh* v. *Ghulam and others*, (1), a Division Bench of the Lahore High Court held that though the sale of a reversionary right of succession did not at the time that the sale took place affect a transfer of property but it gave rise to a right which the Courts would enforce as inheritance had fallen into possession on the well-known rule of equity which treats everything as done which had been agreed to be done, but this being an old case naturally could not take into account the law as laid down by the Privy Council in *Harnath Kuar* v. *Indar Bahadur Singh* (2), and if the Transfer of Property Act embodies the principles of justice, equity and good conscience it cannot be said that such a contract would be enforceable.

The next Punjab case on this point is *Jawala Sahai* v. *Ram Singh* (3), where it was held that a reversioner's right to contest an alienation under Customary Law is not transferable to a stranger and where a reversioner who succeeds after the death of a widow alienates his reversionary rights, the alienee has no status to contest the validity of mortgages made by the widow, and the full Bench decision was followed.

The contrary view was taken in *Gujjar* v. *Auliya* (4), by a Division Bench but that was a case where transfer was by one reversioner of his right of expectancy to another reversioner, and it was held that this transfer is not void, but that question does not arise in the present case. Moreover, this case seems to have been decided on its own facts and is no authority for the proposition which was debated before us.

(1) 13 P.R 1899
(2) 50 I.A. 69
(3) 67 P.R. 1919
(4) 78 P.R. 1914

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In *Indar Singh* v. *Munshi* (1), it was held at page 126 that mere reversionary rights cannot be alienated and that an agreement to transfer such rights does not require registration as it does not itself create any rights at all.

In *Gurbhaj* v. *Lachhman* (2), a Letters Patent Bench held that the right of succession on the death of a widow in Hindu Law is a mere *spes successionis* and the reversioner has no right or interest in the property *in praesenti*, and therefore a deed relinquishing the right of succession does not require registration. Sir Shadi Lal, C. J. referred in this case to *Amrit Narayan Singh* v. *Gaya Singh* (3), *and Harnath Kunwar* v. *Indar Bahadur Singh* (4). At page 92 Sir Shadi Lal, C.J. observed—

> "The transfer of a *spes successionis* does not carry with it any interest in immovable property, and the deed evidencing such transfer does not stand in need of compulsory registration."

Achhar etc. v. *Padmun etc.* (5), was also relied upon by the respondent, but in that case also it was held that the right of an expectant heir to succeed to an estate is a mere *spes successionis* and cannot be the subject-matter of an assignment, but following the judgment of the Chief Court in *Malik Ala Bakhsh* v. *Ghulam and others* (6), it was held that a contract of this kind gives rise to a right which the Court will enforce under section 18 of the Specific Relief Act when the inheritance falls into possession.

(1) I.L.R. 1 Lah. 124
(2) I.L.R. 6 Lah 87
(3) I.L.R. 45 Cal. 590 (P.C.)
(4) 50 I.A. 69
(5) L.P.A. 87 of 1924
(6) 13 P.R. 1899

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Reference may now be made to *Thakar Singh and others* v. *Mst. Uttam Kaur and others* (1), where it was held that the right of expectancy cannot be the subject-matter of a valid transfer so as to invest the transferee with a right to sue and that the principle contained in section 6(a) of the Transfer of Property Act embodies in this respect the spirit of the customs prevailing in the Punjab. *Tota and others* v. *Abdullah Khan and another* (2) was relied upon at page 634, and the Privy Council cases, which I have mentioned above, were also referred to.

Another Division Bench of the Lahore High Court in *Sher Mohammad Khan and others* v. *Chuhr Shah and another* (3), held that the sale of reversionary rights in a widow's estate is opposed to the principles of Customary Law, and according to the principles of section 6 of the Transfer of Property Act which can be taken as a guide, though the Act is not in force in this Province, such a transfer is void.

I may here refer to two Punjab cases which though not dealing with transfer of a right of expectancy dealt with rights which are contained in section 6 of the Transfer of Property Act. In *Tara Chand* v. *Bakshi Sher Singh and others* (4), it was held that though the Transfer of Property Act does not apply to the Punjab, the general principles based on the judgments of Equity Courts can be invoked in aid by the Courts in this Province and the Principle of section 6(dd) which bars a transfer of a right to future maintenance is applicable to the Punjab.

In *Baba Hakam Singh* v. *Narinjan Singh and another* (5), it was held that a right to take accounts and to recover such sums as may be found

(1) I.L.R. 10 Lah. 613
(2) 66 P.R. 1897
(3) A.I.R. 1936 Lah. 753
(4) 38 P.L.R. 702
(5) A.I.R. 1937 Lah. 934

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due is not assignable being a mere right to sue within the meaning of section 6, Clause (e) of the Transfer of Property Act, and the assignee is therefore, not entitled to maintain a suit for such a purpose, and reliance was placed on *Khetra Mohan Das* v. *Biswanath* (1).

I would therefore hold that by deeds Exhs. P. 2 to P. 4 of the year 1914, Jiwan Singh purported to sell his right of expectancy which is not transferable, assignable, transmittable and cannot be the subject-matter of a contract at the date of the transfer. As was held in *Harnath Kuar's case* (2), Jiwan Singh had no interest which was capable of being transferred, and this is apart from the provisions of the Transfer of Property Act.

The respondent then submitted that there is another track of decisions which becomes applicable to this case and which starts with *Malik Ala Baksh* v. *Ghulam and others* (3), I have already discussed this case. What was held there was that although sale of reversionary rights passes no interest yet when the estate falls into possession the vendee can enforce his rights under section 18 of the Specific Relief Act. This rule was followed by Beadon J. in *Attar Chand* v. *Umar Hayat* (4), but it appears that it was nothing more than *obiter*.

In *Arur Singh* v. *Todar Mal* (5), the contract by the reversioner was that the reversioner intended to sue for the cancellation of a sale by a widow in possession and that on being successful he would give possession of half the land to the plaintiff and get a sale deed registered. It was held that the alienee may be entitled to sue for a specific performance on the death of the widow but he had no cause of action to bring the suit

(1) I.L.R. 51 Cal. 972
(2) 50 I.A. 69 p. 74
(3) 13 P.R. 1899
(4) 20 I.C. 556
(5) 49 I.C. 501

during her lifetime because the contract itself did not create any interest in or charge on the property.

Musammat Bhagwati v. *Mussammat Chooli* (1), was then referred to where it was also held that a contract of sale of reversionary rights can be enforced when the estate falls into possession. The learned Judges relied upon section 43 of the Transfer of Property Act although they did not give full effect to section 6 of the same Act. The case was decided on the ground that any interest subsequently acquired by the transferor with a defective title is available to make the transaction effectual when the title is perfected.

Counsel next relied on *Naranjan Singh* v. *Dharam Singh* (2), where it was held that an agreement to sell a reversionary right of succession can be enforced in the Punjab when the inheritance falls into possession and although *Annada Mohan Roy* v. *Gour Mohan Mullick* (3), was referred to, it was distinguished on the ground that the Transfer of Property Act was not in force. This was a judgment by Broadway J. with whom Currie J. agreed and *Malik Ala Bakhsh* v. *Ghulam and others* (4), was followed.

Another judgment which was relied upon is a Single Bench by Currie J. in *Gobinda* v. *Chanan Singh* (5), where the same proposition was laid down.

In *Kishan Singh* v. *Mst. Lachhmi* (6), it was contended by counsel that a transfer of this kind could not be allowed to operate, but the learned Judges contented themselves by saying—

> "This contention is completely answered by another decision of the Lahore High Court, namely, *A. I. R.* 1930 *Lah.* 928",

(1) 55 I.C. 598
(2) 179 I.C. 29
(3) 50 I.A. 239
(4) 13 P.R. 1899
(5) A.I.R. 1933 Lah. 378
(6) R.S.A. 1310/1937

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and that such a transaction gives rise to a right which the Courts will enforce when the inheritance falls into possession and such a contract is enforceable in a Province where the Transfer of Property Act is not in force.

Reliance was also placed by counsel on two judgments of Pipon J.C. of the Peshawar Court. The first one is *Kabal Shah* v. *Muhammad Baqa* (1), where it was held that section 6 of the Transfer of Property Act is not a bar to a suit for specific performance, and the second is *Zabta Khan* v. *Said Habib* (2), where it was held that a transfer of reversionary rights may be valid as an executory contract which will take effect when a title to the property has opened out to the vendor both by a rule of equity and by the application of section 18 of the Specific Relief Act.

A Travancore case *Chacko Thomas* v. *Mathai Abraham* (3), was then cited and it was held there that an agreement to convey property to be acquired in the future is enforceable in spite of section 6 of the Transfer of Property Act. The Punjab cases that I have already given were relied upon as also a judgment of Buckley J. in *In re Ellenborough Towry Law* v. *Burne* (4).

Two English cases were cited before us by the respondent's counsel *in re Ellenborough Towry Law* v. *Burne* (4). What was held in this case was that a volunteer cannot enforce a contract of an assignment of an expectancy even though under seal, but the learned Judge added—

> "It cannot be and is not disputed that if the deed had been for value the trustees could have enforced it.
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> Future property, possibilities, and expectancies are all assignable in equity for value."

(1) 73 I.C. 120
(2) 75 I.C. 246
(3) A.I.R. 1954 Tra-Co. 357
(4) (1903) 1 Ch. 697

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(1) 73 I.C. 120
(2) 75 I.C. 246
(3) A.I.R. 1954 Tra-Co. 357
(4) (1903) 1 Ch. 697

The case referred to by Buckley J. was relied upon by Mr. Faqir Chand Mital and that case is *Tailby* v. *Official Receiver* (1), in which it was held that a right to sue for accounts is assignable in equity, which is contrary to the view taken even in the Punjab in *Baba Hakam Singh* v. *Naranjin Singh and another* (2).

This track of decisions is in my opinion not available to the plaintiff in the present case. In the first place the suit is not for specific performance, and if it had been, many other defences might have been open to the defendants. In any case, the suit being only for possession on the ground that there was a sale of expectancy in favour of the plaintiff's predecessor-in-interest, the cases starting with *Malik Ala Bakhsh* v. *Ghulam and others* (3), have no applicability.

And secondly, the Privy Council cases in *Harnath Kuar* v. *Indar Bahadur Singh* (4), *and Annada Mohan Roy* v. *Gour Mohan Mullick* (5), show that if the right of expectancy is not alienable and cannot form the subject-matter of a contract, such a contract would be unenforceable as was held in *Annda Mohan Roy* v. *Gour Mohan Mullick* (5), where it was said at page 555—

> "There is thus no ground to hold that the claim of the plaintiff, tested by Hindu law, apart from the provisions of section 6 of the Transfer of Property Act, can be seriously entertained."

And this judgment was affirmed by their Lordships of the Privy Council.

Besides, if this agreement was allowed to be enforced it would be defeating the Hindu Law because it would come to this that although expectations cannot be transferred *in praesenti* or in

(1) 13 App. Cas. 523
(2) A.I.R. 1937 Lah. 934
(3) 13 P.R. 1899
(4) 50 I.A. 69
(5) 50 I.A. 239
(6) I.L.R. 48 Cal. 536

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future, a person may bind himself to bring about the same result by giving to the agreement the form of a promise to transfer not the expectations but the fruits of the expectations by saying that what he has purported to do may be described in different language from that which the law has chosen to apply to it for the purpose of condemning it. When the law refuses the transaction as an attempt to transfer a chance, it indicated the true aspect in which it requires the transaction to be viewed. I have taken these words from the judgment of Tyabji J. in *Sri Jagannada Raju* v. *Shri Rajah Prasada Rao* (1), at page 559. Only I have substituted the word 'law' for the word 'Legislature' and the word 'Act'. This observation has received the approval of the Privy Council in *Annada Mohan Roy* v. *Gour Mohan Mullick* (2).

I would hold therefore that the present is neither a suit for specific performance nor can the agreement be specifically performed in the present case.

I would, therefore, allow this appeal, set aside the decree of the trial Court and dismiss the plaintiff's suit with costs throughout.

Khosla, J.

KHOSLA, J.—I agree.

(1) I.L.R. 39 Mad. 554
(2) 50 I.A. 239

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