BEFORE THE NATIONAL GREEN TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI
ORIGINAL APPLICATION NO.63 OF 2025

IN THE MATTER OF :

Mall Road, Vasant Kunj, Resident Welfare Association (Regd.) … Applicant

Versus

Ministry of Environment, Forest & Climate Change & Ors.
…..Respondents

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TARUN GUPTA
ADVOCATE FOR RESPONDENT NO.5
B-7/50, SAFDARJUNG ENCLAVE MAIN
NEW DELHI – 110 029

NEW DELHI
DATED : 04.12.2025

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REPLY ON BEHALF OF RESPONDENT NO.5

MOST RESPECTFULLY SHOWETH :

1. **OA IS BARRED BY PRINCIPLE OF RES JUDICATA:**

That in the instant OA, the primary issue raised by the Applicant is that there is an illegal road within Rajokri Protected Forest and the same is used for transportation purposes by Respondent No. 5.

In this regard it is submitted that the same very Applicant had previously filed O.A. No.1038/2019 before this Hon'ble Tribunal. *In para-8.6(iv) of the said OA, the Applicant had specifically raised the issue regarding illegal construction of road in the Rajokri Protected Forest*. The said OA was disposed of by

this Hon'ble Tribunal vide order dated 6.5.2020. The Applicant had filed a Review Application being Review Application No.26/2020 in the said OA, seeking review of aforesaid order dated 6.5.2020. In the said Review Application the Applicant had specifically agitated the issue regarding construction of illegal road in the Rajokri Protected Forest.

The said Review Application was dismissed by this Hon'ble Tribunal vide order dated 22.9.2020. In para-6, 24 and 25 of the said order, this Hon'ble Tribunal specifically dealt with the argument of the Applicant regarding construction of illegal road in the Rajokri Protected Forest. *It was held by this Hon'ble Tribunal that the construction of road or movement on the road are common things and this Tribunal cannot restrain the movement of trucks on the roads and that too on the version of the Applicant. It was further held by this Hon'ble Tribunal that construction of the road, development of colony and movement are policy matters, which are not to be interfered with by the Tribunal while exercising power of judicial review.*

Thus, a perusal of the previous OA, Review Application

and the order passed by this Hon'ble would show that *the issue regarding illegal construction of road in Rajokri Protected Forest had been specifically raised, pleaded, argued, dealt with and categorically rejected by this Hon'ble Tribunal in no uncertain terms.* Therefore, since the said issue already stands adjudicated by this Hon'ble Tribunal in the previous proceedings filed by the same Applicant, the instant OA, which raises the same very issue, is clearly barred by the principle of Res Judicata.

It has been held by the Hon'ble Supreme Court Mohan Lal Goenka vs Benoy Kishna Mukherjee & Ors, (1952) 2 SCC 648 that even an erroneous decision on a question of law operates as Res Judicata between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as Res Judicata.

2. **AS PER THE AFFIDAVIT FILED BY THE CONCERNED SDM BEFORE THE HON'BLE HIGH COURT, THE ROAD IN QUESTION IS A GOVERNMENT ROAD:**

Pertinently, the Sub Divisional Magistrate (Mehrauli), had filed an affidavit before the Hon'ble High Court wherein it was categorically mentioned that the *road in question is Government*

Road and is used for the benefit of public at large. A perusal of the said affidavit clearly shows that the road in question is a government road and thus the plea of the Applicant that the same is an illegal road or has been constructed in Rajokri Protected Forest, is ex-facie wrong and incorrect.

3. **THE MEMBERS OF THE APPLICANT ASSOCIATION ARE THEMSELVES USING THE ROAD IN QUESTION AND HAVE OBJECTED TO THE CLOSING OF THE SAME:**

A perusal of the reply filed by the Deputy Conservator of Forest before the Hon'ble High Court would show that it has been categorically mentioned therein that the road in question is being used by the members of the Applicant Association and it is they who objected to the closure of the same.

Furthermore, it is mentioned in the said affidavit that the *road in question is also be used by the water tankers of Delhi Jal Board, MCD vehicles, all the residents of Rajokari village and commercial vehicles of private warehouses*. Hence it is evident that the road in question is being used for the benefit of public at large for last several decades and the closure of the same would cause huge inconvenience and hardship to the residents of the

village as well as the public at large.

4. **THE ROAD IN QUESTION IS IN EXISTENCE EVEN MUCH PRIOR TO THE ISSUANCE OF NOTIFICATION DATED TO 2.4.1996:**

Notably, the issue concerning the road in question also came up for consideration before the Forest Settlement Officer, who is the competent authority under the Indian Forest Act to deal with such issues. It was held by the said Forest Settlement Officer that the *road in question is in existence much prior to the issuance of notification dated 2.4.1996*. It was further held that there is no alternate passage for accessing the village except the road in question. It was concluded by the Forest Settlement Officer that the said road cannot be closed till the alternate passage is provided in terms of the provisions of section 25 of the Indian Forest Act. Undisputedly, till date no alternate passage has been provided and thus the prohibition contained in section 25 of the Indian Forest Act continues to operate.

5. **RIGHT OF EASEMENT IN RESPECT OF THE ROAD IN QUESTION:**

As per Section 15 of the Indian Easements Act, 1882,

where a right of way or any other easement has been peacefully and openly enjoyed by any person, without interruption for 30 years, the right to such access shall be absolute. In the instant case the facts enumerated hereinabove make it evident that the road in question is being used peacefully and openly by the residents of the Rajokri village and by the public at large for last 7-8 decades, without any interruption. Thus they have acquired a right of easement over the said road by prescription. Therefore, the said persons cannot be deprived of the usage of the said road.

REPLY ON MERITS

1. At the outset, your answering respondent states that the instant OA is totally misconceived, vexatious, frivolous and is therefore, liable to be dismissed. Your answering respondent denies all purported grounds, submissions, allegations and contentions raised by the Applicant in the OA, which are contrary to and/or inconsistent with what is stated herein. Nothing in the OA should be deemed to have been admitted by your Answering Respondent for want of traverse, unless specifically admitted

hereinbelow.

2. It is vehemently denied that the road in question is an illegal road or that the same falls in the Rajokri Protected Forest. It is vehemently denied that the movement of vehicles is causing serious pollution or degradation of the ecology and environment of Rajokri forest. As has been stated in detail hereinabove, the road in question is in existence for last 7-8 decades and is being used by the residents of the village as well as the government agencies for accessing the village. It is vehemently denied that any waste is dumped into the forest land as has been alleged. It is vehemently denied that the road in question has been constructed on the behest of your Answering Respondent. It is vehemently denied that there exists an alternate passage to access the village. It is vehemently denied that movement of commercial vehicles has led to serious traffic congestion or safety issues for the residents of Church Road. As has been stated hereinabove, as per the affidavit filed by the DCF, the members of the Applicant Association themselves are using the

rode in question and it is they who strongly opposed the closure of the road. Hence it is evident that the instant OA has been filed with an oblique motive to confine the usage of road in question to the owners of the farmhouses situated on the said road, so that those affluent persons can enjoy their luxury living by having a dedicated road for their farmhouses and the general public is deprived of the usage of the road.

3. It is vehemently denied that in the previous OA, the aspect of illegal road had not been specifically prayed. As has been explained in detail hereinabove, the issue regarding illegal construction of road in Rajokri Protected Forest had been specifically raised, pleaded, argued, dealt with and categorically rejected by this Hon'ble Tribunal in no uncertain terms. It is vehemently denied that the movement of the vehicles on the road in question has resulted in deprivation and infringement of any fundamental right of the Applicant. It is vehemently denied that the movement of traffic on the road in question is in

contravention of the provisions of Forest Conservation Act. Detailed submissions made hereinabove are reiterated

A copy of the Indian Easements Act, 1882 is annexed herewith and marked as **Annexure R-1,** copy of judgment dated 9.12.1952 passed by the Hon'ble Supreme Court in Mohan Lal Goenka vs Benoy Kishna Mukherjee & Ors, (1952) 2 SCC 648 is annexed herewith and marked as **Annexure R-2.** copy of masavi of church road filed by SDM before the Hon'ble High Court is annexed herewith and marked as **Annexure R-3,** copy of Jamabandi of Khasra No.106 filed by SDM before the Hon'ble High Court is annexed herewith and marked as **Annexure R-4.**

In view of the submissions made hereinabove, the OA filed by the Applicant deserves to be dismissed. Prayed accordingly.

RESPONDENT NO.5

THROUGH COUNSEL

TARUN GUPTA
ADVOCATE FOR RESPONDENT NO.5
B-7/50, SAFDARJUNG ENCLAVE MAIN
NEW DELHI – 110 029

NEW DELHI
DATED :

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AFFIDAVIT OF VIPIN GUPTA S/O SH. NARESH KUMAR GUPTA, AGED AROUND 40 YEARS, R/O V-4/3, DLF PHASE-3, GURGAON, HARYANA, PRESENTLY AT NEW DELHI.

I, the above named deponent do hereby solemnly affirm and declare on oath as under:-

1. That I am the authorized representative of Respondent No.5 and am fully conversant with the facts of the present case, therefore, I am competent to swear the present affidavit.

2. That the accompanying reply has been prepared under my instructions. I have read and understood the contents of the said reply and same are true and correct to the best of my knowledge and belief.

NOTARY
R.V. SINGH
Advocate
Regn.No.2282
Commission
Expire on
24-10-2027
Area-Delhi
GOVT. OF INDIA

3. I state that all the annexures are true copies to their respective original.

DEPONENT

VERIFICATION :

Verified at New Delhi on this the 4 DEC 2025 day of _____, 2025 that the contents of my above affidavit are true and correct as per my belief, no part of it is false and nothing material has been concealed therefrom.

DEPONENT

I Identified the deponent/executant who has signed in my presence

NOTARY R.V. SINGH Advocate Regn.No.2282 Commission Expire on 24-10-2027 Area-Delhi GOVT. OF INDIA

Solemnly affirmed before me, read over & explained to the deponent.

Notary Public, DELHI

4 DEC 2025

ANNEXURE-R-1

THE INDIAN EASEMENTS ACT, 1882

ARRANGEMENT OF SECTIONS

CHAPTER III

THE INCIDENTS OF EASEMENTS

SECTIONS

CHAPTER IV

THE DISTURBANCE OF EASEMENTS

CHAPTER V

THE EXTINCTION, SUSPENSION AND REVIVAL OF EASEMENTS

SECTIONS

THE INDIAN EASEMENTS ACT, 1882

ACT NO. 5 OF 1882[1]

[17*th February*, 1882.]

An Act to define and amend the law relating to Easements and Licenses.

Preamble.—WHEREAS it is expedient to define and amend the law relating to Easements and Licenses; It is hereby enacted as follows:—

PRELIMINARY

1. Short title.—This Act may be called the Indian Easements Act, 1882.

Local extent.—It extends[2] to the territories respectively administered by the Governor of Madras in Council and the Chief Commissioners of the Central Provinces and Coorg;

Commencement.—and it shall come into force on the first day of July, 1882.

STATE AMENDMENTS

Karnataka

Amendment of Central Act V of 1882.—In section 1 of the Indian Easements Act, 1882 (Central Act V of 1882) for the entry under the heading "Local extent", the following entry shall be substituted, namely:—

"It extends to the whole of the State of Karnataka".

[*Vide* Karnataka Act 33 of 1978, s. 6].

2. Savings.—Nothing herein contained shall be deemed to affect any law not hereby expressly repealed; or to derogate from—

(*a*) any right of the [3][Government] to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation;

(*b*) any customary or other right (not being a license) in or over immovable property which the Government, the public or any person may possess irrespective of other immovable property; or

(*c*) any right acquired, or arising out of a relation created, before this Act comes into force.

[4][**3. Construction of certain references to Act 15 of 1877 and Act 9 of 1871.**—All references in any Act or Regulation to sections 26 and 27 of the Indian Limitation Act, 1877[5] or to sections 27 and 28 of Act No. 9 of 1871[6] shall, in the territories to which this Act extends, be read as made to sections 15 and 16 of this Act.]

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1. For Report of Select Committee, *see* Gazette of India, 1880, Pt. V, p. 1021: and for Proceedings in Council, *see ibid.*, 1881, Supplement, pp. 687 and 766; and *ibid*., 1882, Supplement, p. 172.

2. The Act was extended to—

(*1*) Ajmer-Merwara by notification under s. 5 of the Scheduled Districts Act, 1874 (14 of 1874), *see* Gazette of India, 1897, Pt. II, p. 1413;

(*2*) Bombay and the U.P. by Act 8 of 1891 and continued in force, with modifications, in the territory transferred to Delhi State, *see* the Delhi Laws Act, 1915 (7 of 1915), s. 3 and the Third Schedule;

(*3*) Whole of Madhya Pradesh by Madhya Pradesh Act 23 of 1958;

(*4*) Punjab by Punjab Act 29 of 1961;

(*5*) Kerala by Kerala Act 5 of 1962;

(*6*) Pondicherry by Act 26 of 1968, s. 3 and Schedule.

(*7*) Extended to the Union territory of Jammu and Kashmir and Union territory of Ladakh by Act 34 of 2019 s. 95 and the Fifth Schedule (w.e.f. 31-10- 2019).

The Act has been repealed in its application to Bellary District by Mysore Act 14 of 1955.

3. Subs. by the A.O. 1950, for "Crown".

4. Subs. by Act 10 of 1914, s. 2 and the First Schedule, for s. 3.

5. *See* now the Limitation Act, 1963 (36 of 1963).

6. *Rep.* by Act 15 of 1877.

CHAPTER I

OF EASEMENTS GENERALLY

4. "Easement" defined.—An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

Dominant and servient heritages and owners.—The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

Explanation.—In the first and second clauses of this section, the expression "land" includes also things permanently attached to the earth; the expression "beneficial enjoyment" includes also possible convenience, remote advantage, and even a mere amenity; and the expression "to do something" includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon.

Illustrations

(*a*) A, as the owner of a certain house, has a right of way thither over his neighbour B's land for purposes connected with the beneficial enjoyment of the house. This is an easement.

(*b*) A, as the owner of a certain house, has the right to go on his neighbour B's land, and to take water for the purposes of his household out of a spring therein. This is an easement.

(*c*) A, as the owner of a certain house, has the right to conduct water from B's stream to supply the fountains in the garden attached to the house. This is an easement.

(*d*) A, as the owner of a certain house and farm, has the right to graze a certain number of his own cattle on B's field, or to take, for the purpose of being used in the house, by himself, his family, guests, lodgers and servants, water or fish out of C's tank, or timber out of D's wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees on E's land. These are easements.

(*e*) A dedicates to the public the right to occupy the surface of certain land for the purpose of passing and re-passing. This right is not an easement.

(*f*) A is bound to cleanse a water course running through his land and keep it free from obstruction for the benefit of B, a lower riparian owner. This is not an easement.

5. Continuous and discontinuous, apparent and non-apparent, easements.—Easements are either continuous or discontinuous, apparent or non-apparent.

A continuous easement is one whose enjoyment is, or may be, continual without the act of man.

A discontinuous easement is one that needs the act of man for its enjoyment.

An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.

A non-apparent easement is one that has no such sign.

Illustrations

(*a*) A right annexed to B's house to receive light by the windows without obstruction by his neighbour A. This is a continuous easement.

(*b*) A right of way annexed to A's house over B's land. This is a discontinuous easement.

(*c*) Rights annexed to A's land to lead water thither across B's land by an aqueduct and to draw off water thence by a drain. The drain would be discovered upon careful inspection by a person conversant with such matters. These are apparent easements.

(*d*) A right annexed to A's house to prevent B from building on his own land. This is a non-apparent easement.

6. Easement for limited time or on condition.—An easement may be permanent, or for a term of years or other limited period, or subject to periodical interruption, or exercisable only at a certain place or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.

7. Easements restrictive of certain rights.—Easements are restrictions of one or other of the following rights (namely):—

(*a*) **Exclusive right to enjoy.**—The exclusive right of every owner of immovable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.

(*b*) **Rights to advantages arising from situation.**—The right of every owner of immovable property (subject to any law for the time being in force) to enjoy without disturbance try another the natural advantages arising from its situation.

Illustrations of the rights above referred to

(*a*) The exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force.

(*b*) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.

(*c*) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.

(*d*) The right of every owner of land to so much light and air as pass vertically thereto.

(*e*) The right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person.

Explanation.—Land is in its natural condition when it is not excavated and not subjected to artificial pressure; and the “subjacent and adjacent soil" mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.

(*f*) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons.

(*g*) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.

(*h*) The right of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel shall be allowed by other persons to flow within such owner’s limits without interruption and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner’s limits without material alteration in quantity or temperature.

(*i*) The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally thereto.

(*j*) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners.

Explanation.—A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course.

CHAPTER II

THE IMPOSITION, ACQUISITION AND TRANSFER OF EASEMENTS

8. Who may impose easements.—An easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed.

Illustrations

(*a*) A is tenant of B's land under a lease for an unexpired term of twenty years, and has power to transfer his interest under the lease. A may impose an easement on the land to continue during the time that the lease exists or for any shorter period.

(*b*) A is tenant for his life of certain land with remainder to B absolutely. A cannot, unless with B's consent, impose an easement thereon which will continue after the determination of his life-interest.

(*c*) A, B and C are co-owners of certain land. A cannot, without the consent of B and C, impose an easement on the land or on any part thereof.

(*d*) A and B are lessees of the same lessor, A of a field X for a term of five years, and B of a field Y for a term of ten years. A's interest under his lease is transferable; B's is not. A may impose on X, in favour of B, a right of way terminable with A's lease.

9. Servient owners.—Subject to the provisions of section 8, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility.

Illustrations

(*a*) A has, in respect of his mill, a right to the uninterrupted flow thereto from sunrise to noon of the water of B's stream. B may grant to C the right to divert the water of the stream from noon to sunset: Provided that A's supply is not thereby diminished.

(*b*) A has, in respect of his house, a right of way over B's land. B may grant to C, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way: Provided that A's right of way is not thereby obstructed.

10. Lessor and mortgagor.—Subject to the provisions of section 8, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such, and a mortgagor may impose, on the property mortgaged, any easement that does not render the security insufficient. But a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

11. Lessee.—No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor.

12. Who may acquire easements.—An easement may be acquired by the owner of the immovable property for the beneficial enjoyment of which the right is created or on his behalf, by any person in possession of the same.

One of two or more co-owners of immovable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.

No lessee of immovable property can acquire, for the beneficial enjoyment of other immovable property of his own, an easement in or over the property comprised in his lease.

13. Easements of necessity and *quasi* easements.—Where one person transfers or bequeaths immovable property to another,—

(*a*) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(*b*) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;

(*c*) if an easement in the subject of the transfer or bequest is necessary for enjoying

other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(*d*) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,—

(*e*) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(*f*) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clauses (*a*), (*c*) and (*e*), are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

Illustrations

(*a*) A sells B a field then used for agricultural purposes only. It is inaccessible except by passing over A's adjoining land or by trespassing on the land of a stranger. B is entitled to a right of way, for agricultural purposes only, over A's adjoining land to the field sold.

(*b*) A, the owner of two fields, sells one to B, and retains the other. The field retained was, at the date of the sale, used for agricultural purposes only, and is inaccessible except by passing over the field sold to B. A is entitled to a right of way, for agricultural purposes only, over B's field to the field retained.

(*c*) A sells B a house with windows overlooking A's land, which A retains. The light which passes over A's land to the windows is necessary for enjoying the house as it war enjoyed when the sale took effect. B is entitled to the light, and A cannot afterwards obstruct it by building on his land.

(*d*) A sells B a house with windows overlooking A's land. The light passing over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards A sells the land to C. Here C cannot obstruct the light by building on the land, for he takes it subject to the burdens to which it was subject in A's hands.

(*e*) A is the owner of a house and adjoining land. The house has windows overlooking the land. A simultaneously sells the house to B and the land to C. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here A impliedly grants B a right to the light, and C takes the land subject to the restriction that he may not build so as to obstruct such light.

(*f*) A is the owner of a house and adjoining land. The house has windows over-looking the land. A, retaining the house, sells the land to B, without expressly reserving any easement. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. A is entitled to the light, and B cannot build on the land so as to obstruct such light.

(*g*) A, the owner of a house, sells B a factory built on adjoining land. B is entitled, as against A, to pollute the air, when necessary, with smoke and vapours from the factory.

(*h*) A, the owner of two adjoining houses, Y and Z, sells Y to B, and retains Z. B is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Y as it was enjoyed when the sale took effect, and A is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Z as it was enjoyed when the sale took effect.

(*i*) A, the owner of two adjoining buildings, sells one to B retaining the other. B is entitled to a right to lateral support from A's building, and A is entitled to a right to lateral support from B's building.

(*j*) A, the owner of two adjoining buildings, sells one to B, and the other to C. C is entitled to lateral support from B's building, and B is entitled to lateral support from C's building.

(*k*) A grants lands to B for the purpose of building a house thereon. B is entitled to such amount of lateral and subjacent support from A's land as is necessary for the safety of the house.

(*l*) Under the Land Aquisition Act, 1870[1] (10 of 1870), a Railway Company compulsorily acquires a portion of B's land for the purpose of making a siding. The Company is entitled to such amount of lateral support from B's adjoining land as is essential for the safety of the siding.

(*m*) Owing to the partition of joint property, A becomes the owner of an upper room in a building, and B becomes the owner of the portion of the building immediately beneath it. A is entitled to such amount of vertical support from B's portion as is essential for the safety of the upper room.

(*n*) A lets a house and grounds to B for a particular business. B has no access to them other than by crossing A's land. B is entitled to a right of way over that land suitable to the business to be carried on by B in the house and grounds.

14. Direction of way of necessity.—When [2][a right] to a way of necessity is created under section 13, the transferor, the legal representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way; but it must be reasonably convenient for the dominant owner.

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.

15. Acquisition by prescription.—Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,

and where support from one person's land or things affixed thereto has been peaceably received by another person's land subjected to artificial pressure or by things affixed thereto as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support or other easement shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation I.—Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II.—Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorising the same to be made.

Explanation III.—Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

Explanation IV.—In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

When the property over which a right is claimed under this section belongs to [3][Government] this section shall be read as if, for the words "twenty years", the words "[4][thirty years]" were substituted.

1. *See* now the Land Acquisition Act, 1894 (1 of 1894).
2. Subs. by Act 12 of 1891, s. 2 and the Second Schedule, for "right"
3. Subs. by the A.O. 1950, for "Crown".
4. Subs. by Act 36 of 1963, s. 28, for "sixty years" (w.e.f. 1-1-1964).

Illustrations

(*a*) A suit is brought in 1883 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1st January, 1862, to 1st January, 1882. The plaintiff is entitled to judgment.

(*b*) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time the plaintiff was entitled to possession of the servient heritage as lessee thereof and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed "as an easement" for twenty years.

(*c*) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had admitted that the user was not of right and asked his leave to enjoyed the right. The suit shall be dismissed, for the right of way has not been enjoyed "as of right" for twenty years.

16. Exclusion in favour of reversioner of servient heritage.—Provided that, when any land upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land.

Illustration

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C had a life-interest in the land; that on C's death B became entitled to the land; and that within two years after C's death he contested A's claim to the right. The suit must he dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

17. Rights which cannot be acquired by prescription.—Easements acquired under section 15 are said to be acquired by prescription, and are called prescriptive rights.

None of the following rights can be so acquired:—

(*a*) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed;

(*b*) a right to the free passage of light or air to an open space of ground;

(*c*) a right to surface-water not flowing in a stream and not permanently collected in a pool, tank or otherwise;

(*d*) a right to underground water not passing in a defined channel.

18. Customary easement.—An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

Illustrations

(*a*) By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. A, having become the tenant of a plot of uncultivated land in the village, breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

(*b*) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A's house.

19. Transfer of dominant heritage passes easement.—Where the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.

Illustration

A has certain land to which a right of way is annexed. A lets the land to B for twenty years. The right of way vests in B and his legal representative so long as the lease continues.

CHAPTER III

THE INCIDENTS OF EASEMENTS

20. Rules controlled by contract or title.—The rules contained in this Chapter are controlled by any contract between the dominant and servient owners relating to the servient heritage, and by the provisions of the instrument or decree, if any, by which the easement referred to was imposed.

Incidents of customary easements.—And when any incident of any customary easement is inconsistent with such rules, nothing in this Chapter shall affect such incident.

21. Bar to use unconnected with enjoyment.—An easement must not be used for any purpose not connected with the enjoyment of the dominant heritage.

Illustrations

(*a*) A, as owner of a farm Y, has a right of way over B's land to Y. Lying beyond Y, A has another farm Z, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of Y. He must not use the easement for the purpose of passing to and from Z.

(*b*) A, as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house, the right may be used, not only by A, but by the members of his family, his guests, lodgers, servants, workmen, visitors and customers; for this is a purpose connected with the enjoyment of the dominant heritage. So, if A lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair.

22. Exercise of easement Confinement of exercise of easement.—The dominant owner must exercise his right in the mode which is least onerous to the servient owner; and, when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

Illustrations

(*a*) A has a right of way over B's field. A must enter the way at either end and not at any intermediate point.

(*b*) A has a right annexed to his house to cut thatching-grass in B's swamp. A, when exercising his easement, must cut the grass so that the plants may not be destroyed.

23. Right to alter mode of enjoyment.—Subject to the provisions of section 22, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage.

Exception.—The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.

Illustrations

(*a*) A, the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw mill into a corn-mill, provided that it can be worked by the same amount of water.

(*b*) A has a right to discharge on B's land the rain-water from the eaves of A's house. This does not entitle A to advance his eaves if, by so doing, he imposes a greater burden on B's land.

(*c*) A, as the owner of a paper-mill, acquires a right to pollute a stream by pouring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the stream by pouring in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature, of the pollution.

(*d*) A, a riparian owner, acquires, as against the lower riparian owners, a prescriptive right to pollute a stream by throwing sawdust into it. This does not entitle A to pollute the stream by discharging into it poisonous liquor.

24. Right to do acts to secure enjoyment.—The dominant owner is entitled[1], as against servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.

Accessory rights.—Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights.

Illustrations

(*a*) A has an easement to lay pipes in B's land to convey water to A's cistern. A may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.

(*b*) A has an easement of a drain through B's land. The sewer with which the drain communicates is altered. A may enter upon B's land and alter the drain, to adapt it to the new sewer, provided that he does not thereby impose any additional burden on B's land.

(*c*) A, as owner of a certain house, has a right of way over B's land. The way is out of repair, or a tree is blown down and falls across it. A may enter on B's land and repair the way or remove the tree from it.

(*d*) A, as owner of a certain field, has a right of way over B's land. B renders the way impassable. A may deviate from the way and pass over the adjoining land of B, provided that the deviation is reasonable.

(*e*) A, as owner of a certain house, has a right of way over B's field. A may remove rocks to make the way.

(*f*) A has an easement of support from B's wall. The wall gives way. A may enter upon B's land and repair the wall.

(*g*) A has an easement to have his land flooded by means of a dam in B's stream. The dam is half swept away by an inundation. A may enter upon B's land and repair the dam.

25. Liability for expenses necessary for preservation of easement.—The expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use or preservation of an easement, must be defrayed by the dominant owner.

26. Liability for damage from want of repair.—Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work.[2]

27. Servient owner not bound to do anything.—The servient owner is not bound to do anything for the benefit of the dominant heritage, and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement; but he must not do any act tending to restrict the easement or to render its exercise less convenient.

Illustrations

(*a*) A, as owner of a house, has a right to lead water and send sewage through B's land. B is not bound, as servient owner, to clear the watercourse or scour the sewer.

(*b*) A grants a right of way through his land to B as owner of a field. A may feed his cattle on grass growing on the way, provided that B's right of way is not thereby obstructed; but he must not build a wall at the end of his land so as to prevent B from going beyond it, nor must he narrow the way so as to render the exercise of the right less easy than it was at the date of the grant.

(*c*) A, in respect of his house, is entitled to an easement of support from B's wall. B is not bound, as servient owner, to keep the wall standing and in repair. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support.

(*d*) A, in respect of his mill, is entitled to a watercourse through B's land. B must not drive stakes so as to obstruct the watercourse.

(*e*) A, in respect of his house, is entitled to a certain quantity of light passing over B's land. B must not plant trees so as to obstruct the passage to A's windows of that quantity of light.

1. But *see* s. 36, *infra*, as to abatement of obstruction of easement.
2. But *see* s. 50, *infra*, as to extinguishment or suspension of easement.

28. Extent of easements.—With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect:—

Easement of necessity.—An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed.

Other easements.—The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties and the purpose for which the right was imposed or acquired.

In the absence of evidence as to such intention and purpose—

(*a*) **Right of way.**—A right of way of any one kind does not include a right of way of any other kind;

(*b*) **Right to light or air acquired by grant.**—The extent of a right to the passage of light or air to a certain window, door or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator died or the non-testamentary instrument was made;

(*c*) **Prescriptive right to light or air.**—The extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used;

(*d*) **Prescriptive right to pollute air or water.**—The extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose; and

(*e*) **Other prescriptive rights.**—The extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right.

29. Increase of easement.—The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement.

Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by alluvion, the easement is proportionately increased, and, if the dominant heritage is diminished by dilluvion, the easement is proportionately diminished.

Save as aforesaid, no easement is affected by any change in the extent of the dominant or the servient heritage.

Illustrations

(*a*) A, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the water of a stream. A alters the machinery of his mill. He cannot therbey increase his right to divert water.

(*b*) A has acquired an easement to pollute a stream by carrying on a manufacture on its banks by which a certain quantity of foul matter is discharged into it. A extends his works and thereby increases the quantity discharged. He is responsible to the lower riparian owners for injury done by such increase.

(*c*) A, as the owner of a farm, has a right to take, for the purpose of manuring his farm, leaves which have fallen from the trees on B's land. A buys a field and unites it to his farm. A is not thereby entitled to take leaves to manure this field.

30. Partition of dominant heritage.—Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage: Provided that such annexation is consistent with the terms of the instrument, decree or revenue-proceeding (if any) under which the division was made, and, in the case of prescriptive rights, with the user during the prescriptive period.

Illustrations

(*a*) A house to which a right of way by a particular path is annexed is divided into two parts, one of which is granted to A, the other to B. Each is entitled, in respect of his part, to a right of way by the same path.

(*b*) A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to A, the other to B. A and B are each entitled, in respect of his heritage, to draw from the well fifty buckets a day; but the amount drawn by both must not exceed fifty buckets a day.

(*c*) A, having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed.

31. Obstruction in case of excessive user.—In the case of excessive user of an easement the servient owner may, without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage: Provided that such user cannot be obstructed when the obstruction would interfere with the lawful enjoyment of the easement.

Illustration

A, having a right to the free passage over B's land of light to four windows six feet by four, increases their size and number. It is impossible to obstruct the passage of light to the new windows without also obstructing the passage of light to the ancient windows. B cannot obstruct the excessive user.

CHAPTER IV

THE DISTURBANCE OF EASEMENTS

32. Right to enjoyment without disturbance.—The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.

Illustration

A, as owner of a house, has a right of way over B’s land. C unlawfully enters on B’s land, and obstructs A in his right of way. A may sue C for compensation, not for the entry, but for the obstruction.

33. Suit for disturbance of easement.—The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto; provided that the disturbance has actually caused substantial damage to the plaintiff.

Explanation I.—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and section 34.

Explanation II.—Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section unless it falls within the first *Explanation,* or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

Explanation III.—Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial within the meaning of this section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.

Illustrations

(*a*) A places a permanent obstruction in a path over which B, as tenant of C’s house, has a right of way. This is substantial damage to C, for it may affect the evidence of his reversionary right to the easement.

(*b*) A, as owner of a house, has a right to walk along one side of B’s house. B builds a verandah overhanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot-passengers using the way. This is not substantial damage to A.

34. When cause of action arises for removal of support.—The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation unless and until substantial damage is actually sustained.

35. Injunction to restrain disturbance.—Subject to the provisions of the Specific Relief Act, 1877[1] (1 of 1877), sections 52 to 57 (both inclusive), an injunction may be granted to restrain the disturbance of an easement—

(*a*) if the easement is actually disturbed—when compensation for such disturbance might be recovered under this Chapter;

(*b*) if the disturbance is only threatened or intended—when the act threatened or intended must necessarily, if performed, disturb the easement.

36. Abatement of obstruction of easement.—Notwithstanding the provisions of section 24, the dominant owner cannot himself abate a wrongful obstruction of an easement.

CHAPTER V

THE EXTINCTION, SUSPENSION AND REVIVAL OF EASEMENTS

37. Extinction by dissolution of right of servient owner.—When, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished.

Exception.—Nothing in this section applies to an easement lawfully imposed by a mortgagor in accordance with section 10.

Illustrations

(*a*) A transfers Sultanpur to B on condition that he does not marry C. B imposes an easement on Sultanpur. Then B marries C. B's interest in Sultanpur ends, and with it the easement is extinguished.

(*b*) A, in 1860, let Sultanpur to B for thirty years from the date of the lease. B, in 1861, imposes an easement on the land in favour of C, who enjoys the easement peaceably and openly as an easement without interruption for twenty-nine years. B's interest in Sultanpur then ends, and with it C's easement.

(*c*) A and B, tenants of C, have permanent transferable interests in their respective holdings. A imposes on his holding an easement to draw water from a tank for the purpose of irrigating B's land. B enjoys the easement for twenty years. Then A's rent falls into arrear and his interest is sold. B's easement is extinguished.

(*d*) A mortgages Sultanpur to B, and lawfully imposes an easement on the land in favour of C in accordance with the provisions of section 10. The land is sold to D in satisfaction of the mortgage-debt. The easement is not thereby extinguished.

38. Extinction by release.—An easement is extinguished when the dominant owner releases it, expressly or impliedly, to the servient owner.

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage.

An easement may be released as to part only of the servient heritage.

Explanation I.—An easement is impliedly released—

(*a*) where the dominant owner expressly authorises an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done is pursuance of such authority;

(*b*) where any permanent alteration is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

Explanation II.—Mere non-user of an easement is not an implied release within the meaning of this section.

1. Ref. by Act 47 of 1963, s. 44 (w.e.f. 1-3-1964).

Illustrations

(*a*) A, B and C are co-owners of a house to which an easement is annexed. A, without the consent of B and C, releases the easement. This release is effectual only as against A and his legal representative.

(*b*) A grants B an easement over A's land for the beneficial enjoyment of his house. B assigns the house to C. B then purports to release the easement. The release is ineffectual.

(*c*) A, having the right to discharge his eavesdroppings into B's yard, expressly authorises B to build over this yard to a height which will interfere with the discharge. B builds accordingly. A's easement is extinguished to the extent of the interference.

(*d*) A, having an easement of light to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently. The easement is impliedly released.

(*e*) A, having a projecting roof by means of which he enjoys an easement to discharge eavesdroppings on B's land, permanently alters the roof so as to direct the rain-water into a different channel and discharge it on C's land. The easement is impliedly released.

39. Extinction by revocation.—An easement is extinguished when the servient owner, in exercise of a power reserved in this behalf, revokes the easement.

40. Extinction on expiration of limited period or happening of dissolving condition.—An easement is extinguished where it has been imposed for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled.

41. Extinction on termination of necessity.—An easement of necessity is extinguished when the necessity comes to an end.

Illustration

A grants B a field inaccessible except by passing over A's adjoining land. B afterwards purchases a part of that land over which he can pass to his field. The right of way over A's land which B had acquired is extinguished.

42. Extinction of useless easement.—An easement is extinguished when it becomes incapable of being at any time under any circumstances beneficial to the dominant owner.

43. Extinction by permanent change in dominant heritage.—Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished, unless—

(*a*) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used; or

(*b*) the injury caused to the servient owner by the change is so slight that no reasonable person would complain of it; or

(*c*) the easement is an easement of necessity.

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support of the dominant heritage.

44. Extinction on permanent alteration of servient heritage by superior force.—An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominent owner can no longer enjoy such easement:

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage; and the provisions of section 14 apply to such way.

Illustration

(*a*) A grants to B, as the owner of a certain house, a right to fish in a river running through A's land. The river changes its course permanently and runs through C's land. B's easement is extinguished.

(*b*) Access to a path over which A has a right of way is permanently cut off by an earthquake. A's right is extinguished.

45. Extinction by destruction of either heritage.—An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

Illustration

A has a right of way over a road running along the foot of a sea-cliff. The road is washed away by a permanent encroachment of the sea. A's easement is extinguished.

46. Extinction by unity of ownership.—An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.

Illustrations

(*a*) A, as the owner of a house has a right of way over B's field. A mortgages his house, and B mortgages his field to C. Then C forecloses both mortgages and becomes thereby absolute owner of both house and field. The right of way is extinguished.

(*b*) The dominant owner acquires only part of the servient heritage: the easement is not extinguished, except in the case illustrated in section 41.

(*c*) The servient owner acquires the dominant heritage in connection with a third person: the easement is not extinguished.

(*d*) The separate owners of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages: the easements are not extinguished.

(*e*) The joint owners of the dominant heritage jointly acquire the servient heritage: the easement is extinguished.

(*f*) A single right of way exists over two servient heritages for the beneficial enjoyment of a single dominant heritage. The dominant owner acquires one only of the servient heritages. The easement is not extinguished.

(*g*) A has a right of way over B's road. B dedicates the road to the public. A's right of way is not extinguished.

47. Extinction by non-enjoyment.—A continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years.

A discontinuous easement is extinguished when, for a like period, it has not been enjoyed as such.

Such period shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner; and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner:

Provided that if, in the case of a discontinuous easement, the dominant owner, within such period, registers, under the Indian Registration Act, 1877[1] (3 of 1877), a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

Where an easement can be legally enjoyed only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its enjoyment during the said period at another place, or at other times, or between other hours, or for another purpose, does not prevent its extinction under this section.

The circumstance that, during the said period, no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under this section.

1. *See* now the Registration Act, 1908 (16 of 1908).

An easement is not extinguished under this section—

(*a*) where the cessation is in pursuance of a contract between the dominant and servient owners;

(*b*) where the dominant heritage is held in co-ownership, and one of the co-owners enjoys the easement within the said period, or

(*c*) where the easement is a necessary easement.

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purposes of this section, be deemed to be a single easement.

Illustration

A has, as annexed to his house, rights of way from the high road thither over the heritages X and Z and the intervening heritage Y. Before the twenty years expire, A exercises his right of way over X. His rights of way over Y and Z are not extinguished.

48. Extinction of accessory rights.—When an easement is extinguished, the rights (if any) accessory thereto are also extinguished.

Illustration

A has an easement to draw water from B's well. As accessory thereto, he has a right of way over B's land to and from the well. The easement to draw water is extinguished under section 47. The right of way is also extinguished.

49. Suspension of easement.—An easement is suspended when the dominant owner become entitled to possession of the servient heritage for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein.

50. Servient owner not entitled to require continuance.—The servient owner has no right to require that an easement be continued; and, notwithstanding the provisions of section 26, he is not entitled to compensation for damage caused to the servient heritage in consequence of the extinguishment or suspension of the easement, if the dominant owner has given to the servient owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage.

Compensation for damage caused by extinguishment or suspension.—Where such notice has not been given, the servient owner is entitled to compensation for damage caused to the servient heritage in consequence of such extinguishment or suspension.

Illustration

A, in exercise of an easement, diverts to his canal the water of B's stream. The diversion continues for many years, and during that time the bed of the stream partly fills up. A then abandons his easement, and restores the stream to its ancient course. B's land is consequently flooded. B sues A for compensation for the damage caused by the flooding. It is proved that A gave B a month's notice of his intention to abandon the easement, and that such notice was sufficient to enable B, without unreasonable expense, to have prevented the damage. The suit must he dismissed.

51. Revival of easements.—An easement extinguished under section 45 revives (*a*) when the destroyed heritage is, before twenty years have expired, restored by the deposit of alluvion; (*b*) when the destroyed heritage is a servient building and before twenty years have expired such building is rebuilt upon the same site; and (*c*) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

An easement extinguished under section 46 revives when the grant or bequest by which

the unity of ownership was produced is set aside by the decree of a competent Court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under section 47.

Illustration

A, as the absolute owner of field Y, has a right of way thither over B's field Z. A obtains from B a lease of Z for twenty years. The easement is suspended so long as A remains lessee of Z. But when A assigns the lease to C, or surrenders it to B, the right of way revives.

CHAPTERVI
LICENSES

52. "License" defined.—Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

53. Who may grant license.—A license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the license.

54. Grant may be express or implied.—The grant of a license may be express or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a license.

55. Accessory licenses annexed by law.—All licenses necessary for the enjoyment of any interest, or the exercise of any right, are implied in the constitution of such interest or right. Such licenses are called accessory licenses.

Illustration

A sells the trees growing on his land to B. B is entitled to go on the land and take away the trees.

56. License when transferable.—Unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid, a license cannot he transferred by the licensee or exercised by his servants or agents.

Illustrations

(*a*) A grants B a right to walk over A's field whenever he pleases. The right is not annexed to any immovable property of B. The right cannot be transferred.

(*b*) The Government grant B a license to erect and use temporary grain-sheds on Government land. In the absence of express provision to the contrary, B's servants may enter on the land for the purpose of erecting sheds, erect the same, deposit grain therein and remove grain therefrom.

57. Grantor's duty to disclose defects.—The grantor of a license is bound to disclose to the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware.

58. Grantor's duty not to render property unsafe.—The grantor of a license is bound not to do anything likely to render the property affected by the license dangerous to the person or property of the licensee.

59. Grantor's transferee not bound by license.—When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license.

60. License when revocable.—A license may be revoked by the grantor, unless—

(*a*) it is coupled with a transfer of property and such transfer is in force;

(*b*) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.

61. Revocation express or implied.—The revocation of a license may be express or implied.

Illustrations

(*a*) A, the owner of a field, grants a license to B to use a path across it. A, with intent to revoke the license, locks a gate across the path. The license is revoked.

(*b*) A, the owner of a field, grants a license to B to stack hay on the field. A lets or sells the field to C. The license is revoked.

62. License when deemed revoked.—A license is deemed to be revoked—

(*a*) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license;

(*b*) when the licensee releases it, expressly or impliedly, to the grantor or his representative;

(*c*) where it has been granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled;

(*d*) where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can not longer exercise his right;

(*e*) where the licensee becomes entitled to the absolute ownership of the property affected by the license;

(*f*) where the license is granted for a specified purpose and the purpose is attained, or abandoned, or becomes impracticable;

(*g*) where the license is granted to the licensee as holding a particular office, employment or character, and such office, employment or character ceases to exist;

(*h*) where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee;

(*i*) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist.

63. Licensee's rights on revocation.—Where a license is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby and to remove any goods which he has been allowed to place on such property.

64. Licensee's rights on eviction.—Where a license has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the license, the right for which he contracted, he is entitled to recover compensation from the grantor.

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(TRUE COPY)

(1952) 2 Supreme Court Cases 648

(BEFORE MEHR CHAND MAHAJAN, S.R. DAS, VIVIAN BOSE AND GHULAM HASAN, JJ.)

4J

1952

Dec. 9

MOHANLAL GOENKA . . Appellant;

Versus

BENOY KISHNA MUKHERJEE AND OTHERS . . Respondents.

Civil Appeal No. 139 of 1951[†], decided on December 9, 1952

A. Civil Procedure Code, 1908 — Ss. 11, 39 and 47 — Res judicata and constructive res judicata — Applicability of, to execution proceedings — Explained in detail through case-law — Held, principles of res judicata and constructive res judicata are applicable even to execution proceedings (Paras 22 to 32)

B. Civil Procedure Code, 1908 — Ss. 47 and 11 — Plea of lack of jurisdiction — Failure to raise it at earliest point — Effect of — Held, if plea of lack of jurisdiction is not raised at the earliest point of time then it is deemed to have been waived — Subsequent events would be bound by principles of constructive res judicata — Further, when property was sold and purchaser of property has taken possession, plea of jurisdiction of executing court cannot be raised

— During execution proceedings, respondent never disputed jurisdiction of executing court — During course of proceedings, order for sale of immovable properties was passed — Though respondent challenged such order of sale before subordinate court and High Court, he never contended that executing court lacked jurisdiction — Then an application was filed contending that executing court had no jurisdiction — Executing court rejected that plea whereas High Court allowed that plea — Legality of

— Held, respondent never took objection to jurisdiction of executing court when notices were served on him — He never raised that contention when he filed applications for setting aside the sale He approached High Court questioning order of sale but never raised objection to jurisdiction of executing court — Though objection to jurisdiction was raised but it was not pressed amounting to implied overruling of those objections Respondent challenged order of executing court for sale of immovable properties by filing applications before executing court and High Court — His applications were rejected and thus order for sale of immovable property attained finality — Once respondent failed to raise objection to jurisdiction of executing court, he would be precluded from raising that plea on principles of constructive res judicata — More so, when property had been sold and auction-purchaser had already

[†] On appeal from the Judgment and Decree dated 10 2 1950 of the High Court of Judicature of Calcutta (Harries, C.J. and Sarkar, J.) in Appeal from Original Order No. 95 of 1945, arising out of Judgment and Order dated 30 1 1945 of the Court of the Subordinate Judge at Asansol of Zillah Burdwan in Misc. Case No. 70 of 1941 : **AIR 1950 Cal 287 : 1950 SCC OnLine Cal 18 [Reversed]**

entered into possession, respondent cannot object to jurisdiction of executing court — He admitted that his applications were drawn as per his instructions, there he is bound by order for sale of immovable property (Paras 15 to 35)

Ram Kirpal Shukul v. *Rup Kuari*, (1883-84) 11 IA 37 : 1883 SCC OnLine PC 21: *Raja of Ramnad* v. *Velusami Tevar*, (1920-21) 48 IA 45 : 1920 SCC OnLine PC 88: *Sha Shivraj Gopalji* v. *Edappakath Ayissa Bi*, AIR 1949 PC 302 : (1949-50) 54 CWN 55 : 1949 SCC OnLine PC 37, *relied on*

Annada Kumar Roy v. *Sk. Madan*, 38 CWN 141 : 1933 SCC OnLine Cal 295: *Mahadeo Prasad Bhagat* v. *Bhagwat Narain Singh*, AIR 1938 Pat 427 : 1938 SCC OnLine Pat 80, *approved*

Gurdeo Singh v. *Chandrikah Singh*, ILR (1907) 36 Cal 193: *Rajlakshmi Dasee* v. *Katyayani Dasee*, ILR (1910) 38 Cal 639: *Lakhmi Chand* v. *Madho Rao*, ILR (1930) 52 All 868 : 1930 SCC OnLine All 143, *distinguished*

Ledgard v. *Bull*, (1885-86) 13 IA 134 : 1886 SCC OnLine PC 16, *distinguished on facts*

Benoy Krishna Mukerjee v. *Mohanlal Goenka*, AIR 1950 Cal 287 : 1950 SCC OnLine Cal 18, *reversed*

Raghubir Saran v. *Hori Lal*, ILR (1931) 53 All 560 : 1931 SCC OnLine All 51, *overruled*

C. Civil Procedure Code, 1908 — S. 11 — Res judicata — Erroneous decision — Applicability of — Reiterated, even erroneous decision operates as res judicata between parties there was lack of inherent jurisdiction — Incorrectness of judicial order has no bearing on applicability of res judicata (Para 28)

Abhoy Kanta Gohain v. *Gopinath Deb Goswami*, AIR 1943 Cal 460 : 1942 SCC OnLine Cal 212, *approved*

[**Ed.**: A two-Judge Bench of the Supreme Court in *Kalinga Mining Corpn.* v. *Union of India*, (2013) 5 SCC 252, held that there is ample authority for the proposition that even an erroneous decision on a question of law operates as 'res judicata' between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates a 'res judicata'. It was held that a wrong decision by a court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like review which the law provides for.]

D. Civil Procedure Code, 1908 — S. 39 and Or. 21 Rr. 6 & 90 — Transfer of decree for execution — Material irregularity — What is

Court sending decree for execution to another court — Omission to send copy of decree or to transmit to the court executing the decree certificate referred to in Or. 21 R. 6(b), held, does not prevent the decree-holder from applying for execution to the court to which the decree has been transmitted — Such omissions do not amount to material irregularity within the meaning of Or. 21 R. 90, and as such cannot be made a ground for setting aside a sale in execution — This will be true a fortiori when the executing court already has copies of the same (*see* Shortnote *D*) (Paras 43 and 44)

E. Civil Procedure Code, 1908 — S. 39 and Or. 21 Rr. 6 & 90 — Transfer of decree for execution — Failure to send fresh copies of decree and certificate to executing court when earlier copies were before it — Held, is not a material irregularity, and does not affect jurisdiction of executing court

After decree was passed copies of decree and certificate of non-satisfaction were transferred to executing court — First execution proceedings were dismissed for default but copies were retained by executing court — Second execution proceedings were initiated on basis of copies retained by executing court

— Held, as copies of decree and certificate of non-satisfaction were still with executing court sending a fresh copy of certificate of non-satisfaction would have been a formality — Omission to send fresh copies of certificate of non-satisfaction was mere irregularity — Once order of transfer of decree is communicated to executing court it gets jurisdiction to execute — Therefore contention of respondent that executing court did not have jurisdiction was not sustainable — Words and Phrases — "Material irregularity" (Paras 43 and 44)

F. **Civil Procedure Code, 1908 — S. 39 — Transfer of decree for execution — Held, there is no particular form prescribed for application for transmission of a decree — Court can even suo motu send decree for execution to another court** **(Para 43)**

A decree for Rs 75,000 with interest at 12% p.a. with quarterly rest was passed upon a compromise on the Original Side of the High Court. The judgment-debtor in that suit hypothecated their colliery as security for payment of the decreetal amount. Thereafter the judgment-debtor entered into an agreement with the respondent appointing him as Managing Agent of the said colliery whereby he became entitled to receive royalty of another colliery called Sripur Colliery. The decree was adjusted by making the respondent liable as surety. As the properties hypothecated were situated within the limits of another court, the decree was transferred to that court for execution of the decree along with certified copy of the decree, a copy of the order of transmission and a certificate of partial satisfaction of the decree. The decree-holder filed an application for execution of the decree but it was dismissed for default. The executing court sent only the certificate but it did not send the copy of decree and covering letter as required under relevant rules of practice. Subsequently the decree-holder filed one more application for execution of the decree by sale of the Sripur Colliery. On application of the decree-holder, a Receiver was appointed and he was directed to sell that colliery. In an another suit, the Receiver was restrained from selling that colliery but later that suit was dismissed by the High Court. Then the decree-holder applied for sale of the colliery and sought permission to purchase it. His prayers were granted by the High Court. Accordingly, the decree-holder purchased that colliery for Rs 20,000.

The respondent filed an application for setting aside the sale. His application was registered as a miscellaneous case. At the same time, the original judgment-debtors also started two miscellaneous cases. At this juncture, the appellant purchased the decree. The application filed by the respondent for setting aside the sale was allowed and whereas applications filed by original judgment-debtor were dismissed.

In appeal, the High Court confirmed the order of setting aside the sale of colliery and ordered for resale. During this time the said colliery was sold and an application for setting aside the sale was filed twice. Also some more applications were also filed questioning other issues but they were all dismissed. Finally that colliery was sold and an application for setting aside its sale was filed but it was dismissed. The respondent questioned the propriety of that order in the High Court but was unsuccessful. Then he filed an application before the executing court under Section 47 read with Section 151 CPC questioning the jurisdiction of the executing court. Objections were filed by the appellant. The subordinate court concluded

that it had the jurisdiction to try the second execution application filed by the decree-holder, application filed under Section 151 CPC was not maintainable and finally that principles of constructive res judicate were applicable to execution proceedings. In appeal, the High Court reversed findings of the subordinate court.

Allowing the appeal, the Supreme Court

Held :

The narrative of the various stages through which the execution proceedings passed from time to time will show that neither at the time when the execution application was made and a notice served upon the judgment-debtor, nor in the applications for setting aside the two sales made by him did the judgment-debtor raise any objection to execution being proceeded with on the ground that the execution court had no jurisdiction to execute the decree. The failure to raise such an objection which went to the root of the matter precludes him from raising the plea of jurisdiction on the principle of constructive res judicata after the property has been sold to the auction-purchaser who has entered into possession. (Paras 15 to 22)

There is ample authority for the proposition that even an erroneous decision on a question of law operates as res judicata between the parties to it, unless there was lack of inherent jurisdiction. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata. A decision in the previous execution case between the parties that the matter was not within the competence of the executing court even though erroneous is binding on the parties. (Paras 28 and 29)

G-D-M/38345/C

Ed.: *For case treatment of the above rulings like followed, distinguished, overruled, etc. in later cases of the Supreme Court and High Courts see* SCC OnLine.

Advocates who appeared in this case :

N.C. Chatterjee, Senior Advocate (B.C. Roy and A.K. Mukherjea, Advocates, with him), for the Appellant;

Dr N.C. Sen Gupta, Senior Advocate (B.L. Pal, Advocate, with him), for Respondent 1.

Chronological list of cases cited ***on page(s)***

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3. 1938 SCC OnLine Pat 80 : AIR 1938 Pat 427, *Mahadeo Prasad Bhagat* v. *Bhagwat Narain Singh* 656*a-b*, 660*g*
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5. 1931 SCC OnLine All 51 : ILR (1931) 53 All 560, *Raghubir Saran* v. *Hori Lal* **(overruled)** 663*c d*, 663*e f*
6. 1930 SCC OnLine All 143 : ILR (1930) 52 All 868, *Lakhmi Chand* v. *Madho Rao* 663*c d*
7. 1920 SCC OnLine PC 88 : (1920-21) 48 IA 45, *Raja of Ramnad* v. *Velusami Tevar* 661*f g*
8. ILR (1910) 38 Cal 639, *Rajlakshmi Dasee* v. *Kalyayani Dasee* 663*c*
9. ILR (1907) 36 Cal 193, *Gurdeo Singh* v. *Chandrikah Singh* 663*b c*
10. 1886 SCC OnLine PC 16 : (1885-86) 13 IA 134, *Ledgard* v. *Bull* 662*f g*
11. 1883 SCC OnLine PC 21 : (1883-84) 11 IA 37, *Ram Kirpal Shukul* v. *Rup Kuari* 661*c*

The Judgments[†] of the Court were delivered by

GHULAM HASAN, J.— This case is illustrative of the difficulties which a decree-holder has to encounter in recovering the money in execution after he has obtained the decree of court. It is one of those cases, by no means rare, in which the execution proceedings in the courts below have dragged on to inordinate lengths and led to consequent waste of public time and expense to the parties.

2. The decree in the present case was passed upon a compromise in Suit No. 1518 of 1923 on the Original Side of the Calcutta High Court as long back as 25-6-1923, in favour of one Nagarmull Rajghoria against Pran Krishna Chatterjee and five others (hereinafter referred to as "the Chatterjees"). The decree was for a sum of Rs 75,000 with interest at twelve per cent per annum with quarterly rests. The Chatterjees hypothecated their Koradanga Colliery as security for the payment of the decretal amount. Subsequent to this decree the Chatterjees entered into an agreement with one Benoy Krishna Mukherjee (hereinafter referred to as "Mukherjee") on 24-1-1924, appointing the latter as Managing Agent of the aforesaid colliery whereby he became entitled to receive royalty of another colliery called Sripur Colliery. The decree was adjusted on 18-3-1924, by making Mukherjee liable as surety and by the Chatterjees charging their Sripur Colliery as additional security. The hypothecated properties were situate at Asansol and Nagarmull obtained an order from the High Court for permission to execute the decree at Asansol with the direction that a certified copy of the decree, a copy of the order of transmission and a certificate of partial satisfaction of the decree should be transferred to the Court of the Subordinate Judge at Asansol. This order was passed on 15-4-1931, and the three documents aforementioned were sent to the transferee court at Asansol through the District Judge, Burdwan on 12-6-1931. (Order 21 Rule 6 of the Civil Procedure Code.)

3. On 20-8-1931, Nagarmull filed his first application for execution of the decree by sale of Sripur Colliery. The execution case is numbered as 296 of 1931. Notices under Order 21 Rule 22, Rule 54 and Rule 66 of the Civil Procedure Code were issued and served on various dates. The case was fixed for 16-2-1932. On this date Nagarmull applied for time to prove service of the notices and the case was adjourned to 23-2-1932. He again applied for time on that date and the case was adjourned to 27-2-1932. On this later date Nagarmull was again not ready and asked for more time. But this was refused, and the execution case was dismissed for default without any amount being realised under the decree. The transferee court sent to the High Court what purported to be a certificate under Section 41 of the Civil Procedure Code, stating that the execution case was dismissed for default on 27-2-1932. Neither the copy of the decree, nor any covering letter as required by the rules of the High Court

[†] **Ed.:** Ghulam Hasan, J. delivered the leading judgment of the Court with whom S.R. Das, J. concurred by his separate judgment (para 35 et seq.). Mahajan and Vivian Bose, JJ. expressed their concurrence with the judgments of S.R. Das, J. and Ghulam Hasan, J. (para 46)

was sent along with the certificate. The certificate was received by the High Court on 11-3-1932.

4. It appears that the decree-holder filed a second application for execution of the decree on 24-11-1932, by sale of the Sripur Colliery. This case was numbered as Execution Case No. 224 of 1932. Notices under Order 21 Rule 22 and Rule 66 of the Civil Procedure Code, were duly served and the executing court ordered the issue of a sale proclamation fixing 3-4-1933 as the date of the sale. It appears that the decree-holder received only partial satisfaction of the decree out of the sale proceeds of Koradanga Colliery which had been sold at the instance of the superior landlords and by certain cash payments. He applied for execution of the decree by appointment of a Receiver and by sale of the Sripur Colliery. The Receiver was appointed on 21-6-1926, and he was directed to sell the Sripur Colliery to the highest bidder permitting the decree-holder at the same time to bid for and purchase the property, but he was restrained from proceeding with the sale by an order of court passed in a certain suit filed by Mukherjee against the decree-holder. This suit was dismissed by the High Court. Accordingly the decree-holder applied on 17-3-1933, to the High Court praying that the Receiver be discharged and leave be given to the executing court to sell the Sripur Colliery in execution of the decree of 25-6-1923 in which Execution Proceedings No. 224 of 1932 were pending at the time. He also asked that leave be given to him to bid for and to purchase the property. Notices of this application were duly served on the parties and on 27-3-1933, the High Court granted all the prayers (Ext. F-5).

5. The property was sold on 9-6-1933, and was purchased by the decree-holder for Rs 20,000. Mukherjee, however, filed an application on 7-7-1933, under Section 47 and Order 21 Rule 90 of the Civil Procedure Code for setting aside the sale. The application was numbered as Miscellaneous Case No. 53 of 1933. The Chatterjees also started two Miscellaneous Cases Nos. 54 and 55 of 1933 on 8-7-1933. During the pendency of the three miscellaneous cases, the appellant Mohanlal Goenka purchased the decree on 10-1-1934. Miscellaneous Case No. 53 of 1933 was allowed and the sale was set aside on 29-1-1934, and Cases Nos. 54 and 55 of 1933 were dismissed for default. The result of these miscellaneous cases was communicated to the High Court in a document which purports to be a certificate under Section 41 of the Civil Procedure Code and was received on 1-2-1934. Two appeals were preferred by the decree-holder on 18-4-1934, but the order setting aside the sale was confirmed and resale of the Sripur properties was ordered by the High Court.

6. The properties were again sold on 22-4-1936, and were purchased by the decree-holder for Rs 12,000. Mukherjee filed an appeal in the High Court and during the pendency of the appeal he filed an application under Section 47 and Order 21 Rule 90 of the Civil Procedure Code for setting aside the sale. The appeal was disposed of by consent of parties and it was agreed that the application under Order 21 Rule 90 be heard by the executing court. Accordingly the application was heard and the sale set aside. Mukherjee then applied under Section 47 on 4-4-1938, stating that Mohanlal Goenka could not continue the proceedings started by Nagarmull, but the application was

dismissed and 22-5-1938 was fixed for the sale of the property. He filed an appeal in the High Court which was dismissed under Order 41 Rule 11 of the Civil Procedure Code. The property was sold for the third time and was purchased by the decree-holder for Rs 2,50,000 on 27-5-1938. Mukherjee applied under Section 47 and Order 21 Rule 90 of the Civil Procedure Code for setting aside this sale on 27-6-1938 (E-4) (Miscellaneous Case No. 76 of 1938). The application was dismissed on 30-6-1938, and the sale was confirmed. Execution Case No. 224 of 1932 was dismissed for part satisfaction.

7. The executing court on 9-7-1938, sent to the High Court a certificate under Section 41 of the Civil Procedure Code, accompanied with the covering letter communicating the result of the execution case. This was received by the High Court on 12-7-1938. Mukherjee carried the matter in appeal to the High Court but the appeal was dismissed on 5-8-1940 (Ext. F). Mukherjee filed an application for review under Order 47 Rule 1 of the Civil Procedure Code against the aforesaid order on 25-11-1940 (Ext. B). He also filed on 28-11-1940, an application for leave to appeal to the Privy Council (Ext. A). The review application was dismissed on 8-5-1941, and leave was refused on 16-6-1941. On 12-5-1941, Mukherjee filed an application under Sections 47 and 151 of the Civil Procedure Code (Miscellaneous Case No. 70 of 1941) and it is this application which has given rise to the present appeal before us. The application was supported by an affidavit filed on 26-5-1941.

8. The present appellant filed an objection on 5-7-1941, to the application. The application was dismissed by the Subordinate Judge on 30-1-1945 but the order was set aside on appeal by the High Court on 10-2-1950. Leave to appeal to this Court was granted by the High Court on 28-7-1950.

9. The case put forward by Mukherjee before the Subordinate Judge was that after the dismissal of Execution Case No. 296 of 1931 on 27-2-1932, and the sending of a certificate under Section 41 to the High Court, the decree was never again transferred to the Asansol Court for execution. According to him, the decree-holder fraudulently detached the certificate of non-satisfaction from Execution Case No. 296 of 1931 and attached it to the second Execution Case No. 224 of 1932, inducing the court to believe that the certificate had been obtained from the High Court for taking fresh proceedings in execution. Mukherjee had instituted Title Suit No. 3 of 1936 to recover some money and to enforce a charge against the Sripur Colliery and for permission to redeem the charge declared in favour of the decree-holder if it was prior to his own claim. The suit was dismissed but on appeal the High Court allowed him to redeem the charge in favour of the decree-holder.

10. In order to ascertain the amount of the charge Mukherjee instructed his attorney to search the record of Suit No. 1518 of 1923 and he came to know for the first time on 23-8-1940, that after the dismissal of the first application a certificate under Section 41 of the Civil Procedure Code had been sent by the Asansol Court to the High Court and the latter never retransferred the decree for execution. Accordingly his case was that the Asansol Court had no jurisdiction

to entertain Execution Case No. 224 of 1932, and all the proceedings in connection therewith were null and void. He therefore urged that the auction-sale should be set aside. The present appellant denied the allegations of the judgment-debtor. He pleaded that no certificate under Section 41 of the Civil Procedure Code was sent to the High Court in Execution Case No. 296 of 1931 and the execution court retained jurisdiction throughout, that the High Court had authorised the sale of the property in execution of the decree and that no fresh certificate of non-satisfaction was required to give jurisdiction to the Asansol Court to proceed with Execution Case No. 224 of 1932. The judgment-debtor was aware that the copy of the decree and the certificate of non-satisfaction were not sent to the High Court and he could not possibly have laboured under a wrong impression that a fresh certificate had been sent by the High Court for taking execution proceedings and that the decree-holder practised no fraud upon him. He also pleaded that the application was barred by limitation, that it was barred by the principle of res judicata as the objection now raised had previously been made and either not pressed, or rejected and that the judgment-debtor was fully aware of all the proceedings that had taken place in connection with the decree.

11. The Subordinate Judge framed the following three main issues in the case:

1. Is this miscellaneous case maintainable under Section 151 of the Civil Procedure Code?

2. Did this court act in accordance with Section 41 of the Civil Procedure Code? If so, was the decree retransmitted to this court for fresh execution in 1932? If not, had this court jurisdiction to execute the decree again in 1932?

3. Is this miscellaneous case barred according to the principle of res judicata?

12. Upon the first point the learned Subordinate Judge held that the executing court did not lose jurisdiction to execute the decree, that the allegation about the detaching of certificate of non-satisfaction from the records in the custody of the court and its surreptitious insertion in Execution Case No. 224 of 1932 constitute grounds for a suit, and a fresh application under Section 151 of the Civil Procedure Code, was not maintainable. Upon the second point the court held that having regard to the circumstances of the case, no certificate of non-satisfaction of the decree as required by Section 41 was sent by the executing court to the High Court, that no retransmission of the decree by the High Court was required to start Execution Case No. 224 of 1932 and that the executing court retained seisin of the execution and could execute the same without a further direction from the High Court. Upon the third point, the learned Subordinate Judge held that Mukherjee had alleged in Para 15 of his petition in Miscellaneous Case No. 53 of 1933 that the decree and the certificate were not sent by the High Court for starting the execution case afresh, but this

objection to jurisdiction was not pressed at the time of the hearing. Again in Para 20 of his petition in Miscellaneous Case No. 76 of 1938 he had urged the same point but it was not pressed. Mukherjee admitted in his evidence as PW 4 that all his applications were drawn up according to his instructions but despite this fact he did not press the allegations made in the miscellaneous cases. It was accordingly held on the authority of *Annada Kumar Roy* v. *Sk. Madan*[1] and *Mahadeo Prasad Bhagat* v. *Bhagwat Narain Singh*[2] that the principle of constructive res judicata is applicable to execution proceedings. The view taken by the Court was that having made the allegations in the miscellaneous cases and then abandoned them, the judgment-debtor was precluded from raising the plea of jurisdiction of the court to execute the decree.

13. Mukherjee preferred an appeal to the High Court. The matter came up before Harries, C.J. and Sarkar, J. The learned Chief Justice held that the Asansol Court not only sent what purported to be a certificate under Section 41 of the Civil Procedure Code to the High Court, but intended such certificate to be a certificate of non-satisfaction. He did not agree with the Subordinate Judge that the document was not intended to be a certificate and was merely an intimation that the first attempt at execution had failed. In the view of the learned Chief Justice there was no need for the court at Asansol to send any intimation at all. The learned Chief Justice agreed that upon a true construction of Section 41, failure to execute the decree at the first attempt for non-appearance of the decree-holder was not the total failure to execute the decree as contemplated in that section. He, however, held that the fact that the certificate was sent when it should not have been sent cannot affect the question if, as he held, the certificate was intended to be a certificate of non-satisfaction.

14. The learned Chief Justice referred to a number of authorities in support of his conclusion. He accordingly held that the Asansol Court had ceased to have jurisdiction to execute the decree and was not entitled to entertain the second application for execution. Upon the question of res judicata the learned Chief Justice observed that "a judgment delivered by a court not competent to deliver it cannot operate as res judicata and the order of the Subordinate Judge of Asansol, being wholly without jurisdiction, cannot be relied upon to found a defence upon the principle of res judicata". He went on to say: "It is true that the appellant could and should have raised the question in the second execution case that the Asansol Court had no jurisdiction in the absence of a certificate of non-satisfaction from the High Court to entertain the application. But in my view though this point was neither made nor pressed, these orders of the learned Subordinate Judge in the second execution application cannot be urged as a bar to the present application under the doctrine of res judicata. It is true that Section 11 of the Code of Civil Procedure does not apply to execution proceedings, but it has been held by their Lordships of the Privy Council that the

1 38 CWN 141 : 1933 SCC OnLine Cal 295
2 AIR 1938 Pat 427 : 1938 SCC OnLine Pat 80

principles of the law relating to res judicata do apply to execution proceedings and Mr Atul Gupta has urged that the present application is barred by res judicata....'' He drew a distinction between the case of an irregular assumption of jurisdiction and want of inherent jurisdiction and holding that the order of the Subordinate Judge at Asansol fell under the latter category, he came to the conclusion that the order is wholly null and void and cannot be pleaded in bar of the application on the principle of res judicata.

15. It has been contended before us on behalf of the appellant (assignee decree-holder) that the execution court at Asansol never lost jurisdiction over the execution proceedings and that what purported to be a certificate under Section 41 of the Civil Procedure Code was no more than a mere intimation to the High Court that the execution case had been dismissed only for default, that it was no failure to execute the decree within the meaning of Section 41 of the Civil Procedure Code, that in any case the subsequent orders of the High Court passed from time to time in the presence of the parties conferred jurisdiction upon the execution court to proceed with the execution and that in any event the question whether the execution court had or had not the jurisdiction to execute the decree was barred by the principle of res judicata. Having heard the learned counsel for the parties, we are of opinion that the appeal can be disposed of on the ground of res judicata without entering into other questions.

16. It cannot be disputed that the transferee court was invested with jurisdiction by the High Court when its decree was transferred to it for execution. The first application for execution of the decree was dismissed for default on 27-2-1932, and a document purporting to be a certificate of non-satisfaction under Section 41 of the Civil Procedure Code was sent by the execution court to the High Court. The decree was admittedly not retransmitted for execution by the High Court. Despite this fact the decree-holder made a second application for execution on 24-11-1932 (Execution Case No. 224 of 1932). Notice was duly served upon the judgment-debtor but he preferred no objection before the execution court that it had no jurisdiction to execute the decree. This is the first occasion on which he could have raised the plea of jurisdiction.

17. The second occasion arose when the decree-holder filed an affidavit (Ext. C) before the High Court on 17-3-1933, praying that certain directions should be given to the execution court for the sale of Sripur properties and for an order discharging the Receiver. Notice was duly served upon the judgment-debtors, including Mukherjee (Ext. 13) and the order granting the prayers of the decree-holder was passed on 27-3-1933 (Ext. F-5). The judgment-debtor could have pointed out that the Asansol Court was *functus officio* after sending the certificate under Section 41 and had no further jurisdiction to sell the property in execution but no such objection was raised. This order clearly recites that notice was sent to the Chatterjees as well as to Mukherjee and was proved by an affidavit to have been duly served upon them. The decree-holder's prayer was granted and in pursuance of the order of the High Court the property was sold

and was purchased by the decree-holder for Rs 20,000, whereupon Mukherjee started Miscellaneous Case No. 53 of 1933 for setting aside the sale. In this application (Ext. E) the judgment-debtor raised the question of jurisdiction in Para 19 which runs thus:

> "As the said decree has not been sent to this court for execution nor has any certificate come to this court, therefore, the execution proceedings and the auction-sale are wholly irregular, illegal, fraudulent and collusive."

18. The order of the Subordinate Judge dated 29-1-1934, by which he set aside the sale does not mention that the plea raised in Para 19 of the application was pressed. The decree-holder who was aggrieved by this order preferred two Appeals Nos. 254 and 255 of 1934. The order of the High Court (Ext. F-2) dated 11-7-1935, shows that the decision of the Subordinate Judge setting aside the sale was confirmed. It appears that the judgment-debtors had raised the question that the decree could not be executed without the decree-holder applying for making the decree absolute. In view of this dispute the learned Judges added in the order that although they were confirming the order of the Subordinate Judge setting aside the sale, the judgment-debtors will not be entitled to raise any objection as to the nature of the decree which in their opinion was executable under the terms of the compromise arrived at by the parties concerned. Here again no objection was raised by the judgment-debtors that the execution court had no jurisdiction to execute the decree and sell the property.

19. The next occasion when the objection to jurisdiction should have been raised was when the property was to be resold. Mukherjee started Miscellaneous Case No. 52 of 1936 on 2-4-1936 (Ext. 1), in which he raised all sorts of objections to the execution but nowhere stated that the execution court had no jurisdiction to sell the property after the certificate under Section 41 of the Civil Procedure Code had been sent to the High Court. The property was sold for the second time and was purchased by the decree-holder on 22-4-1936. Mukherjee preferred Appeal No. 238 of 1936 and at the same time started Miscellaneous Case No. 80 of 1936 in the execution court to set aside the sale. No plea of jurisdiction was raised either in the grounds of appeal to the High Court or in the application for setting aside the execution sale. The appeal was disposed of by consent of parties with the direction that Miscellaneous Case No. 80 of 1936 should be reheard by the execution court. The sale was set aside on rehearing. Mukherjee then started Miscellaneous Case No. 40 of 1938 under Section 47 of the Civil Procedure Code on 4-4-1938. The objection of lack of jurisdiction in the execution court was again missing in this application. The application was dismissed and the appeal against it was also dismissed on 25-5-1938.

20. When the property was sold for the third time, Mukherjee started Miscellaneous Case No. 76 of 1938 on 27-6-1938, for setting aside the sale (Ext. E-4). In Para 20 of his application he stated:

"That this court has no jurisdiction to entertain this application for execution without a fresh certificate (sic) the court passing the decree under execution. The previous certificate creating jurisdiction in the present court has long expired after the dismissal of the previous execution case. The whole proceeding and the sale thereunder is not only illegal and materially irregular but is absolutely void for want of jurisdiction."

21. This plea was apparently not pressed and the miscellaneous case was dismissed on 30-6-1938. Mukherjee filed an appeal, FMA No. 262 of 1938 (Ext. F) on 23-8-1938, but the appeal was dismissed on 5-8-1940, on the ground that there was no material irregularity in publishing the sale and the colliery had not been sold at an inadequate price on account of any such irregularity. This again shows that no question of jurisdiction was raised before the learned Judges of the High Court. Then followed the review application (Ext. B) presented on 25-11-1940, to the High Court. Paras 11, 12 and 13 of this application are important and they run as follows:

"11. That after passing the judgment in FA No. 246 of 1937 on 13-8-1940 your petitioner got the records of Suit No. 1518 of 1923 of the Original Side of this Hon'ble Court searched for ascertaining the amount due under the decree of the said suit and came to know for the first time on 23-8-1940, that after dismissal of the old Execution Case No. 296 of 1931 by the Subordinate Judge of Asansol on 27-2-1932, the result of the said execution case was sent to the Original Side of this Hon'ble Court under Section 41 of the Civil Procedure Code, and that was received on 11-3-1932, and that no fresh certificate of non-satisfaction of the decree was sent by the Original Side of this Hon'ble Court for fresh execution and so there was no basis on which Execution Case No. 224 of 1932 could be started in the Court of the Subordinate Judge of Asansol.

12. That your petitioner submits that the copies of the decree and certificate of non-satisfaction were taken by the decree-holder on detaching the same from the records of old used Execution Case No. 296 of 1931 and fraudulently used afterwards in Execution Case No. 224 of 1932 by practising fraud upon the court.

13. That your petitioner further begs to submit that he was misled by order of the Court of the Subordinate Judge which runs as follows:

'Register. Let the certificate of non-satisfaction received be annexed to the record.' "

This application was rejected on 8-5-1941, and the order of the learned Judges which is brief may be reproduced in full:

"The ground for review is that after the dismissal of the said appeal the petitioner discovered that the execution proceedings in which the sale took place was held by the executing court although that court did not receive any certificate of non-satisfaction from the court which passed the decree

under execution. This objection does not properly come for investigation in a proceeding under Order 21 Rule 90 of the Civil Procedure Code. Even if the allegation of the petitioner about the discovery of new matter is correct, it cannot affect the decision of the appeal which we have dismissed."

22. The foregoing narrative of the various stages through which the execution proceedings passed from time to time will show that neither at the time when the execution application was made and a notice served upon the judgment-debtor, nor in the applications for setting aside the two sales made by him did the judgment-debtor raise any objection to execution being proceeded with on the ground that the execution court had no jurisdiction to execute the decree. The failure to raise such an objection which went to the root of the matter precludes him from raising the plea of jurisdiction on the principle of constructive res judicata after the property has been sold to the auction-purchaser who has entered into possession.

23. There are two occasions on which the judgment-debtor raised the question of jurisdiction for the first time. He did not, however, press it with the result that the objection must be taken to have been impliedly overruled. One such occasion was when the property was sold for the second time and was purchased by the decree-holder for Rs 20,000. In Para 19 of his application dated 7-7-1933 (Ext. E) to set aside the sale he challenged the jurisdiction of the court, but the order of the court dated 29-1-1934, does not show that the plea was persisted in. The second occasion was when the property was sold for the third time and in his application (Ext. E-4) dated 27-6-1938, for setting aside the sale he raised the question in Para 20. The objection application was dismissed but there is no trace of the judgment-debtor having pressed this objection. When he preferred an appeal to the High Court, he did not make the plea of jurisdiction a ground of attack against the execution of the decree and the appeal was dismissed on other points. Finally he filed a review application and in Paras 11, 12 and 13 he raised the objection to execution in more elaborate words, but the application was rejected by the High Court on the ground that such an objection did not fall within the purview of Order 21 Rule 90 of the Code of Civil Procedure. This order therefore became final. The judgment-debtor admitted that the two applications (Exts. E and E-4) were prepared according to his instructions. It is not possible therefore for the judgment-debtor to escape the effect of the above orders which became binding upon him.

24. That the principle of constructive res judicata is applicable to execution proceedings is no longer open to doubt. See *Annada Kumar Roy* v. *Sk. Madan*[1] and *Mahadeo Prasad Bhagat* v. *Bhagwat Narain Singh*[2]. In the first case an application was made by a certain person for execution of a decree and no objection was raised that the decree was not maintainable at the instance of the applicant and the application was held to be maintainable. It was held that no

1 38 CWN 141 : 1933 SCC OnLine Cal 295
2 AIR 1938 Pat 427 : 1938 SCC OnLine Pat 80

further objection on the score of the maintainability of a fresh application for execution on the part of the same applicant could be raised. In the second case a money decree had been obtained on the foot of a loan which was the subject-matter of a mortgage and the property was sold in execution. The judgment-debtor raised the question of the validity of the execution proceedings and objected that the execution court had no jurisdiction to sell the property in execution of a money decree as no sanction of the Commissioner had been obtained under Section 12-A of the Chota Nagpur Encumbered Estates Act. The objection was not decided but the objection petition was dismissed with the result that the property came into the possession of the auction-purchaser. In an action for a declaration that the sale to the purchaser was void for want of sanction of the Commissioner it was held that as the point was raised, although not decided in the objection petition under Section 47, it was res judicata by reason of Explanation 4 to Section 11.

25. The Privy Council as early as 1883 in *Ram Kirpal Shukul* v. *Rup Kuari*[3] held that the decision of an execution court that the decree on a true construction awarded future mesne profits was binding between the parties and could not at a later stage of the execution proceedings be set aside. Their Lordships ruled that the binding force of such a decision depends upon general principles of law and not upon Section 13 of Act 10 of 1877, corresponding to Section 11 of the present Code. In that case the Subordinate Judge and the District Judge had both held that the decree awarded mesne profits, but their decision was reversed by the Calcutta High Court. The Full Bench of that Court also held that the law of res judicata did not apply to proceedings in execution of the decree. This decision was reversed in appeal by the Privy Council. At IA p. 43 Sir Barnes Peacock, who delivered the judgment of the Board observed:

> "... The High Court assumed jurisdiction to decide that the decree did not award mesne profits, but, whether their construction was right or wrong, they erred in deciding that it did not, because the parties were bound by the decision of Mr Probyn, who, whether right or wrong, had decided that it did; a decision which, not having been appealed, was final and binding upon the parties and those claiming under them."

26. In *Raja of Ramnad* v. *Velusami Tevar*[4] an assignee of a partially executed decree applied to the Subordinate Judge to be brought on the record in place of the decree-holder. The judgment-debtor denied the assignment and the liability of certain properties to attachment and alleged that the right to execute the decree was barred by limitation. The Subordinate Judge recognised the assignment, allowed the assignee to execute the decree and gave his permission to file a fresh application for attachment. This order was not appealed against. In the final proceedings the Subordinate Judge permitted the judgment-debtors

3 (1883-84) 11 IA 37 : 1883 SCC OnLine PC 21
4 (1920-21) 48 IA 45 : 1920 SCC OnLine PC 88

to raise again the plea of limitation. In the course of the judgment Lord Moulton observed as follows: (IA p. 49)

> "... Their Lordships are of opinion that it was not open to the learned Judge to admit this plea. The order of 13-12-1915, is a positive order that the present respondent should be allowed to execute the decree. To that order the plea of limitation, if pleaded, would according to the respondents' case have been a complete answer, and therefore it must be taken that a decision was given against the respondents on the plea. No appeal was brought against that order, and therefore it stands as binding between the parties. Their Lordships are of opinion that it is not necessary for them to decide whether or not the plea would have succeeded. It was not only competent to the present respondents to bring the plea forward on that occasion, but it was incumbent on them to do so if they proposed to rely on it, and moreover it was in fact brought forward and decided upon."

27. In *Sha Shivraj Gopalji* v. *Edappakath Ayissa Bi*[5] the decree-holder in the earlier execution proceedings could have raised a plea that the judgment-debtor had an interest in certain property which could be attached under his decree but the plea was not raised through his own default and the execution was dismissed. It was held under such circumstances that the dismissal operates as res judicata in the subsequent execution proceedings and even apart from the provisions of Section 11 of the Civil Procedure Code, it is contrary to principle to allow the decree-holder in fresh proceedings to renew the same claim merely because he neglected at a proper stage in previous proceedings to support his claim by the argument of which he subsequently wishes to avail himself.

28. There is ample authority for the proposition that even an erroneous decision on a question of law operates as res judicata between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata. A decision in the previous execution case between the parties that the matter was not within the competence of the executing court even though erroneous is binding on the parties (see *Abhoy Kanta Gohain* v. *Gopinath Deb Goswami*[6]).

29. The learned Chief Justice concedes that the principle of res judicata applies to the execution proceedings but he refused to apply it to the present case on the ground that there was lack of inherent jurisdiction in the execution court to proceed with the execution. He relied upon *Ledgard* v. *Bull*[7]. This case is distinguishable upon the facts. This was a suit instituted before the Subordinate Judge for infringement of certain exclusive rights secured to the plaintiff by three Indian patents. Under the Patents Act the suit could be brought only before the District Judge. The defendant raised an objection to the jurisdiction of the court. It appears that subsequently the defendant joined the plaintiff in

5 AIR 1949 PC 302 : (1949-50) 54 CWN 55 : 1949 SCC OnLine PC 37
6 AIR 1943 Cal 460 : 1912 SCC OnLine Cal 212
7 (1885-86) 13 IA 134 : 1886 SCC OnLine PC 16

petitioning the District Judge to transfer the case to his own court. This was done. The suit was transferred under Section 25 of the Civil Procedure Code. It was admitted that the suit could not be transferred unless the court from which the transfer was sought to be made had jurisdiction to try it. The defendant adhered to the plea of jurisdiction throughout the proceedings but it was urged that by his subsequent conduct he had waived the objection to the irregularity in the institution of the suit. Their Lordships held that although a defendant may be barred by his own conduct from objecting to the irregularity in the institution of the suit, yet where the Judge had no inherent jurisdiction over the subject-matter of the suit, the parties cannot by their mutual consent convert it into a proper judicial process. This decision has no bearing upon the present case as no question of constructive res judicata arose in that case.

30. The cases of *Gurdeo Singh* v. *Chandrikah Singh*[8] and *Rajlakshmi Dasee* v. *Katyayani Dasee*[9] are both distinguishable as they did not involve any question of constructive res judicata.

31. Two cases of the Allahabad High Court, *Lakhmi Chand* v. *Madho Rao*[10] and *Raghubir Saran* v. *Hori Lal*[11] were also relied upon in the judgment under appeal. The first was a case of the grant of assignment of the land revenue of a village in favour of the grantee. He mortgaged it and a suit brought on foot of the mortgage was decreed. In a subsequent suit for a declaration that the previous decree of the court was null and void by reason of the fact that the suit was not cognizable in the absence of a certificate from the Collector as required by the Pensions Act authorising the trial of such a suit, it was held that the decree was one without jurisdiction and that it did not operate as res judicata in the subsequent suit for which the certificate was obtained. It was obvious that the statutory provisions of the Act forbade the trial of any suit without the certificate of the Collector. There was, therefore, an initial lack of jurisdiction to try the case and the case is inapplicable to the facts of the present case.

32. The second case of *Raghubir Saran*[11] which involved the question of territorial jurisdiction was in our view not correctly decided. There a suit against a minor for enforcement of the mortgage was decreed in respect of property which was beyond the territorial jurisdiction of the court passing the decree. When the decree was transferred for execution to the court within whose jurisdiction the property was situate, it was objected that the decree was a nullity. The objection was overruled and the objector was referred to file a regular suit. In the regular suit filed by him it was decided that an independent suit was maintainable for avoiding the decree although no objection was raised to jurisdiction in the court passing the decree. It was also held that the bar of Section 11 Explanation IV of the Code of Civil Procedure did not apply to the case. We think that although Section 21 of the Code of Civil Procedure did not apply in terms to the case, there is no reason why the principle underlying that

8 ILR (1907) 36 Cal 193
9 ILR (1910) 38 Cal 639
10 ILR (1930) 52 All 868 : 1930 SCC OnLine All 143
11 ILR (1931) 53 All 560 : 1931 SCC OnLine All 51

section should not apply even to a regular suit. The objection to jurisdiction must be deemed to have been waived and there was no question of inherent lack of jurisdiction in the case. The suit was clearly barred by the principle of res judicata and was wrongly decided.

33. The question which arises in the present case is not whether the execution court at Asansol had or had not jurisdiction to entertain the execution application after it had sent the certificate under Section 41 but whether the judgment-debtor is precluded by the principle of constructive res judicata from raising the question of jurisdiction. We accordingly hold that the view taken by the High Court on the question of res judicata is not correct.

34. We allow the appeal, set aside the judgment and the decree of the High Court and restore that of the Subordinate Judge dismissing the application of the judgment-debtor. The appellant will be entitled to his costs here and hitherto.

S.R. DAS, J. (*concurring*)— I have had the privilege of perusing the judgment delivered by my learned Brother Hasan, J. and I agree with his conclusion that this appeal should be allowed. I would, however, prefer to rest my decision on a ground different from that which has commended itself to my learned Brother and as to which I do not wish to express any opinion on this occasion.

36. The relevant facts material for the purpose of disposing of this appeal have been very clearly and fully set forth in the judgment of Hasan, J. and I need not set them out in detail here. Suffice it to say that on 12-6-1931 the High Court, Original Side, which is the Court which had passed the decree, transmitted the same for execution to the Asansol Court through the District Judge of Burdwan and that the Asansol Court thereupon acquired jurisdiction to execute the decree against properties situate within its territorial limits. The application for execution made by the decree-holder which was numbered 296 of 1931 was, however, on 27-2-1932, dismissed for default and on 11-3-1932, the Asansol Court sent to the High Court what in form purported to be a certificate under Section 41 of the Code. There is no dispute, however, that the Asansol Court did not return to the High Court the certified copy of the decree and other documents which had been previously transmitted by the High Court.

37. The decree-holder on 24-11-1932 filed in the Asansol Court another petition for execution of the decree against the same judgment-debtors with the same prayer for the realisation of the decretal amount by sale of the same properties as mentioned in the previous execution case. The application was registered as Execution Case No. 224 of 1932. The judgment-debtors' contention is that the certificate sent by the Asansol Court to the High Court on 11-3-1932, was and was intended to be in form as well as in substance a certificate under Section 41 of the Code, and that thereafter the Asansol Court ceased to have jurisdiction as the executing court and that as there was no fresh transmission of the decree by the High Court, the Asansol Court could not entertain Execution Case No. 224 of 1932 and consequently all subsequent proceedings in the Asansol Court were void and inoperative for lack of inherent jurisdiction in that court. This contention was rejected by the Subordinate Judge

of the Asansol Court in his judgment delivered on 30-1-1945, in Miscellaneous Case No. 70 of 1941 but found favour with the High Court in its judgment delivered on 10-2-1950, which is now under appeal before us.

38. It appears that on 17-3-1933, the decree-holder took out a Master's summons in the Original Side of the High Court being the Court which passed the decree in Suit No. 1518 of 1923 praying, inter alia, that the Official Receiver be discharged from further acting as Receiver in execution, that leave be given to the Asansol Court to sell the colliery in execution of the decree dated 25-6-1923, and the order dated 7-2-1924, and that leave be given to the plaintiff to bid for and purchase the Sripur Colliery.

39. This summons was supported by an affidavit affirmed by one Pramatha Nath Roy Chowdhury, an assistant in the employ of the plaintiff. This affidavit refers to the consent decree of 25-1-1923, passed in the said suit and the additional terms of settlement embodied in the order of 7-2-1924, the payments made by the judgment-debtors from time to time amounting to Rs 30,437-8 besides a sum of Rs 3500 which had been paid on account of settled costs and states that the balance of the decretal amount was still due and that there had been no other adjustment of the decree. It refers to a previous application by tabular statement for execution of the decree by the appointment of a Receiver and by the sale of the Sripur Colliery which was charged under the order of 7-2-1924, and to the order made by the High Court on that tabular statement on 21-6-1926, appointing the Official Receiver of the High Court as Receiver of the Sripur Colliery. The affidavit then recites that the Official Receiver who had been given liberty to sell the colliery on certain terms took steps to put up the same to sale but had been prevented from actually doing so by reason of an injunction obtained by one of the judgment-debtors, Benoy Krishna Mukherjee in Suit No. 843 of 1928 filed by him. The affidavit further refers to the fact that the said Suit No. 843 of 1928 had since then been dismissed and that no appeal had been preferred against that decree of dismissal and that no order had been made for stay of execution of the said decree.

40. Para 13 of the affidavit then states as follows:

> "... that the plaintiff was advised that charge should be enforced and Sripur Colliery should be sold in execution of the said order by the Asansol Court in the local jurisdiction of which the colliery is situate and the plaintiff accordingly by an order made on 15-4-1931, obtained leave of the Court to execute the decree against Basantidas Chatterjee, Srimantodas Chatterjee and Bholanath Chatterjee as sons, heirs and legal representatives of the deceased Prankristo Chatterjee and the other defendant judgment-debtors and caused the certified copies of the decree dated 25-6-1923 and the order dated 7-2-1924, to be transmitted to the District Judge at Burdwan who in his turn sent the decree to the Subordinate Judge of Asansol to execute the decree. Such execution proceedings are now pending before the Asansol Subordinate Judge's Court being Execution Proceedings No. 224 of 1932."

41. In the circumstances the plaintiffs asked for directions on the lines mentioned in the summons. The summons was duly served on all the judgment-debtors as mentioned in the affidavit of service filed in Court and referred to in the order made by the Court on the Master's summons on 27-3-1933. The operative part of the said order of the High Court was as follows:

> "It is ordered that Official Receiver of this Court who was appointed the Receiver in this suit of the Sripur Colliery pursuant to the said order dated 21-6-1926, be and he is hereby discharged from further acting as such Receiver as aforesaid; and it is further ordered that the said Receiver do pass his final accounts before one of the Judges of this Court and it is further ordered that the Subordinate Judge of Asansol be at liberty in execution of the said decree and order dated 7-2-1924, to sell either by public auction or by private treaty to the best purchaser or purchasers that can be got for the same provided the said Subordinate Judge shall consider that a sufficient sum has been offered, the Sripur Colliery aforesaid charged under the said order dated 7-2-1924; and it is further ordered that the plaintiff be at liberty to bid for and purchase the said colliery at the said sale and if declared the purchaser to set off the amount of the purchase money *pro tanto* against the balance of his claim under the said decree; and it is further ordered that the plaintiff be also at liberty to add his costs of and incidental to this application to be taxed by the Taxing Officer of this Court to his claim under the said decree."

42. The order-sheet of Execution Case No. 224 of 1932 has not been printed in extenso but there can be no doubt that this order of the High Court was communicated to the Asansol Court, for it was after this order that the Asansol Court proceeded with the execution case and Sripur Colliery was sold for the first time on 9-6-1933, and the decree-holder purchased the same for Rs 20,000. This sale of course was eventually set aside, but this order made by the High Court on the original side being the Court which passed the decree in Suit No. 1518 of 1923 appears to me to involve and imply, and may well be regarded as in substance amounting to, an order for transmission of the decree to the Asansol Court for execution under Section 39 of the Code of Civil Procedure.

43. The Civil Procedure Code does not prescribe any particular form for an application for transmission of a decree under Section 39. Under sub-section (2) of that section the court can even suo motu send the decree for execution to another court. It is true that Order 21 Rule 6 provides that the court sending a decree for execution shall send a copy of the decree, certificate setting forth that satisfaction of the decree had not been obtained by execution within the jurisdiction of the court and a copy of the order for the execution of the decree but there is authority to the effect that an omission to send a copy of the decree or an omission to transmit to the court executing the decree the certificate referred to in clause (*b*) does not prevent the decree-holder from applying for execution to the court to which the decree has been transmitted. Such omission does not amount to a material irregularity within the meaning of Order 21 Rule 90, and as such cannot be made a ground for setting aside a sale in execution.

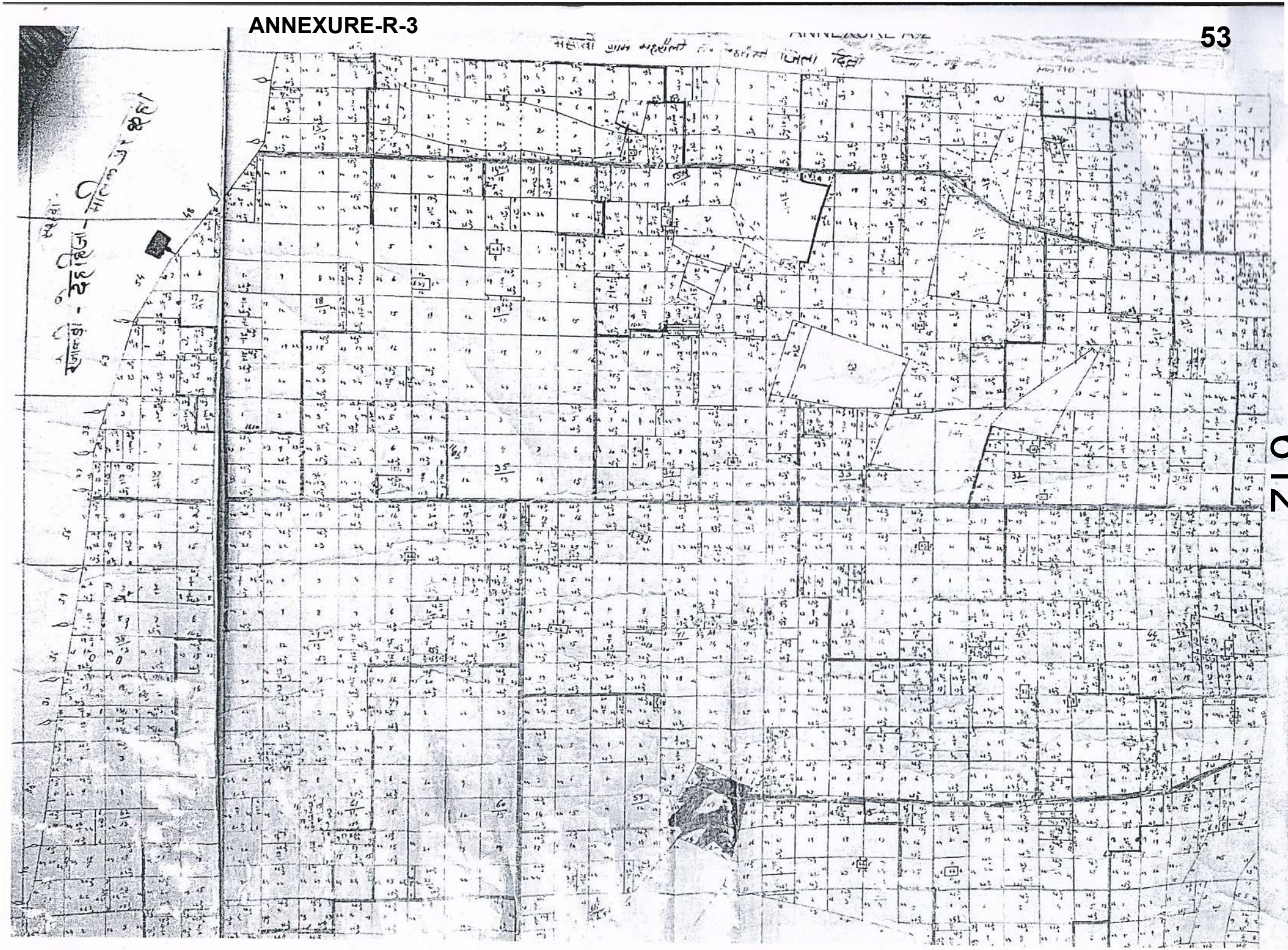
44. Further, the fact remains that the certified copy of the decree and the certificate of non-satisfaction which had been sent by the High Court to the Asansol Court on 15-4-1931, through the District Judge of Burdwan who forwarded the same to the Subordinate Judge at Asansol were still lying on the records of that court and the sending of another certified copy of the decree and a fresh certificate of non-satisfaction by the High Court would have been nothing more than a formality. In the circumstances, the omission to send over those documents again to the Asansol Court was a mere irregularity which did not affect the question of jurisdiction of the executing court. In my opinion, after the order made by the High Court on 27-3-1933, had been communicated to the Asansol Court, the Asansol Court became fully seized of jurisdiction as the executing court and none of the proceedings had thereafter in that court can be questioned for lack of inherent jurisdiction.

45. I would, therefore, on this ground alone accept this appeal and concur in the order proposed by my learned Brother.

M.C. MAHAJAN, J. *(for himself and Vivian Bose, J.) (concurring)* In our opinion, the decision can be rested on either of the grounds which have been raised by our Brothers S.R. Das and Ghulam Hasan, JJ. respectively. We would therefore allow the appeal on both the grounds.

Appeal allowed

ANNEXURE-R-3



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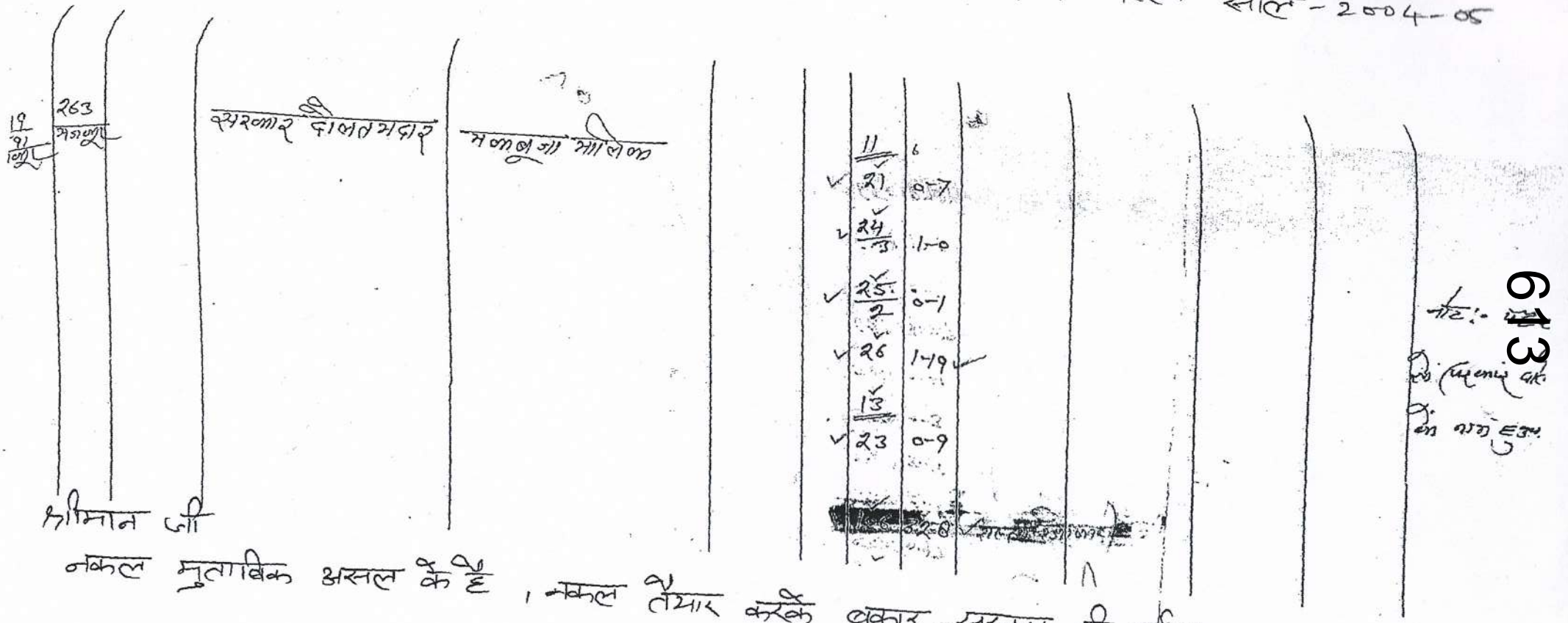
ANNEXURE-R-4

नकल फोटोकापी जमाबन्दी ग्राम- महरौली, तह०- हौज खास, द० दिल्ली साल- 2004-05



नकल मुताबिक असल के है, नकल तैयार करके वकार- सरकार दी गई।

Patwari/Nan
06/10/23

T.C

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TRUE TYPE COPY **ANNEXURE-R-4**

Form No. 32/P

Hindi to English Translation

Jamabandi **Village (Mehrauli)** **Tehsil (Mehrauli)** **District (South)** **Year 2 004-05**

Khewat Jamabandi No.	Khatauni Number	Name of Patti or Taraf with name of Nambardar & Revenue	Name of Land of owner and address	Name of Cultivator & address	Well of other sources or irrigation	Number Khasra		Area & Kind of Land	Rent which Cultivator pays-Rate & Amount	Hisa & Paimana Haquiyat and Tarika Bachh	Demand with details of revenues cases	Balance revenue not paid till the end of the year	Remarks
						Last Settlement	Present Settlement						
1	2	3	4	5	6	7	8	9	10	11	12	13	14
19/91 (Majkur)	263 (Majkur)	Sarkar Daulatmadar	Makbooja Malik			106		32-8 (Rasta Rajokari)					This Khata is Sarkar Daulatmadar

-Sd- (Patwari)

SACHIN KUMAR

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