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March 7

JUGALKISHORE SARAF

v.

RAW COTTON CO. LTD.

[S. R. DAS, BHAGWATI and IMAM JJ.]

Code of Civil Procedure (Act V of 1908), s. 146; Order XXI, rule 16—Debt transferred pending suit thereon—Decree not mentioned in deed—Execution of decree—Application by transferee—Applicability of Order XXI, rule 16 and s. 146—Equitable principles—Transfer of Property Act (IV of 1882), ss. 3, 5, 8 and 130.

H & S filed a suit against the appellant for recovery of money and during the pendency of the suit a document was executed on the 7th February, 1949, whereby H & S transferred to the respondents all book and other debts due to them together with all securities for the debts and all other property to which they were entitled in connection with their business in Bombay. One of the book debts was the subject matter of the suit, but there was no mention in that document of the suit or the decree to be passed in the suit. The respondents did not take any steps under Order XXII, rule 10, of the Code of Civil Procedure to get themselves substituted as plaintiffs in the place of H & S, but allowed the suit to be continued in the name of the original plaintiffs, and on the 15th December, 1949, a decree was passed in favour of H & S against the appellant. On the 25th April, 1951, the respondents filed in the City Civil Court, Bombay, an application for execution of the decree under Order XXI, rule 11 of the Code, and a notice under Order XXII, rule 16 was issued by the Court calling upon H & S and the appellant to show cause why the decree should not be executed by the transferees, the respondents. The appellant contended *inter alia* that as the respondents were only the assignees of the debt which was the subject-matter of the suit and not of the decree itself they were not entitled to execute the decree.

Held, that the respondents as the transferees of the debt which was the subject-matter of the suit were entitled to make an application for execution of the decree under section 146 of the Code of Civil Procedure as persons claiming under the decree-holder.

The effect of the expression "save as otherwise provided in this Code" contained in section 146 is that a person cannot make an application under section 146 if other provisions of the Code are applicable to it.

Per DAS and IMAM JJ., BHAGWATI J. *dissenting.*—Order XXI, rule 16, by the first alternative, contemplates the actual transfer by an assignment in writing of a decree after it is passed and while a transfer of or an agreement to transfer a decree that may be passed in future may, in equity, entitle the transferee to claim the beneficial interest in the decree after it is passed, such

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equitable transfer does not render the transferee a transferee of the decree by assignment in writing within the meaning of Order XXI, rule 16.

Per DAS J.—The transfer in writing of a property which is the subject-matter of a suit without in terms transferring the decree passed or to be passed in the suit does not entitle the transferee to apply for execution of the decree under Order XXI, rule 16, as a transferee of the decree by an assignment in writing.

If by reason of any provision of law, statutory or otherwise, interest in property passes from one person to another, there is a transfer of the property by operation of law. There is no warrant for confining transfers "by operation of law" to the three cases of death, devolution or succession or to transfers by operation of statutory laws only. If the document in question could be construed to be a transfer of or an agreement to transfer the decree to be passed in future, then on the decree being passed, by operation of equity, the respondents would become the transferees of the decree by operation of law within the meaning of Order XXI, rule 16.

Per BHAGWATI J.—Section 5 of the Transfer of Property Act defines a "transfer of property" as an act by which the transferor conveys property in present or in future to the transferee or transferees. The words "in present or in future" qualify the word "conveys" and not the word "property" in the section. A transfer of property that is not in existence operates as a contract to be performed in the future which may be specifically enforced as soon as the property comes into existence. It is only by the operation of this equitable principle that as soon as the property comes into existence and is capable of being identified, equity taking as done that which ought to be done, fastens upon the property and the contract to assign becomes a compete equitable assignment. There is nothing in the provisions of the Code of Civil Procedure or any other law which prevents the operation of this equitable principle, and an assignment in writing of a decree to be passed in future would become a complete equitable assignment on the decree being passed and would fall within the "assignment in writing" contemplated by Order XXI, rule 16 of the Code.

A mere transfer of property as such does not by itself spell out a transfer of a decree which has been passed or may be passed in respect of that property and it would require an assignment of such decree in order to effectuate the transfer. But where the property is an actionable claim within the meaning of the definition in section 3 of the Transfer of Property Act and is transferred by means of an instrument in writing, the transferee could by virtue of section 130 of the Transfer of Property Act step into the shoes of the transferor and claim to be the transferee of the decree and apply for execution of the decree under Order XXI, rule 16 of the Code of Civil Procedure.

Per IMAM J.—There must be a decree in existence which is transferred before the transferee can benefit from the provisions

of rule 16. The ordinary and natural meaning of the words of rule 16 can carry no other interpretation and the question of a strict and narrow interpretation of its provisions does not arise.

Case-law reviewed.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 212 of 1954.

Appeal from the Judgment and Decree dated the 10th day of November 1953 of the High Court of Judicature at Bombay in Appeal No. 8 of 1953 under the Letters Patent, against the decree dated the 23rd day of September 1952 of the said High Court in Appeal No. 67 of 1952 from Original Decree arising out of Order dated the 20th November 1951 of the City Civil Court, Bombay, in Summary Suit No. 233 of 1948.

R. Subramania Iyer and *K. R. Choudhry,* for the appellant.

H. J. Umrigar, J. B. Dadachanji and *Rajinder Narain,* for the respondent.

1955. March 7. The following Judgments were delivered.

DAS J.—The facts leading up to this appeal are few and simple. Two persons named Mahomedali Habib and Sakerkanoo Mahomedali Habib used to carry on business as merchants and pucca *adatias* in bullion and cotton at Bombay under the name and style of Habib & Sons. In 1948 that firm instituted a suit in the Bombay City Civil Court, being Summary Suit No. 233 of 1948, against the present appellant Jugalkishore Saraf, a Hindu inhabitant carrying on business at Bombay, for the recovery of Rs. 7,113-7-0 with interest at 6 per cent. per annum said to be due by him to the firm in respect of certain transactions in gold and silver effected by the firm as pucca *adatias*. On the 7th February, 1949 when that summary suit was still pending a document was executed whereby it was agreed that the two partners would transfer and Messrs Raw Cotton Company, Limited, (hereinafter called the respondent company)

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would accept the transfer of, *inter alia,* all book and other debts due to them in connection with their business in Bombay and full benefit of all securities for the debts and all other property to which they were entitled in connection with the said business. The respondent company did not take steps under, O. XXII, r. 10 of the Code of Civil Procedure to get themselves substituted as plaintiffs in the place and stead of Habib & Sons, the plaintiffs on record, but allowed the suit to be continued in the name of the original plaintiffs. Evidently, the two partners migrated from India to Pakistan and their properties vested in the Custodian of Evacuee Property. On the 15th December 1949 a decree was passed in the summary suit for the sum of Rs. 8,018-7-0 for the debt and interest and the sum of Rs. 410 for costs of the suit, aggregating to Rs. 8,428-7-0, and for further interest at 4 per cent. per annum from the date of the decree until payment. Habib & Sons being the plaintiffs on record the decree was passed in their favour.

On the 11th December 1950 the Custodian of Evacuee Property, Bombay, informed the respondent company that by an order made on the 2nd August 1950 the Additional Custodian of Evacuee Property had confirmed "the transaction of transfer" of the business of Habib & Sons to the respondent company.

On or about the 25th April, 1951 the respondent company presented before the Bombay City Civil Court a tabular statement purporting to be an application for execution under Order XXI, rule 11 of the Code of Civil Procedure. In the last column of the tabular statement, under the heading "The mode in which the assistance of the Court is required", the respondent company prayed that the Court "be pleased to declare the Applicants the assignees of the decree as the decretal debt along with other debts had been transferred by the plaintiffs to the Applicants by a deed of assignment dated the 7th February 1949 which was confirmed by the Custodian of Evacuee Property, Bombay, and order them to be substituted for the plaintiffs". There was, in that column, no specification of any of the modes in which the assist-

ance of the Court might be required as indicated in clause (j) of Order XXI, rule 11 of the Code. On the 10th May 1951 the Bombay City Civil Court issued a notice under Order XXI, rule 16 of the Code to Habib & Sons, who were the decree-holders on record, and Jugalkishore Saraf, who was the defendant judgment-debtor, requiring them to show cause why the decree passed in the suit on the 15th December 1949 in favour of the plaintiffs and by them transferred to the respondent company, should not be executed by the said transferees against the said defendant judgment-debtor. The defendant judgment debtor showed cause by filing an affidavit affirmed by him on the 15th June 1951. Amongst other things, he denied that the document in question had been executed or that the document transferred the decree to the respondent company.

The matter was tried on evidence and the execution of the document was proved by the evidence of an attesting witness which has been accepted by the executing Court. The executing Court, however, rejected the second contention and made the notice absolute with costs and gave leave to the respondent company to execute the decree against the judgment-debtor. The judgment-debtor filed an appeal before the High Court. The appeal was heard by Dixit, J. Before him the execution of the document was not challenged and nothing further need be said about that. The only substantial question raised was whether the respondent company were the transferees of the decree within the meaning of Order XXI, rule 16. The learned Judge answered the question in the affirmative on the authority of the decisions of the Bombay High Court in *Purmananddas Jivandas* v. *Vallabdas Wallji*(1) and in *Chimanlal Hargovinddas* v. *Ghulamnabi*(2) and affirming the order of the executing Court dismissed the appeal. The judgment-debtor preferred a Letters Patent Appeal before the High Court which was dismissed by Chagla, C.J., and Shah, J., following the two earlier decisions mentioned above. They, however,

(1) [1877] I. L. R. 11 Bom. 506.
(2) I. L. R. [1946] Bom. 276.

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granted, under article 133(1) (c) of the Constitution, a certificate of fitness for appeal to this Court. The principal question urged before us is as to whether the respondent company can claim to be the transferees of the decree within the meaning of Order XXI, rule 16 of the Code of Civil Procedure.

Order XXI, rule 16 of the Code of Civil Procedure, omitting the local amendments which are not material for our present purpose, provides :—

"16. Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it ; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder.

Provided that, where the decree or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution :

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others".

The first thing that strikes the reader is the sequence of events contemplated by this rule. It postulates, first, that a decree has been passed and, secondly, that that decree has been transferred (i) by assignment in writing or (ii) by operation of law. The cardinal rule of construction of statutes is to read the statute literally, that is by giving to the words used by the legislature their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning the Court may adopt the same. But if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation. In the present case a literal construction of the rule

leads to no apparent absurdity and, therefore, there can be no compelling reason for departing from that golden rule of construction. It is quite plain that if Order XXI, rule 16 is thus construed the respondent company canot possibly contend that the the decree now sought to be executed by them was, after its passing, transferred to them by an assignment in writing within the meaning of that rule, for the document in question was executed on the 7th February 1949 but the decree was passed subsequently on the 15th December 1949. Whether they can claim to have become the transferees of the decree after it was passed by operation of law within the meaning of this rule or to have otherwise become entitled to the benefit of it is a different matter which will be considered later on. For the moment it is enough to say that there had been no transfer of the decree to the respondent company by any assignment in writing executed after the decree was passed, as contemplated and required by Order XXI, rule 16. Indeed, Dixit, J. conceded—

"If the language of Order XXI, rule 16 is strictly construed, it seems to me that the Respondents have no case".

And so did Chagla, C.J., when he said—

"....and it is perfectly clear that if one were to construe rule 16 strictly there is no assignment of the decree in favour of the first respondent".

The learned Chief Justice, like Dixit, J., however, departed from the rule of strict or literal construction as they felt pressed by the fact that the Bombay High Court had consistently taken the view that there might be an equitable assignment of a decree which would constitute the assignee an assignee for the purpose of rule 16 and that what the Court must consider is not merely a legal assignment but also an assignment which operates in equity. The equitable principle relied upon by the Bombay High Court is what had been enunciated by Lord Westbury in *Holroyd* v. *Marshall*(1) in the following words:

(1) [1862] 10 H.L.C. 191, 210, 211.

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"It is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation merely because there is nothing to transfer.

But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance".

The same principle was thus reaffirmed by Jessel, M.R., in *Collyer* v. *Isaacs*(1) :

"A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment".

Applying the above principles to the facts of the instant case the High Court came to the conclusion that the document of the 7th February, 1949, on a proper reading of it, constituted an assignment of the decree. The reasoning, shortly put, is : that on a true construction the document in question amounted to a transfer of the decree that was expected to be passed in the pending suit, that as the decree was not in existence at the date of the document it operated as an agreement to transfer the decree when it would be passed, that such an agreement could be enforced by a suit for specific performance as indicated by the

(1) L. R. 19 Ch. D. 342, 351.

Privy Council in *Raja Sahib Perhlad* v. *Budhoo*(1), that as soon as a decree was passed equity, treating as done what ought to be done, fastened upon the decree and the agreement for transfer became the transfer of the decree and the transferee became a transferee of the decree within the meaning of Order XXI, rule 16. It is to be noted that to attract the application of this equitable principle there must be an agreement to transfer the decree to be passed in future. As soon as the decree is passed equity fastens upon it and, by treating as done what ought to be done, that is by assuming that the transferor has executed a deed transferring the decree to the transferee as in all conscience he should do equity regards the transferee as the beneficial owner of the after-acquired decree. The equitable principle we are considering only implements or effectuates the agreement of the parties. This equity does not, however, take upon itself the task of making any new agreement for the parties either by filling up the lacuna or gap in their agreement or otherwise. If, therefore, there is no agreement between the parties to transfer the future decree the equitable principle referred to above cannot come into play at all. In order, therefore, to test the propriety of the application of this equitable principle to the facts of the present case we have to enquire whether there was here any agreement between the parties to transfer the decree to be passed in the then pending suit. This necessarily leads us to scrutinise the terms of the document in question and ascertain its true meaning and import.

No point has been taken before us that the document of the 7th February 1949 is only an executory agreement and not a deed of transfer. Indeed, the argument has proceeded before us, as before the Court below, that the document in question is a completed deed of transfer. This relieves us of the task of closely examining the form of the document. For our present purpose we have, therefore, only to consider what properties were covered by the document. The High Court has held that the decree to be

(1) [1869] 12 M. I. A. 275; 2 B.L.R. 111.

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passed was also included in this document. The reasoning appears to be this: Clause 1 of the document comprised six several items of proprieties. Each of these items referred to "the said Indian business". The Fourth item was "All the book and other debts due to the vendors in connection with the said Indian business and the full benefits of all securities for the debts" and the last and residuary item was "All other property to which the vendors are entitled in connection with the said Indian business". One of the book debts was the subject-matter of the pending suit. The decree that the plaintiff would obtain in that suit would, therefore, be property or right "in connection with the said Indian business". Therefore, as they were transferring all property in connection with their business they must have intended to transfer the future decree also. Therefore, it must be regarded as covered by the document. I am unable to accept this line of reasoning. It cannot be overlooked that there was no mention in that document of any suit or decree to be passed in that suit as one would have expected if the parties really intended to transfer the future decree also. In this connection it is significant that the residuary item covered "All properties to which the vendors *are* entitled" and not all properties to which they might in future become entitled. Reference may also be made to the provisions of the Transfer of Property Act. Under section 8 of that Act the transfer of property passes to the transferee all the interest which the transferor is *then* capable of passing in the property and in the legal incidents thereof, and if the property transferred is a debt or actionable claim, also the securities therefor. It is urged that as the respondent company thus became entitled, by virtue of this document read in the light of section 8, to all the rights and remedies including the right to prosecute the pending suit and to obtain a decree the decree that was eventually passed automatically and immediately upon its passing must be taken as having been transferred by this very document. This argument appears to me to really amount to a begging of the question. The

transfer of the debt passed all the interest which the transferors were *then* capable of passing in the debt and in the legal incidents thereof. There was *then* no decree in existence and, therefore, the transferors could not *then* pass any interest in the non-existing decree. Therefore, section 8 of the Transfer of Property Act does not assist the respondent company Upon the assignment of the debt the respondent company undoubtedly became entitled to get themselves substituted under Order XXII, rule 10 as plaintiffs in the pending suit but they did not choose to do so and allowed the transferors to continue the suit and a decree to be passed in their favour. The true position, therefore, is that at the date of the transfer of the debt to the respondent company the transferors could not transfer the decree, because the decree did not exist. On a true construction of the document the transferors agreed only to transfer, besides the five items of spectified properties, "All other properties to which the vendors *are* entitled", that is to say, all properties to which at the date of the docoment they were entitled. At the date of the document they had the right to proceed with the suit and to get such relief as the Court by its decree might award but no decree had yet been passed in that suit and, therefore, property to which they were then entitled could not include any decree that might in future be passed. It is significant that there was, in the document, no provision purporting in terms to transfer any future decree. Section 8 of the Transfer of Property Act does not operate to pass any future property, for that section passes all interest which the transferor can *then*, i.e., at the date of the transfer, pass. There was thus no agreement for transfer and much less a transfer of a future decree by this document. All that was done by the transferors by that document was to transfer only the properties mentioned in clause 1 together with all legal incidents and remedies. The properties so transferred included book debts. A book debt which was made the subject-matter of the pending suit did not, for that reason, cease to be a book debt and, therefore, it was also transferred but no

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decree to be passed in respect of that book debt was in terms transferred. In such a situation there was no room or scope for the application of the equitable principle at all. The transfer in writing of a property which is the subject-mater of a suit without in terms transferring the decree passed or to be passed in the suit in relation to that property does not entitle the transferee to apply for execution of the decree as a transferee of the decree by an assignment in writing within the meaning of Order XXI, or 16 See *Hansraj Pal* v. *Mukhraj Kunwar*(1) and *Vithal* v. *Mahadeva* (2). In my judgment the decree was not transferred or agreed to be transferred to the respondent company by the document under consideration and the latter cannot claim to be transferees of the decree by an assignment in writing as contemplated by Order XXI, rule 16.

The matter, however, has been argued before us at length on the footing that the decree had been transferred or agreed to be transferred by this document and therefore, the equitable principle came into play and that as soon as the decree was passed the respondent company became the transferees of the decree by assignment in writing within the meaning of Order XXI, rule 16. As considerable legal learning has been brought to bear on the question of the application of the equitable principle and its effect on the prior written agreement and as the different decisions of the High Court are not easily reconcilable, I consider it right to record my views on that question.

I shall, then, assume, for the purposes of this part of the argument, that the document of the 7th February 1949 was a completed deed of transfer covering the decree to be passed in future in the then pending suit. Under the Transfer of Property Act there can be no transfer of property which is not in existence at the date of the transfer. Therefore, the purported transfer of the decree that might be passed in future could only operate as a contract to transfer the decree to be performed in future, i.e., after the passing of the

(1) [1908] I. L. R. 30 All. 28.
(2) [1924] 26 Bom. L.R. 333.

decree. The question then arises: What is the effect of the operation of the equitable principle on the decree as and when it is passed? Where there is a contract for the transfer of property which is not in existence at the date of the contract, the intending transferee may, when the property comes into existence, enforce the contract by specific performance, provided the contract is of the kind which is specifically enforceable in equity. It is only when the transferor voluntarily executes a deed of transfer as in all conscience he should do or is compelled to do so by a decree for specific performance that the legal title of the transferor in that property passes from him to the transferee. This transfer of title is brought about not by the prior agreement for transfer but by the subsequent deed of transfer. This process obviously involves delay, trouble and expenses. To obviate these difficulties equity steps in again to short circuit the process. Treating as done what ought to be done, that is to say, assuming that the intending transferor has executed a deed of transfer in favour of the intending transferee immediately after the property came into existence, equity fastens upon the after-acquired property and treats the beneficial interest therein as transferred to the intending transferee. The question for consideration is: Is this transfer brought about by the earlier document whereby the property to be acquired in future was transferred or agreed to be transferred? In other words, can it be said, in such a situation, that the after-acquired property had been transferred, *proprio vigore,* by the earlier document? Does that document operate as an assignment in writing within the meaning of Order XXI, rule 16? Learned counsel for the respondent company contends that the answer to these questions must be in the affirmative. He relies on several cases to which reference may now be made.

In *Purmananddas Jivandas* v. *Vallabdas Wallji* (*supra*) the facts were these. In May 1859 one R died leaving his properties to executors in trust for the appellant. In August 1868 the executors filed a suit in the Original Side of the Bombay High Court

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against Luckmidas Khimji for recovery of money lent to him as manager of Mahajan Wadi. During the pendency of the suit, the executors on the 11th May 1870 assigned in very wide and general terms all the properties of the testator to the appellant including "all movable property, debts claims and things in action whatsoever vested in them as such executors". The appellant was not brought on the record but the suit proceeded in the name of the executors. On the 23rd January 1873 a decree was passed for the plaintiffs on the record, i.e. the executors, for Rs. 31,272-13-5 which was made a first charge on the Wadi properties. The appellant thereupon applied for execution of the decree under section 232 of the Code of 1882 (corresponding to our Order XXI, rule 16), as transferee of the decree. The Chamber Judge dismissed the application. On appeal Sargent, C.J., and Bayley, J., held that the appellant was competent to maintain the application. After pointing out that the assignment was in the most general terms, Sargent, C.J., observed :—

"..... and the effect of this assignment was, in equity, to vest in Purmananddas the whole interest in the decree which was afterwards obtained. But it has been suggested that Purmananddas is not a transferee of the decree under section 232 of the Civil Procedure Code, because the decree has not been transferred to him "by assignment in writing or by operation of law", and that, therefore, he is not entitled to apply for execution. There is no doubt that, in a Court of equity, in England the decree would be regarded as assigned to Purmananddas, and he would be allowed to proceed in execution in the name of the assignors. Here there is no distinction between "law" and "equity", and by the expression 'by operation of law' must be understood the operation of law as administered in these Courts. We think under the circumstances that we must hold that this decree has been transferred to Purmananddas 'by operation of law' ".

The last sentence in the above quotation, standing by itself, quite clearly indicates that the learned

Chief Justice was of the view that as the benefit of the decree became available to the appellant by operation of the equitable principle it had to be held that the decree had been transferred to the appellant "by operation of law" rather than by an assignment in writing and that is how it was understood by the reporter who framed the head-note. The learned Chief Justice, however, immediately after that last sentence added :—

"In the present case the decree has been transferred by an assignment in writing as construed in these Courts".

This sentence *prima facie* appears to be somewhat inconsistent with the sentence immediately preceding and it has given rise to a good deal of comments in later cases. The learned Chief Justice has not referred to any case in which the Bombay High Court had adopted such a construction.

The case of *Ananda Mohon Roy* v. *Promotha Nath Ganguli*(1) follows the decision of the Bombay High Court in *Purmanandas Jivandas* v. *Vallabdas Wallji* (*supra*). It should be noted, however, that in this Calcutta case the decree was obtained and the transfer was made on the same day and it was held that though there was no assignment of the decree in so many words the property with all arrears of rent having been assigned to the mortgagee simultaneously with the passing of the decree the assignment passed the decree also.

The case of *Chimanlal Hargovinddas* v. *Ghulamnabi* (*supra*) has been strongly relied upon. In that case a shop was held by A and B as tenants-in-common. In May 1936 A agreed to sell his half share to C. As per arrangement A filed a partition suit on the 16th January 1937 to recover his share. The disputes in the suit were referred to arbitration by order of Court and eventually the umpire made his award on the 16th January 1939 declaring that A was entitled to a half share. A then, on the 7th March, 1939, sold all his rights under the award (which was

(1) [1920] 25 C.W.N. 863; A.I.R. 1921 Cal. 74.

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called a decree) to C by a registered deed. C did not apply for substitution of his name on the record of the suit. The Court passed a decree upon the award on the 1st September, 1939. On the 24th November 1939 C applied for execution of the decree. It was held that C was entitled to execute the decree under Order XXI, rule 16, for what had been transferred to him was not merely A's half share in the property but all his rights under the award including the right to take a decree. In this case, having regard to the terms of the previous agreement and the fact that the parties were treating the award as a decree the intention was quite clear that by the subsequent deed of sale both the award and the decree upon it had been transferred. It was quite clearly recognised by the Full Bench that if the sale deed transferred only A's half share in the property or only his right to take a decree C could not apply under Order XXI, rule 16.

Reading the three cases relied on by learned counsel for the respondent company it seems to me that they proceeded on the footing that the equitable title related back to the earlier agreement in writing and converted the agreement to transfer the future decree into an assignment in writing of that decree as soon as it was passed. Some support is sought to be derived by learned counsel for this doctrine of relation back from the above quoted observations of Lord Westbury in *Holroyd* v. *Marshall* (*supra*) "that the contract would, in equity, transfer the beneficial interest" and of Jessel, M.R., in *Collyer* v. *Isaacs* (*supra*) that "the contract to assign thus becomes a complete assignment". I find considerable difficulty in accepting this argument as sound. In the first place the Lord Chancellor and the Master of the Rolls were not concerned with the question of relation back in the form in which it has arisen before us. In the next place it must not be overlooked that the equitable principle herein alluded to is not a rule of construction of documents but is a substantive rule which confers the benefit of the after-acquired property on the person to whom the transferor had, by his agreement, promised to transfer the same. Thus, by treating as done that

which ought to be done, equity fastens upon the after-acquired property and brings about a transfer of it. The implication of this principle, to my mind, is clearly that the agreement, by itself and *proprio vigore,* does not transfer the property when it is subsequently acquired but that instead of putting the intending transferee to the trouble and expense of going to Court for getting a decree for specific performance directing the promisor to execute a deed of transfer which when executed will transfer the after-aquired property, equity intervenes and places the parties in a position relative to each other in which by the prior agreement they were intended to be placed as if a deed of transfer had been made. As I apprehend the position, it is by the operation of equity on the subsequent event, namely, the actual acquisition of the property on its coming into existence that the beneficial interest therein is transferred to the promisee. This transfer, to my mind, is brought about by operation of equity which is something dehors the prior agreement. It is true that that agreement makes the application of the equitable principle possible or I may even say that it sets the equity in motion but, nevertheless, it is equity alone which denudes the transferor of his interest in the after-acquired property and passes it to the intending transferee. That being the true position, as I think it is, the after-acquired property cannot, logically and on principle, be said to have been transferred to the intending transferee by the agreement in writing. I do not see on what principle this transfer can be said to relate back to the previous agreement. I am fortified in my view by the observations of Lord Cave in the case of *Performing Right Society* v. *London Theatre of Varieties* (1). In that case, in 1916 a firm of music publishers, being members of the plaintiff society, assigned by an indenture of assignment to the society the performing right of every song, the right of performance of which they then possessed or should thereafter acquire, to be held by the society for the period of the assignor's membership. Subsequently, a certain

(1) L. R. [1924] A. C. 1.

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song was written, and the copyright in it, together with the right of performance, was assigned by the author to the said firm, but there was no fresh assignment in writing by the firm to the plaintiff society such as was required by section 5(2) of the Copyright Act, 1911. The defendants, who were music hall proprietors, permitted this song to be publicly sung in their music hall without the consent of the plaintiff society. The plaintiff society then sued the defendants for infringement of their performing rights and claimed a perpetual injunction. The defence was that as there was no assignment in writing of the copyright subsequently acquired by the firm to the plaintiff society the latter was not the legal owner and, therefore, was not entitled to a perpetual injunction. Discussing the nature of the right acquired by the plaintiff society under the indenture of 1916 and its claim to the after-acquired copyright secured by the firm and referring to section 5, sub-section (2) of the Copyright Act, 1911, Viscount Cave, L.C., observed at p. 13 :—

"There was on the respective dates of the instruments under which the appellants claim no existing copyright in the songs in question, and therefore no owner of any such right; and this being so, neither of those instruments can be held to have been an assignment "signed by the owner of the right within the meaning of the section. No doubt when a person executes a document purporting to assign property to be afterwards acquired by him, that property on its acquisition passes in equity to the assignee: *Holroyd* v. *Marshall,* 10 H.L.C. 191; *Tailby* v. *Official Receiver,* 13 A.C. 523; but how such a subsequent acquisition can be held to relate back, so as to cause an instrument which on its date was not an assignment under the Act to become such an assignment, I am unable to understand. The appellants have a right in equity to have the performing rights assigned to them and in that sense are equitable owners of those rights; but they are not assignees of the rights within the meaning of the statute. This contention, therefore, fails".

The above observations, to my mind, completely cover the present case. On a parity of reasoning, the respondent company may have, by operation of equity, become entitled to the benefit of the decree as soon as it was passed but to say that is not to say that there has been a transfer of the decree by the document of the 7th February 1949. And so it has been held in several cases to which reference may now be made.

In *Basroovittil Bhandari* v. *Ramchandra Kamthi*(1) the plaintiff assigned the decree to be passed in the pending suit. The assignee was not brought on the record under section 372 of the 1882 Code corresponding to Order XXII, rule 10 of the present Code but the suit proceeded in the name of the original plaintiff and a decree was passed in his favour. The assignee then applied for execution of that decree claiming to be a transferee decree-holder under section 232 of the 1882 Code. That application was dismissed. White, C.J., observed :—

"We are asked to hold that in the event which happened in this case the appellant is entitled to be treated as the transferee of a decree from a decree-holder for the purposes of section 332, notwithstanding that at the time of the assignment there was no decree and no decree-holder. It seems to us that we should not be warranted in applying the doctrine of equity on which the appellant relies, which is stated in *Palaniappa* v. *Lakshmanan,* I.L.R. 16 Mad. 429, for the purpose of construing section 232 of the Code. We think the words "decree-holder" must be construed as meaning decree-holder in fact and not as including a party who in equity may afterwards become entitled to the rights of the actual decree-holder, and that the words of the section relating to a transfer of a decree cannot be construed so as to apply to a case where there was no decree in existence at the time of the agreement".

It is true that the case of *Purmananddas Jivandas* v. *Vallabdas Wallji* (*supra*) was not cited in that case but the case of *Palaniappa* v. *Lakshmanan*(2) which

(1) [1907] 17 M.L.J. 391. (2) [1893] I.L. R.16 Mad. 429.

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adopted the equitable principle enunciated by Jessel, M.R., in *Collyer* v. *Isaacs* (*supra*) on which that Bombay case had been founded was brought to the notice of the Court.

In *Dost Muhammad* v. *Altaf Husain Khan*(1) one M instituted a suit for recovery of some immovable property. During the pendency of the suit M transferred his interest in the property to the respondent. The respondent did not apply to bring himself on the record and the suit went on in the name of M as the plaintiff. By a compromise decree M was awarded a portion of the property. After the decree was passed the respondent applied to execute the decree as the transferee of the decree. The Munsiff rejected the application but the District Judge reversed his order. On second appeal Chamier, J., found it impossible to treat the respondent as the transferee of the decree, for the document on which he relied was executed before the decree was passed.

Peer Mahomed Rowthen v. *Raruthan Ambalam*(2) may also be referred to. In that case the Madras High Court followed its earlier decision in *Basroovittil Bhandari* v. *Ramchandra Kamthi* (*supra*).

The case of *Thakuri Gope* v. *Mokhtar Ahmad*(3) does not carry the matter any further, for it only follows the three earlier cases hereinbefore mentioned.

Mathurapore Zamindary Co. Ltd. v. *Bhasaram Mandal*(4) represents the view taken by the Calcutta High Court. In that case Hennessey and his brothers, who were Zamindars, instituted rent suits against their tenants. Pending those suits Hennessey and his brothers transferred the Zamindari to the appellant company. The appellant company did not get themselves substituted as plaintiff but allowed the suits to proceed in the names of the original plaintiffs who were the transferors. Eventually, decrees were passed in favour of Hennessey and his brothers. The appellant company then applied for execution. The executing Court and the lower appellate Court held that

(1) [1912] 17 I.C. 512.
(2) [1915] 30 I. C. 831.
(3) 1922 C.W.N. (Patna) 256; A. I. R. 1922 Pat. 563.
(4) [1924] I.L.R. 51 Cal. 703.

the appellant company was not a transferee of the decree. The appellant company thereupon preferred this second appeal to the High Court. It was held that the appellant company could not apply under Order XXI, rule 16, for that rule could not properly cover a case where there was no decree at the date of the assignment of the property and the term "decree-holder" could not cover a party who, in equity, might afterwards have become entitled to the rights of the actual decree holder. The case of *Ananda Mohon Roy* v. *Promotha Nath Ganguli* (*supra*) was explained as being based really on the construction that was put upon the conveyance, namely, that it covered a decree which had been passed "simultaneously with, if not before, the execution of the conveyance". After pointing out that in *Purmananddas Jivandas* v. *Vallabdas Wallji* (*supra*) the transferor and transferee stood in the position of trustee and *cestui que trust* and that that circumstance might have attracted the application of the equitable principle the Court could not assent to the broad proposition supposed to have been laid down in that case that the transferee in equity became a transferee of the decree by the prior agreement so as to come under Order XXI, rule 16 and preferred to follow the decision of the Madras High Court in *Basroovittil Bhandari* v. *Ramchandra Kamthi* (*supra*) and the other decisions to which reference has been already made.

In *Pandu Joti Kadam* v. *Savla Piraji Kate*(1) one Tuljaram obtained a decree on a mortgage against the appellant Pandu Joti. Later on, the respondent Savla brought a suit against the appellant Pandu and Tuljaram. In that suit a decree was passed directing Tuljaram to transfer the mortgage decree to Savla. The respondent Savla thereupon without having obtained, amicably or by execution of his decree, an actual assignment of the mortgage decree sought to execute that decree. It was held that although Savla had a legal right, by executing his own decree, to compel his judgment-debtor Tuljaram to assign to him the mortgage decree obtained by Tuljaram, such

(1) [1925] 27 Bom. L. R. 1109.

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right alone, without an assignment in writing, did not make him a transferee of the mortgaged decree so as to be entitled to execute that decree.

Even the Bombay High Court (Fawcett and Madgavkar, JJ.) in *Genaram Kapurchand Marwadi* v. *Hanmantram Surajmal*(1) followed the decision of the Madras High Court in *Basroovittil Bhandari* v. *Ramchandra Kamthi* (*supra*). The question came up for consideration in connection with a plea of limitation. There in February 1914 the appellant obtained an assignment of the rights of the plaintiff in a pending suit which was thereafter continued by the original plaintiff. In November 1914 a decree was passed in favour of the original plaintiff. The appellant made several applications for execution of the decree in 1916, 1917, 1920 and 1921 all of which were dismissed. In November 1923 the appellant obtained a fresh assignment in writing from the plaintiff and made a fresh application for execution. The judgment-debtor pleaded that the earlier applications were not in accordance with law and did not keep the decree alive. It was held that although the appellant was entitled, in equity, to the benefit of the decree he did not, before he actually obtained an assignment of the decree in 1923, become a transferee of the decree by an assignment in writing within Order XXI, rule 16 and, therefore, the applications made by him prior to 1923 were not made in accordance with law and, therefore, the last application was barred by limitation. This decision clearly proceeded on the ground that Order XXI, rule 16 contemplated only the transfer of a decree after it had been passed.

The case of *Abdul Kader* v. *Daw Yin*(2) does not assist the respondent company, for in that case the Court took the view that, on its true construction, the deed under consideration in that case actually transferred the decree that had already been passed.

In *Prabashinee Debi* v. *Rasiklal Banerji*(3), Rankin, C. J., considered the previous cases and preferred to

(1) A.I.R. 1926 Bom. 406; 28 Bom. L.R. 776.
(2) A.I.R. 1920 Rang. 308.
(3) [1931] I.L.R. 59 Cal. 297.

follow the case of *Mathurapore Zamindary Co. Ltd.* v. *Bhasaram Mandal* (*supra*).

The case of *Purna Chandra Bhowmik* v. *Barna Kumari Debi*(1) does not, when properly understood, afford any support to the contention of the respondent company. There the defendant No. 1 had executed a mortgage bond in favour of the plaintiff assigning by way of security the decree that would be passed in a pending suit which he, the defendant No. 1, had instituted against a third party for recovery of money due on unpaid bills for work done. After this mortgage a decree was passed in that suit in favour of the defendant No. 1 who had continued that suit as the plaintiff. The plaintiff claiming to be the assignee by way of mortgage of that decree instituted this suit against two defendants. The defendant No. 1 was the plaintiff in the earlier suit who had mortgaged to the plaintiff the decree to be passed in that suit and the defendant No. 2 was a person who claimed to be a transferee of the same decree under a conveyance subsequently executed in his favour by the first defendant. The judgment-debtor under the decree in the first suit was not made a party defendant in this suit. The first defendant did not contest this suit and it was only contested by the second defendant. One of the points raised by the contesting defendant was that this subsequent suit which was one for a pure declaration of title was bad under section 42 of the Specific Relief Act inasmuch as the plaintiff did not pray for consequential relief in the shape of a permanent injunction restraining him, the contesting defendant, from executing the decree. In repelling that argument as manifestly untenable Mukherjea, J., as he then was, said :—

"All that the plaintiff could want possibly at the present stage was a declaration that she was an assignee of the decree and if she gets a declaration it would be open to her to apply for execution of the decree under Order XXI, rule 16, of the Code of Civil Procedure. No other consequential relief by way of

(1) I.L.R. [1939] 2 Cal. 341.

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injunction or otherwise could or should have been prayed for by the plaintiff in the present suit".

It will be noticed that the construction of Order XXI, rule 16, was not in issue at all. The question was not between the person claiming to be the transferee of the decree and the judgment-debtor. Indeed, the judgment-debtor was not a party to this suit at all. The simple question was whether the suit was maintainable under section 42 by reason of the absence of a prayer for consequential relief. In view of the facts of that case the observation quoted above appears to me to be a passing one not necessary for the decision of the question then before the Court and not an expression of considered opinion on the meaning, scope and effect of Order XXI, rule 16.

All the cases, except the three cases relied on by learned counsel for the respondent company, quite clearly lay down—and I think correctly—that Order XXI, rule 16, by the first alternative, contemplates the actual transfer of the decree by an assignment in writing executed after the decree is passed and that while a transfer of or an agreement to transfer a decree that may be passed in future may, in equity, entitle the intending transferee to claim the beneficial interest in the decree after it is passed, such equitable transfer does not relate back to the prior agreement and does not render the transferee a transferee of the decree by an assignment in writing within the meaning of Order XXI, rule 16.

Learned counsel for the respondent company then contends that even if the respondent company did not, by force of the prior agreement in writing read in the light of the equitable principle alluded to above or of the provisions of the Transfer of Property Act, become the transferees of the decree by an assignment in writing, they, nevertheless, became the transferees of the decree "by operation of law" within the meaning of Order XXI, rule 16. That phrase has been considered by the different High Courts in numerous cases but the interpretations put upon it are not at all uniform and it is difficult to reconcile all of them.

In this judgment in the present case the executing Court expressed the view that the phrase could only mean that the rights had been transferred "on account of devolution of interest on death, etc". In delivering the judgment in the Letters Patent Appeal, Chagla, C.J., said :—

"The operation of law contemplated by Order XXI, rule 16 is not any equitable principle but operation by devolution as in the case of death or insolvency".

The learned Chief Justice does not give any reason for the view expressed by him but assumes the law to be so. The genesis for such assumption is probably traceable to the observations of Sir Robert P. Collier who delivered the judgment of the Privy Council in *Abedoonissa Khatoon* v. *Ameeroonissa Khatoon*(1). The question arose in that case in this way. One Wahed sued his father Abdool for possession of certain properties. The trial Court dismissed the suit and Wahed appealed to the High Court. During the pendency of the appeal Wahed died and his widow Abedoonissa was substituted in the place of Wahed for prosecuting the appeal. The High Court allowed the appeal and by its decree declared that Wahed was in his lifetime and those who became his heirs were entitled to recover the properties in suit. Abedoonissa applied for execution of the decree for herself and for one Wajed who was said to be the posthumous son of Wahed born of her womb. Objection was taken, *inter alia,* that Wajed was not the legitimate son of Wahed. This objection was overruled and it was held that Abedoonissa was entitled to execute the decree for herself and as the guardian of Wajed. Then the judgment-debtor Abdool died. Abdool's widow Ameeroonissa filed a suit for a declaration that Wajed was not the legitimate son of Wahed and for setting aside the last mentioned order. Abedoonissa took the point that the matter was concluded by principles of *res judicata.* To that Ameeroonissa's reply was that the proceeding in which the the question of the legitimacy of Wajed was decided was wholly incompetent so far as

(1) [1876] L. R. 4 I. A. 66, I.L.R. 2 Cal. 327.

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Wajed was concerned because, the decree being in favour of Abedoonissa, Wajed was not a transferee of the decree within the meaning of section 208 of Act VIII of 1859 corresponding to Order XXI, rule 16 of the present Code and could not apply for execution and that being so any adjudication on his status in such proceeding was not binding at all. The question for decision in the suit was whether Wajed was a transferee of the decree within the meaning of section 208 of the Code of 1859. It was in that connection that Sir Robert P. Collier in delivering the judgment of the Privy Council, after quoting that section, observed :—

"It appears to their Lordships, in the first place, that, assuming Wajed to have the interest asserted, the decree was not, in terms of this section, transferred to him, either by assignment, which is not pretended, or by operation of law, from the original decree-holder. No incident had occurred, on which the law could operate, to transfer any estate from his mother to him. There had been no death; there had been no devolution; there had been no succession. His mother retained what right she had; that right was not transferred to him; if he had a right, it was derived from his father; it appears to their Lordships, therefore, that he is not a transferee of a decree within the terms of this section".

The above observations seem to put upon the phrase "by operation of law" an interpretation which, in the language of Chakravartti, J., in his judgment in *Sailendra Kumar* v. *Bank of Calcutta*(1) "suggests that it would apply only in cases where certain events, not connected with any act on the part of anybody towards making a transfer, happen and the law, operating on those events, brings about a transfer". Some of the decisions of certain High Courts to be presently cited seem to assume that their Lordships of the Privy Council were out to give an exhaustive enumeration of the cases of transfer of property by operation of law but I find myself in agreement with Chakravartti, J.; that there is no reason for making

(1) I. L. R. [1948] 1 Cal. 472.

such an assumption and treating these observations as the text of a statute.

In *Dinendranath Sannyal* v. *Ramcoomar Ghose*(1) Sir Barnes Peacock pointed out the great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. One of the principal distinctions so pointed out was :—

"Under the former the purchaser derives title through the vendor, and cannot acquire a better title than that of the vendor. Under the latter the purchaser notwithstanding he acquires merely the right, title and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and freed from all alienations or incumbrances effected by him subsequently to the attachment of the property sold in execution".

Here the act of the decree-holder in seeking execution by attachment and sale and the act of the Court in directing attachment and sale cannot possibly be said to be the happening of an event unconnected with the act of making a transfer such as death or devolution or succession referred to in *Abedoonissa's case* (*supra*) could be said to be. By the act of applying for execution the decree-holder quite clearly desires that the judgment-debtor should be stripped of all his right, title and interest in the property attached and sold and the order of the Court has the effect of so denuding the judgment-debtor and of passing his right, title and interest to the purchaser of the property at the Court sale. This transfer of property is not by any assignment in writing executed by the transferor in favour of the transferee but is brought about by the operation of the statutory provisions relating to and governing execution of decrees. Thus this Privy Council decision itself shows that transfers "by operation of law" were not intended by it to be confined to the three cases of death, devolution or succession.

More often than not transfers "by operation of law" will be found to be brought about by the opera-

(1) [1889] L. R. 8 I.A. 65,75.

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tion of statutory law. Thus when a person dies testate there is a devolution of his properties to his legal representatives by operation of the law of testamentary succession which is now mainly statutory in this country. When a person is adjudged insolvent his properties vest in the official assignee and that transfer is brought about by the operation of the insolvency laws which have been codified. Court sale of property in execution of a decree vests the right, title and interest of the judgment-debtor in that property in the auction-purchaser thereby effecting a transfer by operation of the law embodied in the Code of Civil Procedure. Likewise, statutes in some cases provide for the forfeiture of property, e.g. property in relation to which an offence has been committed, namely, illicit liquor or opium, etc., and thereby effect a transfer of such property from the delinquent owner to the State. It is neither necessary nor profitable to try and enumerate exhaustively the instances of transfer by operation of law. Suffice it to say that there in no warrant for confining transfers "by operation of law" to transfers by operation of statutory laws. When a Hindu or a Mohammaden dies intestate and his heirs succeed to his estate there is a transfer not by any statute but by the operation of their respective personal law. In order to constitute a transfer of property "by operation of law" all that is necessary is that there must be a passing of one person's rights in property to another person by the force of some law, statutory or otherwise.

Reference has already been made to the case of *Purmananddas Jivandas* v. *Vallabdas Wallji* (*supra*) where, by applying the equitable principle, Sargent, C.J., upheld the appellant's right to maintain the application for execution. In the beginning the learned Chief Justice founded his decision on the ground that the appellant had become the transferee of the decree "by operation of law". This view appears to me to be logical, for it was by the operation of the equitable principle that the right, title and interest of the transferor in the after-acquired decree became the property of the appellant. In other words,

it was equity which operated on the decree as soon as it was passed and passed the interest of the decree-holder to the appellant. The result of this transmission was to transfer the property from the decree-holder to the appellant and this transfer was brought about by the operation of the equitable principle discussed above which is as good as any rule of law. The actual decision in *Purmananddas Jivandas* v. *Vallabdas Wallji* (*supra*) may well be supported as an instance of transfer by operation of law and indeed Sargent, C.J., himself first described the transfer in that case as being one by operation of law. The same remarks apply to the other two cases of *Ananda Mohon Roy* v. *Promotha Nath Ganguli* (*supra*) and *Chimanlal Hargovinddas* v. *Ghulamnabi* (*supra*) relied on by learned counsel for the respondent company.

In *Abdul Kader* v. *Daw Yin* (*supra*) in July 1928 the plaintiff obtained a decree that a certain sale deed be set aside on payment of a certain sum and for possession of the properties and mesne profits. In August 1928, *i.e.*, after the passing of the decree the plaintiff executed a deed for the sale of the properties to the appellant who by the terms of the deed was to obtain possession of the properties through Court on payment of the amount mentioned therein. The plaintiff deposited the necessary amount and applied for execution of the decree but she died shortly thereafter. Thereupon the appellant applied for execution of the decree. On a construction of the terms of the sale deed the Court came to the conclusion that the sale deed covered the decree and, therefore, the appellant was a transferee of the decree by assignment in writing. This was sufficient to dispose of the case but the learned Judges tried to reconcile some of the earlier cases by deducing two propositions:

(1) that the words "by operation of law" cannot be invoked so as to make an assignment operative to transfer the decree and the right under it which would upon the true construction of its terms, otherwise, be inoperative in that regard; and

(2) that although in certain cases principles of equity may be relied on, *e.g.*, in the case of a transfer

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by trustees and a beneficiary, such principles cannot be considered as rendering a transfer valid "by operation of law".

It is difficult to appreciate the implication of the first proposition. When on a true construction of the deed it actually operates to transfer a decree then in existence, no equitable principle need be invoked, for in that case the transfer is by the deed itself and as such is by an assignment in writing. It is only when the deed does not effectively transfer the decree because, for instance, the decree is not then in existence, but constitutes only an agreement to transfer the decree after it is passed that the invocation of the equitable principle becomes necessary and it is in those circumstances that equity fastens and operates upon the decree when it is passed and effects a transfer of it. If, however, the learned Judges meant to say that if on a true construction of the deed it did not cover the decree then the equitable principle would not come into play at all and in that case the principle of transfer by operation of law could not be invoked, no exception need then be taken. As regards the second proposition which appears to be founded on the observations of Mukherji, J., in *Mathurapore Zamindary Co.'s case* (*supra*) I do not see why the equitable principle may be relied on only in the case of a transfer by trustees to *cestui que trust*. Indeed, it was applied in the two earlier English cases as between mortgagor and mortgagee and in *Performing Right Society* v. *London Theatre of Varieties* (*supra*) to an indenture of assignment of copyright to be acquired in future made between persons who did not stand in the relationship of trustee and beneficiary. Nor do I see why, in cases where the equitable principle applies, the transfer should not be regarded as one by operation of law.

In *Mahadeo Baburao Halbe* v. *Anandrao Shankarrao Deshmukh*(1) the judgment confined transfers by operation of law to cases of death, devolution or succession for which, as already stated, I see no warrant.

(1) [1933] I. L. R. 57 Bom. 513.

The decision in *Periakatha Nadar* v. *Mahalingam*(1) is somewhat obscure. There a receiver appointed in a partnership action filed a suit against a debtor of the firm and obtained a decree. Thereafter the assets of the firm including the decree were directed to be sold by auction amongst the partners. This order was made in spite of the objection of the partners. The decree was purchased by one of the partners who was defendant No. 2. The purchaser then applied for execution of the decree. Pandrang Rao, J. said, at p. 544 :—

"It appears to us that the words 'operation of law' cannot apply to a case where a person has become the owner of a decree by some transaction *inter vivos*. It applies to cases where the decree has been transferred from one to another by way of succession or where there is a bankruptcy or any similar event which has the effect in law of bringing about such a transfer".

If the purchaser of a property in execution sale becomes the transferee of the property by operation of law I, for one, cannot see why the purchaser of a property at an auction sale held in a partnership action under the order of the Court made *in invitum* will not be a transferee by operation of law. If an involuntary execution sale is not a transaction *inter vivos* why should an auction sale held in a partnership action in the teeth of opposition of the parties be a transaction *inter vivos*? The learned Judges concluded that as no particular form of assignment was prescribed for transfer, the order of the Court might be treated as an assignment in writing of the decree. I find it much easier to hold that there was in that case a transfer by operation of law than that the Court acted as the agent of the partners and the order of the Court was the assignment in writing. The law authorised the Court in a partnership action to order the sale of the partnership assets and consequently the sale passed the interest of all the partners other than the purchasing partner in the decree solely to

(1) A.I.R. 1936 Mad. 543.

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the latter. I do not see why a transfer thus brought about should not, like a transfer effected by a Court sale in execution, be regarded as a transfer by operation of law. Further, as I have already said, there is no valid reason for confining transfer by operation of law to succession and bankruptcy or the like.

In *G. N. Asundi* v. *Virappa Andaneppa Manvi*(1) a father sued his sons for a declaration of his sole title to a decree previously obtained by the sons against a third party on promissory notes. The parties came to a compromise and a joint petition signed by the father and the sons was filed in Court in which it was stated that the sons had no objection to surrender all their rights in the decree to the father. The Court passed a decree in accordance with the compromise. On an application for execution by the father of the decree on the promissory notes it was held that on its true construction the compromise petition amounted to an assignment of the decree within the meaning of Order XXI, rule 16. So far there can be no difficulty; but the learned Judges went on to say, without, I think, any good reason, that transfer by operation of law was obviously intended to be confined to testamentary and intestate succession, forfeiture, insolvency and the like. This was only because the Court felt bound to hold that the decision in *Abedoonissa's case* had so limited it. It was also pointed out—I think correctly —that a decree declaring the title of the decree-holder to another decree previously passed in another suit did not effect a transfer of the earlier decree by operation of law and the decree-holder under the latter decree did not become the transferee of the earlier decree by operation of law within the meaning of Order XXI, rule 16. This was also held in a number of cases including *Mahadeo Baburao Halbe's case* (*supra*) and *Firm Kushaldas Lekhraj* v. *Firm Jhamandas Maherchandani*(2). This must follow from the very nature of a declaratory decree. A declaratory decree does not create or confer any new right but declares a pre-existing right. Therefore, when a

(1) I.L.R. [1939] Bom. 271.
(2) A.I.R. 1944 Sind 230.

declaratory decree declares the right of the decree-holder to another decree passed in an earlier suit, there is no divesting of interest of one person and vesting of it in another. There is no transfer at all and, therefore, the person in whose favour the declaratory decree is passed does not fall within Order XXI, rule 16, Code of Civil Procedure.

The last case to which reference need be made is that of *Maya Debi* v. *Rajlakshmi Debi*(1). There a Darpatnidar deposited under section 13(4) of the Bengal Patni Taluqa Regulation (VIII of 1819) the arrears of revenue to avoid a *putni* sale and entered into possession of the *putni* as he was entitled to do under the above section. He then filed a suit and obtained a decree for arrears of rent due to the Patnidar from another Darpatnidar. Subsequently he relinquished possession in favour of the Patnidar by giving a notice to the Patnidar. The question was whether the Patnidar, after he got back the possession of the *putni,* could be regarded as the assignee of the decree which had been obtained by the Darpatnidar against another Darpatnidar. It was held that in view of the provisions of section 13(4) the Patnidar on getting back possession of the *putni* became the transferee of the decree by operation of law. It was also held that the notice given by the Darpatnidar to the Patnidar could also be construed as an assignment in writing.

The result of the authorities appears to me to be that if by reason of any provision of law, statutory or otherwise, interest in property passes from one person to another there is a transfer of the property by operation of law. There is no reason that I can see why transfers by operation of law should be regarded as confined to the three cases referred to by the Privy Council in *Abedoonissa's case.* If, therefore, I were able to construe the document of the 7th February 1949 to be a transfer or an agreement to transfer the decree to be passed in future then I would have had no difficulty in holding that by operation of equity the beneficial interest in the decree

(1) A.I.R. 1950 Cal. 1.

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was immediately after its passing taken out of the transferors and passed to the respondent company and that the latter had become the transferees of the decree now sought to be executed by operation of law. As, however, I have held that that document did not cover the decree, there was no room for the application of the equitable principle and the respondent company cannot, therefore, claim to come under Order XXI, rule 16 as transferees by operation of law and cannot maintain the application for execution.

There is another ground on which the right of the respondent company to maintain the application for execution has been sought to be sustained. This point was not apparently taken before the High Court and we have not had the advantage and benefit of the opinion of the learned Judges of that Court. Section 146 of the Code of Civil Procedure on which this new point is founded provides as follows :

"146. *Proceedings by or against representatives.*— Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him".

There are two questions to be considered before the section may be applied, namely, (1) whether the Code otherwise provides and (2) whether the respondent company can be said to be persons claiming under the decree-holder. As regards (1) it is said that Order XXI, rule 16 specifically provides for application for execution by a transferee of decree and, therefore, a transferee of decree cannot apply under section 146 and must bring himself within Order XXI, rule 16. This is really begging the question. Either the respondent company are transferees of the decree by an assignment in writing or by operation of law, in which case they fall within Order XXI, rule 16, or they are not such transferees, in which event they may avail themselves of the provisions of section 146 if the other condition is fulfilled. There is nothing in Order XXI, rule 16 which, expressly or by necessary implication

precludes a person, who claims to be entitled to the benefit of a decree under the decree-holder but does not answer the description of being the transferee of that decree by assignment in writing or by operation of law, from making an application which the person from whom he claims could have made. It is said: what, then, is meant by the words "save as otherwise provided by this Code"? The answer is that those words are not meaningless but have effect in some cases. Take, by way of an illustration, the second proviso to Order XXI, rule 16 which provides that where a decree for payment of money against two or more persons has been transferred to one of them it shall not be executed against the others. This is a provision which forbids one of the judgment-debtors to whom alone the decree for payment of money has been transferred from making an application for execution and, therefore, he cannot apply under section 146 as a person claiming under the decree-holder. As the respondent company do not fall within Order XXI, rule 16 because the document did not cover the decree to be passed in future in the then pending suit that rule cannot be a bar to the respondent company making an application for execution under section 146 if they satisfy the other requirement of that section, namely, that they can be said to be claiming under the decree-holder.

A person may conceivably become entitled to the benefits of a decree without being a transferee of the decree by assignment in writing or by operation of law. In that situation the person so becoming the owner of the decree may well be regarded as a person claiming under the decree-holder and so it has been held in *Sitaramaswami* v. *Lakshmi Narasimha*(1), although in the earlier case of *Dost Muhammad* v. *Altaf Husain* (*supra*) it was held otherwise. The case of *Kangati Mahanandi Reddi* v. *Panikalapati Venkatappa*(2) also held that the provisions of Order XXI, rule 16 did not prevent execution of the decree under section 146. In that case it was held that the appli-

(1) [1918] I.L.R. 41 Mad. 510.
(2) A.I.R. 1942 Mad. 21.

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cant could not execute the decree under Order XXI, rule 16 but he could execute the same under section 146. The main thing to ascertain is as to whether the respondent company had any right, title or interest in the decree and whether they can be said to be persons claiming under the decree-holder.

I have already held that the document under consideration did not transfer the future decree and, therefore, the equitable principle did not apply and, therefore, the respondent company did not become a transferee of the decree within the meaning of Order XXI, rule 16. What, then, was the legal position of the respondent company? They had undoubtedly, by the document of the 7th February 1949, obtained a transfer of the debt which was the subject matter of the then pending suit. This transfer, under the Transfer of Property Act, carried all the legal incidents and the remedies in relation to that debt. The transferors no longer had any right, title or interest in the subject matter of the suit. After the transfer it was the respondent company which had the right to continue the suit and obtain a decree if the debt was really outstanding. They, however, did not bring themselves on the record as the plaintiffs in the place and stead of the transferors but allowed the latter to proceed with the suit. The transferors, therefore, proceeded with the suit although they had no longer any interest in the debt which was the subject matter of the suit and which had been transferred by them to the respondent Company. In the premises, in the eye of the law, the position of the transferors, *vis-a-vis* the respondent company, was nothing more than that of *benamidars* for the respondent company and when the decree was passed for the recovery of that debt it was the respondent company who were the real owners of the decree. As between the respondent company and the transferors the former may well claim a declaration of their title. Here there is no question of transfer of the decree by the transferors to the respondent company by assignment of the decree in writing or by operation of law and the respondent company cannot apply for execution of the

decree under Order XXI, rule 16. But the respondent company are, nontheless, the real owners of the decree because it is passed in relation to and for the recovery of the debt which undoubtedly they acquired by transfer by the document under consideration. The respondent company were, after the transfer, the owners of the debt which was the subject matter of the suit and the legal incidents thereof and consequently were the real owners of the decree. The respondent company derived their title to the debt by transfer from the transferors and claimed the same under the latter. When the respondent company became the owner of the decree immediately on its passing they must, in relation to the decree, be also regarded as persons claiming under the transferors. The respondent company would not have become the owner of the decree unless they were the owners of the debt and if they claimed the debt under the transferors they must also claim the relative decree under the transferors as accretions, as it were, to their original right as transferees of the debt. In my opinion, the respondent company are entitled under section 146 to make the application for execution which the original decree-holders could do.

In *Mathurapore Zamindary Co. Ltd.* v. *Bhasaram Mandal* (*supra*) Mukherji, J., felt unable to assent to the broad proposition that Courts of execution have to look to equity in considering whether there has been an assignment by operation of law. I see no cogent reason for taking this view. If the executing Court can and, after the amendment of Order XXI, rule 16 by the deletion of the words "if that Court thinks fit", must deal with complicated questions relating to transfer of decree by operation of statutory provisions which may be quite abstruse, I do not see why the executing Court may not apply its mind to the simple equitable principle which operates to transfer the beneficial interest in the after-acquired decree or to questions arising under section 146. Section 47 of the Code of Civil Procedure does require that the executing Court alone must determine all questions arising between the

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parties or their representatives and relating to the execution, discharge or satisfaction of the decree and authorises it even to treat the proceedings as a suit. As the assignees from the plaintiff of the debt which was the entire subject matter of the suit the respondent company were entitled to be brought on the record under Order XXII, rule 10 and must, therefore, be also regarded as a representative of the plaintiff within the meaning of section 47 of the Code.

Learned Counsel for the appellant contends that the application for execution was defective in that although it purported to be an application for execution under Order XXI, rule 11, it did not comply with the requirements of that rule in that it did not specify any of the several modes in which the assistance of the Court was required. The application was undoubtedly defective as the decision in the case of *Radha Nath Das* v. *Produmna Kumar Sarkar*(1) and *Krishna Govind Pati* v. *Moolchand Keshavchand Gujar*(2) will show but this objection was not taken before the executing Court which could then have returned the application, nor was any objection taken by the appellant at any later stage of the proceedings. Further, it appears that the respondent company actually presented another tabular statement for execution specifying the mode in which the assistance of the Court was required. In these circumstances, it is not open to the appellant to contend that the application is not maintainable.

The result, therefore, is that this appeal must be dismissed with costs.

BHAGWATI J.—I agree that the appeal be dismissed with costs. I would however like to record my own reasons for doing so.

Habib & Sons, a partnership firm which carried on business as merchants and Pukka Adatias in bullion and cotton in Bombay filed a suit against the Appellant in the City Civil Court, Bombay being Summary

(1) I. L. R. (1939) 2 Cal. 325.
(2) A. I. R. 1941 Bom. 302.

Suit No. 233 of 1948, to recover a sum of Rs. 7,113-7-0 with interest and costs. During the pendency of the suit an agreement was arrived at between Habib & Sons and the Respondents on the 7th February, 1949 under which Habib & Sons transferred to the Respondents *inter alia*.... "Fourthy :—All the book and other debts due to the Vendors in connection with the said Indian business and the full benefit of all securities for the debts.....Sixthly :—All other property to which the Vendors are entitled in connection with the said Indian business". As consideration for the said transfer the Respondents undertook to pay satisfy, discharge and fulfil all the debts, liabilities contracts and engagements of the vendors in relation to the said Indian business and to indemnify them against all proceedings, claims and demands in respect thereof. The Respondents did not take any steps under Order XXII, rule 10 of the Code of Civil Procedure to bring themselves on the record of the suit as plaintiffs in place and stead of Habib & Sons and a decree was passed in favour of Habib & Sons against the Appellant on the 15th December, 1949 for Rs. 8,428/7/- inclusive of interest and costs with interest on judgment at 4 per cent. per annum till payment. Both the partners of Habib & Sons were declared evacuees and by his order dated the 2nd August, 1950 the Custodian of Evacuee Property, Bombay confirmed the transaction of transfer of the business of Habib & Sons to the Respondents as evidenced by the agreement dated the 7th February, 1949. A communication to that effect was addressed by the Custodian to a Director of the Respondents on the 11th December, 1950.

On the 25th April, 1951 the Respondents filed in the City Civil Court, Bombay an application for execution under Order XXI, rule 11 of the Code of Civil Procedure to execute the decree obtained by Habib & Sons against the Appellant. That application was by the Respondents as assignees of the decree and the mode in which the assistance of the Court was required was that the Court should declare the Respon-

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dents the assignees of the decree as the decretal debt along with other debts were transferred by Habib & Sons to them by a deed of assignment dated the 7th February, 1949 which was confirmed by the Custodian of Evacuee Property, Bombay and should order them to be substituted for the plaintiffs. A notice under Order XXI, rule 16 of the Code of Civil Procedure was issued by the Court on the 10th May, 1951, calling upon Habib & Sons and the Appellant to show cause why the decree passed in favour of Habib & Sons and by them transferred to the Respondents, the assignees of the decree should not be executed by the said transferees against the Appellant. The Appellant showed cause and contended (1) that the deed of assignment in favour of the Respondents was not executed by Habib & Sons and (2) that the assignee of the subject-matter of the suit and not of the decree itself was not entitled to apply for leave under Order XXI, Rule 16 of the Code of Civil Procedure. The Chamber Summons was adjourned to Court in order to take evidence whether the document in question was executed by Habib & Sons or not. Evidence was led at the hearing and the Court held the document duly executed by the two partners of Habib & Sons and as such duly proved. On the question of law the Court followed the decisions in *Purmananddas Jiwandas* v. *Vallabdas Wallji*(1) and *Chimanalal Hargovinddas* v. *Gulamnabi*(2) and held that the Respondents were entitled to execute the decree under Order XXI, rule 16 of the Code of Civil Procedure.

An appeal was taken by the Appellant to the High Court against this decision of the City Civil Court. The appeal came for hearing before Dixit, J. The finding that the deed of assignment was duly proved was not challenged. But the contention that inasmuch as there was no transfer of the decree itself but only of the property the Respondents were not entitled to apply to execute the decree was pressed and was negatived by the learned Judge. The learned Judge observed that if the language of Order XXI,

(1) [1877] I.L.R. 11 Bom. 506.
(2) I.L.R. [1946] Bom. 276.

rule 16 was strictly construed it seemed to him that the Respondents had no case. But he followed the decisions in *Purmananddas Jiwandas* v. *Vallabdas Wallji*(1) and *Chimanlal Hargovinddas* v. *Gulamnabi* (2) and dismissed the appeal.

A Letters Patent Appeal was filed against this decision of Dixit, J. and it came on for hearing and final disposal before a Division Bench of the High Court constituted by Chagla, C.J. and Shah, J. The Division Bench also were of the opinion that if one were to construe Order XXI, rule 16 strictly there was no assignment of the decree in favour of the respondents. They however were of the opinion that the High Court had consistently taken the view that there could be an equitable assignment of a decree, which would constitute the assignee an assignee for the purpose of Order XXI, rule 16 and that what the Court must consider was not merely a legal assignment but also an assignment which operated in equity. They then considered the two Bombay decisions which had been relied upon by the City Civil Court as well as by Dixit, J. and came to the conclusion that the deed of assignment fell within the principle of those two decisions, that it constituted an equitable assignment of the decree which was ultimately passed in favour of Habib & Sons, that the application for execution was maintainable under Order XXI, rule 16 and dismissed the appeal. The Appellant applied for and obtained the necessary certificate under article 133 (1)(c) of the Constitution.

Order XXI, rule 16 provides for an application for execution by transferee of a decree and runs as under :—

"Where a decree.....is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-hloder:

(1) [1877] I.L.R. 11 Bom. 506.
(2) I.L.R. [1946] Bom. 276.

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Provided that, where the decree..... has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution....."

The transfer contemplated under this rule is either by assignment in writing or by operation of law. It was not contended by the Appellant at any stage of the proceedings that there was in this case a transfer by operation of law or that the agreement dated the 7th February 1949 was not an assignment of all the rights which Habib & Sons had in connection with the Indian business. The question therefore that falls to be considered is whether the deed of assignment dated the 7th February 1949 operates as a transfer of the decree by assignment in writing within the meaning of Order XXI, rule 16 of the Code of Civil Procedure.

A strict and narrow construction has been put upon the words "where a decree....is transferred by assignment in writing" by the High Court of Madras in *Basroovittil Bhandari* v. *Ramchandra Kamthi*(1) and the decisions following it, particularly *Kangati Mahanandi Reddi* v. *Panikalapati Venkatappa & Another* (2) and by the High Court of Calcutta in *Mathurapore Zamindary Co. Ltd.* v. *Bhasaram Mandal* (3) which is followed in *Prabashinee Debi* v. *Rasiklal Banerji* (4). They have held that the words "decree-holder" must be construed as meaning decree-holder in fact and not as including a party who in equity may afterwards become entitled to the rights of the actual decree-holder and that the language of Order XXI, rule 16 (old section 232) cannot be construed so as to apply to a case where there was no decree in existence at the time of the assignment and this position was in effect conceded by Dixit, J. and by the Division Bench when they observed that on a strict construc-

(1) (1907) 17 Madras Law Journal 391.
(2) A.I.R. 1942 Madras 21.
(3) (1924) I.L.R. 51 Calcutta 703.
(4) (1931) I.L.R. 59 Calcutta 297.

tion of Order XXI, rule 16 there was no assignment of the decree in favour of the Respondents.

A contrary view has however been taken by the High Court of Bombay in *Purmananddas Jiwandas* v. *Vallabdas Wallji*(1) and *Chimanlal Hargovinddas* v. *Gulamnabi*(2). These two decisions have applied the equitable principle enunciated by Sir George Jessel, M. R. in *Collyer* v. *Isaacs*(3) as under :—

"The creditor had a mortgage security on existing chattels and also the benefit of what in form was an assignment of non-existing chattels which might be afterwards brought on to the premises. That assignment, in fact, constituted only a contract to give him the after-acquired chattels. A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment".

The High Court of Calcutta also applied the same principle in *Purna Chandra Bhowmik* v. *Barna Kumari Debi*(4) and the High Court of Madras in *Kangati Mahanandi Reddi* v. *Panikalapati Venkatappa and another*(5) observed that if the matter were *res integra* much might perhaps be said for the contention that the assignee under similar circumstances could execute the decree under Order XXI, rule 16.

The decision in *Purmananddas Jivandas* v. *Vallabdas Wallji*(1) and the equitable principle enunciated therein was brought to the notice of the learned Judges who decided the case of *Mathurapore Zamindary Co. Ltd.* v. *Bhasaram Mandal*(6) but was negatived by them and they relied upon the observations of the Privy Council in dealing with a somewhat similar provision contained in Section 208 of Act VIII of 1859 in the case of *Abedoonissa Khatoon* v. *Ameeroonissa Khatoon*(7):

(1) (1877) I.L.R. 11 Bom. 506. (2) I.L.R. 1946 Bom. 276.
(3) L. R. 19 Ch. D. 342. (4) I. L. R. [1939] 2 Calcutta 341.
(5) A.I.R. 1942 Madras 21. (6) [1924] I.L.R. 51 Calcutta 703.
(7) (1876) L. R. 4 I. A. 66.

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"Their Lordships have further to observe, that they agree with the Chief Justice in the view which he expressed,—that this was not a section intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree".

Rankin, C.J. laid stress upon this aspect of the question and delivered a similar opinion in *Prabhashinee Debi* v. *Rasiklal Banerji*(1) at page 299 :—

"There seem to be two possible views of the rule. One view would be to say that there must be a decree in existence and a transfer in writing of that decree. That is the strict view—a view which the courts in India have taken. The only other possible view would be to say that, while other cases are within the rule—such as cases where a person claims to be entitled in equity under an agreement to the benefit of the decree—it is optional with the courts to give effect to the rule according as the case is a clear one or one which requires investigation of complicated facts or difficult questions of law unsuited for discussion on a mere execution application. In that view, if it were understood that the court had a complete discretion to apply the rule or not, it might be that the rule would be workable; but I do not think that any such discretion as that is intended to be given by the rule" and he fortified himself in his conclusion by relying upon the deletion of the words "if that Court thinks fit the decree may be executed" when the Civil Procedure Code of 1908 was enacted.

Order XXI, rule 16 of the Code of Civil Procedure is a statutory provision for execution by the transferee of a decree and unless and until a person applying for execution establishes his title as the transferee of a decree he cannot claim the benefit of that provision. He may establish his title by proving that he is a transferee of a decree by assignment in writing or by operation of law. Section 5 of the Transfer of Property Act defines a "transfer of pro-

(1) [1931] I. L. R. 59 Calcutta 297.

perty" as an act by which the transferor conveys property in present or in future to the transferee or transferees. A transfer of a decree by assignment in writing may be effected by conveying the decree in present or in future to the transferee. But even for the transfer to operate in future the decree which is the subject matter of the transfer must be in existence at the date of the transfer. The words "in present or in future" qualify the word "conveys" and not the word "property" in the section and it has been held that a transfer of property that is not in existence operates as a contract to be performed in the future which may be specifically enforced as soon as the property comes into existence. As was observed by the Privy Council in *Rajah Sahib Perhlad* v. *Budhoo*(1) :—

"But how can there be any transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed *in future,* and upon the happening of a contingency, of which the purchaser may claim a specific performance, if he comes into Court shewing that he has himself done all that he was bound to do".

It is only by the operation of the equitable principle that as soon as the property comes into existence and is capable of being identified, equity taking as done that which ought to be done fastens upon the property and the contract to assign thus becomes a complete equitable assignment. In the case of a decree to be passed in the future therefore there could be no assignment of the decree unless and until the decree was passed and the agreement to assign fastened on the decree and thus became a complete equitable assignment. The decree not being in existence at the date of the transfer cannot be said to have been transferred by the assignment in writing and the matter resting merely in a contract to be performed in the future which may be specifically enforced as soon as the decree was passed there would be no transfer

(1) [1869] 12 M. I. A. 275.

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automatically in favour of the "transferee" of the decree when passed. It would require a further act on the part of the "transferor" to completely effectuate the transfer and if he did not do so the only remedy of the "transferee" would be to sue for specific performance of the contract to transfer. There would therefore be no legal transfer or assignment of the decree to be passed in future by virtue of the assignment in writing executed before the decree came into existence and the only way in which the transferee could claim that the decree was transferred to him by assignment in writing would be by the operation of the equitable principle above enunciated and the contract to assign having become a complete equitable assignment of the decree.

Is there any warrant for importing this equitable principle while construing the statutory provision enacted in Order XXI, rule 16 of the Code of Civil Procedure? The Code of Civil Procedure does not prescribe any mode in which an assignment in writing has got to be executed in order to effectuate a transfer of a decree. The only other statutory provision in regard to assignments in writing is to be found in Chapter VIII of the Transfer of Property Act which relates to transfers of actionable claims and an actionable claim has been defined in section 3 of the Act as "a claim to any debt.....or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief.....". A judgment debt or decree is not an actionable claim for no action is necessary to realise it. It has already been the subject of an action and is secured by the decree. A decree to be passed in future also does not come as such within the definition of an actionable claim and an assignment or transfer thereof need not be effected in the manner prescribed by section 130 of the Transfer of Property Act. If therefore the assignment or transfer of a decree to be passed in the future does not require to be effectuated in the manner prescribed in the statute there would be no objection to the

operation of the equitable principle above enunciated and the contract to assign evidenced by the assignment in writing becoming a complete equitable assignment of the decree when passed. The assignment in writing of the decree to be passed would thus result in a contract to assign which contract to assign would become a complete equitable assignment on the decree being passed and would fulfil the requirements of Order XXI, rule 16 in so far as the assignment or the transfer of the decree would in that event be effectuated by an assignment in writing which became a complete equitable assignment of the decree when passed. There is nothing in the provisions of the Civil Procedure Code or any other law which prevents the operation of this equitable principle and in working out the rights and liabilities of the transferee of a decree on the one hand and the decree-holder and the judgment debtor on the other, there is no warrant for reading the words "where a decree .....is transferred by assignment in writing" in the strict and narrow sense in which they have been read by the High Court of Madras in *Basroovittil Bhandari* v. *Ramchandra Kamthi*(1) and the High Court of Calcutta in *Mathurapore Zamindary Co. Ltd.* v. *Bhasaram Mandal*(2) and *Prabashinee Debi* v. *Rasiklal Banerji*(3). It is significant to observe that the High Court of Calcutta in *Purna Chandra Bhowmik* v. *Barna Kumari Debi*(4) applied this equitable principle and held that the plaintiff in whose favour the defendant had executed a mortgage bond assigning by way of security the decree that would be passed in a suit instituted by him against a third party for recovery of money due on unpaid bills for work done was entitled to a declaration that he was the assignee of the decree passed in favour of the defendants and was as such entitled to realise the decretal debt either amicably or by execution. If the plaintiff was thus declared to be the assignee of the decree subsequently passed in favour of the defendant and entitled to realise the decretal amount by execution he could

(1) [1907] 17 M.L.J. 391.
(2) [1924] I.L.R.51 Cal. 703.
(3) [1931] I.L.R. 59 Cal. 297.
(4) I.L.R. [1939] 2 Cal. 341.

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apply for execution of the decree and avail himself of the provisions of Order XXI, rule 16 as the assignee of the decree which was passed subsequent to the date of the assignment in writing in his favour. There could be no objection to decide questions involving investigation of complicated facts or difficult questions of law in execution proceedings, as section 47 of the Code of Civil Procedure authorises the Court executing the decree to decide all questions arising therein and relating to execution of the decree and subsection (2) further authorises the executing Court to treat a proceeding under the section as a suit thus obviating the necessity of filing a separate suit for the determination of the same. The line of decisions of the High Court of Bombay beginning with *Purmanandas Jivandas* v. *Vallabdas Wallji*(1) and ending with *Chimanlal Hargovinddas* v. *Gulamnabi*(2) importing the equitable principle above enunciated therefore appears to me to be more in consonance with law and equity than the strict and narrow interpretation put on the words "where a decree.....is transferred by assignment in writing" by the High Courts of Madras and Calcutta in the decisions above noted.

Even if an equitable assignment be thus construed as falling within an "assignment in writing" contemplated by Order XXI, rule 16 of the Code of Civil Procedure it would in terms require an assignment of the decree which was to be passed in the future in favour of the assignor. In the present case, it is impossible to read the deed of assignment dated the 7th February, 1949 as expressly or by necessary implication assigning in favour of the Respondent the decree which was going to be passed by the City Civil Court in favour of Habib & Sons. There is however another aspect of the matter which was not urged before the Courts below in the present case nor does it appear to have been considered in most of the judgments above referred to.

There is no doubt on the authorities that a mere transfer of property as such does not by itself spell out

(1) [1877] I.L.R. 11 Bom. 506.
(2) I.L.R. 1946 Bom. 276.

a transfer of a decree which has been passed or may be passed in respect of that property and it would require an assignment of such decree in order to effectuate the transfer (vide *Hansraj Pal* v. *Mukhraji Kunwar & others*(1), *Mathurapore Zamindary Co. Ltd.* v. *Bhasaram Mandal*(2), and *Kangati Mahanandi Reddi* v. *Panikalapati Venkatappa & another*(3). Where however the property which is transferred is an actionable claim within the meaning of its definition in section 3 of the Transfer of Property Act the consequences of such transfer would be different. An actionable claim means a claim to any debt, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, and a transfer of an actionable claim when effected by an instrument in writing signed by the transferor is under section 130 of the Act complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, vest in the transferee, whether such notice of the transfer as is therein provided be given to the debtor or not. If the book debt or the property which is an actionable claim is thus transferred by an assignment in writing all the rights and remedies of the transferor in respect thereof including the right to prosecute the claim to judgment in a Court of law either in a pending litigation or by institution of a suit for recovery of the same vest in the transferee immediately upon the execution of the assignment as a necessary corollary thereof. Not only is the actionable claim thus transferred but all the necessary adjuncts or appurtenances thereto are transferred along with the same to the transferee. Section 8 of the Act provides that unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof. These incidents include where the property is

(1) [1908] I. L.R. 30 All. 28. (2) [1924] I.L.R. 51 Cal. 703.
(3) A.I.R. 1942 Mad. 21.

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a debt or other actionable claim, the securities therefor.....but not arrears of interest accrued before the transfer. In cases of transfer of book debts or property coming within the definition of actionable claim there is therefore necessarily involved also a transfer of the transferor's right in a decree which may be passed in his favour in a pending litigation and the moment a decree is passed in his favour by the court of law, that decree is also automatically transferred in favour of the transferee by virtue of the assignment in writing already executed by the transferor. The debt which is the subject-matter of the claim is merged in the decree and the transferee of the actionable claim becomes entitled by virtue of the assignment in writing in his favour not only to the book debt but also to the decree in which it has merged. The book debt does not lose its character of a debt by its being merged in the decree and the transferee is without anything more entitled to the benefit of the decree passed by the court of law in favour of the transferor. It would have been open to the transferee after the execution of the deed of assignment in his favour to take steps under Order XXII, rule 10 of the Code of Civil Procedure to have himself substituted in the pending litigation as plaintiff in place and stead of the transferor and prosecute the claim to judgment; but even if he did not do so he is not deprived of the benefit of the decree ultimately passed by the court of law in favour of the transferor, the only disability attaching to his position being that under section 132 of the Act he would take the actionable claim subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer. The transferee of the actionable claim thus could step into the shoes of the transferor and claim to be the transferee of the decree by virtue of the assignment in writing executed by the transferor in his favour and could therefore claim to execute the decree as transferee under Order XXI, rule 16 of the Code of Civil Procedure.

This aspect could not be considered by the High

Court of Bombay in *Purmananddas Jivandas* v. *Vallabdas Wallji*(1) because the assignment there was executed on the 11th May, 1870, i.e. before the enactment of the Transfer of Property Act in 1882. The Court therefore applied the equitable principles and came to the conclusion that the equitable assignment which was completed on the passing of the decree was covered by the old section 232 of the Code of Civil Procedure. It was also not considered by the Full Bench of the High Court of Bombay in *Chimanlal Hargovinddas* v. *Gulamnabi*(2) nor by Dixit, J. or by the Division Bench in the present case. The High Court of Patna in *Thakuri Gope and Others* v. *Mokhtar Ahmad & Another*(3), went very near it when it observed that all that was transferred was an actionable claim, but did not work out the consequences thereof and its reasoning was deflected by the consideration of the equitable principles and the applicability thereof while construing the provisions of Order XXI, rule 16 of the Code of Civil Procedure. The High Court of Calcutta in *Purna Chandra Bhowmik* v. *Barna Kumari Debi* (4) definitely adopted this position and observed at p. 344 :—

"In my opinion, what was transferred was the claim to a debt and as such would come within the definition of actionable claim as given in section 3 of the Transfer of Property Act. The mere fact that the claim was reduced by the Court did not make, in my opinion, any difference".

It no doubt applied the equitable principle also and held that the mortgage must be deemed to have attached itself to the decree which was for a definite amount as soon as the decree was passed, but further observed that the plaintiff was entitled to a declaration that she was an assignee of the decree and if she got that declaration it would be open to her to apply for execution of the decree under Order XXI, rule 16 of the Code of Civil Procedure. I am sure that if this aspect of the question had been properly presented to Dixit, J. or the Division Bench in the

(1) [1877] I.L.R. 11 Bom. 506.
(2) I.L.R. 1946 Bom. 276.
(3) A.I.R. 1922 Patna 563.
(4) I. L. R. [1939] 2 Cal. 341.

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present case they also would have come to the same conclusion.

Mr. Umrigar, learned counsel for the Respondents, further urged that even if the Respondents were not entitled to the benefit of Order XXI, rule 16 of the Code of Civil Procedure they were the true owners of the debt and the decree which was ultimately passed by the City Civil Court in favour of Habib and Sons by virtue of the deed of assignment dated the 7th February 1949 and that under section 146 of the Code of Civil Procedure execution proceedings could be taken and application for execution could be made by them as persons claiming under Habib & Sons. The deed of assignment transferred the debt which was the subject matter of the pending litigation in the City Civil Court between Habib & Sons and the Appellant. Habib & Sons could have taken proceedings in execution and made the application for execution of the decree against the Appellant and the Respondents claiming under Habib & Sons by virtue of the deed of assignment were therefore entitled to take the execution proceedings and make the application for execution under Order XXI, rule 11 of the Code of Civil Procedure. He also urged that Order XXI, rule 16 of the Code of Civil Procedure did not prohibit such execution proceedings at the instance of the Respondents and for this purpose relied upon the observations of the learned Judges of the High Court of Madras in *Kangati Mahanandi Reddi* v. *Panikalapati Venkatappa & another* (5) at page 23 :—

"We are unable to hold that merely because rule 16 has been interpreted as applying only to 'decrees in existence at the time of the transfer, it prohibits an application by a transferee who obtained the transfer of a decree, a transfer which is legally valid and is embodied in a written deed (as rule 16 requires) before the decree was actually passed. To permit execution by such a transferee, in our opinion, in no way violates the principles which are embodied in rule 16 or in Order XXI generally. The appellant here is the

(1) A.I.R. 1942 Mad. 21

true owner of the decree, and he has his written title deed, and that is all that the law requires".

It was however urged on behalf of the Appellant that section 146 did not apply because Order XXI, rule 16 was a specific provision in the Code of Civil Procedure which applied when a person other than a decree-holder wanted to execute the decree and if the Respondents could not avail themselves of Order XXI, rule 16 of the Code of Civil Procedure they could not avail themselves of section 146 also. Reliance was placed in support of this contention on a decision of the High Court of Patna in *Thakuri Gope and others* v. *Mokhtar Ahmad and another*(1) and another decision of the High Court of Allahabad in *Shib Charan Das* v. *Ram Chander & Others*(2). This contention of the Appellant is obviously unsound. Order XXI, rule 16 provides for execution of a decree at the instance of a transferee by assignment in writing or by operation of law and enables such transferee to apply for execution of the decree to the Court which passed it. If a transferee of a decree can avail himself of that provision by establishing that he is such a transferee he must only avail himself of that provision. But if he fails to establish his title as a transferee by assignment in writing or by operation of law within the meaning of Order XXI, rule 16 of the Code of Civil Procedure there is nothing in the provisions of Order XXI, rule 16 which prohibits him from availing himself of section 146 if the provisions of that section can be availed of by him. That is the only meaning of the expression "save as otherwise provided by this Code". If a person does not fall within the four corners of the provision of Order XXI, rule 16 of the Code of Civil Procedure that provision certainly does not apply to him and the words "save as otherwise provided in this Code" contained in section 146 would not come in the way of his availing himself of section 146 because Order XXI, rule 16 cannot then be construed as an "otherwise provision" contained in the Code. I am therefore of the opinion that if the Respondents could not avail themselves of Order XXI,

(1) A.I.R. 1922 Patna 563. (2) A.I.R. 1922 All. 98.

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rule 16 of the Code of Civil Procedure they could certainly under the circumstances of the present case take the execution proceedings and make the application for execution of the decree passed by the City Civil Court in favour of Habib & Sons under section 146 of the Civil Procedure Code.

An objection was however taken on behalf of the Appellant during the course of the arguments before us though no such objection was taken in the Courts below, that the application for execution made by the Respondents was defective inasmuch as it was not an application in proper form under Order XXI, rule 11 of the Code of Civil Procedure. Order XXI, rule 11(2) (j) prescribes that particulars in regard to the mode in which the assistance of the Court was required should be set out therein. The respondents had in their application for execution filed before the City Civil Court not mentioned any of these particulars but had only stated that the Court should declare them the assignees of the decree as the decretal debt along with other debts were transferred by Habib & Sons to them by the deed of assignment dated the 7th February 1949 which was confirmed by the Custodian of Evacuee Property, Bombay and should order them to be substituted for Habib & Sons. This was no compliance with the provisions of Order XXI, rule 11(2)(j) and therefore there was no proper application for execution before the Court and the same was liable to be dismissed. Reliance was placed in support of this contention on a decision of the High Court of Calcutta in *Radha Nath Das* v. *Produmna Kumar Sarkar*(1), where it was held dissenting from a decision of the High Court of Bombay in *Baijnath Ramchander* v. *Binjraj Joowarmal Batia & Co.*(2) that under Order XXI, rule 16 of the Code of Civil Procedure the assignee of a decree cannot make two applications, one for recording the assignment and another for executing the decree. The assignee of a decree could only make one application for execution under Order XXI, rule 11 of the Code of Civil Procedure specifying therein the mode in which the assistance of the Court

(1) I. L. R. [1939] 2 Calcutta 325. (2) I.L.R. 1937 Bombay 691.

was required and it was only after such application had been made to the Court which passed the decree that the Court would issue notice under Order XXI, rule 16 to the transferor and the judgment debtor and the decree would not be executed until the Court had heard their objections if any to its execution. Sen, J. in that case observed at page 327 :—

"It seems to me to be obvious from the wording of the rule that there can be no notice to the transferor or judgment-debtor and no hearing of any objection unless and until there is an application for execution. The notice and the entire proceedings under Order XXI, rule 16, originate from an application for execution. If there is no such application the proceedings are without any foundation. Order XXI, rule 16, of the Code nowhere provides for an application to record an assignment or for an application for leave to execute a decree by an assignee or for an application for substitution".

This in my opinion correctly sets out the position in law and in so far as the two decisions of the High Court of Bombay in *Baijnath Ramchander* v. *Binjraj Joowarmal Batia & Co.*(1) and *Krishna Govind Patil* v. *Moolchand Keshavchand Gujar*(2) decide anything to the contrary they are not correct. The position was clarified by a later decision of the High Court of Bombay in *Bhagwant Balajirao and Others* v. *Rajaram Sajnaji & Others*(3) where Rajadhyaksha and Macklin, JJ. held, following *Radha Nath Das* v. *Produmna Kumar Sarkar*(4) that an application made by an assignee of a decree must under Order XXI, rule 16 be for the execution of the decree and not merely for the recognition of the assignment and for leave to execute the decree. It was urged before the learned Judges that the practice in the High Court of Bombay was to entertain applications of this kind, but they observed that the practice if such a practice prevailed was opposed to the provisions of the Order XXI, rule 16, of the Code of Civil Procedure. The contention therefore urged on behalf of the Appellant that, the

(1) I.L.R. 1937 Bom. 691.
(2) A.I.R. 1941 Bom. 302 (F.B.).
(3) A.I.R. 1947 Bom. 157.
(4) I. L. R. [1939] 2 Cal. 325.

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application for execution in the present case was defective appears to have some foundation.

This defect however was not such as to preclude the Respondents from obtaining the necessary relief. The application which was filed by them in the City Civil Court was headed "application for execution under Order XXI, rule 11 of the Code of Civil Procedure" and the only defect was in the specification of the mode in which the assistance of the Court was required. The particulars which were required to be filled in column 3. were not in accordance with the requirements of Order XXI, rule 11(2)(j) and should have specified one of the modes therein prescribed and certainly a declaration that the respondents were the assignees of the decree and the order for their substitution as the plaintiffs was certainly not one of the prescribed modes which were required to be specified in that column. The practice which prevailed in the High Court of Bombay as recognised in *Baijnath Ramchander* v. *Binjraj Joowarmal Batia & Co.*(1) and also in *Bhagwant Balajirao and others* v. *Rajaram Sajnaji & others*(2) appears to have been the only justification for making the application in the manner which the respondents did. That defect however according to the very same decision in *Bhagwant Balajirao and others* v. *Rajaram Sajnaji & others*(2) was purely technical and might be allowed to be cured by amendment of the application. As a matter of fact Order XXI, rule 17 lays down the procedure on receiving applications for execution of a decree and enjoins upon the Court the duty to ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with and if they have not been complied with the Court has to reject the application or allow the defect to be remedied then and there or within a time to be fixed by it. When the application for execution in the present case was received by the City Civil Court, the Court should have scrutinised the application as required by Order XXI, rule 17(1) and if it was found that the

(1) I.L.R. 1937 Bom. 691.
(2) A.I.R. 1947 Bom. 157.

requirements of rules 11 to 14 as may be applicable were not complied with as is contended for by the Appellant, the Court should have rejected the application or allowed the defect to be remedied then and there or within a time to be fixed by the Court. Nothing of the kind was ever done by the City Civil Court nor was any objection in that behalf taken on behalf of the Appellant at any time until the matter came before this Court.

On the 27th March, 1952 however a further application for execution was filed by the Respondents in the City Civil Court specifying in column 'J' the mode in which the assistance of the Court was required and it was by ordering attachment and sale of the moveable property of the Appellant therein specified. This further application for execution was a sufficient compliance with the provisions of Order XXI, rule 11 (2)(j) and was sufficient under the circumstances to cure the defect, if any, in the original application for execution made by the Respondents to the City Civil Court on the 25th April, 1951. This objection of the Appellant therefore is devoid of any substance and does not avail him.

The appeal accordingly fails and is dismissed with costs.

IMAM J.—I have had the advantage of perusing the judgments of my learned brethren. I agree that the appeal must be dismissed with costs and in the view expressed by them that the respondent should be permitted under the provisions of section 146 of the Code of Civil Procedure to execute the decree passed in favour of Habib & Sons, as one claiming under the latter.

The document under which the respondent claimed to execute the decree was treated as a deed of transfer in the courts below and not merely as an agreement to transfer. By this document there was a transfer of all the book and other debts due to Habib & Sons in connection wich the Indian business and the full benefit of all securities for the debts. The document, however, neither in terms, nor by any reasonable inter-

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pretation of its contents purported to transfer any decree which Habib & Sons may obtain in the future. It seems to me, therefore, that the respondent cannot claim to be a transferee of the decree, which was subsequently obtained by Habib & Sons, by an assignment in writing within the meaning of Order XXI, rule 16 of the Code of Civil Procedure.

Order XXI of the Code of Civil Procedure relates to execution of decrees and orders. Rule 1 of that Order relates to payments under a decree which has been passed. Rules 4 to 9 relate to the transfer of an existing decree for execution. The normal rule is that a decree can be executed only by the person in whose name it stands and rule 10 enables him to do so, while rule 16 of Order XXI, enables the transferee of the decree to execute it in the same manner and subject to the same conditions as an application for execution made by the decree-holder. It seems to me, therefore, that there must be a decree in existence which is transferred before the transferee can benefit from the provisions of rule 16. The ordinary and natural meaning of the words of rule 16 can carry no other interpretation and the question of a strict and narrow interpretation of its provisions does not arise. The position of an assignee, before a decree is passed, is amply safeguarded by the provisions of Order XXII, rule 10, which enables him to obtain the leave of the Court to continue the suit. Thereafter the decree, if any, would be in his name which he could execute. I agree with my learned brother Das, J., that the provisions of Order XXI, rule 16 contemplate the actual transfer by an assignment in writing of a decree after it is passed and that while a transfer of or an agreement to transfer a decree that may be passed in future may, in equity, entitle the intending transferee to claim the beneficial interest in the decree after it is passed, such equitable transfer does not render the transferee a transferee of the decree by assignment in writing within the meaning of Order XXI, rule 16. In this respect the decisions of the Madras High Court in *Basroovittil Bhandari* v. *Ramchandra Kamthi*(1)

(1) [1907] 17 M.L.J. 391.

and of the Calcutta High Court in *Mathurapore Zamindary Co. Ltd.* v. *Bhasaram Mandal*(1) and *Prabashinee Debi* v. *Rasiklal Banerji*(2) are correct.

As at present advised, I would like to express no opinion as to whether the expression "by operation of law" can be given the interpretation suggested by my learned brother Das, J., as it is unnecessary to do so in the present appeal.

Appeal dismissed.

SHIVNANDAN SHARMA

v.

THE PUNJAB NATIONAL BANK LTD.

[VIVIAN BOSE, JAGANNADHADAS and SINHA JJ.]

Master and servant—Banker—Agreement between Bank and Treasurers—Treasurers, whether servants or independent contractors—Cashier appointed by Treasurer—Whether servant of the Bank.

The appellant was appointed head cashier in one of the branches of the respondent Bank by the Treasurers who were in charge of the Cash Department of the Bank by virtue of an agreement between them. The question arose as to whether the appellant was an employee of the Bank.

Held, (i) that the terms of the agreement clearly showed that the Treasurers were servants of the Bank and not independent contractors; and that

(ii) as the direction and control of the appellant and of the ministerial staff in charge of the Cash Department of the Bank was entirely vested in the Bank, the appellant was an employee of the Bank.

If a master employs a servant and authorizes him to employ a number of persons to do a particular job and to guarantee their fidelity and efficiency for a cash consideration, the employees thus appointed by the servant would be, equally with the employer, servants of the master.

The question as to whose employee a particular person is has to be determined with reference to the facts and circumstances of each individual case, and among the many tests by which to ascertain who is the employer, the most satisfactory one is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged.

(1) [1924] I.L.R. 51 Cal. 703.
(2) [1931] I.L.R. 59 Cal. 297.