In my opinion, the two villages in this case form an "unsettled jagir" and, therefore, fall within the definition of the term "estate" in section 3, sub-section (2) of the Estates Land Act and the appellants who are the tenants of the villages can, therefore, claim rights of occupancy under the Estates Land Act. The judgment of DEVADOSS, J., is reversed and the Subordinate Judge's decree is restored with costs here and at the hearing before DEVADOSS, J.

K.R.

ORIGINAL CIVIL.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice.*

SETH CHAND MULL DUDHA, C.I.E., PLAINTIFF,

v.

PURUSHOTHAM DOSS, DEFENDANT.*

1926, March 3.

Civil Procedure Code, O. XXXVIII, r. 1—Arrest before judgment—Security for appearance—Order for—Conditions precedent to.

A Court before exercising the powers conferred by Order XXXVIII, rule 1, Civil Procedure Code, has to be satisfied that (1) the plaintiff's cause of action is *prima facie* unimpeachable, i.e., the plaint on the face of it does not reveal any matter which is obviously doubtful and arguable and (2) there is reason to believe on adequate materials that unless the jurisdiction is exercised there is a real danger that the defendant will remove himself from the ambit of the powers of the Court.

APPLICATION under Order XXXVIII, rule 1, of the Civil Procedure Code for the arrest before judgment of the defendant in Civil Suit No. 114 of 1926 on the file of the High Court in its Ordinary Civil Jurisdiction.

Nugent Grant (with him *B. C. Sankara Narayana*) for the plaintiff:—My suit is founded upon a judgment of a special

* Civil Suit No. 114 of 1926.

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commission set up by H.E.H. the Nizam. That commission must be deemed under the circumstances to have been invested with judicial powers. It is open to the sovereign in a State to set up any kind of a tribunal he chooses, to adjudicate on the disputes between his subjects and such a tribunal, even though it be constituted only for the purpose of deciding a single case, is none the less a judicial tribunal. H.E.H. being the ultimate sovereign authority within the State is competent to suspend the operation of any provision of law and the *firman* by which H.E.H. appointed the commission and directed an adjudication between the parties without reference to the law of limitation is quite constitutional.

Sufficient facts have been set out in the affidavit in support of my application to satisfy the Court that unless the defendant is immediately arrested and brought before the Court and directed to furnish security for his appearance he will put himself outside the jurisdiction of this Court.

S. Varadachari (with him *V. C. Gopalaratnam*) for the defendant.—Plaintiff's suit is not based on the judgment of a Court of competent jurisdiction. The commission set up by the *firman* was not a judicial tribunal. The Commissioners only submitted a report to H.E.H. and on that H.E.H. issued an executive order directing the defendants to pay the plaintiff the sum found by the Commissioners. The proceedings which terminated in the order to pay are not in consonance with the principles of natural justice.

JUDGMENT.

This is an application under Order XXXVIII, rule 1, Civil Procedure Code, for arrest before judgment of the defendant and an order that he should be made to show cause in compliance with section 94 (*a*), Civil Procedure Code, why he should not give security for his appearance. At the close of the argument, I intimated what I proposed to do in the matter, but as it is one of considerable general importance I thought it best to state my reasons formally. The facts are shortly as follows: The suit was brought on the Original Side of this Court for a sum of very nearly 5½ lakhs and it was founded upon what is described as "the decree, dated 19th December

1925, at Hyderabad, Deccan, of the Court of the Judicial Commissioner in the State of His Exalted Highness the Nizam of Hyderabad." That suit is not before me, but will be tried in the ordinary course by a Judge sitting on the Original Side of this Court, and I desire to say nothing that would in any way seem to anticipate that decision. But I am asked here to exercise a jurisdiction the effect of which might be to compel a man either to furnish security in a very large sum of money or possibly on his failure to do so to undergo imprisonment. I think it is desirable that I should state what are the principles which in my opinion should guide me in exercising that jurisdiction. It appears to me that before exercising the powers conferred by Order XXXVIII a Court should be satisfied on two points. The first is that the plaintiff's cause of action is *prima facie* an unimpeachable one subject to his proving the allegations made in the plaint. The second is that the Court should have reason to believe on adequate materials that unless the jurisdiction is exercised there is a real danger that the defendant will remove himself from the ambit of the powers of the Court. For the reasons which I am about to give, I do not think it necessary for me to go into the second point in this case as I do not think the plaintiff has succeeded in establishing his position on the first point. The debt on which the Hyderabad proceedings were founded was incurred about fifty years ago before the present defendant was born, in any event before the year 1877, because in that year a suit of some sort was launched for this very debt against Hargopaldoss, the brother of the present defendant's grandfather. It appears to have been started in a tribunal called the Court of Bankers which ceased to exist before any conclusion was arrived at; and according to the plaintiff, the suit was then transferred to the

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High Court of Hyderabad which I take to be the ordinary and regular tribunal in that State for the disposal of civil cases. No final judgment was ever delivered in that Court, because owing to some failure by the plaintiff to pay stamp duties or fees in the regular course the High Court ordered the suit to be taken off its list of pending cases. This statement I take from the affidavit of the plaintiff himself. The defendant says that that order was passed as long ago as 1881, and his statement is uncontradicted. In March 1922 a petition was addressed by the plaintiff to His Exalted Highness the Nizam of Hyderabad and in response to that petition a *firman* was issued by H.E.H. appointing a special commission to hear and report to him upon the claim and apparently some special directions were given in the *firman*, a complete copy of which has not been put before me, as to how the plea of limitation which, it was doubtless anticipated, the defendant would set up, was to be dealt with. The Commissioners were two Judges of the High Court and a gentleman who is described as holding the office of Sadrul Maham which is translated as head of the Department of Commerce and Industries. That tribunal issued a report, a copy of which is before me furnished by the plaintiff. The Commissioners framed issues, heard evidence, and examined accounts. The wording of a portion of the *firman* is quoted to the effect that the suit is to be heard by the commission "irrespective of limitation." The issue that was framed is this :

> "Is this case different from the case of Amersi Sejan Mal and Mahanand Ram Puran Mal (that is, apparently, the Original Suit in the Court of Bankers) and is it not covered by the *firman* and is it not exempt from limitation?"

with a note "onus on the defendant." The reason for framing this issue in this form appears to be as follows, that the plaintiff contended that the proceedings

before the Commissioners were a mere continuation of the old suit that was filed before the defunct Court, the Court of Bankers, in 1877, and it was alleged that in that Court no question of limitation was ever entertained and no such plea was ever open to a defendant there.

I have not had put before me any information as to how the Courts of Ordinary Civil Jurisdiction in Hyderabad are constituted nor under what authority the ordinary law of limitation is in force, as it undoubtedly appears to be, in the Ordinary Civil Courts of the State. I have no information as to how far the prerogative of H.E.H. extends and I am not suggesting any doubts that H.E.H. was acting entirely within his constitutional powers in issuing the *firman* of 1923. So far as I can ascertain from perusing the document, the proceedings of the commission really amounted to what I should call a report to be laid before H.E.H. and I gather that the mandate to pay a sum of money issued to the defendant took the form of an order passed by H.E.H. in the amount reported by the Commissioners to be the sum in their opinion due. I may add that the principal debt was found by them to be a sum of about $2\frac{3}{4}$ lakhs and that interest at the rate which is alleged to have been originally agreed upon between the parties would, on a rough calculation, appear to amount to nearly eight lakhs at simple interest and to the stupendous figure of about half a crore at compound. Such a conclusion obviously staggered the Commissioners and they cut down the interest to the exact sum of the principal, I do not know on what legal basis.

I have already said that I do not propose to say anything about the merits of this case but I think before I make an order under Order XXXVIII, rule 1, must at least be satisfied that the plaint does not reveal on the face of it any matter which is obviously doubtful and arguable. In my opinion this plaint discloses highly contentious

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matters. Assuming, as I do for the purposes of this case, that the acts of H.E.H. the Nizam as a Sovereign Prince cannot be questioned in these Courts and that his subjects cannot be heard to say that any orders passed by him in relation to them are not binding upon them or that he has not power to take away any matter from the jurisdiction of the Ordinary Courts, to be dealt with by himself or anybody appointed for the purpose by him, it nevertheless seems to me that there are two matters apparent on the face of this plaint which preclude me from exercising the jurisdiction conferred on me by Order XXXVIII. The plaint is founded on the proceedings of the special tribunal created under the *firman* and describes it as a decree of that Commission. As I have already pointed out, it is at least highly arguable that the proceedings before the Commissioners terminated not in anything that could be called a decree or a foreign judgment within the meaning of section 13 of the Code of Civil Procedure but a report submitted to H.E.H. to guide him as to what action he should take. It is also obvious that it is highly arguable that the order to pay passed by H.E.H., though binding on the defendant as a subject, is not a judgment but an executive Act. I pass no opinion as to whether those arguments are sound or unsound but it appears to me that it would be wrong for me to subject this defendant to any process before he has had an opportunity of urging them. It is inapposite to speak in this case of safeguarding the liberty of the subject, because the matter comes before me on the footing that the defendant is not a subject of His Majesty the King-Emperor but of H.E.H. the Nizam. But at the same time when the jurisdiction of this Court is invoked against a subject of a foreign State on the ground that by coming within the physical boundaries of the jurisdiction of this Court he is liable to be sued as if he were a subject of His Majesty, a duty is cast

upon me to be as jealous in safeguarding his liberties as if he were for all purposes a subject of His Majesty. I do not think it necessary to refer to the provisions of section 13 of the Code of Civil Procedure except in so far as inferentially I may be taken to have founded myself on clause (*a*) of that section as being a provision which it will be open to the defendant to invoke in his favour, and I do not feel called upon to pay any attention to the argument about natural justice which is referred to in clause (*d*). It would obviously be grossly disrespectful of this Court to entertain any argument to the effect that an order passed by a sovereign power by virtue of its prerogative was opposed to natural justice: nor for the matter of that am I able to see how natural justice, whatever the expression may mean, can be said to include the right of a defendant to plead limitation, unless it is granted to him by a statute acknowledged by the Sovereign Prince to be binding upon him and to limit by its terms the exercise of his prerogative. I may add that the impossibility of this Court taking upon itself to question the act of a Sovereign Prince on any such ground adds additional force to the defendant's contention that the act of H.E.H. was an executive act performed by him by virtue of his prerogative as a Sovereign Prince and not in any sense a judgment or a judicial decree. In conclusion, I wish to repeat once more that all these matters which I have discussed are ultimately matters for the Judge before whom the suit will come for trial, and that I need say no more than this: that they raise to my mind sufficient grounds for my refusing to act in anticipation of that determination by that tribunal. The summons will be dismissed with defendant's taxed costs in any event.

Attorney for the plaintiff: *N. T. Shamanna.*

B.C.S.