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my judgment the opposite party is within his rights in instituting the suit in Bombay and should not be restrained from taking such a course.

There is no doubt that the institution of two parallel suits in two courts may lead to complications which if possible should be avoided. It is for the applicant to take such steps as may be open to him. This Court however will not be justified in restraining one of the parties from claiming his legal remedy. An order of injunction no doubt will be helpful to the applicant, but it will manifestly be detrimental to the interest of the opposite party. In my opinion there is no justification for such a discrimination.

In the result I discharge the temporary injunction and dismiss the application with costs. I direct that the record be sent immediately to the court below to enable the applicant to proceed with his appeal.

Before Mr. Justice Iqbal Ahmad and Mr. Justice Collister

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NANDLAL BHANDARI MILLS (APPLICANT) *v.* COMMISSIONER OF INCOME-TAX (OPPOSITE PARTY)*

Income-tax Act (XI of 1922), sections 42(1), 43—"Agent"—"Business connection"—Selling agents at Cawnpore appointed by managing agents of a cloth mill at Indore—Income accruing to the managing agents out of the sales at Cawnpore—Assessment of the Cawnpore agents as "agents" of the non-resident managing agents.

The Nandlal Bhandari Mills, Ltd., Indore, was a cloth manufacturing company. The company appointed the firm of Nandlal Bhandari and Sons, Indore, as managing agents for the sale of the cloths manufactured by the company, the remuneration being a fixed allowance and a commission on the sale proceeds, the commission to be paid annually when the accounts of the company were made up. The firm of managing agents accordingly opened a branch of the company at Cawnpore, known as Nandlal Bhandari Mills, Ltd., Cawnpore, for the sale of the company's cloth. The Income-tax Officer, treating the branch at Cawnpore as the "agents", within the meaning of section 43 of the Income-tax Act, of the non-resident firm of Nandlal Bhandari and Sons, Indore,

*Miscellaneous Case No. 375 of 1937.

assessed the Cawnpore branch to income-tax under section 42(1) of the Act in respect of the profits or commissions accruing to the firm through the Cawnpore branch. The following question was then referred under section 66(2) of the Act to the High Court: "Whether on the facts proved or admitted Messrs. Nandlal Bhandari Mills, Ltd., Cawnpore, were and could be treated as agents of the non-residents Messrs. Nandlal Bhandari and Sons, Indore, within the meaning of sections 42 and 43 of the Income-tax Act."

Held that the answer to the question referred was in the affirmative.

In order to show that a non-resident has a "business connection", within the meaning of sections 42 and 43 of the Income-tax Act, with a resident of British India it must be established that the two persons have some sort of association in a business, that is to say in a profit-making occupation or activity in British India. In the present case Nandlal Bhandari and Sons of Indore supplied goods to the branch at Cawnpore opened under their own control, which were sold in British India, and they received a commission on the sales so effected. It might be that according to the agreement the commission did not become payable until the annual accounts of the company had been taken at Indore, but the fact remained that their right to the commission accrued upon the sales effected at Cawnpore. Thus this commission was in the nature of profits or gains accruing or arising to the non-resident through or from a business connection in British India within the meaning of section 42 and must therefore be deemed to be income accruing or arising in British India; and since there was this business connection between the branch at Cawnpore and the non-resident firm of Nandlal Bhandari and Sons, the resident branch at Cawnpore must be deemed to be the agents of the non-resident firm within the meaning of section 43, and the profits accruing in British India to the non-resident firm would be assessable in the name of their fictional agents in British India.

It was manifest from the language of section 43 that a person may be fictionally deemed to be an agent for the purposes of the Act who might not be an agent as that term is ordinarily understood in law.

Sir *Tej Bahadur Sapru* and Mr. *S. N. Katju*, for the applicant.

Dr. *N. P. Asthana*, for the opposite party.

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IQBAL AHMAD and COLLISTER, JJ.:—This is a reference by the Commissioner of Income-tax, Central and United Provinces, under section 66(2) of the Indian Income-tax Act.

There is a company at Indore known as the Nandlal Bhandari Mills, Ltd., Indore—hereinafter called the company—which is engaged in the manufacture of textiles. On the 27th February, 1922, a deed of agreement was executed whereby a firm known as Nandlal Bhandari and Sons were appointed secretaries, treasurers and agents of the company. Paragraph 5 of that instrument provides as follows:

"The said firm shall at any time hereafter, upon the request in writing of the directors for the time being of the said company, but at the sole cost and charges of the said company, open and maintain in Indore or/and Bombay or/and elsewhere a shop suitable for the sale by retail of the cloth and yarn manufactured at the said company's mills, and shall from time to time, out of the cloth and yarn manufactured at the said company's mills, supply the said shop with so much cloth and yarn as there shall be a demand for. The said firm shall, with the assistance of the directors, have the general management of the said shop and of the business transacted therein and the engagement and discharge of all clerks and servants required in the said shop. The salaries of such clerks and servants shall be paid by the said company."

By way of remuneration it was agreed that Nandlal Bhandari and Sons should have a fixed allowance and should also be entitled to commission at 16 per cent of the net profits of the company and to commission at Rs.1-9-0 per cent of the gross sale proceeds. The commission was to be paid annually when the accounts of the company were made up. The instrument was in fact a contract of managing agency.

In accordance with the powers which were conferred upon them Nandlal Bhandari and Sons opened a branch of the company at Cawnpore, known as Nandlal Bhan-

dari Mills, Ltd., Cawnpore; and for the years 1934-35 and 1935-36 the Income-tax Officer served a notice on the Cawnpore branch to show cause why it should not be treated as the agent of the non-resident firm, i.e. Nandlal Bhandari and Sons, Indore, under section 43 of the Act. Cause was shown on various grounds, but the contentions which were advanced did not find favour with the Income-tax Officer, who on the 3rd March, 1936, declared the branch at Cawnpore to be agents of the non-resident firm, i.e. Nandlal Bhandari and Sons, Indore, and assessment was made accordingly.

There was an appeal to the Assistant Commissioner of Income-tax, but it was dismissed; and thereafter an application for review under section 33 was preferred to the Commissioner of Income-tax and also an application under section 66(2) requiring the Commissioner to refer certain questions of law to the High Court. The application for review was disallowed, but the Commissioner has referred the following question for the decision of this Court: "Whether on the facts proved or admitted Messrs. Nandlal Bhandari Mills, Ltd., Cawnpore, were and could be treated as agents of the non-residents Messrs. Nandlal Bhandari and Sons, within the meaning of sections 42 and 43 of the Income-tax Act."

Section 42(1) of the Act provides: "In the case of any person residing out of British India, all profits or gains accruing or arising to such person, whether directly or indirectly, through or from any business connection or property in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax: Provided that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident person which are, or may at any time come, within British India."

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Section 43 enacts: "Any person employed by or on behalf of a person residing out of British India, or having any business connection with such person, or through whom such person is in the receipt of any income, profits or gains, upon whom the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall, for all the purposes of this Act, be deemed to be such agent: Provided that no person shall be deemed to be the agent of a non-resident person, unless he has had an opportunity of being heard by the Income-tax Officer as to his liability."

Sir *Tej Bahadur Sapru* on behalf of the company contends that the branch at Cawnpore cannot be regarded as agents of Nandlal Bhandari & Sons, for the reason that the latter are the duly appointed agents of the company at Indore, of which the firm Nandlal Bhandari Mills, Ltd., Cawnpore, is a branch. He also pleads that there is no business connection between the company—through its branch at Cawnpore—and Nandlal Bhandari and Sons, as required by sections 42 and 43 of the Act. He contends that the term "business connection" signifies dealings of a commercial nature between the parties concerned and necessitates the buying and selling of commodities and the relationship of creditor and debtor.

The decision of the question referred to us will depend on the interpretation to be placed on sections 42 and 43 of the Act. It is manifest from the language of section 43 that a person may be fictionally deemed to be an agent for the purposes of the Act who might not be an agent as that term is ordinarily understood at law; and the fact that Nandlal Bhandari and Sons are the duly constituted agents of the company at Indore will not, in our opinion, preclude the Income-tax authorities from treating the branch at Cawnpore as agents of the non-resident firm of Nandlal Bhandari and Sons, if the conditions of sections 42 and 43 are otherwise satisfied.

In paragraph 6(*c*) of the agreement of agency it is provided that Nandlal Bhandari and Sons shall receive commission at the rate of Rs.1-9-0 per cent on the gross sale proceeds of all sales of yarn and cloth of the company "as the selling agents". Nandlal Bhandari and Sons have authority to open branches and appoint and discharge employees, and if they manage the business of each branch as selling agents, some argument might be advanced as regards residence and non-residence of the respective parties *quoad* the branch at Cawnpore; but it was assumed by the Income-tax authorities and has been assumed in argument before us by learned counsel for the company that the company is resident at Cawnpore through its branch, i.e. through Nandlal Bhandari Mills, Ltd., Cawnpore, and that Nandlal Bhandari and Sons are non-residents; and we will proceed to answer the reference on this same assumption. Learned counsel for the company pleads that the element of "business" is wanting in the connection which exists between the branch at Cawnpore and the non-resident firm. He contends that sections 42 and 43 are not charging sections, but machinery sections; and he argues that unless the income of Nandlal Bhandari and Sons can be expressly brought within the terms of the statute, it is not liable to be taxed. "Business" in the term "business connection" cannot, says learned counsel, have a wider significance than "business" as used in section 6, which is the charging section; and we have already shown what meaning he asks us to attach to the expression. Finally he contends that according to the deed of agreement the commission is to be paid to Nandlal Bhandari and Sons at Indore after the accounts of the company have been made up, and therefore it cannot be said that this is an income which "accrues or arises" to them in British India.

Learned counsel for the company and learned counsel for the department have referred us to various authorities which we will proceed to discuss. None of these cases is on all fours with the facts of the present case,

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with the possible exception of one from Bombay, which, if not identical, is very nearly so, as we shall presently show.

The first of these authorities is the English case of *Greenwood* v. *Smidth & Co.* (1). In that case the respondents were a Danish firm resident in Copenhagen manufacturing and dealing in cement-making and other similar machinery, which they exported all over the world. They had an office in London in charge of a qualified engineer, who was their whole-time servant. He received inquiries for machinery such as the respondents could supply, sent to Denmark particulars of the work which the machinery was required to do, including samples of materials to be dealt with, and when the machinery was supplied, he was available to give the English purchaser the benefit of his experience in erecting it. The contracts between the respondents and their customers were made in Copenhagen and the goods were shipped f. o. b. Copenhagen. The respondents were assessed to income-tax in respect of the profits derived from dealings in machinery with purchasers in the United Kingdom, but it was held by the House of Lords that they did not exercise a trade within the United Kingdom within the meaning of schedule D of section 2 of the Income-tax Act, 1853, and were therefore not assessable to income-tax either under that schedule or under section 31, sub-section 2 of the Finance (No. 2) Act, 1915.

That decision rested on the terms of the English statutes, and the basis of decision was that the respondents did not exercise a trade within the United Kingdom. There is no such expression as "exercising a trade" in the Indian Income-tax Act, as in schedule D of section 2 of the English Act of 1853. What we have to do is to interpret the relevant sections of the Indian Income-tax Act according to the language which the legislature has thought fit to employ, and we do not think that we can safely apply to the Indian statute the

(1) [1922] 1 A.C. 417.

analogy of English decisions based on the language of the Acts in force in that country.

The next case in chronological order is that of *Board of Revenue v. Madras Export Company* (1). A French firm had a branch in Madras whose sole duty was to buy leather goods in India and ship them to France The French firm was a firm of commission agents and they made their profits by being paid commission at a defined rate on the value of the goods shipped to them. It was held by a Bench of the Madras High Court that as the profits accrued solely in France, they were not taxable in British India. It was further held that section 33(1) of the Indian Income-tax Act [equivalent to section 42(1) of the Act now in force] did not create a new category of income which could be charged under the Act in addition to the incomes mentioned under section 5 (equivalent to section 6 of the present Act) as chargeable under the Act, but that section 33(1) merely provided a machinery by which non-resident foreigners trading in British India or having a business connection in British India could be taxed on income derived by them in British India. At page 367 WALLACE, J., observed: "The term 'business connection' has not been defined in the Act. That perhaps is not surprising in an Act which does not even define the source of gain which it sets out to tax; but when it is contended that 'business connection' was designed to mean something different from and wider than the business itself, which *ex hypothesi* takes place outside British India, and thus to cast wider the net of the income-tax gatherer, it behoves us to be cautious and not to accept the contention, unless we find it justified by the legal maxim enunciated by Lord STERNDALE, M. R., in *Smidth & Co.* v. *Greenwood* (2) that the well-known canon of construction of taxing Acts is that no one is to be taxed except by express words." At page 369 the learned Judge said: "The condition precedent to assessability is business in British India and not merely a business connec-

(1) (1922) I.L.R. 46 Mad. 360. (2) [1921] 3 K.B. 583(588).

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tion in British India, and it is not laid down in that Act that the two phrases are identical in meaning. The test, I take it, is, Is the non-resident firm by its agency out here in British India making profits in British India which pass to it through the hands of its agent? If it is, then section 33(1) applies. If not, not. I am therefore unable to hold, in the absence of more clear and express words,, that section 33(1) was intended in any way to enlarge the scope of section 5 or to bring into the net any income accruing outside British India, but not derived from business within British India, merely because that income was received through or from a business connection in British India. Section 33(1) then is governed and controlled by section 5 and really applies and was intended to apply to cases where a non-resident firm takes income or profits from business carried on by it in British India, which are transmittable and are transmitted to it through its resident agent. The agent will be taxed and will be the assessee for the purposes of the Act for the profits in British India of that business, and, in order to guard against the section being taken to mean that it is merely the agent's own profits which are chargeable, language is used implying that it is the profits of his firm accruing in or arising through its business connection in British India which are taxable through the agent. In the present case the non-resident firm in India is merely buying raw material for shipment and sale abroad, and the profits realised from the sale are realised in Paris. There is clear authority in the leading case of *Sulley* v. *Attorney-General* (1), which is an exactly parallel case, for holding that the firm does not thereby carry on trade or business in British India."

The view taken by the High Court of Madras was dissented from by a Full Bench of the Calcutta High Court in *Rogers Pyatt Shellac & Co. v. Secretary of State for India* (2). The Rogers Pyatt Shellac Co. was incorporated in the United States of America with its

(1) (1860) 5 H and N. 711. (2) (1924) I.L.R. 52 Cal. 1.

headquarters in the city of New York. The company had a branch office in Calcutta to buy gum, shellac and other Indian products and a factory at Wyndhamganj in the United Provinces. No sales were conducted in India by the company. Their transactions were limited to the purchase of shellac and other goods, some of which were purchased on account of a certain gramophone company, which paid the company a fixed percentage on the purchases plus expenses, while the balance was sold in the open market. It was held that income-tax was leviable in India under section 33(1) of the Act. At page 15 CHATTERJEA, J., distinguished the English authorities on the ground that under chapter 34(2), schedule D, of the Act of 1853 it was necessary to show that the non-resident was exercising a trade in the United Kingdom and that there was no provision in the English Act to the effect that profits or gains accruing or arising to a non-resident, whether directly or indirectly, through or from any business connection in the United Kingdom should be deemed to be income accruing or arising within the United Kingdom.

It will be observed that in neither of the above two cases was there any sale of goods in British India; all that the "agents" in British India did was to purchase raw materials in British India and export them to the non-resident firm.

In the Full Bench case of *Jiwan Das* v. *Income-tax Commissioner* (1), a person residing and carrying on business in British India purchased goods in British India and sent them for sale to his shop in Kashmir, and it was held by a Bench of five learned Judges of the Lahore High Court that such a person was not liable to be assessed to income-tax on any part of the profits derived by sale in a foreign country of the goods purchased by him in British India, when the profits had neither been received in, nor brought into, British India. The view expressed by the Madras High Court

(1) (1929) I.L.R. 10 Lah. 657.

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in *Board of Revenue* v. *Madras Export Company* (1) was approved and relied upon.

In the case of *Commissioner of Income-tax* v. *Bombay Trust Corporation* (2) a company incorporated and carrying on business at Hongkong lent large sums on deposit to a Bombay company at $5\frac{1}{4}$ per cent. interest, and the company at Bombay remitted the interest to the Hongkong company; and it was held by their Lordships of the Privy Council that the interest was a profit or gain accruing or arising to the Hongkong company from a business connection in British India so as to be chargeable to income-tax under section 42(1) of the Indian Income-tax Act, 1922; and that the tax could be levied on the Bombay Company because under section 43 they were to be deemed the agents of the Hongkong company for all purposes of the Act and so by section 42(1) the tax was chargeable in their names and they were to be deemed the assessees, which by section 2(2) means the person by whom the tax was payable.

Learned counsel for the company distinguishes the last mentioned case from the case with which we are now dealing on the ground that there was a relationship of creditor and debtor and thus a business connection between the company in Hongkong and the company in Bombay.

The next case is *Commissioner of Income-tax* v. *Sarupchand Hukamchand* (3). The facts of that case were as follows. The assessees acted as the secretaries, treasurers and agents of a company named Hukumchand Mill Ltd., which had its registered office at Indore, and as such they were entitled to certain remuneration. The terms of the agreement between the assessees and the company provided that a further commission at a certain percentage on the gross sale proceeds of cloth produced by the mill be paid to the

(1) (1922) I.L.R. 46 Mad. 360. (2) (1929) I.L.R. 54 Bom. 216.
(3) (1930) I.L.R. 55 Bom. 231.

assessees for their services as selling agents of the company. The company opened a shop at Bombay for the sale of cloth produced by the company's mill at Indore and it was managed by the assessees. It will thus be observed that the facts were very similar indeed to the facts of the case which is now before us. It was held by the Bombay High Court that having regard to the terms of the agreement, the income, being a commission upon sales made in Bombay, accrued or arose in British India and was liable to be taxed in Bombay, though as a matter of practice between the parties it was paid at Indore. The only respect in which learned counsel for the company attempts to distinguish that case is that according to the interpretation which BEAUMONT, C. J., placed on clause 16 of the agreement in that case, the assessees were competent, if they so wished, to deduct their commission at Bombay before handing over to the company the proceeds of the sale of cloth at that shop. Clause 16 was more or less similar in its terms to clause 12 of the agreement in the case with which we are now dealing; but in clause 7 of the agreement in the present case it is provided that the commission shall become due and shall be paid to Nandlal Bhandari and Sons annually as soon as the accounts of the company have been made up. Whether any such provision found place in the agreement in the Bombay case we do not know. Section 4(1) of the Act is discussed in the separate judgments of BEAUMONT, C. J., and BARLEE, J., but there is no discussion of sections 42 and 43.

The last authority which need be mentioned is *Commissioner of Income-tax* v. *Remington Typewriter Co.* (1). A company incorporated in the United States of America carried on business in New York and there manufactured and sold typewriter machines. The respondent company had been incorporated under the Indian Companies Act, 1913, and had purchased from

(1) (1930) I.L.R. 55 Bom. 243.

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the American company for shares the goodwill of that company in the Bombay Presidency and adjoining territory; the American company held all the shares except three issued to that company's nominees. Two other companies had been incorporated in India, each being in substance in the same position toward the American company as the Bombay company; their respective business territory covered the rest of India. It was held by their Lordships of the Privy Council that there was a business connection within the meaning of section 43 and section 42(1) of the Indian Income-tax Act between the American company and each of the Indian companies, and consequently the respondent company could be deemed for the purposes of the Act to be the agent of the American company and as its agent could be charged to tax under section 42(1) in respect to (*a*) profits made by the American company upon machines exported to British India, and (*b*) dividends paid to the American company by the three Indian companies.

As we have already said, our reply to the reference must depend on our interpretation of the relevant provisions of the Indian Income-tax Act. Section 4(1) of that Act provides: "Save as hereinafter provided, this Act shall apply to all income, profits or gains as described or comprised in section 6, from whatever source derived, accruing, or arising, or received in British India or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

We have adready quoted sections 42(1) and 43 in an earlier part of this judgment, and it is unnecessary to repeat them. The expression "business connection" has not been defined in the Act. Section 6 is the charging section, and in it income, profits and gains from "business" is shown as a separate head of income, the other heads being salaries, interest on securities, property, professional earnings and "other sources". Section 2(4) defines "business" in the following terms: "'Business' includes any trade, commerce, or manufacture or any adventure or concern in the nature of

trade, commerce or manufacture." This definition is obviously not exhaustive, as its language shows. Now, in order to show that a non-resident has a business connection with a resident of British India it must, we conceive, be established that the two persons have some sort of association in a business, that is to say in a profit-making occupation or activity in British India; and when this is established, it will have to be determined whether the other conditions of sections 42 and 43 are satisfied. We must therefore consider what is the position in the present case. Nandlal Bhandari & Sons of Indore are the managing agents of Nandlal Bhandari Mills Ltd., Indore, on whose behalf they have opened a branch at Cawnpore under their own control. Nandlal Bhandari & Sons supply goods to the branch at Cawnpore, which are sold in British India, and they receive a commission on the sales so effected. It is true that according to clause 7 of the agreement the commission does not become payable until the annual accounts of the company have been taken, but their claim to the commission is dependent upon the sale of goods in British India. Clause 12 of the agreement even suggests that they might be competent to retain their commission before transferring the profits to the company, and this is the view which was taken by the Assistant Commissioner of Income-tax; but even if it be held, having regard to the provisions of clause 7, that Nandlal Bhandari and Sons are only entitled to receive their commission when the annual accounts of the company are made up, the fact remains that their right to this commission accrues upon the sales effected at Cawnpore. This being the position, we think it must be held that this commission is in the nature of profits or gains accruing or arising to the non-resident through or from a business connection in British India within the meaning of section 42, and must therefore be deemed to be income accruing or arising in British India; and since there is a "business connection" between the

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branch at Cawnpore, representing in British India the company at Indore, and the non-resident firm of Nandlal Bhandari and Sons, the resident branch at Cawnpore must be deemed to be the agents of the non-resident firm within the meaning of section 43, and the profits accruing in British India to the non-resident firm will be chargeable in the name of their fictional agents in British India.

For the reasons given above our answer to the question referred to us is in the affirmative. Let a copy of this judgment be sent to the Commissioner of Income-tax under the seal of the Court.

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May, 9

Before Mr. Justice Iqbal Ahmad and Mr. Justice Bajpai

LODHI (PLAINTIFF) *v.* ZIAUL HAQ (DEFENDANT)*

Stamp Act (II of 1899), *section* 36—*Document "admitted in evidence"—Attention not called or directed to question of sufficiency of stamp—Subsequent objection on ground of insufficiency of stamp—Document cannot then be rejected.*

When a court "admits a document in evidence" it does, or at least is deemed to, act judicially and this judicial act of admitting the document in evidence can at no subsequent stage of the suit be set at naught on the ground that the document was not duly stamped. In other words, if no objection to the admissibility of a document on the ground of insufficiency of stamp is raised before the document is admitted in evidence, such objection cannot subsequently be raised.

The provisions of section 36 of the Stamp Act are mandatory and preclude the question of the admissibility of a document on the ground of insufficiency of stamp from being raised after the document has once been "admitted in evidence". There is no warrant for introducing the words, "after judicially considering the question of sufficiency of stamp", after the words "admitted in evidence" in the section.

Dr. *N. C. Vaish,* for the applicant.

Mr. *M. A. Aziz,* for the opposite party.

IQBAL AHMAD and BAJPAI, JJ.:—This is a reference by the Small Cause Court Judge of Saharanpur under section 113 read with order XLVI, rule 1 of the Civil

*Miscellaneous Case No. 618 of 1938.