## APPELLATE CIVIL.

*Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Blagden.*

1940
May 3.

## EBRAHIM BODI *v.* K. BA GYI. *

*Insolvency—Appeal from order of Insolvency Judge on Original Side—Refusal to examine further a witness—Rangoon Insolvency Act, ss. 8 (2) (b), 36—Proceedings in insolvency—Series of "suits"—"Judgment"—Letters Patent, cl. 13—Determination of substantive rights—Examination of witness under s. 36—Scope of examination—Litigation ensuing against witness—Discretion of Court to allow or refuse examination—Appellate Court's interference.*

An appeal lies under s. 8 (2) (*b*) of the Rangoon Insolvency Act from an order of the Insolvency Judge on the Original Side of this Court refusing an applicant further examination of a witness under s. 36 of the Act. The various proceedings in an insolvency must be regarded as a series of "suits" arising out of one failure and that is a "Judgment" for this purpose which finally determines the substantive rights of those concerned in any one such "suit".

*Arjuna Iyer* v. *Official Assignee*, I.L.R. 6 Ran. 363 ; *Re Dayabhai* v. *A.M.M. Chettiar*, I.L.R. 13 Ran. 457 ; *P. Abdul Gaffoor* v. *The Official Assignee*, I.L.R. 3 Ran. 605, distinguished.

S. 36 of the Rangoon Insolvency Act confers on the Court an extraordinary and inquisitorial, though a necessary power, to be exercised in the interests of the due administration of the insolvent's estate without fear, but not without scrupulous regard to considerations of economy and fairness to the person examined.

*Re Maundy Gregory*, (1935) 1 Ch. 65, referred to.

*Ex parte Eckersley*, 48 L.T. 832, dictum dissented from.

The scope of the examination is not necessarily confined to questions arising out of the matters stated in the affidavit leading to the summoning of the witness. The machinery of s. 36 is not, save in exceptional circumstances, to be used by one party to an actually pending suit for the purpose of examining his opponent, but the mere fact that litigation against the witness may ensue cannot be a ground for refusing the examination.

*Re Desportes*, 10 Mor. 40 ; *Re Franks*, (1892) 1 Q.B. 646 ; *Re Goolbai Petit*, I.L.R. 57 Bom. 665, referred to.

*Re Ghanchee & Sons*, I.L.R. 7 Ran. 675, overruled.

*Mirmahomed* v. *Ismail Karim*, A.I.R. (1929) Bom. 230, dissented from.

The discretion of the Court in refusing to summon or further to examine a witness is interfered with on appeal only if no discretion was used at all or if it was exercised unjudicially, or on a wrong principle of law, or on a wrong appreciation of facts.

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* Civil Misc. Appeal No. 6 of 1940 from the order of this Court on the Original Side in Insolvency Case No. 49 of 1938.

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*Dadachanji* for the appellant.

*Kyaw Myint* for the respondent.

BLAGDEN, J.—The appellant in this case is, it appears, the sole unsecured creditor of one U Po Sein against whom he has a decree for some Rs. 30,000 odd. On this decree an interest of U Po Sein was, on the 13th January 1938, attached. That attachment lasted till the 25th April 1938, and therefore at the last moment the 3rd February 1938 at the latest, U Po Sein suffered an act of insolvency under section 9 (*e*) of the Rangoon Insolvency Act, hereinafter called "the Act". Within 3 months of that date, to wit on the 25th April 1938, the appellant presented an insolvency petition against U Po Sein founded on this act of insolvency. The proceedings under this petition were somewhat protracted and it was not until the 15th June 1938 that U Po Sein was adjudicated insolvent. This, however, does not matter because by section 51 of the Act the insolvency of U Po Sein must be deemed to have relation back to and to have commenced at midnight of the 3rd/4th February 1938 at the latest. This moment of time is important.

By section 52 (2) (*a*) of the Act, the property divisible amongst his creditors (which by section 17 of the Act vested in the Official Assignee) therefore included (at least) all such property as belonged to U Po Sein at midnight of the 3rd/4th February 1938.

The respondent K. Ba Gyi comes into the matter in this way. According to the insolvent's schedule lodged on the 23rd February 1939 he was on the 15th June 1938 a secured creditor of U Po Sein for Rs. 5,000 (the debt and security dating from the 25th July 1932) and the security was thereby estimated to produce a surplus of Rs. 5,000. This made two things obvious, namely, (1) that if the insolvent's estimate of the value

of the security was anything like correct—and such estimates are, of course, apt to be optimistic—he was never likely to prove in the insolvency at all (see the proviso to section 17 of, and Schedule II to, the Act) and (2) that if the appellant, the only unsecured creditor, wished this particular point really investigated it was vital for him to know whether this debt, this security and not least this date (25th July 1932) were or were not genuine, and, as hereinafter appears, he had reason to suspect that the debt had in fact been to a large extent repaid by midnight of the 3rd/4th February 1938.

The public examination of the insolvent was concluded on the 4th July 1939 and on the 28th of that month the present appellant applied to the Court for the private examination under section 36 of the Act of the present respondent and of six other persons not material to the present appeal. In support of this application he filed an affidavit paragraph 15 of which read as follows :

[The allegation was that the insolvent's wife in certain affidavits had stated that the debt due to K. Ba Gyi was originally Rs. 6,000 out of which Rs. 4,000 had been paid up and the balance owing was Rs. 2,000 and not Rs. 5,000.]

Pursuant to this application the present respondent was on the 20th December 1939 examined under section 36 of the Act. According to his evidence, the transaction alleged by the insolvent to have taken place was, subject to an immaterial discrepancy as to its date, genuine. But it was not an isolated transaction, there having been repayments and renewals of the loan, not all recorded in any existing book of the witness. His deposition concluded as follows :

[K. Ba Gyi said he began new books of account on the 15th June each year. A book containing entries

upto 14th June 1937 was destroyed. On 18th May 1938 the insolvent owed him nothing, but on the 19th May 1938 a fresh sum of Rs. 5,000 was paid by him to the insolvent, the security remaining the same.]

From this it will be seen at once that the examination had, in a sense, "gone beyond" what was stated in paragraph 15 of the applicant's affidavit. But to serve any useful purpose a private examination must elicit something more than is stated in the evidence on which the order for the examination is made, since that evidence is filed merely to show the Court that there are grounds for enquiry and it would be a vain thing if the Court were restricted to ascertaining from the witness facts of which it was already aware. It is also very apparent that the applicant had elicited information far more valuable to him than, on the facts as he previously supposed them to be, he could in his most sanguine moments have expected. The insolvency had notionally commenced at a date long anterior to that on which (according to the respondent) he made his advance and, in consequence his security became effective as such. Unless therefore he could bring himself within section 57 of the Act by proving affirmatively that he had no notice of the presentation of any insolvency petition his security appears, on his own showing, worthless in view of sections 17, 51 and 52 (2) (*a*) of the Act while section 46 (2) of the Act leaves it extremely doubtful if he had, on the same version of the facts, even a provable debt. There might have been further matters which Mr. Dadachanji for the present appellant might have wished to put to the witness and which the Registrar if asked to do so might have properly allowed him to ask. But Mr. Dadachanji told us very frankly that he could not now remember whether or not he had in mind any

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specific question as being desirable at that stage, though he was anxious to continue a general examination of the witness. Certainly it does not seem that the Registrar was asked to consider allowing any specific further question to be put, and in the absence of any such request I think that he might, if unfettered by authority, well have taken the view that the applicant had elicited from the witness all he could possibly hope for and that further questions were a waste of time. That, however, is not quite the course he took. The following is his note of what occurred at this stage in the proceedings :

[The Registrar noted that the examination had gone beyond what was stated in paragraph 15 of the affidavit and, his attention being drawn to the case in 7 Ran. 675, he submitted the case to the insolvency Judge.]

On the 2nd January 1940 the matter came before my brother Ba U and his order reads as follows—

"The insolvency Registrar was perfectly justified in doing what he had done. If Mr. K. Ba Gyi wants to realize his share he must come before the Court and prove his case in the manner laid down by the Insolvency Act. If and when he does this he can be subjected to searching cross-examination with regard to the amount due to him. It is unnecessary to go into this now. It will only result in waste of time. The order of the Registrar is confirmed."

Thence the matter comes before us by way of appeal.

U Kyaw Myint took the preliminary objection that no appeal lies. In support of this proposition he relies on section 8 (2) (*b*) of the Act which allows an appeal from the Insolvency Judge in cases not covered by section 8 (2) (*a*) (and the present case, he rightly concedes, is not so covered)—

"in the same way and subject to the same provisions as on appeal from an order made by a Judge in the exercise of the ordinary original civil jurisdiction of the Court."

He then draws our attention to clause 13 of the Letters Patent and *Re Dayabhai* v. *Jivandas A.M.M. Murugappa Chettiar* (1) and cases there cited which, so far as this High Court is concerned, settle that the word "judgment" in that clause means and is a decree in a suit by which the rights of the parties at issue in the suit are determined. *P. Abdul Gaffoor* v. *The Official Assignee* (2) shows that for "an order made by a Judge in the exercise of the ordinary original civil jurisdiction of the Court" to be appealable it must be either (*a*) within Order XLIII, rule 1, of the Civil Procedure Code (which this order is clearly not) or (*b*) a judgment. The present order, he says, is not a judgment because it does not determine the rights of the parties to the insolvency. He rightly admits that this ingenious argument (carried to its logical conclusion) involves the startling proposition that no order made by the Insolvency Judge as such is appealable at all, since no one order made in the course of a particular insolvency determines the rights of everbody concerned in that insolvency. It is curious, if this be so, that this Court should have heard hundreds of such appeals and (in, for example, the case last cited) declined to hear others, not on the ground that they were appeals from the Insolvency Judge but on the ground that the particular order concerned was not a "judgment". Moreover the Letters Patent were already in existence when, in 1926, the Presidency-Towns Insolvency Act (now the Act) was applied to Rangoon. In so applying it the Legislature can hardly have meant to emulate that freak of nature which torments the desert traveller with visions of non-existent oases by extending before the citizens of Rangoon [by section 8 (2) of the Act] an alluring prospect of a right of appeal well knowing that clause 13 of the Letters Patent made that right illusory.

(1) (1935) I.L.R. 13 Ran. 457. (2) (1925) I.L.R. 3 Ran. 605.

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It has, I think, to be remembered that neither this Court in *Re Dayabhai Jivandas* v. *A.M.M. Murugappa Chettiar* (1) nor their Lordships of the Privy Council in the judgments there cited had in mind the peculiar nature of an insolvency. For the purposes of this point the various proceedings in an insolvency should, in my opinion, be regarded as a series of "suits" arising out of one failure, and in my opinion that is a "judgment" for this purpose which finally determines the substantive rights of those concerned in any one such "suit": for example, an order of adjudication on a creditor's petition is a "judgment" although it happens almost at the outset of the insolvency, but an order adjourning the hearing of the petition is not a "judgment".

In *P. Abdul Gaffoor* v. *The Official Assignee* (2) a Bench of this Court held that an order refusing to issue a commission to examine a witness in Madras could not be appealed. But there the witness's evidence was desired not as an end in itself but for the purposes of a then pending petition for the annulment of the adjudication, so that the Court's refusal was in reality an interlocutory order in that petition. Here there was, immediately before the decision of Ba U J., no material proceeding pending other than the examination of Mr. K. Ba Gyi. This may or may not lead to further proceedings, but, for the moment, his further examination was desired as an end in itself and the decision of Ba U J. finally determined the question in dispute before him, namely, whether the witness should or should not be further examined. The distinction is perhaps fine, but I think it is real. There is less difficulty in distinguishing *Arjuna Iyer* v. *Official Assignee* (3) for whereas, in the present case, the Court

(1) (1935) I.L.R. 13 Ran. 457. (2) (1925) I.L.R. 3 Ran. 605.
(3) (1928) I.L.R. 6 Ran. 363.

heard and determined a disputed question, there the Court in its discretion declined to entertain the question at all and left the appellant to his remedy if any by a regular suit. A "judgment", properly so called, must in my opinion be an exercise of jurisdiction, and therefore a refusal to exercise jurisdiction, at all events if it be a lawful refusal, cannot be a "judgment". This preliminary objection, therefore, in my opinion, fails.

The substantial question remains whether we should now direct that Mr. K. Ba Gyi be further privately examined.

Sub-sections (*1*) and (*3*) of section 36 of the Act read thus :

"36. (*1*) The Court may, on the application of the Official Assignee or of any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it in such manner as may be prescribed the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent, or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property; and the Court may require any such person to produce any documents in his custody or power relating to the insolvent, his dealings or property.

(*3*) The Court may examine any person so brought before it concerning the insolvent, his dealings or property, and such person may be represented by a legal practitioner."

These sub-sections are for all material purposes identical with sub-sections (*1*) and (*3*) of section 25 of the English Bankruptcy Act 1914 except that the right of the witness to legal representation at the examination is, in this country, expressly conferred by statute, while in England it is only sanctioned by long-established practice.

The section confers on the Court an extraordinary and inquisitorial, though certainly a necessary, power, to be exercised in the interests of the due

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administration of the insolvent's estate without fear, but not without scrupulous regard to considerations of economy and of fairness to the person examined. See for example *Re Maundy Gregory* (1). It is to be observed that the only right which the section gives to the Official Assignee or to any creditor who has proved is a right to apply to the Court to summon a witness. It is in the discretion of the Court whether or not it will do so at all, and, if it does do so, the examination of the witness is, in theory, an examination by the Court ; it is only as a matter of practice that the person applying for the summons is permitted to attend and question the person summoned at all.

In this connection attention was called to *Ex parte Eckersley* (2), where in the course of the judgment it is said

"where the statute has plainly said that the trustee has a right to examine persons as therein directed, I may not withhold from the Queen's subjects that right which the law has given them."

This was said in connection with section 96 of the Bankruptcy Act 1869 which was in similar terms to section 36 (*1*) of our Act. I must therefore observe that the statute has not, plainly or otherwise, said what is attributed to it, and has in fact said nothing of the kind. The observation cited was unnecessary to the perfectly proper decision in that case and formed part of an unconsidered judgment, of Vice-Chancellor Bacon sitting as Chief Judge in Bankruptcy. He was a Judge of wide learning and experience whose decisions are entitled to great respect ; but, as the Court of Appeal has not infrequently had occasion to observe his unconsidered dicta are often characterized rather by the attractive vigour than by the accuracy of the language in which they are expressed.

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(1) (1935) 1 Ch. 65. (2) 48 L.T. 832.

That the discretion of the Court in refusing to summon or further to examine a witness is not lightly to be interfered with on appeal is a proposition which Mr. Dadachanji, who appeared for the appellant, rightly accepts. He admits that it is not enough for him to show that the discretion was wrongly exercised, but that he must go further and show either that it was not exercised at all, or, if exercised, was exercised either unjudicially, or on a wrong principle of law, or on a wrong appreciation of the facts. That one or other of these things must be shown in order to sustain an appeal from the purported exercise by a lower Court of a discretionary power is too well settled to need authority: but we must not forget that there is such a thing as a right decision reached in the wrong way. To take the most glaring example one could imagine of a failure to exercise discretion judicially or indeed at all, let us suppose that a Judge having a discretion to make or not to make a particular order decided not to make it by the spin of a coin, substituting for his own judgment the arbitrament of chance. Even if this absurdity were shown to have occurred, still the Court of Appeal would not, I apprehend, make a different order if it thought that, on the facts as they were when the case came before it, a right decision had, by a fortunate accident, been reached.

Mr. Dadachanji, if I follow aright his careful argument, says that there was here no exercise of discretion because there was applied a supposed hard and fast rule against "going beyond" the evidence on which the summons was issued. I have already tried to show how absurd the literal application of any such rule would be. What I think the learned Registrar had in mind was the correct principle that section 36 should not be used for purposes of what is sometimes termed a "roving commission" or "fishing enquiry". Both

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terms are apt to create confusion because they are necessarily inexact, though the expression "fishing" has a fairly well-known meaning in relation to interrogatories, the scope of which is of course much narrower than that of a private examination in an insolvency. Suffice it for the moment to say that it is impossible to lay down any hard and fast rule limiting the scope of a private examination, and that though the Court may (not must) think it proper to confine it to questions arising out of the matters stated in the affidavit leading to the summons there is certainly no rule that only those matters themselves may be put to the witness.

Alternatively, which is perhaps only another way of putting the same point, Mr. Dadachanji says that the discretion was exercised on what was really a wrong principle of law because the Court below conceived itself bound by *Re G. H. Ghanchee & Sons* (1) to allow no further questions. He says that this decision does not decide that the Court was so bound, and that in any event it is not binding on us and he asks us to overrule it.

If that decision were merely to the effect that the machinery of section 36 is not, save in exceptional circumstances, to be used by one party to an actually pending suit for the purpose of his examining his opponent I should entirely agree with it. [See *Re Franks* (2) and *Re Desportes* (3).] To let one litigant see the other's brief is obviously wrong. But it is clear that the decision goes further. The Registrar there was of opinion that the Official Assignee intended to examine the witness in order to prepare for future litigation, and, following certain observations of Davar J., in *Mirmahomed* v. *Ismail Karim* July 1929 Bombay (not officially reported), he apparently disallowed the

(1) (1929) I.L.R. 7 Ran. 675. (2) (1892) 1 Q.B. 646.
(3) 10 Mor. 40.

examination on that ground. Das J., upheld his order, observing that "section 36 was not intended for the purpose of enabling the Official Assignee to cross-examine a claimant and get from him the proof of his case."

As I have tried to indicate, he did not by "claimant" mean merely claimant in actually pending litigation, and therefore, with all respect, I think that both he and Davar J., were, if the latter is correctly reported, wrong. The section is not in terms restricted to the examination of persons who are thought to be indebted to or possessed of part of the debtor's estate but extends to "any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property." In England the corresponding section is constantly employed to examine, for example, persons claiming to be creditors with a view to considering a motion to expunge or reduce their proofs. I have had some experience of its operation in practice and not only does it not work injustice but the contrary is in my opinion the case. Moreover if one looks at sub-sections (*4*) and (*5*) it becomes quite clear that the mere fact that litigation against the witness may ensue cannot be a ground for refusing the examination. Suppose the witness admits that he owes the insolvent's estate Rs. 10 and has in his possession the insolvent's watch : the Court may under these sub-sections order him there and then to pay the money and to hand over the watch. But if he denies one or both of these things is the examination to be stopped on the witness's bare denial, or is it to proceed on the terms that if eventually it becomes clear that the witness's denials are false the Official Assignee is to do nothing about recovering the money and the watch ? That the answer to the former question is No is clear from *Re Scharrer* (1), and that the answer to

(1) 20 Q.B.D. 518.

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the latter is also No is plain common sense. In my opinion we ought to disapprove *Re Ghanchee & Sons* (1) and I am fortified in this opinion by the fact that both this decision and the cases there cited have been doubted in *Re Goolbai Bomanji Petit* (2) with which I respectfully and entirely agree.

Then it is said that Ba U J. acted on a misapprehension as to the facts in that he assumed that sooner or later Mr. K. Ba Gyi "must come before the Court and prove his case in the manner laid down by the Insolvency Act" when there will be a full opportunity for cross-examining him. This does seem to me, with great respect, a quite unfounded assumption, though I am not sure that it materially affects the result at which he arrived, as doubtless if Mr. K. Ba Gyi brought a regular suit for the purpose of bringing his security to sale he would have to make the Official Assignee a party.

Mr. Dadachanji has therefore in my opinion made out two or possibly three, grounds on which we are entitled if we think fit to vary Ba U J.'s order although his power to make that order was discretionary. It remains to be considered whether exercising our own unfettered discretion we should order a further examination or not.

I am for myself much impressed by Ba U J.'s observation "it will only result in waste of time", though as I have said I do not quite agree with the grounds on which he formed that opinion. Moreover the last paragraph of the head-note in *Re Goolbai Bomanji Petit* (2) reads :

"The Court ought not to make an order for the examination of a witness under section 36 of the Act unless there is ground for thinking that the order is likely to be of some use."

(1) (1929) I.L.R. 7 Ran. 675. (2) (1933) I.L.R. 57 Bom. 665.

This strikes me as both sound law and sound sense even if the word " further " be inserted before the word " examination ".

Mr. Dadachanji's examination of the witness has already produced results of which he had (if I may take an expression from another section of the Act) " no reasonable or probable ground of expectation." I can imagine some specific questions which might possibly make his client's prospects even brighter, but as there may be litigation between the parties about the matter I will not indicate what questions I have in mind. It may well be that Mr. Dadachanji would prefer not to put those particular questions at this stage and if so that is certainly a wise, and more than likely a right, decision from his client's point of view. What he does ask us to do is to give him general liberty to continue the witness's examination in the hope of further windfalls. Whether a continuance of the examination will produce any result beneficial to the estate is, of course, a matter of speculation, but for my part I think it very unlikely. On the whole I think that Mr. Dadachanji's client has now got adequate materials on which to decide whether or not to take proceedings against Mr. K. Ba Gyi, and that he should make his mind up about it now. The appeal should, therefore, in my opinion be dismissed.

With regard to costs, a witness who is legally represented at an examination under section 36 is not, I think, entitled to costs of such representation. It is a measure of prudence which he takes at his own expense. The position of Mr. K. Ba Gyi as to the appeal is somewhat different because (rightly or wrongly) he was made respondent and served as such. [See as to this *Re Scharrer* (1) to which I have already referred in another connection.] But no substantive

(1) 20 Q.B.D. 518.

relief was asked for against him, and he would not have been out of pocket by reason of our decision, had it gone against him, if he had not contested the appeal and I therefore think we ought to dismiss the appeal without costs. In *Re Maundy Gregory* (1), to which I have also referred, a witness was given costs of an appeal. But there he was himself the appellant, and the matter arose out of his refusal to answer a question. Unless he could justify that refusal (which he did) he would have been in contempt and liable to punishment. Possibly Mr. Bodi may be advised to apply to the insolvency Judge for his costs out of the estate, to which the Official Assignee would have been entitled had this application and this appeal been properly made and preferred by him. We should therefore I think make an order for Mr. Bodi's costs to be taxed if he so desires, and, while expressing no opinion as to what should be done on that application, we should grant him liberty to make it.

ROBERTS, C.J.—I agree with the conclusions expressed by my learned brother.

The order appealed from was made in the exercise of a discretionary power; and, having regard to the answers already given in the examination under the Rangoon Insolvency Act, I make no doubt but that the exercise of his discretion by the learned Judge in Insolvency was not only one with which we ought not to interfere, but was in the circumstances a wise exercise of it.

The examination of a person under this section is at least in theory, an examination by the Court; it is entirely a matter for the Court's discretion how far it should extend. The statutory power given to the Court does not entitle a creditor to demand this or that latitude

(1) (1935) 1 Ch. 65.

in putting questions, but the decision in *Re Ghanchee & Sons* (1) cannot now be regarded as good law; and, as has been stated in *Re Goolbai Bomanji Petit* (2) by the Bench of the High Court in Bombay, one of the objects of the section is to enable the Official Assignee to discover whether he has grounds for embarking on litigation on behalf of the creditors or not.

I have not acquired the experience of my learned brother with regard to the English law and practice in Bankruptcy cases analogous to the case under appeal here. But I entertain no doubt that we ought not to interfere in the present matter, though it must be conceded that we have jurisdiction to do so, for the reasons which he has given. The appellant's learned advocate has not been able to suggest any specific question which he was debarred from putting, and no hardship has been occasioned to his client. Any attempt to convert the latitude given to the advocate of a creditor in these circumstances into a right to try and establish, by devious questioning and cross-examination of a speculative character, some accidental advantage ought to be discouraged. And it is for this reason that in my respectful judgment the learned Judge in Insolvency exercised a wise discretion and the appeal against his order must be dismissed.

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(1) (1929) I.L.R. 7 Ran. 675. (2) (1933) I.L.R. 57 Bom. 665.