by way of penalty and that S. 74, Contract Act, has no application; and he fortifies his position with the help of *Janki Das* v. *Ahmad Husain Khan* (1) and *Vencatachellam Chettiar* v. *Veerappen Ambalagaran* (2). As in those cases, so here the rate at which compound interest was to be computed was the same as that promised for simple interest, and we have no doubt of the soundness of the view taken in them that compound interest, not at an enhanced rate, is not a penalty. No authority to the contrary is cited; and Mr. Shafi has only been able to refer us to *Kirpa Ram* v. *Samiud-Din Ahmad Khan* (3), which deals not with questions of penalty or no penalty, but lays it down that compound interest of an unconscionable amount should not be allowed.

He also tries to argue for "undue influence," but we must overrule him on both points, inasmuch as the later plea is taken too late, and as to the former point we cannot see anything unconscionable in the stipulations. We also do not agree with Mr. Shafi that the course of dealings between the parties shows that plaintiff waived his right to compound interest. If plaintiff had in his books made up accounts or struck balances on the basis of simple interest only, there would perhaps be some force in the contention; but the mere fact that payments are shown as credited to "interest" and not to "compound interest," does not seem to us to prove anything.

The next point is as to the value to be assigned to the building work done by defendant for plaintiff. In his plaint in Case No. 1200 of 1910, plaintiff put the value at Rs. 8,436-4-0* while the local commissioner stated the value as low as Rs. 6,446. Mr. Petman urges that only the latter figure should be allowed to defendant, but we are of opinion that plaintiff cannot ask the Court to go behind what plaintiff admitted in his own plaint. Here we agree with the learned District Judge, and we may say at once that we decline to tamper with the small item of Rs 165 found by the District Judge: see ground 4 (b), Case No. 27 of 1911, and p. 47, book A.

(1) [1903] 25 All. 159=(1902) A.W.N. 218.
(2) [1912] 14 I.C. 283.
(3) [1903] 25 All. 244=(1903) A.W.N. 44.
* From this sum Rs. 2,790 falls to be deducted, see below.

It seems to us clear that defendant must have credit for this sum of Rupees 8,436-4-0 on 1st August 1907, on which date the work was first valued and found complete. The lower Court has allowed defendant interest on this sum at 2 per cent per mensem, or rather on this sum reduced by Rs. 2,790 received by defendant from plaintiff "in cash and kind"; see p. 75, lines 4 to 19, and p. 77, lines 1 to 4. It may be noted here that in the paper book at p. 77, lines 1 to 6, Rs. 4,770 seems to be a mistake for Rs 4,700. Mr. Petman argues that defendant is not entitled on this sum of Rs. 5,646 to more than 1 per cent. per mensem at most but, in our opinion, the proper way of adjusting the conflicting claims of the parties makes this question merely academic. We do not think any question of appropriation of payments under Ss. 59-61, Contract Act, arises in connexion with this set-off by defendant. His work done is not a "payment," in connexion with the work done he is creditor and not debtor and this was the sole debt due to him. The matter stands to be adjusted according to equity and common sense, apart from those provisions of the Contract Act.

*Appeal allowed.*

R.M./R.K. *Appeal No. 27 dismissed.*

*Note.*—The rest of the judgment is immaterial for the purpose of this report.—Ed.]

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## A. I. R. 1914 Lahore 365

SHAH DIN AND SCOTT-SIMTH, JJ.

*Devi Das* and *others*—Plaintiffs—Appellants.

v.

*Raja Khan* and *others*—Defendants—Respondents.

Second Appeal No. 1648 of 1912, Decided on 25th May 1914, from decree of Divl. Judge, Rawalpindi, D/- 13th May 1912.

**Hindu Law—Alienation—Widow—Consent of next reversioner does not always estop remote reversioner to challenge alienation even though of portion.**

In all cases and under all circumstances the consent of the next reversioner of a Hindu widow in possession of her husband's estate to an alienation of a portion of that estate does not validate the alienation and debar the more remote reversioners from contesting it.

The principles underlying such cases discussed and explained: 19 *I. C.* 273, *Rel. on.*

[P 368 C 1]

*Gobind Das* for *Sukh Dial*—for Appellants.

*Muhammad Iqbal* and *Kanwar Sain*—for Respondents.

**Judgment.**—The facts of this case are briefly these: By registered deed, dated 25th October 1909, Mt. Lajwanti, defendant 1, widow of Kishen Chand, and Shankar Das, defendant 2, first cousin of her deceased husband, sold a portion of the land left by Kishan Chand which Mt. Lajwanti was holding on the usual widow's life-estate, to Raja Khan, defendant 3. On 29th April 1911 the present suit was brought by Ram Chand and Mt. Nanki, daughter of Dittoo Mal for a declaration that the sale of the land in question in favour of Raja Khan shall not affect their reversionary rights after the death of Mt. Lajwanti. Ram Chand died during the pendency of the suit in the first Court, and his sons, Devi Das and Deputy Lal, were brought on the record as his legal representatives. In answer to the plaintiff's suit, the defendants pleaded that the plaintiffs were not the reversioners of Kishan Chand, deceased, husband of Mt. Lajwanti; that the land in suit was not ancestral; and that Shankar Das defendant 2 who was the presumptive heir at the time when the sale was made, having assented to the sale by joining as a co-vendor with the widow, the plaintiffs were precluded from contesting the validity of the sale.

The District Judge held that the plaintiffs were the collaterals of Mt. Lajwanti's deceased husband; that although the land was not ancestral property *qua* the plaintiffs they could contest the sale by the widow; that the sale was not validated merely by the consent of Shankar Das, defendant 2, who was the nearest reversioner at the date of the sale and that the sale had not been made for legal necessity. In support of his view regarding the validation of the sale by the consent of the nearest reversioner the District Judge relied on the Full bench decision of the Allahabad High Court in *Ramphal Rai* v. *Tula Kuari* (1). As a result of the above findings, the District Judge decreed the plaintiffs' claim.

On appeal the learned Divisional Judge agreed with the District Judge that the plaintiffs were the collaterals of Kishan Chand and that the sale was not made for legal necessity; but following the decision of their Lordships of the Privy Council in the case of *Bajrangi Singh* v. *Manakarnika Bakhsh Singh* (2) he held, differing from the District Judge, that the nearest reversioner of the widow's husband having consented to the sale in question the plaintiffs could not challenge it. He accordingly accepted the appeal and dismissed the plaintiffs' suit.

The plaintiffs have preferred a second appeal to this Court, and their learned pleader has urged that the Divisional Judge has not correctly understood the decision of the Judicial Committee in *Bajrangi Singh* v. *Manikarnika Baksh Singh* (2), and that that decision is no authority for the proposition that in all cases and under all circumstances the consent of the next reversioner of a Hindu widow in possession of her husband's estate to an alienation of a portion of that estate validates the alienation and debars the more remote reversioners from contesting it. It is admitted that the parties are governed by Hindu law.

The Privy Council's decision, on which the Divisional Judge has relied, has been the subject of consideration by the High Courts in this country, and we have been referred to a large number of recent decisions bearing on the point before us. The appelants' pleader has cited *Rangappa Naik* v. *Kamti Naik* (3), *Bakhtawar* v. *Bhagwana* (4), *Abdulla* v. *Ram Lal* (5), *Pittu Appa Nalvade* v. *Babaji Narumang* (6), *Ramkrishna Kuppuswmi* v. *Tripurabai* (7), *Athesang Tirabhai* v. *Raisang Fatesang* (8), *Debi Prosad Chowdhry* v. *Golap Bhagat* (9) and *Gopeswar Misra* v. *Gopini Baishnabi* (10). On the other hand, counsel for the respondents (for the widow and for the vendee respectively), have relied upon *Pulin Chandra*

(1) [1884] 6 All. 116=(1883) A. W. N. 243.

(2) [1908] 30 All 1=35 I. A. 1=5 A. L. J. 1=9 Bom. L. R. 1348=6 C. L. J. 766=12 C. W. N. 74=17 M. L. J. 605 (P. C.)

(3) [1908] 31 Mad. 366=18 M. L. J. 309=3 M. L. T. 355 (F.B.)

(4) [1910] 32 All. 176=5 I. C. 270.

(5) [1911] 34 All. 129=12 I. C. 601.

(6) [1909] 34 Bom. 165=4 I. C. 584.

(7) [1911] 12 I. C. 529

(8) [1912] 16 I. C. 561

(9) [1913] 40 Cal. 721=19 I. C. 273.

(10) A. I. R. 1914 Cal. 291=21 I. C. 200.

*Mandal* v. *Bolai Mandal* (11), *Kattamoody Raghupathy* v. *Kattamoody Kanamma* (12) and *Tek Chand* v. *Mt. Gopal Debi* (13). The whole case-law upon the subject is carefully summarized in Rama Krishna's Hindu Law, Volume 2, Edition of 1913, pp. 346-57.

In the Privy Council case [*Bajrangi Singh* v. *Manakarnika Baksh Singh* (2)] the widow had made sales for valuable consideration of successive portions of her husband's property to her own son-in-law, and the sales taken together covered the whole estate. These sales were made without legal necessity, and the consent of the reversionary heirs of the widow's husband was not obtained when the sales were made. Subsequently some of the reversioners, who were at the time admittedly the nearest reversionary heirs to her husband's estate, executed two deeds of relinquishment in favour of the widow for a certain consideration and ratified the sales that had been made by her to her son-in-law. After the widow's death the property sold, which consisted of revenue-paying land, was duly mutated in the name of the son-in-law, but after the death of the son-in-law the sons of some of the reversioners who had consented to the sales by the widow brought a suit, in their capacity of reversionary heirs of the widow's husband, for possession of the estate. One of the questions for decision before their Lordships of the Privy Council was whether the consent of the fathers of the plaintiffs, who were the nearest reversionary heirs at the time of the sales by the widow, and who had subsequently ratified the sales for consideration did not debar the plaintiffs from questioning the validity of those sales. In the course of their judgment after referring to two of their previous decisions bearing upon the question of the validation of an alienation made by a Hindu widow without legal necessity by the consent of her husband's kindred, their Lordships observe that upon the practical application of the general principle laid down in those decisions there has been much discussion in the High Courts in India. They then refer to the decision of the Allahabad High Court in *Ramphal Rai* v. *Tula Kuari* (1) to the effect that the consent of the heir-presumptive to an alienation by a widow was not sufficient to defeat the rights of a more remote reversioner, and that an assignment by the widow to the heir-presumptive has no greater effect in his favour than it would have had if he were a stranger. Reference is then made to two decisions of the Calcutta High Court, *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (14) and *Radha Shyam Sircar* v. *Joy Ram Senapati* (15), and to the Full Bench decision of the Madras High Court in *Marudamuthu Nadan* v. *Srinivasa Pillai* (16) as laying down the principle that if a Hindu widow was competent to surrender her whole estate to the next heir of her husband, it followed as a legitimate consequence that she could also alienate it with his consent without any legal necessity. Next their Lordships refer to the ruling of the Bombay High Court in *Vinayak Vithal Bhange* v. *Govind Venkatesh Kulkarni* (17) and quote with approval the view of Ranade, J., that in order to validate an alienation by a widow otherwise than for legal necessity the consent of the reversioners must be of such kindred the absence of whose opposition raises the presumption that the alienation was a fair and proper one. Their Lordships then go on to observe :

"The principle being thus admitted by the High Courts in India, the question of the quantum of consent necessary only remains. The High Court of Allahabad, indeed does not recognize the validity of surrenders in favour or alienations with the consent, of presumptive reversioners, so as to defeat the title of the actual reversioner at the time of the widow's death. But this restriction is at variance with the principle itself, and is not in accordance with the practice in other parts of India in which the Mitakshara law prevails. * * * They (their Lordships) agree with the High Court of Calcutta—*Radha Shyam Sircar* v. *Joy Ram Senapati* (15)—that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible."

In the next paragraph their Lordships apply the rule above enunciated to the case before them, and at the same time point out, as found by the Judicial Com-

(11) [1908] 35 Cal. 939=12 C. W. N. 837=8 C. L. J. 280.
(12) [1912] 16 I. C. 710.
(13) [1912] 46 P. R. 1912=13 I. C. 482.
(14) [1884] 10 Cal. 1102 (F. B.).
(15) [1890] 17 Cal. 896.
(16) [1898] 21 Mad. 128=8 M. L. J. 69.
(17) [1901] 25 Bom. 129=2 Bom. L. R. 123.

missioner of Oudh, that of the seven reversionary heirs who had executed deeds of relinquishment in favour of the widow two were four degrees removed and five were five degrees removed from the common ancestor of themselves and the widow's deceased husband. There did not appear to have been alive at the time of the sales by the widow any other reversionary heirs at all in the line of the common ancestor. Then follows what appears to be an important passage in the judgment:

"Their Lordships agree with the Judicial Commissioner that the consent of these persons was sufficient, and that it is immaterial that it was given after the execution of the deeds. * * * The appellants who claim through Matadin Singh and Baijnath Singh must be held bound by the consent of their fathers."

From the judgment of their Lordships three important facts emerge with sufficient clearness:-

(1) That the widow had sold the whole estate of her husband to a stranger for valuable consideration.

(2) That the whole body of the nearest reversioners of her husband (indeed, according to the Judicial Commissioner, the whole body of reversioners) had ratified the sales and assented to them after receiving consideration for their ratification and assent.

(3) That the suit which was brought to contest the sales was brought by the sons of the consenting reversioners.

The appellants' learned pleader has argued with great force that the ruling of their Lordships in *Bajrangi's* case (2), must be interpreted by the light of the facts of that case and of the observations made by their Lordships in the course of their judgment, and that their Lordships did not intend to lay down the broad proposition that in all cases and under all circumstances the mere assent of the nearest reversionary heir to an alienation made by a Hindu widow without justifying legal necessity debars the more remote reversionary heirs from contesting that alienation. After careful consideration of the decisions of the High Courts of Madras, Allahabad, Bombay and Calcutta, to which reference has been made above, we are of opinion that the view of the Divisional Judge in this case cannot be sustained. It is unnecessary for us to discuss in this place the above mentioned decisions of the High Courts in which the Privy Council case has been considered and explained, as it is sufficient to say for our present purpose that we entirely agree in the view of the law as propounded in the recent Full Bench decision of the Calcutta High Court in *Debi Prasad Chowdhury* v. *Golap Bhagat* (9). In that case the question referred to the Full Bench was this :

"Is the alienation by way of mortgage by a Hindu widow of a portion of the estate of her husband without any proved legal necessity but with the consent of the nearest reversioner for the time being, valid and binding on the actual reversioner who is not the heir of the consenting reversioner ?"

After a full discussion of the several Privy Council decisions, including the decision in *Bajrangi's* case (2), bearing on the question referred, the learned Sir Lawrence Jenkins, C. J., sums up the result of the authorities as follows :

"The result, then, of the authorities binding on us appears to me to be this : To uphold an alienation by a widow of her deceased husband's estate, where she is his heir, it should be shown : (i) that there was legal necessity, or (ii) that the alienee, after reasonable inquiry as to the necessity, acted honestly in the belief that it existed, or (iii) that there was such consent of the next heirs as would raise a presumption, either of the existence of necessity, or of reasonable inquiry and honest belief as to its existence, or (iv) that there was a consent of the next heirs to an alienation capable of being supported by reference to the theory of the relinquishment of the widow's entire interest and consequent acceleration of the interest of the consenting heirs. Where any one of the first three positions is established, the alienation may be of the whole or any part of the husband's estate but where the fourth alone is proved, there the alienation must be of the whole.

"Here the alienation is only of a part of the husband's estate, and that by way of mortgage, so that the fourth position cannot apply.

"I would therefore answer the question propounded by saying that the alienation by way of mortgage by a Hindu widow as heiress of a portion of the estate of her deceased husband, without proof either of legal necessity or of reasonable inquiry, and honest belief as to its existence, but with the consent of the next reversioner, for the time being, will be valid and binding on the actual reversioner, if the presumption of legal necessity or of reasonable inquiry and honest belief raised by such consent is not rebutted by more cogent proof."

Another member of the Full Bench, Sir Asutosh Mookerjee, after referring to the theory maintained by Lord Davey in *Sham Sundar Lal* v. *Achhan Kunwar* (18), that consent of reversioners merely affords proof of the propriety of the alie-

(18) [1899] 21 All. 71=25 I. A. 183=2 C. W. N. 729=7 Sar. 417. (P.C.).

nation by the widow, and also to the doctrine of surrender of the estate by the widow in favour of the next reversioner as explained by Lord Morris in *Behari Lal* v. *Madho Lal Ahir Gayawal* (19), goes on to say :

"The two doctrines, thus formulated and applied, came up for examination by their Lordships of the Judicial Committee in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (2), and it is remarkable that neither theory was expressly repudiated or approved, though detailed reference was made to judicial decisions in which either the one or the other principle had found acceptance. Under these circumstances, I think, the inference may legitimately be drawn from the decision of their Lordships in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (2), that both the doctrines are well founded on principle ; the only question is what are the limitations or qualifications, if any, subject to which each of these doctrines has to be applied. If the widow has alienated the whole of the estate of her husband with the consent of some only of the immediate reversioners, or, if she has alienated a part only of the estate of her husband with the consent of all the immediate reversioners, or again, if she has alienated part of the estate of her husband with the consent of some only of the immediate reversioners, the consent merely furnishes evidence of the propriety of the transaction or of the fact that the transferee has taken after due inquiry as to the existence of the legal necessity. The presumption which thus arises from the consent of the reversioners is not conclusive and is rebuttable; but, plainly, there is no room for the application of the relinquishment theory. In each of these cases, either the widow does not absolutely convey and destroy her limited estate or she does not accelerate the estate of the entire body of immediate reversioners. On the other hand, if the widow transfers the entire estate of her husband with the consent of the whole body of immediate reversioners, the relinquishment theory becomes forthwith applicable, the position is precisely the same as if the widow had withdrawn completely and in its entirety her own qualified estate, and the whole estate had vested at once in the entire body of immediate reversioners, who, upon this acceleration of their estate, had conveyed an absolute interest to the transferee. The distinction between the two classes of cases is fundamental and well marked, and if it is borne in mind, we can appreciate without difficulty why, Sir Andrew Scoble observes in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (2) that ordinarily the consent of the whole body of persons constituting the next reversioners should be obtained, as laid down in *Radha Shyam Sircar* v. *Joy Rama Senapati* (15), but that there may be cases in which special circumstances may render the strict enforcement of this rule impossible. This view is consistent only with the doctrine that consent of reversioners, in certain classes of cases as already explained, merely furnishes presumptive evidence of the propriety of the transaction ; from this standpoint the rule laid down in *Ramphal Rai* v. *Tula Kuari* (1) cannot be sustained."

(19) (1892) 19 Cal. 236=19 I. A. 30 (P.C.).

The samelearned Judge then sums up the result in these terms :

"Upon an examination, then, of the texts and judicial decisions applicable to this matter, and upon a review of the principles which underlie them, the following propositions appear to be deducible :

"(i) When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, the transferee can establish a good title as against the reversionary heir after her death, if he proves that the alienation was made by her for purposes of legal necessity.

"(ii) When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, the transferee can establish a good title as against the reversionary heir after her death, if he proves that he made proper and bona fide inquiry as to the actual existence of legal necessity and did all that was reasonable to satisfy himself as to the existence of such necessity.

"(iii) When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, with the consent of the reversionary heirs, such consent may raise the presumption that the transfer was for legal necessity or that the transferee had made proper and bona fide inquiries and had satisfied himself as to the existence of such necessity. The quantum of consent necessary to raise this presumption depends upon the facts of each particular case, and in all cases, the presumption raised by such concurrence on the part of the reversioners is rebuttable.

"(iv) When a Hindu widow has alienated her entire interest in the estate inherited by her from her husband, with the consent of the whole body of persons entitled to succeed as immediate reversionary heirs, the transferee acquires a good title as against the actual reversionary heirs at the time of her death."

In the result, Sir Asutosh Mookerjee concurred with the learned Chief Justice in the answer proposed by him to the reference.

This decision of the Calcutta High Court is, in our opinion, perfectly sound, and we have no hesitation in following it. The ruling of this Court, *Tek Chand* v. *Mt. Gopal Devi* (13), which has been relied on by the respondents' counsel is not directly applicable to the facts of the case before us. There the nearest reversioners on the widow's husband who had consented to the alienation by the widow had male issue, and it is pointed out by this Court that the chances of the then plaintiff (he being a more remote reversioner) succeeding to the property in suit by inheritance were very remote and insufficient to support a suit for a declaration of the invalidity of the alienation under S. 42, Specific Relief Act. The reference to *Bajrangi's* case (2) at p. 171 was in the nature of obiter dictum, and it seems to us that

the learned Judges did not feel called upon to consider and lay down in clear terms what the real effect of the decision of their Lordships of the Privy Council on that case was. It is significant however that the learned Judges explicitly stated in the paragraph relied upon that the consent of the nearest reversioners concerned must be a bona fide one.

In the case before us the learned Divisional Judge has dismissed the suit of the plaintiffs simply on the ground that they are debarred from suing by reason of the consent of the nearest reversioner, Shankar Das, to the sale by the widow in favour of Raja Khan. This position is untenable, and the question of the effect of the consent of Shankar Das on the plaintiffs' claim must be decided with reference to the considerations laid down by the Calcutta High Court in the Full Bench decision above referred to.

We observe that the Divisional Judge has not recorded considered findings on the questions whether the plaintiffs are the reversionary heirs of Kishan Chand, deceased, and whether the sale by the widow was for legal necessity, and he must record fresh findings on these two points after a careful consideration of the evidence adduced by the parties. He must also decide whether or not there are any other reversionary heirs of Kishan Chand, deceased, between Shankar Das and the plaintiffs, and if there are any other reversioners how the fact of their extistence would affect the plaintiffs' claim.

For the foregoing reasons, we accept the appeal, set aside the decree of the Divisional Judge and remand the case to him for re-decision under R. 23, O. 41, Civil P. C. The stamp on this appeal will be refunded and other costs will be costs in the cause.

R.M./R.K. *Appeal accepted.*

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## A. I. R. 1914 Lahore 370

JOHNSTONE AND SCOTT-SMITH, JJ.

*Bahadur Chand* — Defendant—Appellant.

v.

*Naina Mal* and *others*— Plaintiffs—Respondents.

First Appeal No. 1100 of 1911, Decided on 16th July 1914, from decree of Dist. Judge, Lyallpur, D/- 21st August 1911.

**Hindu Law—Alienation —Setting aside—Limitation time runs from date of possession actual or constructive of the vendee.**

In a suit under the Mitakshara law for possession of land by annulment of illegal sales by his father, the son's only cause of action is the taking of possession by the vendee of what was the son's joint share of the family property, and his suit ought to be brought within 12 years of such adverse possession.

It is not necessary in order to obtain possession that the purchaser should step on to the land at all. The physical possibility of the buyer dealing with the thing exclusively as his own is all that is necessary. [P 371 C 1,2]

*Mahomed Shafi*, *Sheo Narain* and *Sangam Lal*—for Appellant.

*Oertel*—for Respondents.

**Judgment.**—This was a suit by the plaintiffs-respondents for possession of certain land sold by their father, Jhanda Mal to Bahadur Chand, defendant-appellant, by a registered deed on 3rd August 1893. The deed recites that the full consideration, Rs. 400, has been paid and that possession has been given to the vendee. A number of issues were framed by the first Court, but the important ones dealt with the questions of limitation and necessity for the sale. The finding of the Court was that the suit was within time having been brought within 12 years from the time when the vendee obtained possession of the land sold. The Court further found that necessity for the sale was not proved and gave the plaintiffs a decree for possession.

The defendant has appealed and the only point argued before us is whether the suit is barred by limitation. It is admitted now that the parties are governed by Hindu law and that the land sold was the ancestral property of the plaintiffs' father. The first question which we have to decide is When did the vendee obtain possession of the land sold? The sale as already stated took place on 3rd August 1893. On 13th August 1893 an entry was made in the mutation register to the effect that Jhanda had sold the land to Bahadur Chand. At first mutation was refused on the ground that the land was unculturable and the vendee had not taken physical possession of it. Subsequently however on 1st May 1894, mutation was sanctioned on the ground that the vendor had admitted the transfer of possession and the sale had been completed. No cultivation of the land took place until the year 1904 and the lower Court