

(1953) 03 KL CK 0008

In the High Court Of Kerala

Case No : A.S. No's. 220 to 224 and 448 of 1123 (T) and A.S. No. 86 of 1125

Eravi Pillai Krishna Pillai and Another

APPELLANT

Vs

Maluk Mohammad Shaul and Others

RESPONDENT

Date of Decision : 30-03-1953

Acts Referred:

Civil Procedure Code, 1882 — Order 21 Rule 11(2), Order 21 Rule 22, Order 21 Rule 54, Order 21 Rule 54(1), Order 21 Rule 68
Limitation Act, 1963 — Article 12, 120, 130, 9
Public Demands Recovery Act, 1895 — Section 10
Revenue Recovery Act, 1968 — Section 1, 112, 30, 32(3), 33
Travancore Revenue Recovery (Amendment) Act, 1097 — Section 23A, 23B, 6
Travancore Revenue Recovery Act, 1068 — Section 23, 23A, 25, 5

Citation : (1953) 03 KL CK 0008

Hon'ble Judges : Vithayathil, J;Sankaran, J;Kumara Pillai, J

Bench : Full Bench

Advocate : M. Madhavan Nair and M. Krishnan Nair, in A.S. No. 220 of 1123, N.K. Narayana Pillai and M. Ramanatha Pillai, in A.S. No. 448 of 1123 and N. Varadaraja Iyengar, in A.S. No. 86 of 1125, for the Appellant; M.N. Parameswaran Pallai, Govt. Pleader in A.S. Nos. 220 to 224 and 448 of 1123 and for Respondent 1 in 86 of 1125, N.K. Narayana Pillai, in A.S. Nos. 220 to 224 of 1123 and M.P. Ramakrishna Pillai, for Respondent 2 in A.S. No. 86 of 1125, for the Respondent

Judgement

Vithayathil, J.—A.S. Nos. 220 to 224 of 1123 and A.S. No. 448 of 1123 were referred to a Full Bench by the following order:

These appeals were heard together. The suit O.S. 17 of 1118 in the District Court of Nagercoil as originally framed was to set aside several revenue sales in respect of different portions of the plaint properties comprised in four survey numbers lying in one tract of paddy land called Nedunkuttu Konam. Subsequently under orders of the Court the suit was split up into seven separate suits, O.S. 17 of 1118 and O.S. 146 to 151 of 1119. O.S. 17 of 1118 was to set aside the revenue sale dated 20-12-1109 in respect of 54 cents in S. No. 3002.

O.S. 146 to 151 of 1119 were to set aside the revenue sales of 5-6-1111 regarding 99 cents in S. No. 3002 of 30-12-1112, regarding 99 cents in S. No. 3001, of 31-9-1112 regarding 9 cents in S. No. 3003 of 22-10-1113 regarding 10 cents in S. No. 3003/1, of 22-1-1110 regarding 33 cents in S. No. 3003 and of 26-7-1114 regarding 14 cents in S. No. 3020/A respectively. The cases were jointly tried. The Court below decreed the suits O. S. 146 to 149 of 1119. Defendants 2 and 5 have filed A.S. 220 to 224 of 1123 against the decrees in O.S. 147 of 1119, O.S. 149 of 1119, O.S. 148 of 1119 and O.S. 146 of 1119 respectively. Defendant 1 Sirkar and the Plaintiff have filed memorandum of objections. O.S. 150 of 1119 was dismissed by the trial Court and the Plaintiff has filed A.S. 448 of 1123 against that decree. Defendant 1 and Defendants 2 and 5 have filed memorandum of objections.

2. Admittedly all the above suits have been filed more than one year after the revenue sales impugned. The case of the Plaintiff is that the provisions of the Revenue Recovery Act in the matter of sale of immovable property for arrears of public revenue have not been complied with and therefore the sales are "ab initio" void for want of jurisdiction to sell. He therefore contends that neither Section 51, Revenue Recovery Act nor Article 9, Limitation Act is applicable to the present cases and that the suits are therefore within time. In support of his position the learned Advocate for the Plaintiff relied on the decision of the Travancore High Court reported in - "Thomman Ouseph v. Diwan of Travancore" 28 Trav. LR 55(A), and the subsequent decisions of the same Court reported in - "Sirkar v. Kamapalan" 57 Trav. LR 413 (B) - John v. Philip" 1945 Trav. LR 926(C), -"1948 Trav. LR 131 (D)", and -"Damo-dara Kyaial v. The Diwan of Travancore" 1943 Tray LR 1032 (E).

3. Section 51 Revenue Recovery Act as it was first enacted was as follows: "Nothing in this Regulation shall be held to prevent parties, deeming themselves aggrieved by any decision or order passed or proceedings taken under this Regulation from suing the Government in the Civil Courts.

Provided that such suits shall be preferred within six months from the time at which the cause of action arose.

Provided further that that the whole time occupied by the Diwan in revising the proceedings u/s 50 shall be excluded from the computation of the period of limitation of the said six months".

In construing this section Hunt and Muthunayagom Pillai JJ. in - "25 Trav. LR 233 (F)". held: that "if in any particular case, there has been a revenue sale when there was no revenue in arrears, the whole of the proceeding was beyond the jurisdiction of the revenue officer, who held the sale and hence void "ab initio" and not entitled to the protection given by the Revenue Recovery Law. In Such a case the sale is, in the eye of law, non-existent from the very commencement and consequently there will be no necessity to set it aside". As a result of this decision the six months period of limitation prescribed by the above section for

institution of suits applied only to cases where the sale of property was for arrears of revenue in fact due and not to cases where the property was sold for arrears of revenue alleged by the revenue authorities to be due but was not really due.

4. After the decision in - "25 Trav. LR 233 (F)". the above section was substituted by the following section under Act 3 of 1087."Nothing in this Regulation shall be held to prevent parties deeming themselves aggrieved by any decision or order passed or proceedings taken under this Regulation "for arrears due or alleged to be due from such parties" from suing the Government in the Civil Courts:

Provided that such suits shall be preferred within one year from the time at which the cause of action arose:

Provided further that the whole time occupied by the Dewan in revising the proceedings u/s 50 shall be excluded from the computation of the period of limitation of the said one year.

The words "for arrears due or alleged to be due from such parties" in the above section were introduced with a view to bring within the purview of the section all revenue sales whether they be for arrears of revenue actually due or alleged by the revenue authorities to be due but not really due.

5. Section 51 of the Act again came up for consideration in Anr. case reported in 28 Trav. L. R. 55 (A)". In that judgment Krishnan Nair C.J. and Muthunayagom Pillai J. stated thus:

"The point for determination in this appeal is whether the suit is barred by limitation. The decision of this question depends upon the effect to be given to some preliminary steps which the Revenue Recovery Regulation requires to be adopted before the sale is effected. These preliminary steps are, in our opinion, matter of substance and not of mere form and their observance is a condition precedent to giving the revenue officers jurisdiction to sell property. A sale without jurisdiction is void "ab initio" and is a nullity, and there is necessity to cancel only those sales which, but for such cancellation, would remain valid. A revenue sale without jurisdiction, therefore, does not require to be set aside and the limitation period applicable to such a sale is not six months but twelve years, and the party deprived of possession by such a sale may bring a suit for recovery of possession at any time before the expiry of twelve years from the date of dispossession. The right to sell the properties of a private person for arrears of revenue, vested in public officers, is a statutory right, and in order that this right which is the creation of a statute may come into existence, all the formalities prescribed by the Statute must be substantially complied with. Otherwise, the right does not come into existence and cannot therefore be exercised". This decision was pronounced on 1st Kumbhom 1087 just about two weeks after Act 3 of 1087 came into force.

6. As a result of the decision in - "28 Trav. L.R. 55 (A)" in order to get

jurisdiction to sell the properties for arrears of public revenue, the revenue authorities had to comply substantially with the provisions enjoined under the Act in the matter of the sale of the properties. Otherwise the sale would be without jurisdiction and therefore void. It appears that with a view to get over the result brought about by the above construction of the statute, Section 51 was again amended by Act 8 of 1094 by adding after the words "proceedings taken" the words "or purporting to be passed or taken". The section as amended stands as follows:

Nothing in this Regulation shall be held to prevent parties, deeming themselves aggrieved by any decision or order passed or proceedings taken or "purporting to be passed or taken under this Regulation" for arrears due or alleged to be due from such parties, from suing the Government in the Civil Courts.

Provided that such suits shall be prepared within one year from the time at which the cause of action arose:

Provided further that the whole time occupied by the Dewan (or Land Revenue and Income Tax Commissioner) in revising the proceedings u/s 50 shall be excluded from the computation of the period of limitation of the said one year". It may also be mentioned that the Act was again amended under Act 10 of 1097 by which Section 6 of the Act was repealed and it was virtually reenacted as Sections 23-A and 23-B.

7. Sections 23-A and 23-B relate to the written demand to be served on the defaulter before attaching his immovable property and lay down the form and contents of that notice, the manner in which it has to be served and other details in connection with the demand. Section 24 of the Act enjoins the manner in which the attachment of immovable property is to be effected. Section 32 lays down the rules to be observed in the sale of immovable property in the matter of notice of sale and other particulars.

8. In determining whether Section 51, proviso (1) will operate as a bar to a suit brought after one year from the date of the revenue sale, the main questions that arise for consideration are: (1) whether in view of Section 51 as it stands a sale under the Revenue Recovery Act conducted without the issue of any of the notices enjoined under Sections 23-A and 32 or without attachment u/s 24 of the Act would make the sale bad for want of jurisdiction and therefore void; (2) whether even if the above notices had been issued the non-service of notices in the prescribed manner or the non-compliance with the provisions of Sections 23-A, 24 and 32 in any other particulars or the non-compliance with any other provisions of the Act will again make the sale void for want of jurisdiction; or (3) whether the irregularities mentioned in Nos. 1 and 2 above would make the sale voidable only.

9. The irregularities pointed out in the cases before us come under No. 2 mentioned above. The Plaintiff has also raised the contention in all the cases that since no one has been brought on the revenue records as the legal

representatives of the deceased thandaper-holder there is no notice to the defaulter as enjoined u/s 23-A of the Act. It is also contended by him that a larger portion of the land than was sufficient to discharge the arrears was sold in each case and therefore the sales were void on account of the violation of Section 41. It appears that the purpose behind the amendment of Section 51 under Act 8 of 1094 was to make all such sales voidable only and thus make it obligatory for the parties deeming themselves aggrieved to prefer suit for setting aside the sales within one year from the time at which the cause of action arose. How far that object is achieved by the amendment in question is a matter which has to be considered.

10. It is to be regretted that in none of the reported decisions after the abovesaid amendment of Section 51, the effect of the amendment was considered. The decisions in -"57 Trav L.R. 413 (B)" - "1045 Trav LR 926 (C) - "1948 Trav LR 131 (D)" and - "1948 LR 1032 (E) though the sales sought to be set aside in all those cases were after the amendment of Section 51, merely followed the dictum in - "28 Trav LR 55 (A) without even noticing the legislative changes in Section 51 of the Act. It has also to be noted that while the decision in - "28 Trav LR 55 (A)" and some subsequent decisions insisted only substantial compliance with the provisions of the Revenue Recovery Act for conferring jurisdiction on the Revenue Authorities to sell the property for arrears of public revenue the decision in - "1948 Trav. L R 131 (D)" laid down "that the provisions under the Revenue Recovery Act are imperative and they are to be "strictly" complied with for the validity of the sales, and every detail prescribed under the rules have to be followed to give jurisdiction to the Revenue Authorities to conduct a valid sale." Vide - "1948 Trav LR 131 at p. 134 (D).

11. The only case in which the question was considered with reference to Section 51 as amended is an unreported decision in -A.S. 34 of 1113" (Ex. 63) where Nokes J. and Krishna Pillai JJ. held that "when notice of demand was not duly served, or due notice of sale was not published or any other material formality was neglected Section 51 of the Act applied to sales conducted since-1094". This is in conflict with the view expressed in the reported decisions cited above. In view of this conflict and also in view of the importance of the questions involved we think that an authoritative decision by a Full Bench is necessary.

12. Therefore, u/s 24 of the High Court Act we refer the above cases for hearing and decision by a Full Bench.

26th July 1951.

Sd/- K.A. Gangadhara Menon, Judge. I agree. Sd/- K. Sankaran, Judge. 2. A.S. No. 88 of 1125 was subsequently referred to the Full Bench by the following order:

The question raised here is the same as that arising in A.S. 220/23 and that case has been referred to a Full Bench. This appeal will also therefore be placed before the Full Bench to be heard and disposed of along with that case.

Sd/- K.T. Koshi, Chief Justice. Sd/ K.S. Govinda Pillai, Judge. 3. The important question to be considered in these appeals is whether the suits which gave rise to these appeals are barred by limitation. The revenue sale which was sought to be set aside in each of these suits was confirmed more than a year before the date of the respective suit. Article (9)(b), Travancore Limitation Act which was in force when these suits were filed prescribed a period of one year for a suit to set aside a revenue sale.

The Article reads thus:

Period of Time from which Limitation. Period begins to run.

(9) To set, aside any of the following sales (a).... (b) sale for arrears One year. When the sale is of Government confirmed or would revenue or for any otherwise become demand recoverable final and conclusive as such arrears. had no such suit been brought.

If Section 51, Travancore Revenue Recovery Act, Act 1 of 1068, under which the sales were held, applies to a suit to set aside a revenue sale the period of limitation prescribed by that section is also one year.

4. The Plaintiffs' case is that the revenue sales-which are sought to be set aside are void and not merely voidable, that the prayer in the suits for setting aside the sales is superfluous, and that suits are really for declaration that the revenue sales are void and for consequential reliefs relating to recovery of possession of property. If the sales are void the period of limitation that would apply is that prescribed by Article 130, Travancore Limitation Act corresponding to Article 142 of the Indian Act, namely, 12 years from the date of dispossession of the property. It is not disputed that if the revenue sales are void the suits are not barred by limitation. Therefore, the real question for decision in these appeals is whether the revenue sales in these cases are void or not.

It is argued for the Plaintiffs that the sales were not conducted in conformity with the provisions of the Travancore Revenue Recovery Act, that a strict compliance with those provisions is a condition precedent for conducting a sale under the Act, that if that condition is not satisfied the revenue authority will have no jurisdiction to sell a property under the Act and that, therefore, a sale conducted in contravention of the provisions of the Act will be void and not merely voidable. The provisions of the Act which according to the Plaintiffs, have been contravened in one or the other of the revenue sales in these suits are those contained in Sections 23-A, 24, 32 and 41. The question whether the failure to comply with any of these provisions will affect the jurisdiction of the revenue authority to sell the property will depend upon the further question whether these provisions are mandatory or not. If they are not mandatory the failure to comply with them will be only an irregularity and will not affect the jurisdiction of the revenue authority to conduct the sale. Even if the provisions are mandatory the further question will be whether they should be strictly complied with or whether a substantial compliance will be sufficient to confer jurisdiction on the

revenue authority to sell a property.

5. Before going into the question whether the provisions contained in the sections mentioned above are mandatory or not it; is necessary to note the distinction between a mandatory or absolute enactment and a directory enactment. The distinction is explained thus by Craies:

When a statute is passed for the purpose of enabling something to be done and prescribes the way in which it is to be done, it may be either that is called an absolute enactment, or a "directory" enactment, the difference being, as explained in - "*Woodward v. Sarsons*" (1375) L.R. 10 C.P. 733 (G) that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment is obeyed or fulfilled substantially, i.e., that the act permitted by an absolute enactment is lawful only if done in accordance with the conditions annexed to the statutory permission. If an absolute enactment is neglected or contravened, a Court of law will treat the thing which is being done as invalid and altogether void, but if an enactment is merely directory it is immaterial, so far as relates to the validity of the thing which is being done, whether it is complied with or not.

(Craies on Statute Law, 5th Edition, page 240).

6. What then is the test for determining whether a particular enactment or a particular provision in a statute is mandatory or not? It must be said that there is no general rule by which we can say that a particular enactment is mandatory and not directory or "vice versa". This is what Lord Campbell said in - "*Liverpool Borough Bank v. Turner*" (1861) 30 L. J. Ch. 379 (H):

No universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.

Citing this dictum of Lord Campbell Lord Penzance observed thus in - "*Howard v. Bodington*" (1877) 2 P.D. 203 (I):

Now, the distinction between matters that are directory and matters that are imperative is well known to us all in the common language of the Courts at Westminster. I am not sure that it is the most fortunate language that could have been adopted to express the idea that is intended to convey; but still, that is the recognised language and I propose to adhere to it. The real question in all these cases is this: A thing has been ordered by the Legislature to be done. What is the consequence if it is not done? In the case of statutes that are said to be imperative, the Courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all void.

On the other hand, when the Courts hold a provision to be (mandatory?) or directory, they say that, although such provision may not have been complied

with, the subsequent proceedings do not fail. Still, whatever the language, the idea is a perfectly distinct one. There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the Court to be of that material importance to the subject-matter to which they refer, as that the Legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the Court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow, must come to an end....

I have been very carefully through all the principal cases, but upon reading them all the conclusion at which I am constrained to arrive is that you cannot glean a great deal that is very decisive from a perusal of those cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them is to come to the conclusion which was expressed by Lord Campbell in the case of - "Liverpool Borough Bank v. Turner (H)",... I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.

7. Maxwell deals with the question in the following manner:

The reports are full of cases dealing with statutory provisions which are devoid of indication of intention regarding the effect of non-compliance with them. In some of them the conditions, forms or other attendant circumstances, prescribed by the statute have been regarded as essential to the act or thing regulated by it and their omission has been held fatal to its validity. In Ors. , such prescriptions have been considered as merely directory, the neglect of which did not affect its validity or involve any other consequences than a liability to a penalty, if any were imposed, for breach of the enactment. The propriety, indeed, of ever treating the provisions of any statute in the latter manner has been some times questioned, but it is justifiable in principle as well as abundantly established by numerous authorities.

It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard or as imperative, with an implied nullification, for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and, when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of

neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the Legislature. The whole scope and purpose of the statute under consideration must be regarded. The general rule is that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially." (Maxwell, on the Interpretation of Statutes, 9th Edition pages 373-374).

8. The following are some of the tests given by Craies for deciding whether an enactment is mandatory or not:

As a general rule, statutes which enable persons to take legal proceedings under certain specified circumstances must be accurately obeyed notwithstanding the fact that their provisions may be expressed in merely affirmative language... This rule may also be expressed thus - that when a statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with....

If the object of a statute is not one of general policy or if the thing which is being done will benefit only a particular person or class of persons, then the conditions prescribed by the statute are not considered as being indispensable. This rule is expressed by the maxim of law, "Quilibet potest renuntiare juri pro se introductu". As a general rule the conditions imposed by statutes which authorise legal proceedings are treated as being indispensable to giving the Court jurisdiction. But if it appears that the statutory conditions, were inserted by the Legislature simply for the security or benefit of the parties to the action themselves, and that no public interests are involved, such conditions will not be considered as indispensable and either party may waive them without affecting the jurisdiction of the Court.

(Craies pp. 246, 247, 248).

9. It may also be useful to refer to the following passage in Halsbury relating to this question.

Upon the principle that the ordinary sense of enacting words is primarily to be adhered to, provisions which appear on the face of them to be imperative cannot without strong reason be held to be directory; nor are those which are susceptible of a permissive meaning to be construed in the first instance as imperative. A duty, however, may exist outside and apart from the enacting words, whereby those on whom a faculty or power is conferred by the statute are under an obligation to exercise it. The expressions "shall and may", "shall be empowered", "it shall be lawful for" and "may" simply have for this reason, though primarily permissive, been, in certain circumstances, treated as mandatory. Broadly speaking, it may be said that powers conferring jurisdiction on a judicial body, provisions as to time in regard to procedure, and generally in public statutes, enacting words where the thing to be done is for public benefit or in advancement of public justice, must be taken to have a compulsory force.

On the other hand, statutes conferring private rights or prescribing that certain things are to be done within a certain time, time not being of the essence, or in a certain manner, or by those whose action the person invoking the aid of the statute is unable to control, are usually directory only; and where the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of that duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of legislature, such provisions should be construed as being directory only and not imperative. The Courts lean against construing words as mandatory when the result would be that the common law rights of individuals would be infringed. Much will depend upon the subject-matter, and it is in deciding whether a provision in a statute is imperative or permissive that the intention of Parliament has most strictly to be regarded. The distinctions are often fine.

(Halsbury, 2nd Edition, Vol. XXXI, pp. 529 to 531).

10. The same aspect is emphasised by Mukherjee J. in his judgment in - "Ashutosh Sikdar v. Behari Lal" 35 Cal 61 (FB) (J). The learned Judge says:

The only rule, therefore, that may be adopted is that, when the provision of a statute has been contravened if a question arises as to how far the proceedings are affected by such contravention, it must be determined with regard to the nature, scope and object of the particular provision which has been violated. As pointed out in *Macnamara on Nullities and Irregularities*, no hard and fast line can be drawn between a nullity and an irregularity; but this much is clear that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it, or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated.

It may be conceded that the application of this doctrine to an individual case, may sometimes be attended with difficulty. One test, however, is well established, and is often useful, as observed by Coleridge J. in - "*Holmes v. Russell*" (1841) 9 Dowl PC 487 (K) "it is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity." To the same effect are the observations of Taunton J. in - "*Garrat v. Hooper*" (1831) 1 Dowl. PC 28 (L)....

It is well settled however that no general rule can be laid down as to whether a provision in a statute is absolute or directory.

The learned Judge then refers to the observations of Campbell L. J. in - "*Liverpool Borough Bank v. Turner*", (H) and of Lord Penzance in - "*Howard v. Bodington (I)*", already referred to and proceeds thus:

When the object of the statute has been determined, if the statutory provision is not based on grounds of public policy and is intended only for the benefit of a particular person or class of persons the conditions prescribed by the Statute are not considered as indispensable and may be waived, because everyone has a right to waive and to agree to waive, the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, and which may be dispensed with without infringement of any public right or policy. This rule is expressed by the maxim of law "quilibet potest renuntiare juri pro se introductu" any one may renounce a law introduced for his own benefit: Broom's Maxims, 7th Edition, p. 531, and Hughes on Procedure Vol I page 353. - "Rumsey v. N.E.R. Co" (1663) 14 C. B.N.S. 641, 649 (M). - "Caledonian Railway v. Lockhart (1360) 3 Macq. HL 303, 322 (N).

As was pointed out by Lord Westbury in - "Hunt v. Hunt" (1862) 4 Dc. G.F. and J. 221, 233 (O) the words "pro se" were introduced into the mixms "to shew that no man can renounce a right of which his duty to the public and the claims of society forbid the renunciation.

- "Park Gate Iron Co. v. Coates" (1870) LR. 5 CP 634 (P); - "MacAllister v. Bishop of Rochester" (1880) 5 C.P.D. 194 (Q); - "Bhutto v. Thompson" (1372) 15 Wallace U.S. 151 (R) Montgomery v. Edwards" (1873) 14 Am. Rep. 618(S); and - "Wilson v. McIntosh" (1894) AC 129 (T).

11. Bearing in mind the above principles that should guide us in the matter of determining whether an enactment is mandatory or not we shall consider the question whether the provisions contained in Sections 23-A, 24, 32 and 41, Travancore Revenue Recovery Act are mandatory in the sense that non-compliance with those provisions would make a revenue sale void. But before going into that question it is necessary to consider an argument advanced on behalf of the Defendants on the basis of Section 51, Revenue Recovery Act. If that argument is accepted it will not be necessary to consider the question whether the provisions of Sections 23-A, M, 32 and 41 arc mandatory or not. Section 51 reads thus:

Nothing in this regulation shall be held to prevent parties deeming themselves aggrieved by any decision or order passed or proceedings taken, or purporting to be passed or taken under this Regulation, for arrears due or alleged to be due from such parties, from suing the Government in the civil Courts:

Provided that such suits shall be preferred within one year from the time at which the cause of action arises:

Provided further that the whole time occupied by the Diwan or the Land Revenue or Income Tax Commissioner in revising the proceedings u/s 50 shall be excluded from the computation of the period of limitation of the said six months.

The section as it originally stood in Act 1 of 1068 was as follows:

Nothing in this Regulation shall be held to prevent parties, deeming themselves

aggrieved by any decision or order passed or proceedings taken under this Regulation from suing the Government in the civil Courts:

Provided, that such suits shall be preferred within six months from the time at which the cause of action arose:

Provided further that the whole time occupied, by the Diwan in revising the proceedings u/s 50 shall be excluded from the computation of the period of limitation of the said six months.

12. The section was first amended in 1087 by Act 3 of 1087 by which the words "for arrears due or alleged to be due from such parties" were added and the period of limitation for suit was changed into one year from six months. The amendment appears to have been occasioned by the decision of the Travancore High Court in - "Nina Pillai Meera Pillai Lebba v. The Diwan of Travancore" 25 Trav L.R. 233(U) in which case it was held that a revenue sale held when there was no revenue in arrears was beyond the jurisdiction of the revenue authority and hence "void ab initio." The object of the amendment was to make the section applicable to proceedings taken under the Revenue Recovery Act even in cases in which revenue was not really in arrears.

In - "Sirkar v. Kumaran Marthandan" 5 Trav. LJ 61 (V), this question again came up for consideration before the Travancore High Court. In that case the revenue sale took place before the amending Regulation 3 of 1087 was enacted. The judgment of the High Court was after the regulation came into force. On the authority of - "25 Trav. LR 233 (F)", it was held that the revenue sale was void since there was no revenue in arrears. The learned Judges, however, observed that if Regulation 3 of 1087 applied to the case the position would have been different. They said:

There can be no doubt that if after the coming into force of Regulation 3 of 1087 a revenue auction sale had taken place even when there were no arrears really due, the party aggrieved would have to sue within one year from the date of the accrual of the cause of action.

13. Shortly after Regulation 3 of 1087 was enacted the Travancore High Court held in - "28 Trav. LR 55 (A)", that the period of limitation prescribed in Section 51 would not apply to a case in which the sale was held without service of a demand notice. The sale in that case also took place before Regulation 3 of 1087 came into force. Subsequently the section was further amended in 1094 by Act 3 of 1094 by which the words "or purporting to be passed or taken" were added to the section. It is argued that the effect of these two amendments is to make the section applicable to suits for setting aside revenue sales even in cases in which revenue was not in arrears and also in cases in which the provisions of the Act were not complied with by the officer conducting the sale.

According to the learned Government Pleader if the revenue authority sells a property alleging that revenue was in arrears while as a matter of fact no

revenue was in arrears and without complying with any of the provisions of the Revenue Recovery Act, that is to say, without the issue and service of the demand notice, without the attachment of the property and without any proclamation of sale the party aggrieved by the so-called sale will have to file a suit within one year to have it set aside and if he fails to do so he will lose the property. The revenue authority has only to allege that an amount of revenue is in arrear, and it is enough if he purports to sell the property under the Revenue Recovery Act and the person whose property is sold will lose it if he does not file a suit within one year even though he had no opportunity whatsoever to know that his property was sold by the revenue authority. That will be the logical consequence of accepting the argument of the learned Government Pleader. We have to see whether the wording of the section calls for such an interpretation of the section. The Travancore High Court gave such an interpretation to the section in one unreported case, namely, "A.S. No. 34 of 1118", a copy of the judgment of which was produced in the Court below and marked as Ex. 63.

In an earlier case, i.e., - "Govinda Menon v. The Diwan of Travancore" 19 Trav. LJ 589 (W), which was decided after Section 51 was amended by Act 8 of 1094 "28 Trav. LR 55 (A)", already referred to was followed and it was held that the service of demand notice on the defaulter was an essential preliminary to a revenue sale and that a sale held without such service of notice and without proper proclamation as required by Section 32(2) of the Act was void. But the revenue sale in that case took place on 27-7-1094, before the amending Act 8 of 1094 was enacted. In - "57 Trav. LR 413 (B)", the revenue sale took place after Section 51 was amended in 1094. In that case also there was no proper sale proclamation as provided in Section 32(2). Following the decision in - "19 Trav. LJ 589 (W)", it was held that the sale was a nullity. It is true that the learned Judges did not consider in that case the effect of the amendment of the section in 1094.

Ex. 63 is the next decision of the Travancore High Court relating to the question. In that case Nokes and Krishna Pillai JJ. considered the effect of the amendment of Section 61 and held that sales conducted since 1087 even when there was no revenue in arrears and those conducted since 1094 even when notice of demand was not duly served or notice of sale was not duly published would be valid unless set aside by means of suit filed within one year. But even subsequent to this decision the Travancore High Court held that the provisions of the Revenue Recovery Act relating to the service of the demand notice and proclamation of sale are mandatory and that a revenue sale-held in contravention of those provisions is void. Vide - "1945 Trav. LR 926 (C)", - "1948-1 Trav. LR 131 (D)", and - "1948 Trav. LR 1032 (E)". It is true that the Plaintiffs in these cases were not parties to the revenue recovery proceedings and it was held in these cases that Section 51 would apply only to parties to the proceedings. There was also no discussion in any of these cases about the effect of the amendment of Section 51 by Act 8 of 1094. Ex. 63 decision was also not brought to the notice of the learned Judges who decided these cases. We have, therefore, to consider the

question whether the interpretation put upon Section 51 by Nokes and Krishna Pillai JJ. in Ex. 63 judgment is warranted by the wording of that section.

14. In the first place Section 51, Revenue Recovery Act in terms applied only to parties to the proceedings. The words used are

nothing in this Regulation shall be held to prevent "parties" deeming themselves aggrieved by any decision or order passed or proceedings taken or purporting to be passed or taken under this Regulation for arrears due or alleged to be due "from such parties" from suing the Government in the civil Courts.

It is clear from the wording of the section that it will apply only to "parties" to the proceedings from whom arrears of revenue are due or are alleged to be due. That the section will only apply to parties to the "revenue proceeding has been held in numerous decisions of the Travancore High Court vide - "Raman v. Narayanan" 11 Trav. LJ 487 (X), - "Sirkar v. Mathevan" 22 Trav. LJ 503 (Y), - "Sirkar v. Velayudhan Pillai" 25 Trav. LJ 361 (Z), - "Mathew v. Varkey" 14 Trav. LT 791 (FB) (Z1) - "John v. Philip" 1949 Trav LR 925 (Z1a), - "1948 Trav. LR 131 (D)", and - "1948 Trav LR 1032 (E)".

The same view was taken by this Court also in - "Madhavan Nayar v. State" 6 Dom LR T-C 427, in which case Sankaran J. observed thus:

The plea of limitation raised by the Defendants is based on Section 51, Revenue Recovery Act. The period of one year prescribed by Section 51 of the Act applies only to a suit to set aside the revenue sale by a person who has been a party to the sale proceedings, and not to a suit by a person who was not a party to such proceedings. That section has no application to cases where the sale itself was conducted without jurisdiction and where it is impeached by the Plaintiff whose title to the property is not lost by such a sale. In the case of a suit by such a Plaintiff the suit is governed by the 12 years" rule prescribed by Article 130, Travancore Limitation Act; vide - "1948 Trav. LR 131 (D)", and - "1948 Trav. LR 1032 (E)".

The Plaintiffs in the suits which have given, rise to these appeals were not parties to the sale proceedings. Nor were they persons from whom arrears of revenue were due or were alleged to be due. Therefore, Section 51 cannot apply to these suits.

15. Further, Section 51 is only an enabling provision. It only says that nothing in the Act shall be held to prevent parties aggrieved by any decision passed or proceedings taken under the Act from suing the Government in the civil Courts. That does not mean that the right to sue for setting aside a sale by which a person's property has been wrongfully sold under the Revenue Recovery Act is conferred on him by the section and that he will have no such right apart from the section. That is a civil right which every person possesses and there is nothing in the CPC or in any other law which prohibits him from enforcing that right. The right that is conferred by the section is the right to sue the

Government in respect of any decision or order passed or proceedings taken or purporting to be passed or taken under the Act.

It is true that the word proceedings will include a sale also, but a suit to set aside a revenue sale cannot be said to be a suit against the Government. The words used are "from suing the Government". The suit to set aside a revenue sale is really a suit against the purchaser in the revenue sale. The Government may be a proper party in such a suit but the suit cannot be said to be a suit against the Government. That in suits to set aside revenue sales the State is not a necessary party has been held in various cases. Vide - "Balkrishan Das v. Simpson" 25 Cal 833 (PC) (Z2)" - "Jahannovi v. Secy. of State" 7 Cal WN 377 (Z3) - "Balmokoond Lal v. Jairjudhan Roy" 9 Cal 271 (Z4) and - Birendra Nath Raha Vs. Mir Mahabubar Rahaman and Others, The object of the section as can be gathered from the wording of it is to enable persons aggrieved by any decision or order passed or proceedings taken under the Revenue Recovery Act by a Revenue Officer to sue the Government for proper reliefs in respect of such decision, order or proceedings.

The question whether the State will be liable for acts done by public servants in the exercise of powers conferred on them by statute has given rise to much difference of opinion. In some cases it has been held that the State will not be liable for such acts vide - Secy. of State Vs. Ramnath Bhatta, - A.M. Rose v. Secy. of State" AIR 1915 Mad 434 (Z7). It is not necessary to discuss that question in these appeals and we do not wish to express any opinion on the point. The effect, of Section 51 seems to be to confer on persons aggrieved by orders passed or proceedings taken by revenue officers under the Revenue Recovery Act, the right to sue the State in respect of such orders or proceedings, and such right they will have even if the proceedings taken are for arrears of revenue alleged to be due from them while in fact no arrears were due and also in respect of proceedings which purport to have been taken under the Act although they are not sanctioned by the provisions of the Act. As already stated, the right to sue to set aside a wrongful sale of one's property is an undisputed civil right which cannot be said to have been created for the first time by the provision contained in the section.

It was argued for the State that the purpose sought to be achieved by the amendment of Section 51 in 1087 and 1094 is not what is stated above as can be seen from the Objects and Reasons of the Bills introduced for amending the section and also from the speeches of the mover of the Bills. But in construing a statute we are not concerned with what the framer of the bill which resulted, in the enactment hoped to achieve. We have only to interpret the statute as it is. We are clearly of opinion that the wording of Section 51 does not warrant the interpretation sought to be put upon it by the learned Government Pleader. It is true that the decisions of the Travancore High Court in which the applicability of the section to suits for setting aside revenue sales was considered, proceeded on the basis that the section would apply to such suits by persons who are parties to

the revenue proceedings. But none of the above aspects of the question was considered in any of those cases.

16. Before the amendment of Section 51 in 1087 the period of limitation prescribed by the section for a suit coming within the purview of the section was only six months. But the period of limitation prescribed by Article 9, Travancore Limitation Act for a suit to set aside a revenue sale is one year. If the section applied to a suit for setting aside a revenue sale there would be two periods of limitation for such a suit, i.e., one year prescribed by Article 9, Limitation Act and six months prescribed by Section 51, Revenue Recovery Act in the case of parties to the revenue proceedings. It is doubtful whether the Legislature intended that there would be such a difference so far as the period of limitation is concerned in respect of suits to set aside revenue sales.

17. For the reasons mentioned above we are not inclined to accept the argument advanced on behalf of the Defendants on the basis of Section 51, Revenue Recovery Act and we think it necessary to (sic) into the question whether Sections 23-A, 24, 32 and 41 contain mandatory provisions of law the fulfilment of which is a necessary condition for holding a sale under the Revenue Recovery Act.

18. Section 23-A of the Act reads thus:

(1) Before proceeding to attach the immovable property of a defaulter, a written demand signed by the Tahsildar shall be served on the defaulter, specifying the amount of revenue due with interest, the land in respect of which it is claimed, and the date when it fell due, the batta due to the person who shall serve the demand and the time allowed for payment.

(2) Such demand shall be served on the defaulter in the manner prescribed in the CPC for serving summonses on Defendants.

(3) If within the time prescribed under Sub-section (1) the defaulter objects to the claim of arrears wholly or in part, the Tahsildar shall enquire into the objection and record a decision before proceeding to attachment.

Section 23-B provides thus:

When the amount due shall not have been paid pursuant to the terms of the demand and no arrangement for securing the same shall have been entered into to the satisfaction of the Tahsildar or other officer empowered in this behalf by the Division Peishkar, the immovable property of the defaulter may be attached and sold in the following manner.

So far as Section 23-A is concerned, these questions arise for consideration, namely (1) what is the effect of omission to issue a notice as required by the section; (2) what is the effect of failure to serve the notice on the defaulter in the manner prescribed by the section; and (3) is it necessary that the provisions of the section should be strictly complied with or is it enough if the provisions are

substantially complied with. According to the learned Government Pleader the omission to comply with the provisions contained in Section 23A does not affect the jurisdiction of the revenue authority to conduct a sale under the Act. According to him, the section that confers jurisdiction on the revenue authority to sell the property of the defaulter is Section 5 which reads thus:

When public revenue due on land may be in arrear, such arrear together with interest, if any, and costs of process may be recovered by the sale of the defaulter's movable or immovable property or both in the manner hereinafter provided.

On the basis of the wording of this section it is argued that the moment there is arrear of public revenue due on a land the revenue authority concerned gets jurisdiction to recover the same by the sale of the defaulter's property, that the subsequent provisions in the Act relate only to the manner in which the sale should be conducted and that failure to comply with those provisions cannot affect the jurisdiction of the revenue authority to conduct the sale. It is, therefore, argued that omission to issue a notice u/s 23A does not take away the jurisdiction of the Tahsildar to sell the defaulter's property for arrears of public revenue and that consequently a sale held without a demand notice being issued under the section is not void, the omission being only an irregularity which may be a sufficient ground for setting aside the sale by means of a suit, instituted; within one year.

19. Reliance was placed on the decision of a Full Bench of four Judges of the Madras High Court in - "Venkata v. Chengadu" 12 Mad 168 (FB) (Z 8). That was a case under the Madras Revenue Recovery Act, 2 of 1864. Section 5 of that Act is similar to Section 5, Travancore Revenue Recovery Act. Section 25 corresponds to Section 23A of the Travancore Act. Muthuswami Iyer J. who wrote the leading judgment in that case observed thus:

Another point pressed upon us is that neither the Pattadar nor the Plaintiff had, according to the plaint, a demand served upon him, and that neither of them was a party to the proceedings held under the Act. It is true that the Collector is bound u/s 25 to cause a written demand to be served on the defaulter, and that he can only proceed to recover the arrears u/s 26 by the attachment and sale of the land after the demand has been served on the defaulter and he has neglected to pay the arrears pursuant to the terms of demand; but u/s 6 the Collector has power to sell the land when there is an arrear due upon it, and Sections 25 and 26 only regulate the mode in which that power is to be exercised. The omission to conform to the prescribed procedure is certainly always an irregularity and may also at times be a material irregularity. But I see no sufficient reason to say that the proceeding, however, irregular it may be, is not a proceeding under the Act.

A distinction should be made for purposes of limitation between a sale in fact and a valid sale; and whenever there has been a sale in fact and it has been made in

the professed exercise of the power conferred by the Act, the provision inserted for the limitation of suits must be taken to refer rather to the factum than to the validity of the sale and the sale, however, irregular, must be considered to be a proceeding under the Act... I do not see my way to hold that, for purpose of limitation, material error of procedure stands on the same footing with the absence of power to sell. A sale without jurisdiction to sell may on general principles be said to be void "ab initio" and, therefore, legally non-existent; but a sale where there is power to sell, but the power is not properly exercised is only voidable and cannot be said, it seems to me, to have no legal basis or legal existence until it is set aside by a suit instituted within the time prescribed for such suits.

20. The case was followed in - *Vadlur Chinna Nagi Reddy Vs. Devineni Venkatramaniah and Another*, and in - "*Narayana v. Damodaran*" 17 Mad 189(Z 10). In the latter case also, the leading judgment was written by Muthuswami Iyer J. The decision in - "12 Mad 168 (FB) (Z 8) was, however, not followed in many subsequent decisions of the Madras High Court. In - "*Meka Peruma v. Collector of Salem*" 12 Mad 445 (Z 11) it was held that service of demand notice u/s 25, Madras Revenue Recovery Act was an essential preliminary to a sale under the Act and that absence of such service would vitiate the sale. It is true that no reference was made in that case to the Full Bench ruling in - "12 Mad 168 (FB) (Z 8) and it was also not expressly held in that case that the sale was void.

In - *Kootoorlingam Pillai and Others Vs. Sennappa Reddiar and Others*, a similar question arose for consideration. That was a case under the Madras Estates Land Act. It was held in that case that a sale held u/s 112 of the Act without notice to the lawful ryot was a nullity. Ramesam J. observed thus in that case:

In my opinion, notice to the lawful ryot is such an important condition precedent to the holding of the sale u/s 112 that the want" of it must be regarded as making the sale a nullity.

In this case also no reference was made to the Full Bench decision in - "12 Mad 168 (FB) (Z8) although reference was made to - *Vadlur Chinna Nagi Reddy Vs. Devineni Venkatramaniah and Another*, which followed - "12 Mad 168 (FB) (Z 8) *Vadlur Chinna Nagi Reddy Vs. Devineni Venkatramaniah and Another*, was distinguished on the ground that in that case subsequent proceedings in connection with the revenue sale came to the knowledge of the party and that it was for that reason that it was held in that case that the sale was not without jurisdiction.

21. *Marukkolandayammal Vs. The Secretary of State for India in Council and Another*, was a case of a revenue sale under the Madras Revenue Recovery Act, 2 of 1864. In that case it was held that the absence of a demand notice u/s 25 of the Act would make the whole of the subsequent proceedings for sale null and void. Reference was made to - "12 Mad 168 (FB) (Z 8) but it was not followed.

Jackson and Pandalai JJ. Observed thus about that case:

The Government Pleader relies on - "12 Mad 168 (FB) (Z 8)" for the view that failure to give notice u/s 25 is only an irregularity. But this case has not been followed on this point in subsequent decisions and the better opinion in this Court is as stated above.

- Vadlur Chinna Nagi Reddy Vs. Devineni Venkatramaniah and Another, and - 17 Mad 189 (Z 10)" were also referred to but distinguished. Another decision of the Madras High Court relating to a sale under the Madras Estates Land Act is - Kalepalli Rajitagiripathi Vs. Jannavala Pedakotayya and Others, In that case it was held that a sale held under that Act with notice of sale served by affixture without an attempt to effect personal service was a nullity. - "12 Mad 168 (FB) (Z 8) was, referred to but was not followed. The same view was held in -"Thyammal v. Subramania Gurukkal" AIR 1930 Mad 86 (Z 15). In the light of these later rulings of the Madras High Court it cannot be said that the Full Bench decision in - "12 Mad 163 (FB) (ZB)" is regarded as good authority by that Court.

22. The decision of the Privy Council in -"Baijnath Sahai v. Ramgut Singh" 23 Cal 775(PC) (Z 16) lends support to the position that a revenue sale held without a demand notice is null and void. That was a case under the Public Demands Recovery Act (Bengal Act 7 of 1880). u/s of that Act the Collector has to make a certificate of the amount of arrears of revenue due and. cause the same to be tiled in his office. Section provides that such a certificate will have the force and effect of a decree of a civil Court. Section 10 requires that notice of the certificate should be given to the judgment-debtor. Their Lordships held that a sale held without a certificate being, filed in the manner prescribed by Section 7 would be without jurisdiction and, therefore, null and void.

23. This question was discussed at length by the Calcutta High Court in a decision by a Full Bench of five Judges, viz. - "Poornachandra v. Deenabhandu" (34 Cal 811 (FB) (Z 17)). That also was a case under the Public Demands Recovery Act (Bengal Act 1 of 1895). The question that was referred to the Full Bench was:

Whether, when it is found that notice has not been served u/s 10, Public Demands Recovery Act, 1895, and a suit is brought for the purpose of setting aside the certificate and the sale and for recovery of possession of property, Article 12 or Article 120 of Schedule II, Limitation Act applies to such a suit.

MacLean C.J. who delivered the judgment of the Full Bench observed thus:

The solution of this question depends upon the effect to be attributed to a sale held without service of notice u/s 10. If the sale be regarded as an irregular or illegal sale, it is an obstacle which the Plaintiff must get over before he can recover possession; on this view he must ask to have the sale set aside within one year from the date of confirmation as provided in Article 12 of Schedule II, Limitation Act. If, on the other hand, the sale be regarded as held without

jurisdiction, and consequently null and void the Plaintiff need not sue to set aside the sale; he may sue to recover possession, within 12 years from the date of dispossession, as prescribed by Article 142 upon declaration that the sale is a nullity and has not affected his rights. The latter view has been uniformly adopted by this Court for several years in a series of decisions to which reference was made in the course of argument.

The ground upon which these decisions are founded appears to be that it is only after the notice u/s 10 is served that the certificate acquires the force and effect of a decree which may be enforced and satisfied by the sale of the immovable property of the debtor. It has been argued on behalf of the Appellant that this reason is unsound and that u/s 8, pub lic Demands Recovery Act every certificate made u/s v. acquires, as soon as it is made, the force and effect of a decree of a civil Court. We are of opinion that this contention is well-founded, and that the certificate when duly made and filed has, in so tar as regards the remedies for enforcing it, the force and effect of a decree of a civil Court notwithstanding that notice may not have been served u/s 10.

It has been argued, however, on behalf of the Respondents, that even if this view be maintained a sale of immovable property held without the issue of a. notice u/ s 10 is void, as the Collector has no jurisdiction to initiate execution proceedings against the debtor until a notice u/s 10 has been previously served upon him; in other words, that such a sale is without authority because if there is no notice of the certificate, there is nothing to bind the immovable property of the debtor and to enable the Collector to .sell. In support of this contention our attention has been invited to the form of the notice required to be issued u/s 10 (schedule From No. 4) and also to the provisions of Section 10, Sub-section (1), the former, it is said, shows that the object of the notice u/s 10 is not merely to effect a general attachment of all immovable property of the debtor but also to notify the demand to him and to offer him facility either to contest or to satisfy if; the latter, it is suggested indicates that the Collector has no jurisdiction to enforce and execute the certificate till the notice mentioned in Section 10 has been served, and the debtor has thus been apprised of the demand and allowed an opportunity to satisfy the same.

In answer to this argument it has been contended on behalf of the Appellant that as a certificate duly made is a. decree for a specific purpose the Collector must be taken to have jurisdiction to execute it, and if he enforces it without service of notice on the debtor u/s 10, his act not without jurisdiction, but amounts at most, to an irregular or illegal assumption or exercise of jurisdiction. The question raised is one of considerable nicety and not free from doubt as no general test can be applied to determine whether in a given set of circumstances an act is without jurisdiction and consequently void or only amounts to an irregular or illegal exercase of jurisdiction and, therefore merely voidable. It is clear, however, that the view put forward on behalf of the Respondents, if adopted, does afford intelligible basis for the rule uniformly followed for many

years past by this Court namely, that a sale held without service of a notice u/s 10 which is a condition precedent to the validity of the sale is a sale wholly without authority and is a nullity. Under these circumstances, we are not prepared to dissent from this rule which has been followed in numerous cases.

24. One of the earlier decisions of the Calcutta High Court in which this view was held is -"Saroda Charan v. Kista Mohun" 1 Cal. WN 516(Z 18) in which MacLean C.J. observed thus:

When the Act says that a notice shall be served and the whole proceedings proceed upon the footing that such notice has been duly served, and it then turns out that it has not been so served, it seems to me that all subsequent proceedings based upon and resulting from such notice having been served must be invalid.

25. The demand notice prescribed by Section 23A, Travancore Revenue Recovery Act is intended to serve the purpose which is sought to be served by Sections 7 to 10, Bengal Public Demands Recovery Act relating to the filing of the certificate and the serving of it upon the judgment-debtor before his property is sold. The purpose is to give the defaulter an opportunity either to contest the demand or to satisfy it. u/s 23B it is only

when the amount due shall not have been paid, pursuant to the terms of the demand, and no arrangement for securing the same shall have been entered to the satisfaction of the Tahsildar or other officer empowered in this behalf by the Division Peishkar

that the immovable property of the defaulter can be attached and sold under the provisions of the Act. It is, therefore, clear that the compliance with the provisions contained in Section 23A is a condition precedent for conducting a sale under the Act and that it is only when that condition, is satisfied that the revenue authority gets jurisdiction to sell the property of the defaulter. This is the view that has been consistently taken by the erstwhile Travancore High Court.

26. In - "28 Trav. LR 55 (A)" the decisions of the Calcutta and Madras High Courts relating to the question were discussed and it was held that, the service of a demand notice u/s 6, Revenue Recovery Act before it was amended by Act 10 of 1097 by which Section 6 was repealed and Sections 23A and 23B were inserted in its place, was a condition, precedent for a sale being conducted under the Act, -"23 Cal 775 (PC) (Z16)"-I Cal WN 516 (Z18)" - "34 Cal 811 (FB) (Z 17)" and-"12 Mad 445 (Z 11)" already referred to were followed by the learned Judges - "12 Mad 168 (FB) (Z 8)" - "Raja Goundan v. Raja Goundan" 17 Mad. 134(Z19) and Vadlur Chinna Nagi Reddy Vs. Devineni Venkatramaniah and Another, in which a contrary view was taken were not followed. This, case was followed in - "19 Trav. LJ 589 (W)".

27. The same view was taken by this Court in-"Sourimuthu Nadar v. Madandas", 5 Dom LRTC 143 in which case Govinda Pillai J. observed thus:

Under Section 23A, Revenue Recovery Act written demand should be served on the defaulter specifying the amount of revenue due with interest thereon, the land in respect of which it was claimed and the date when it fell due, the batta due to the person who was to serve the demand notice and the time allowed for the payment of the arrears. The service of such a notice alone would give jurisdiction to the revenue authority to start proceedings under the Act against the defaulter's properties.

To the same effect is the decision of this Court in - "Madhavan Nayar v. State" (6 Dom. L.R. TC 427) already referred to Sankaran J. observed thus in that case:

Section 23, Revenue Recovery Act, (Act 1 of 1063 of Travancore) makes it obligatory on the part of the revenue authorities to issue a demand notice to the defaulting Thandaperholders before proceeding to attach and sell their properties for recovery of such arrears. Section 23A lays down that the demand notice should specify the amount of revenue due with interest, the land in respect of which it is claimed and the date when it fell due and also the time within which the same has to be paid. Section 23B lays down that when default is made to pay up the amount as per such a demand, the immovable properties of the defaulter may be attached and sold in the manner prescribed in the Act. Thus it is clear that the revenue authorities could get jurisdiction to attach and sell the properties only after a proper demand notice had been issued to the Thandaperholders and only on finding that the notice has not been duly honoured. The sale in the present case has violated such mandatory provisions contained in Section 23, Revenue Recovery Act. This by itself is a vital defect which renders the entire sale void.

28. In the light of these rulings we have no hesitation in holding that Section 23A, Travancore Revenue Recovery Act contains a mandatory provision, that a compliance with that provision is a condition precedent for conducting a sale under the Act, that it is only if that condition is satisfied that the revenue authority will get jurisdiction to sell the immovable property of the defaulter under the Act. "A sale held without the issue of a notice as prescribed by the section will, therefore, be void and not merely voidable."

29. It was argued for the Defendants that even if the issue of a demand notice u/s 23A is a necessary condition for conferring jurisdiction on the revenue authority to conduct a sale under the Act, service of such notice on the defaulter is not necessary to confer such jurisdiction and that an omission to serve the notice or defect in the service of the notice is only an irregularity which will make the sale only voidable and not void. On the face of it the argument is unacceptable. If the issue of a written demand is a necessary condition for conducting a sale under the Act it necessarily follows that the service of that demand is an equally necessary condition. Unless the demand notice is served on the defaulter it cannot be said that a demand has been made on him. What the section says is that "a written demand signed by the Tahsildar shall be served on the defaulter" and Sub-section (2) of the section says that

such demand shall be served on the defaulter in the manner prescribed in the CPC for serving summonses on Defendants.

No purpose will be served by the issue of a demand notice unless it is served on the defaulter. What is required by the section is the service of a demand notice on the defaulter before his property is attached and sold. In most of the cases referred to above dealing with the question of demand notice the question considered was the effect of omission to serve the notice and not of omission to issue the notice. Vide - 1 Cal WN 516 (Z18)- "34 Cal 811 (FB) (Z17)". "12 Mad 445 (Z11)- Marukkolandayammal Vs. The Secretary of State for India in Council and Another, , - "AIR 1933 Mad 855 (Z14)", - Thyammal Vs. Subramania Gurukkal and Others, ". - "28, Trav LR 55 (A)", and - "19 Trav. LJ 589 (W)The mode of service of the notice prescribed in the section is that laid down in the CPC for serving summonses on Defendants. It is only if the notice is served in the manner prescribed in the CPC that it can be said that the notice has been served on the defaulter. If the notice is not so served it has to be taken that it has not been served in the manner prescribed by the section and that consequently the requirement of the section has not been satisfied.

30. Even in the case of a sale of property by the civil Court the omission to serve a notice under Order 21, Rule 22, CPC affects the jurisdiction of the Court to hold the sale and makes the sale void as held by the Privy Council in - "Ragunath Das v. Sundar Das", AIR 1914 PC 129(Z20). Approving the decision of the Calcutta High Court in - "Gopal Chunder Chatterji v. Gunamani Dasi" 20 Cal 370 (Z21), their Lordships held that a notice u/s 248, CPC 1882, corresponding to Order 21, Rule 22 of the present Code "is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor". Vide also - "Shyam Mandal v. Satinath Banerji", AIR 1917 Cal 728 (Z22), and - Rajagopala Aiyar by guardian Ramachandra Aiyar Vs. Ramanujachariar and Another, 31. Reliance was placed by the Defendants on some decisions in support of the position that mere defect in the service of notice is only an irregularity which will not affect the jurisdiction of the Court or the revenue authority, as the case may be, to conduct a sale. One case relied on was - Shyamnandan Sinha and Others Vs. Naurangi Singh and Others, There was a case under the CPC in which notice was served upon certain Defendants as majors whereas they were in fact minors. It was held that it was a case of irregularity in the service of notice and not a case of absence of service and that mere irregularity in the method of service would not affect jurisdiction. Another case relied on was - Dukkupati Venkata Subba Rao Vs. Pandrangi Kanakaraju and Others, That also was a case under the Code of Civil Procedure. The propositions laid down in that case were:

(1) Notice under Order 21, Rule 22, CPC is a necessary condition for conferring jurisdiction upon the executing Court to sell the judgment-debtor's properties and a sale without such " notice is a nullity.

(2) If the initial notice under Order 21, Rule 22 was served on the parties the

sale would not be void even though at the later stages notice was not served on all the parties if as a matter of fact, the estate was sufficiently represented by any one of the parties:

(3) The sale would be valid if the notice under Order 21, Rule 22 was served on a person who was held by the Court to be the representative of the deceased party even though it subsequently turned out that he was not the real or only representative of the deceased party.

This latter proposition had been laid down by the Privy Council in - "Malkarjun v. Narhari" 25 Bom 337 (PC) (Z26). The third case referred to is-"Haricharan Singh v. Chandrakumar Dey" 11 Cal WN 745 (Z27). That was a case under the Bengal Public Demands Recovery Act. In that case it was held that it was the due making and filing of a certificate u/s 7 of the Act which gave jurisdiction to the Collector, to sell the property of the defaulter and that non-service of the notice u/s 10 would not affect the validity of the certificate itself. This is a decision by a single Judge and we have seen that a Full Bench of five Judges of the Calcutta High Court have held in - "34 Cal 811 (FB) (Z17) that a sale held without service of notice u/s 10 Bengal Public Demands Recovery Act would be a nullity. We do not think that on the authority of the decisions relied on by the Defendants we can hold that in order to give jurisdiction to the revenue authority to sell property under the Revenue Recovery Act the mere issue of a demand notice is sufficient and that it is not necessary that the notice should be served on the defaulter according to law. We are clearly of opinion that the service of the demand notice on the defaulter in the manner prescribed by the CPC is a condition precedent for conducting a sale under the Revenue Recovery Act. A sale held without such service of notice will therefore be a nullity.

32. The further question for consideration so far as Section 23A is concerned is whether the provisions of that section should be strictly complied with in order that the revenue authority may have jurisdiction to conduct a sale under the Act or whether substantial compliance with the requirements of the section will be sufficient. In view of the fact that the compliance with the provisions of the section is a condition precedent for conducting a sale under the Act we are of opinion that those provisions have to be strictly complied with in all material particulars. The wording of Section 23B makes this position clear. It is only

when the amount due shall not have been paid pursuant to the terms of the demand and no arrangements for securing the same shall have been entered into to the satisfaction of the Tahsildar or other officer empowered in this behalf by the Division Peishkar.

that the immovable property of the defaulter can be attached and sold.

A similar question was considered by the Privy Council in - "Nawab Khaja Ahsanulla Khan Bahadur v. Haricharan Moozumdar" 20 Cal 86 (PC) (Z28). That was a case under the Bengal Patni Taluks Regulation, Regulation 8 of 1819. Section 8 of that Regulation provided for the issue of a notice and also the

publication of the same before the property of the defaulter could be brought to sale. Their Lordships observed thus in that case with regard to the mandatory nature of the provision contained in the Section:

We think that the serving of the notice is a condition precedent to the sale being held and that the notice so served must be a good notice, that is to say, it must be a notice which shall put all parties concerned in saving the tenure from sale in possession of the knowledge of what really they will have to do if they desire to save the tenure, and would be purchasers in possession of information as to the amount they will have to spend if they wish to purchase the property.

Their Lordships further observed:

It appears to their Lordships to be clear that the notice which is a condition precedent to any sale taking place under this clause must in all material respects comply with the provisions of the clause.

Section 23A provides that the written demand shall specify the amount of revenue due with interest, the land in respect of which it is claimed, the date when it fell due, the batta to be paid to the person serving the notice and the time allowed for the payment. It is necessary that all these particulars are specified in the written demand and a demand not containing all these particulars cannot be said to be a proper demand that will satisfy the requirements of the section. In order to confer jurisdiction on the Tahsildar to conduct a sale under the Act it is necessary that the demand notice should satisfy the requirements mentioned in Section 23A in all material particulars subject to the maxim "*de minimis non curat lex*".

Reference may also be made in this connection to the following observation of Pal J. in - "*DharendraKrishna v. Nihar Ganguly*" AIR Cal 266 at p. 283 (Z29):

It seems also certain that if the mandatory form preparatory to or connected with the sale is not strictly complied with the non-compliance if established will be a sufficient plea for the reversal of the sale without anything more, subject, of course, to the maxim "*de minimis non curat lex*". This seems to be well settled by the several decisions of the Judicial Committee.

33. So far as the service of the demand notice is concerned the provisions of the CPC relating to the service of summons have to be strictly complied with in view of the wording of Sub-clause (2) Section 23A which says that the "demand shall be served on the defaulter in the manner prescribed in the CPC for serving summonses on Defendants." Such service of the demand notice being a condition precedent to a sale being held under the Act it is clear that that condition will have to be fulfilled in all material particulars. But a distinction has to be made between the service of the demand notice and the record prepared relating to that service. The CPC contains provisions relating to the record to be prepared by the serving officer as to the manner in which the summons was served. For example, in the case of substituted service under Order 5, Rule 17, Code of Civil

Procedure, the serving officer has to prepare a report stating the circumstances under which the summons was served by affixture and the name and address of the person, if any, by whom the house of the Defendant was identified and in whose presence the copy of the summons was affixed.

In the case of service under Rule 16 also the serving officer, has to make a similar report as provided in Rule 18. We do not think that the directions contained in these rules should be strictly complied with in order that the revenue authority may have jurisdiction to conduct a sale under the Act. This question was considered by Sir Barnes Peacock in - "Sona Bibi v. Lalchand Choudhury" 9 W.R. 242(Z30), which was a case under the Bengal Patni Taluks Regulation (8 of 1819). Dealing with Section 8 of that Regulation, the learned Judge observed thus:

The material part of Clause 2, Section 8, Regulation 8/1819 is that the notice required to be sent into the mofussil shall be served. The zamindar is exclusively answerable, for the observance of the forms prescribed by that clause. The subsequent part of the section which prescribes that the serving peon shall bring back the receipt of the defaulter or of his manager, or in the event of his inability to procure it, that he shall obtain that which by the regulation is substituted for it, is merely directory and, if not done, does not vitiate the sale provided the notice is duly served.

Their Lordships of the Judicial Committee agreed with this view of Sir Barnes Peacock in - "Ram Sabuk v. Monmohini Dossee" 2 Ind App 71 (PC) (Z31). They observed thus in that case:

Their Lordships are disposed to agree with the judgment of the High Court as delivered by Sir Barnes Peacock confined as it is to cases where there is proof that the notice was duly served. The consequences of holding that a statutory sale of these Putnees could be set aside because one of the witnesses to the notice turned out not to be substantial, when it was in fact served, would be to give too great effect to form at the expense of substance.

In - "Maharaja of Burdwan v. Sm. Tara Soondari Debia" 10 Ind App 19 (PC) (Z32), Lord Fitzgerald said: Their Lordships desire to point out that the due publication of the notices prescribed by the Regulation forms an essential portion of the foundation on which the summary power of sale is exercised and makes the Zamindar who institutes the proceeding exclusively responsible for its regularity. Their Lordships do not, however intend at all to controvert a decision - "9 W. R. 242 (Z30) to which their attention was called, Sir Barnes Peacock when he filled the office of Chief Justice of the High Court of Bengal, to the effect that if the notice itself has been duly published, if it is not a matter of controversy, if the fact was ascertained that it was published, then one would not regard any objection either to the form of the receipt or the absence of the receipt itself. That decision was alluded to in a case before this Tribunal in - "2 Ind App 71 (PC) (Z31)", in which their Lordships say they are disposed to agree with the

judgment of the High Court confined as it is to cases where there is proof that notice was duly served. That, again, is where there is no controversy as to the fact of the service. It seems to their Lordships that the object of the Regulation was that due service or publication should not be left a matter of controversy.

In - "Maharani of Burdwan v. Murtunjoy Singh" 14 Ind App 30 (PC) (Z33), Lord Hobhouse observed:

The formalities which the Zamindar has to observe and the evidence by which that observance has to be proved are two totally distinct things. All that Sir Barnes Peacock decided in - "9 W. R. 242 (Z30)", was that if the observance of the requisite formality was distinctly proved it was not necessary to have the mode of proof which the regulation directs. In the case in - "10 Ind App 19 (PC) (Z32)", this committee found that the question whether the requisite formality had been observed depended on conflicting evidence, but that the statutory mode of proof had clearly not been followed, and they held that the decision must go against the Zamindar whose business it was to follow the prescribed method. They did not differ from Sir Barnes Peacock, nor did they hold that the statutory proof was the only proof that could be given.

34. It will thus be seen that the only mandatory provision relating to the service of demand notice that has to be strictly complied with is that relating to the service itself and not the one relating to the manner in which statutory proof of such service should be prepared. Any defect in the record prepared for that purpose cannot amount to non-compliance with the mandatory provision of the section and cannot, therefore, affect the jurisdiction of the revenue authority to conduct a sale under the Act.

35. We shall next consider the question whether the provision contained in Section 24, Revenue Recovery Act relating to attachment is a mandatory provision and whether the omission to comply with the same will make the revenue sale null and void. It has been held in various cases that omission to attach a property under the provisions of the CPC will not make the sale of that property under that Code null and void. Vide - Haidarali Gulamali Vs. Saiyed Gulam Mohiuddin, - Namdev Krishna Chaudhari Vs. Govardhan Nanabhai Gujarathi, , - K. Swaminatha Iyer and Another Vs. K.G. Krishnaswami Iyer and Others, , - "Tarka Nath v. Syama Charan" AIR 1916 Cal 465 (S37), - "Kishory Mohun v. Muhamed Mujaffar Hossein" 18 Cal 188(Z38), - "Sheodhayan v. Bholanath" 21 All 311 (Z39), - "Md. Abdulla v. Jamiat Rai AIR 1930 Lah 635 (Z40), - Raja Wazir Narain Singh Vs. Bhikhari Ram, - Narayanan Mathevan v. Kandan Kochentran" 20 Trav LR 236 (Z42), - "Arunachalam v. Chellakannu" 22 Trav LJ 93 (Z43), - "Kesava Pillai v. Aiyappan Pillai" 24 Trav LJ 723 (Z44).

It was argued for the Defendants that so far as the provisions relating to sale are concerned the CPC and the Revenue Recovery Act are statutes in "pari materia", and that the principles relating to Court sales under the CPC should apply to sales under the Revenue Recovery Act also. It is true that the provisions in the

CPC and in the Revenue Recovery Act relating to sale of immovable property are more or less analogous: The CPC provides for the issue of a demand notice under Order 21, Rule 22, before execution is taken in certain cases, for attachment of property, for claims being preferred to the attachment, for proclamation of the property, for sale by public auction and for setting aside the sale either on deposit of the decree amount or on grounds of material irregularity. There are similar provisions in the Revenue Recovery Act also. Yet there is fundamental difference between the two statutes.

The CPC relates to the ordinary mode of enforcing a civil right. The civil Court cannot be said to be a tribunal invested with special authority to enforce a right. Ordinarily every person has to seek the aid of the civil Court to enforce his civil right. But in the case of revenue due to the State, the legislature thought it necessary to confer on the revenue authorities themselves the power to realise the same in a speedy manner. The officer on whom those powers are conferred by the Statute is the person who is primarily responsible for the collection of the revenue itself. He is, therefore, in one sense both the decree-holder and the tribunal. It is a well recognized rule of law that in the case of an officer on whom special power is conferred by the Statute it is necessary that he should strictly conform to the provisions of the Statute in the exercise of the power conferred on him. In the words of their Lordships of the Privy Council in - "23 Cal 775 (PC) (Z16)

When power is given to a public officer to sell the property of any of Her Majesty's subjects the terms required by the Act which are matters of substance should be complied with.

Reference may also be made to Cooley's Constitutional Limitations, Edn. 5, Vol. II, page 1106 where the learned author says:

Where proceeding is taken under the statutory authority in derogation of the common right, every requisite of the statute having a semblance of benefit to the owner must be complied with or the proceeding will be ineffectual.

The following observation in - "Walton v. Moore" 58 Oreg. 237 (Z 45) is also quoted by Cooley:

While the proceedings regarding sale of land for taxes is in many respects analogous to sales of real property on execution, yet, there is abundant reason for requiring a stricter compliance with statutory requirements in the former than in the latter class of cases.

In - "Maharaj Mahashoor Singh Eahadoor v. Baboo Marruck Narain Singh" 9 Moo Ind App 263(PC) (Z 46) their Lordships of the Judicial Committee observed that "they thought important that the regularity of government sales under the Act, 1 of 1845 for arrears of revenue should be strictly observed." In that case the Sudder Court drew a distinction between "errors, defects, or irregularities of procedure in Courts of civil judicature" and "rules of law or conditions" laid down

in Act 1 of 1845, and the decision of the Sudder Court was affirmed by their Lordships of the Privy Council.

36. Another important feature of a sale of property under the Revenue Recovery Act for arrears of revenue due thereon is that the sale will extinguish the rights of not only the party to the proceedings but also of all other persons who may have any interest in the property. As provided in Section 39 of the Act the property is sold free of all encumbrances. The party to the proceedings will be only the landholder, namely, the registered holder for the time being. Such registered holder may have no real interest in the property at the time of the sale. The property might have been either sold or mortgaged to Ors. and if their names are not entered in the register of the revenue authorities no notice need be issued to them under the Act before the property is sold. But in the case of a Court sale under the CPC the sale can affect only the rights of parties to the proceedings. This is an important distinction between a Court sale and a revenue sale.

In the case of a Court sale the party affected by the sale has the right and the opportunity to appear at every stage of the proceedings and to raise objections to any of those proceedings. The provisions in the CPC relating to the formalities to be observed in the case of a Court sale are all meant for the protection of the parties to the proceedings and it is therefore open to them to waive objections regarding the non-compliance with any of those provisions. But in the case of a sale under the Revenue Recovery Act some of the provisions of the Act are meant for the protection of not only the party to the proceedings, but also all other persons who may be interested in the property sold. As stated already, this is one of the considerations that should be borne in mind in determining whether a provision in a statute is mandatory or not.

37. Again, the object of an attachment under the CPC cannot be said to be the same as that of an attachment under the Revenue Recovery Act. Order 21, Rule 54, CPC lays down the following procedure for the attachment of immovable property:

Rule 54 (1) Where the property is immovable the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way and all persons from taking any benefit from, such transfer or charge.

(2) The order shall be proclaimed, at someplace on or adjacent to such property by beat of drum or other customary mode and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court house and also in the Pakuthi Cutcheri or the village office, as the case may be, of the place in which the land is situate.

As is clear from Sub-rule (1) the object of an attachment under the CPC is to prevent the alienation of the property so that it may be available for sale for the realisation of the decree debt. As observed by their Lordships of the Privy Council

in - AIR 1938 230 (Privy Council) The main purpose of an attachment is to prevent a transfer or charging of the property attached by the judgment-debtor.

In the words of Mahmood J. in - "Ganga Din v. Khushali" 7 All 702 (Z 48)

the object of an attachment under the CPC is to give notice to the judgment-debtor not to alienate his property and to the public not to accept any alienation from him.

38. But the object of an attachment under the Revenue Recovery Act is entirely different. Section 24 of the Act prescribes the following procedure for the attachment of immovable property under the Act:

The attachment of immovable property shall be effected by affixing a notice thereof to some conspicuous part of the land or building to be attached by the Tahsildar in person or the Proverthicar acting under his written authority or through any other official appointed by the Division Peishkar and authorised by him in writing for the purpose. The notice shall specify the amount of revenue with interest, the land on which and the date from which it is due, and the party in arrear, and shall set forth that, unless the arrear, with interest and expenses be paid within the date therein mentioned, the land or building concerned will be brought to sale in due course of law. The notice of attachment shall be affixed in some conspicuous part of the Taluk and Proverthi Cutcheries and shall also be published by beat of tom-tom on the immovable property attached. The publication shall also be reported to the Division Peishkar.

As is clear from the language of the section the object of the attachment is to give notice of persons interested in the property attached that the property would be sold in auction if the arrear of revenue claimed is not paid within a particular time together with the interest and expenses. The Act provides for such attachment even in the case of the sale of a property for the arrear of revenue due thereon although u/s 2 of the Act such arrear is a charge on that property. Under the Code of Civil Procedure, in the case of decree's by which the decree amount is charged on a property, attachment of that property is not necessary before it is brought to sale. It is, therefore, clear that the object of an attachment u/s 24, Revenue Recovery Act, is not to prevent the alienation of the property as in the case of an attachment under the Code of Civil Procedure.

39. Then again, the provisions of the CPC themselves go to show that attachment is not absolutely necessary for selling a property under that Code. This is clear from Section 51 (b) and Order 21, Rule 11, Sub-rule (2) (j) (ii). Section 51 provides thus:

Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree-

(a)

(b) by attachment and sale or by sale without attachment of any property.

Clause (j) of Sub-rule (2) of Order 21, Rule 11, enumerates the modes in which the assistance of the Court may be required for the execution of a decree and Sub-clause (ii) provides that it may be "by the attachment and sale, or by the sale without attachment, of any property". It is, therefore, clear that a sale may be held under the CPC without attachment. But Section 23B, Revenue Recovery Act provides that if the arrear of revenue is not paid in terms of the demand notice "the immovable property of the defaulter may be attached and sold" implying thereby that it is necessary that the property should be attached before it is sold. There is nothing in the Act to show that a property may be sold under the Act without attachment. For these reasons we are of opinion that the rulings relating to sale of property under, the CPC without" attachment cannot apply to sales under the Revenue Recovery Act.

40. The question whether the provision contained in Section 24 is mandatory or not has to be determined in the light of the principles mentioned in the beginning regarding the tests to be applied in deciding whether a particular provision on a statute is mandatory or directory. As observed by Lord Campbell in - "Liverpool Borough Bank v. Turner", (H) we have to "try to get at the real intention of the legislature by carefully attending to the whole scope of the statute". According to Lord Penzance we must "consider the importance of the provision" and "the relation of that provision to the general object intended to be secured by the Act". Another test is to see whether the conditions were inserted by the legislature "simply for the security or benefits of the parties to the auction themselves" and whether "either party may waive them without affecting the jurisdiction of the Court".

In the light of these principles we are of opinion that the provision contained in Section 24 of the Act was intended by the legislature to be mandatory and not merely directory. The main object of the provision is to give an opportunity to all persons who may have an interest in the property proposed to be sold to avoid the sale by paying the arrears of revenue within the appointed time. In view of the fact that a sale under the Act will extinguish the rights not only of the party to the proceedings, namely, the Thandapper-holder, but also of all other persons who may have an interest in the property due importance has to be attached to the provisions. There is also nothing in the Act which shows that the party to the proceedings, namely, the Thandapper-holder, can waive the benefit of the provision so as to prejudice the rights of other persons who may have an interest in the property. That the legislature intended this provision to be mandatory is also clear from Section 30 of the Act which provides thus:

If, within 30 days from the date of attachment of any immovable property, any objection is made by any one other than the defaulter to the attachment of the whole or any portion of such property on the ground that such- property was not liable for the arrears of revenue for which the attachment was made, the Tahsildar shall inquire into such objection and report the result of such inquiry to the Division Peishkar. The Division Peishkar shall thereupon decide whether such

property is liable to be attached and, in case he finds the attachment untenable, he shall forthwith direct the release of the attachment.

The section allows a period of 30 days from the date of attachment for any person to object to the attachment on the ground that the property is not liable for the arrears of revenue for which the attachment is made. The Tahsildar has to enquire into this objection and report the result to the Division Peishkar. It is only in case the Division Peishkar decides that the property is liable to be attached that the Tahsildar will have jurisdiction to sell the property. It is clear from this that an attachment in the manner prescribed by Section 24 is a condition precedent for selling the property.

41. The provision contained in Section 24 is to some extent analogous to that contained in Section 8, Bengal Putni Taluks Act, Act 8 of 1819, already referred to. One of the reasons given by their Lordships of the Privy Council in - "20 Cal 86 (PC) (Z 28)" for holding that the publication of the notice mentioned in Section 8 of the Bengal Act is a necessary condition for conducting a sale under that Act is that

the object of the publication of the notice is to give not only to the defaulting Putnidars, but Dur-Putnidars, mortgagees and other encumbrancers notice of the sale.

The same is the object intended to be served by the publication of the notice mentioned in Section 24 of the Travancore Act, and we have no doubt that the publication of such notice, which is the purport of an attachment under the section is a necessary condition for selling a property under the Act. Omission to attach the property under the section will therefore affect the jurisdiction of the revenue authority to sell it and a sale held without attachment will be null and void.

42. The further question for consideration is whether the provisions of Section 24 should be (sic) compliance will be sufficient. Section 24 prescribes the manner of attaching immovable property. The object of the section is, as already stated, to give an opportunity to all persons interested in the property proposed to be sold to avoid the sale by paying the arrear of revenue with interest and expenses within the date mentioned in the notice. That object can be achieved only if the amount of revenue is correctly shown in the notice and the notice is published in the manner mentioned in the section. We saw that in - "20 Cal 86 (PC) (Z 28)" their Lordships of the Privy Council held that the notice must be one

which shall put all parties concerned in saving the tenure from sale, in possession of the knowledge of what really they will have to do if they desire to save the tenure.

Their Lordships, therefore, held that a notice which did not satisfy this condition was not a good notice under the section. In - "Walton v. Moors", (Z45) referred to by Cooley it was held that

"a statute requiring the sheriff to publish a notice stating the time and place of a tax sale, describing the parcels to be sold, stating the amount of taxes, interest to date of sale, and the penalties accrued against each tract, is mandatory, so that a statement in a notice that the amount of interest due on the tax was Section 1.12 when the amount really was Section 1.05 made the sale void". (Cooley's Constitutional Limitations, Vol.I Lpage 1106).

43. It will thus be seen that in order to satisfy the requirements of the section it is necessary that the notice should "in all material particulars comply with the provisions" of the section as held by their Lordships of the Privy Council in - "20 Cal 86 (PC) (Z 28)". In other words, the provision of the section relating to the particulars of the notice must be strictly complied with, subject, of course, to the maxim "de minimus non curat lex".

44. In order to achieve the object intended by the notice it is not sufficient that it contains the particulars mentioned in the section. It is necessary that it is published in the manner prescribed by the section. It is obvious that unless the notice is published it will not serve any purpose. Just as the demand notice u/s 23A is intended to give the defaulter an opportunity to pay the arrear of revenue or to show cause why the arrear claimed was not payable, the notice of attachment mentioned in Section 24 is intended to give an opportunity to all persons interested in the property either to pay up the arrear of revenue claimed or to show cause why the property is not liable to be sold for the amount claimed. Therefore, just as it is necessary that the notice issued u/s 23A is served on the defaulter according to law, it is necessary that the notice of attachment u/s 24 is published in the manner prescribed by that section. Then only can it be said that there has been an attachment as contemplated by the section.

It follows from this that the requirements of the section relating to the publication of the notice should also be complied with in all material particulars. We have already referred to the observation of the Privy Council in - "10 Ind App 19 (PC) (Z 32)" regarding the mandatory nature of the provision in Section 8, Bengal Putni Taluks Act, 8 of 1819 relating to the publication of the notices mentioned in that section. According to their Lordships "the due publication of the notices" formed "an essential portion of the foundation on which the summary power of sale" was exercised. To the same effect is the decision of their Lordships in - "20 Cal 86 (PC) (Z28)" already referred to.

45. We are, therefore, of opinion that the provisions contained in Section 24 relating to the particulars of the notice of attachment, and the publication of the same are mandatory provisions which should be complied with in all material particulars in order that the revenue authority may have jurisdiction to sell an immovable property under the Act. But the last provision of the section which directs that "the publication shall also be reported to the Division Peishkar" cannot be said to be a mandatory provision. That does not relate to the mode of effecting the attachment. That is obviously a directory provision and failure to

comply with it cannot in any manner affect the jurisdiction of the revenue authority to sell the property.

46. The next section to be dealt with is Section 32 which reads thus:

In the sale of immovable property under this Regulation, the following rules shall be observed:

(1) all such sales shall be conducted by the Tahsildar unless, in any case, the Land Revenue and Income Tax Commissioner or the Division Peishkar may deem it necessary that the sale should be conducted by the Division Peishkar.

(2) Previous to the sale, the Tahsildar shall issue a notice specifying the name of the defaulter, the possession, tenure and extent of land and the buildings therein; the amount of revenue assessed on land or upon its different sections; the proportions of the public revenue due during the remainder of the current Melabar year, and the time, place and conditions of the sale. This notice shall be posted, 30 days at least before the sale, in the nearest Police Station House, the Proverthicar"s and Taluk Cutcheries and on some conspicuous part of the land or building, as the case may be.

(3) The sale shall be by public auction to the highest bidder.

Sub-section (4) deals with the deposit of 15 per cent of the purchase money and the payment of the balance. Sub-section (5) provides for cases in which the purchaser fails to make the deposit or pay the balance purchase money. Sub-section (6) requires persons bidding at the auction to state whether they are bidding on their own behalf or as agents of other persons and, in the latter case, to produce written authority from their principals. The question for consideration is whether the provisions of these sections are also mandatory in the sense that failure to comply with them will make the sale null and void.

So far as Sub-section (1) is concerned it provides that the sale should be conducted by the Tahsildar or the Division Peishkar. It is clear that a sale conducted by any other officer will be without jurisdiction and therefore void. Sub-section (2) relates to the proclamation of the sale while Sub-section (3) provides that the sale shall be by public auction. Sale by public auction necessarily implies that notice of the sale should be given to the public. Therefore, a sale of property by the revenue authority without notice to the public will not be a sale under the Act. It is by means of the proclamation of sale that notice of the sale is given to the public. In order to constitute a sale under the Act it must be preceded by a proclamation and it must be by public auction to the highest bidder. A sale without proclamation being one not contemplated by the Revenue Recovery Act will be a nullity. Similarly a sale held against the notice of proclamation will also be null and void. If, for example, the notice is that the sale will take place in a particular place and at a particular time and if it is actually held in a different place or at a different time it will be as good as a sale without a proclamation. Such a sale will be void even under the Code of Civil

Procedure.

In - "Basharutulla v. Uma Churn Dutt" 16 Cal 794 (Z49), the property was sold at an earlier hour than that stated in the proclamation and the Court held that there was no sale within the meaning of the Code, and that the proclamation of the time and place and the holding of the sale at such time and place were conditions precedent to its being a sale under the Code. This decision was followed in - Jayarama Aiyar Vs. Vridhagiri Aiyar, That was a case in which the property was sold at a time and by an officer different from those mentioned in the proclamation. Oldfield J. observed thus in that case:

It seems to be that if, when a proclamation was made any of the usual and effective methods prescribed or permitted by the Code for its publication has been misleading as to details of the matter proclaimed and has been such as not merely not to give information to possible bidders, but to divert them to a place where the sale is not to be held, the result must be in the-words of - "Basharutulla v. Uma Chura Dutt", (Z49), that the property had never been sold under the Code at all.

Seshagiri Iyer J. who concurred in this view said:

The Code itself gives some indications as to when a sale can be regarded as irregular and when illegal. In Order 21, Rule 90, which permits an aggrieved party to come to Court to set aside a sale, the language employed is that it may be set aside on the ground of material irregularity or fraud in "publishing or conducting" it. When there is no publication or conduct of the sale, it is, I think, a right inference to draw from R. 90 that the sale should be regarded as illegal.

47. This does not, however, mean that failure to comply with all the formalities prescribed in Section 32(2) for the proclamation of the sale will make the sale void. It has been repeatedly held that in the case of a sale under the CPC a defect in publishing or conducting it is only an irregularity and will not make the sale void. In - "Tasadduk Rasul Khan v. Ahmad Hussain" 21 Cal 66 (PC) (Z51), their Lordships of the Privy Council held that non-compliance with the requirement of Section 290 of the old CPC corresponding to Order 21, Rule 68 of the present Code, that before a sale of immovable property in execution of a decree not less than 30 days should intervene between the proclamation and the sale, was only and material irregularity and that it would not make the sale a nullity. So far as the provisions in Section 32(2) relating to the formalities to be observed in publishing a sale are concerned it cannot be said that they are of the same mandatory nature as those prescribed by Sections 23A and 24 and that a strict compliance with those formalities is a condition precedent for holding a sale under the Act. Although a sale without proclamation will not be a sale under the Act mere irregularities in the proclamation cannot affect the jurisdiction of the revenue authority to hold the sale. That the legislature wanted to draw a distinction between cases in which there was no publication of the sale and those in which there was only an irregularity in the publishing of it is clear from Section

34(2) of the Act which reads thus:

At any time within 30 days from the date of such sale application may be made to the Division Peishkar to set aside the sale on the ground of some material irregularity or mistake or fraud in publishing or conducting it; but except as otherwise is hereinafter provided, no sale shall be set aside on the ground of any such irregularity or mistake unless the applicant proves to the satisfaction of the Division Peishkar that he sustained substantial injury by reason thereof.

It follows from this that the legislature does not regard as void a revenue sale in which there has been material irregularity or mistake or fraud in the publishing or the conducting of it but that it regards it only as voidable. The effect of holding that all the provisions in the Revenue Recovery Act relating to the publishing and the conducting of a revenue sale are mandatory in the sense that the breach of any of those provisions will make the sale void and not merely voidable will lead to the result that a sale under the Revenue Recovery Act can be only either perfectly valid or completely void. If that is the position Section 34(2) of the Act will have no meaning. As stated at the outset the question whether a provision in a statute is to be regarded as absolute or not depends on the intention of the legislature; and if that intention can be gathered from other provisions of the statute it is necessary that an interpretation consistent with those provisions should be given to the provision in dispute. We have, therefore, to hold that an irregularity, mistake or fraud in publishing or conducting a revenue sale will not make the sale void "ab initio". The sale in such cases will be only voidable and will have to be set aside within the period of limitation prescribed by law.

48. It has been held in various cases that mere defects in the proclamation of a revenue sale will not make the sale void and that they are only irregularities which may make the sale voidable. In - "Gobind Lal Roy v. Ramjanam Misser" 21 Cal 70(PC) (Z52), which was a case under the Bengal Land Revenue Sales Act, (11 of 1875) their Lordships of the Privy Council held that irregularities in publishing or conducting a sale under the Act would not make the sale void. It is true that that decision was based on Section 33 of the Act which provided that no sale for arrears of revenue

shall be annulled by a Court of justice except upon the ground of its having been made contrary to the provisions of the Act and then only on proof that the Plaintiff has sustained substantial injury by reason of the irregularity complained of, and no such sale shall be annulled upon such ground unless such ground shall have been declared and specified in an appeal made to the Commissioner u/s 25 of the Act.

The Travancore Revenue Recovery Act does not contain a similar provision. It is also true that the grounds upon which the revenue sale was sought to be set aside in that case were not declared and specified in the appeal to the commissioner. Apart from this, the reasoning of their Lordships would go to show

that in the opinion of their Lordships a sale held under the Act is not void merely by reason of irregularity in the publishing or the conducting of it.

49. In - "Ramayya Naidu v. Chidambaram Chettiar 22 Mad 440(Z53), it was held that an omission to display the notice of sale in the Collector's Office was only an irregularity and would not make the sale void. In - Ananga Mohan Roy Chowdhury Vs. Kalidas Roy and Others, a revenue sale under the Bengal Land Revenue Sales Act. 11 of 1859, was held within 30 days from the date on which notice of the sale was affixed in the Collector's Office in contravention of Section 6 of that Act. It was held that the sale was not a nullity and that the restrictions, imposed by Section 33 of the Act on the right of the defaulter to have the sale set aside would apply to the case. To the same effect is the decision of the Calcutta High Court in - "Gangadhar Das v. Bhikari Charan Das" 16 Cal W. N. 227 (Z55). The Cochin High Court also has taken the view that failure to comply with the provisions of the Revenue Recovery Act relating; to the proclamation of the sale is only an irregularity and that it would not make the sale void (Vide - "Kunhunni Kartha v. Diwan of Cochin" 17 Cochin 391 (Z58) and - "Inchunni Thambay " v. Jayathan Namboori" 22 Cqchin 234 (Z57).

50. But the Travancore High Court has taken a different view on the question. In - "19 Trav. LJ 589 (W)", the demand notice was not properly served and the proclamation of sale was made only two days before the sale. Following the decision in - "28 Trav LR 55 (A)", it was held that

the preliminary steps required by the Revenue Recovery Regulation to be adopted before sale were matters of substance and not mere form and that their observance was a condition precedent in order to give jurisdiction to the revenue officers to sell the property.

It was, therefore, held that the sale was a nullity. Except for the fact that the proposition of law was too broadly stated in so far as it related to the proclamation of sale no objection can be taken to the decision in this case. In - "57 Trav L.R. 413 (B)", there was only an interval of 21 days between the date of the proclamation and the date of the sale. Following - "19 Trav. LJ 589 (W)", it was held that the provisions of Section 32(2) were imperative and that the sale was a nullity.

In - "1946 Trav L. R. 926 (C)", the proclamation notice was not affixed on the property and it was held on the authority of - "19 Trav. LJ 589 (W) that the sale was without jurisdiction and, therefore, void. In - "1948 Trav. LR 1032 (E)", the notices of attachment and sale were not properly published, and on the authority of - "19 Trav. LJ 589 (W) and - 1945 Trav. LR 926 (C)", it was held that the sale was a nullity. It will be seen that the basis of the view taken in all these cases that the observance of the provisions of Section 32(2) relating to proclamation is "a condition precedent in order to give jurisdiction to the revenue officers to sell the property" is the dictum in - "28 Trav. LR 55 (A)".

In that case the ground on which the revenue sale was sought to be declared

void was that no demand notice was served on the defaulter. The effect of omission to serve a demand notice cannot be said to be the same as that of omission to comply with the provisions of the Act relating to the publishing and the conducting of the sale. The question whether any defect in the proclamation of sale would affect the jurisdiction of the Court to sell the property did not arise for consideration in that case. When discussing the question whether the service of demand notice is a condition precedent to giving the revenue authority jurisdiction to hold a sale under the Act the learned Judges made the following observations:

The decision of this question depends upon the effect to be given to some preliminary steps which the Revenue Recovery Regulation requires to be adopted before the sale is effected. These preliminary steps are, in our opinion, matters of substance and not of mere form and their observance is a condition precedent to giving the revenue officers jurisdiction to sell property.

What the learned Judges say at page 58 of the Report is that if the demand notice has been duly served "and the other essential formalities mentioned, in the regulation have also been substantially complied with the sale would be valid". We do not think that this decision goes to the extent of holding that a strict observance of all the formalities mentioned in Section 32(2) of the Act is a condition precedent for holding a sale under the Act and that any defect in the publishing of the notice of sale will make the sale null and void and not merely voidable. In - "1948 Trav. LR 131 (D)", which was a case of non-service of the demand notice the dictum in - "28 Trav LR 55 (A)", was thus improved upon by Habeeb Mohamed J.

The provisions in the Revenue Recovery Act are imperative and they are to be strictly complied with for the validity of the sales and every detail prescribed under the rules has to be followed to give jurisdiction to the revenue authorities to conduct a valid sale.

In none of these cases of the Travancore High Court was the question considered whether there can be voidable sales under the Revenue Recovery Act, nor was the implication of Section 34(2) of the Act taken note of. The decisions of the Indian High Courts and of the Privy Council under similar revenue Recovery enactments to the effect that mere irregularities in the proclamation of a revenue, sale would not make the sale null and void were also not considered in any of these cases. It is true that in - "Madhavan Nair v. State" 6 Dom LR TC 427, a decision of this Court already referred to it was observed that failure to adhere to the procedure prescribed by Section 32 would render the sale void. But the main ground on which the sale was held to be void in that case was that there was no proper service of the demand notice. We do not find our way to accept the view taken in the above cases that a strict compliance with the formalities prescribed by Section 32(2), Revenue Recovery Act relating to the proclamation of sale is a condition precedent for holding a sale under the Act and that any defect in the proclamation of the sale will make the sale null and void.

While holding that sale without a proclamation or in contravention of the notice of proclamation will not be a sale under the Act and consequently void we are of opinion that an omission to strictly comply with the formalities prescribed by the section regarding the proclamation of sale will only be an irregularity in the publishing and the conducting of the sale which may make the sale voidable and that in such cases a suit will have to be instituted within the statutory period of one year to have the sale set aside. The question whether in a particular case there has been a proclamation in the real sense will have to be decided on the facts of that case. If the requirements of Section 32(2) as to the particulars of the notice of proclamation and as to the publication of the same have been substantially complied with it can be said that there has been a proclamation of the sale. But if they have not been, even substantially complied with and the so-called proclamation was in fact no proclamation at all as contemplated by the section the sale cannot be said to be one held under " the Act and will be void

51. As for Section 41 of the Act, we have no doubt that it contains only a directory provision. It reads thus:

It shall be lawful to the Division Peishkar or Tahsildar to attach or sell the whole or any portion of the land of a defaulter for the recovery of arrears of revenue:

Provided always that no larger portion of the land shall be attached or sold than may be sufficient to discharge the arrears with interest and expenses of attachment and sale.

It was faintly argued for the Plaintiffs that this also is a mandatory provision and that attachment and sale of more land than what is sufficient to discharge the amount of revenue claimed would be without jurisdiction and that the sale would be void. The question whether the land that is attached and sold will be sufficient to meet the demand will be to a great extent one of conjecture. The revenue authorities may not be in a position to know what amount, will be fetched by the sale. If the section is interpreted as laying down a mandatory provision conferring jurisdiction on the revenue authority to sell only that extent of property which is just sufficient to meet the demand, the attachment and sale of, say, 50 cents of land when the demand could have been satisfied by the attachment and sale of 49 cents would be without jurisdiction.

We do not think that anything like that was meant by the legislature in enacting this provision. The section is obviously meant only as a direction, to the revenue authorities not to attach and sell more land than what is sufficient to discharge the arrears of revenue due from the defaulter. An omission to comply with this direction can amount only to an irregularity and cannot in any sense affect the jurisdiction of the revenue authority to hold the sale. We have, therefore, no hesitation in holding that failure to comply with the direction contained in Section 41 will not affect the jurisdiction of the revenue authority to sell a property under the Act.

52. In the result, the following are our answers to the question whether the

provisions contained in Sections 23A, 24, 32 and 41, Travancore Revenue Recovery Act are mandatory in the sense that a failure to comply with the provisions contained in any of these sections will make the revenue sale void:

(1) The provision contained in Section 23A relating to the issue and service of demand notice is mandatory and a sale held without the issue and service of such notice will be void.

(2) The provision contained in Section 34 relating to attachment is also mandatory. The notice of attachment should comply with the provisions of the section in all material particulars and it should be published in the manner prescribed by the section. The failure to comply with these requirements will also make the sale void.

(3) A revenue sale held without proclamation or in contravention of the notice of proclamation; or against the provisions of Sub-sections (1) and (3) of Section 32 will not be a sale under the Revenue Recovery Act and will therefore be void. If the provisions of Section 32(2) have been substantially complied with it can be said that there has been a proclamation. Failure to strictly comply with the requirements of the section relating to the publishing and the conducting of the sale make the sale only voidable and not void.

(4) The provision contained in Section 41 is not mandatory and failure to comply with that provision will not make the sale void.

53. In the light of the conclusions reached by us on these questions of law we shall examine whether the revenue sales sought to be set aside in the suits which gave rise to these appeals are void or not. But before doing so it is necessary to consider Anr. contention raised by the Defendants in A.S. Nos. 221, 222, 223, 224 and 448 of 1123, viz., that the Plaintiff is not competent to question the revenue sales in these cases on the ground that he has no interest in the properties.

54. This question was decided by the Court below in favour of the Plaintiff. The Defendants have questioned, this finding in these appeals. Defendant 3 had a mortgage right for 19,500 fanams (Bs. 2730-a-l-pies 5) over Nedunkottu konam paady land. The properties sold under the revenue sales formed part of this paaday land. The mortgage was of the year 1082. Plaintiff's father, Maluk Muhamad, brought a suit against Defendant 3 for money due to him in O.S. No. 635 of 1085 of the Padmana-bhapuram Munsiff's Court and attached before judgment the mortgage right of Defendant 3 in Edavam 1086. Maluk Muhamad died during the pendency of the suit and the Plaintiff got himself impleaded in the case. The suit was decreed in 1088. In order to defeat his creditors Defendant 3 executed a sub-mortgage in favour of his father-in-law Abdur Razak on 17-3-1086.

The Plaintiff brought O.S. No. 46 of 1094 of the Nagercoil District Court against Defendant 3 and his sub-mortgagee to set aside the sub-mortgage. Under the

decree that was passed in that case the attachment before judgment was confirmed and the sub-mortgage was declared invalid as against the attachment. According to the Plaintiff's interpretation of the decree he was given a charge on the properties for the decree amount in O.S. No. 635 of 1085. In appeal filed by the Defendants the High Court confirmed the decree of the District Court with the modification that if on sale of the properties in O.S. No. 635 of 1085 any balance remained after realisation of the amount due to the Plaintiff it should go to the sub-mortgagee. Other creditors of Defendant 3 had obtained decrees against him in O.S. Nos 258 of 1087, 633 of 1087 and 105 of 1088. They attached the mortgage right and sold the same in Court auction. Those sales were in 1114. The Plaintiff brought the mortgage right to sale in execution of his decree in O.S. No. 635 of 1085 only in 1117. It is, therefore, argued that the Plaintiff acquired no right in the mortgage right as per his sale since it had already been sold in 1114.

The Plaintiffs case is that by virtue of the decree in O.S. No. 46 of 1094 he got a charge on the mortgage right of Defendant 3 for the decree amount in O. S. No. 635 of 1085 and that in any case he must be deemed to have purchased the submortgage right. Exhibit A is the copy of the decree of the District Court in O. S. No. 46 of. 1094. Exhibit B is the copy of the judgment of the High Court. The mortgage property was scheduled to the plaint in that case and the decree, Ex. A, reaffirmed the attachment before judgment in O. S. No. 635 of 1035" and allowed the Plaintiff to sell the mortgage right for realising the decree amount in that case. According to the learned District Judge this amounted to creating a charge on the mortgage right in favour of the Plaintiff. The attachments and sales in O. S. Nos. 258 and 638 of 1087 and 105 of 1088 were after the date of the decree in O. S. No. 46 of 1094.

The learned Judge was also of opinion that the sale in O.S. No. 636 of 1085 had the effect of conveying to the Plaintiff the sub-mortgage right in the property. By the decree in O.S. No. 46 of 1094 the sub-mortgage was not set aside in its entirety. The Plaintiff was only given a preference over the sub-mortgagee so far as the decree amount in O.S. No. 635 of 1085 was concerned as is clear from the judgment of the High Court, Ex. B. If any balance was left after realisation of that amount it was to go to the sub-mortgagee. That shows that the sub-mortgage was upheld subject to the rights of the Plaintiff. The sub-mortgage was executed long before the attachments in O.S. Nos. 258 and 638 of 1087 and 105 of 1088. The decree holders in those cases did not seek to set aside the sub-mortgage on the ground that it was a fraudulent transaction. The sub-mortgage must, therefore, be deemed to have been subsisting when, the mortgage right was sold in those cases, and, it could not be affected by the sales. By virtue of the decree in O.S. No. 46 of 1094 the Plaintiff must be held to have acquired the right under the sub-mortgage by his sale in O.S. No. 635 of 1085. In. the circumstances, we agree with the Court below in its view that the Plaintiff has a subsisting interest in the properties and that he is competent to question the revenue sales that gave rise to-these suits.

55. A.S. No. 220 of 1123. With regard to the question of limitation in this case the main ground urged by the Plaintiff is that the demand notice was not properly served on the Thandapper-holder, One of the Thandapper-holders was Narayanai Pillai of Pallithottathu Veedu in Chitharayil, Arumanai. Exhibit XI is the demand notice issued to her. It is seen that it was accepted by Narayani Pillai's husband Mallan Pillai Sankara Pillai. It is not stated in the endorsement in Ex. XI why it was not served on Narayani Pillai herself. Neither is it stated that Sankara Pillai was living in the house of Narayani Pillai and that the notice was served on him at Pallithottathu house. Plaintiff's case is that Sankara Pillai had several wives, that he was not living with Narayani Pillai but was living with his two other wives in Mangalavu Veedu, about a mile away from Pallithottathu Veedu where Narayani Pillai was living and that he had practically abandoned Narayani Pillai. PW. 4 is the peon who served the notice, Ex. XL He admits that Narayani Pillai was living in Pallithottathu Veedu and that Sankara Pillai was living in Mangalavu Veedu, and that Sankara Pillai had other wives by name Chakki Amma Pillai, Easwari Pillai and Bhaga.vathi Pillai. It is also seen from the evidence of P. W. 4 that Narayani Pillai had children by her first husband living with her in Pallithottathu Veedu and that some of them were adults.

Under Order 5, Rule 15, CPC it is only when the Defendant cannot be found and has no agent empowered to accept service of the summons on his behalf that service may be made on any adult; member of the family of the Defendant who is residing with him. In this case even if Sankara Pillai is regarded as a member of the family of Narayani Pillai it is seen from the evidence of P. W. 4 that he was not residing with her P.W. 4 does not also say that he took the notice to the house where Narayani Pillai was living. He does not remember at what place the notice was served on Sankara Pillai. It is only if Narayani Pillai could not be found in her house that the notice could be served on any adult member of the family residing with her.

It was argued for the Defendants that Sankara Pillai was an agent of Narayani Pillai empowered to accept service of the notice on her behalf. For this the only evidence is that of P. W. 4 who says that Narayani Pillai had told the Pakuthv officers that all notices issued to her might be served on her husband. The Court below did not accept this evidence and we also do not think that it can be held on the evidence of P. W. 4 that Sankara Pillai was an agent empowered by Narayani Pillai to accept service of the notice on her behalf. We are of opinion that the services" of the notice, Ex. XI, on Sankara Pillai was no service on the Thandapper-holder Narayani Pillai So long as the notice was not served on the defaulter in the manner prescribed by the CPC it should be taken that there was no service of the demand notice as contemplated by Section 23A, Revenue Recovery Act. When there are more than one Thandapper-holder it is necessary that the demand notice should be served on all of them. Then only can it be said that there has been a service of the demand notice as provided in Section 23A (2) Vide - "1948 Trav LR 131 (D). The revenue sale in this case has therefore to be held to be void.

56. The Court below allowed Defendant 4 receiver, and on his failure, the Plaintiff to recover possession of the suit property on depositing Rs. 70 1/2 and allowed mesne profits at the rate of 99 paras of paddy per year from the date of suit. The Plaintiff has objected to the portion of the decree directing him to deposit the sum of Rs. 70 1/2. We do not think that the Court below acted without jurisdiction in directing the Plaintiff to deposit the arrear of revenue for which the property was sold before recovering possession of the same. So long as Defendants 2 and 5 are liable under the decree to surrender possession of the property only on receipt of the amount of Rs. 70 1/2 we do not think that they can be made liable for mesne profits before the deposit of that amount by the Plaintiff. We, therefore, modify the decree of the Court below by allowing the Plaintiff to recover mesne profits only from the date of deposit of the amount of Rs. 70 1/2 and Subject to this modification the judgment and decree of the Court below are confirmed and the appeal and the memorandum of objection in A.S. No. 220 of 1123 are dismissed with costs.

57. A.S. No. 221 of 1123:" In this case the demand notices are Exs. XVI and XXXIII. Exhibit XVI is the demand notice issued to one of the Thandapper-holders, i.e. Madhavi Amma alias Chellamma. The notice was accepted by her. Exhibit XXXIII is the notice issued to the other Thandapper-holder, viz., Narayani Pillai. As in the case of Ex. XI, this notice also was accepted by Narayani Pillai's husband Sankara Pillai. Counsel for the Plaintiff in the Court below wrote down on Ex. XXXIII that it was admitted by him. It is not clear what is meant by that admission. It would seem that what counsel meant was that he admitted that Sankara Pillai did accept the notice. But this cannot amount to an admission that the notice was legally served on the Thandapper. It must have been to avoid the taking of evidence to prove that Sankara Pillai accepted the notice that Plaintiff's counsel wrote down on Ex. XXXIII that he admitted it. The question whether the notice was legally served on the Thandapper-holder will depend upon the further question whether Sankara Pillai was competent to accept it on behalf of Narayani Pillai.

We have discussed the question in A. S. No. 220 of 1123. The endorsement on Ex. XXXIII does not show that it was taken to the house of Narayani Pillai or that any attempt was made to serve it on her personally. Neither is there any evidence to that effect. Sankara Pillai was not an agent empowered to accept service of the notice on behalf of Narayani Pillai. For the reasons stated in A.S. No. 220 of 1123 it has to be held that the demand notice, Ex. XXXIII, was not served on the defaulter Narayani Pillai. This aspect of the case was not considered by the Court below. It was because only 29 days had intervened between the date of proclamation and the date of sale and therefore there was an infringement of the provision of Section 32 of the Act that the sale was held to be void. We have expressed our view that this is not a ground for holding that the sale is void. But in view of our finding that the demand notice was not served on one of the Thandapper-holders in the manner prescribed by the CPC we have to hold that the sale is void.

58. The objection memorandum filed by the Plaintiff against the direction contained in the decree of the Court below relating to the deposit of the; arrear of revenue by the Plaintiff cannot be accepted for the reasons already given by us. The Plaintiff will be allowed to recover mesne profits only from the date of deposit of the amount mentioned in the decree. Subject to this modification the judgment and decree of the Court below are confirmed and the appeal and the memorandum of objection in A.S. No. 221 of 1123 are dismissed with costs.

59. A.S. No. 222 of 1123". In this case Exs XXIX and XXX are the demand notices issued to Madhavi Amma alias Chellamma, one of the Thand-apperholders. She accepted the same. Exhibits XXXI and XXXII are the demand notices issued to Narayani Pillai. The endorsements on these notices show that she refused to accept them and that they were, therefore, served by affixture on the outer door of her house. There is no reason to hold that these endorsements are not true. It has, therefore, to be held that the demand notices were properly served in this case. But there was a grave defect in the notice of attachment. Exhibit XXIV is that notice. It does not contain the date within which the arrear of revenue, interest and expenses would have been paid in order to avoid the sale. According to Section 24 of the Act the notice

shall set forth that, unless the arrear, with interest and expenses, be paid within the date therein mentioned, the land or building concerned will be brought to sale in due course of law.

We have held that the provisions contained in Section 24 relating to the particulars of the notice of attachment are mandatory provisions which should be complied with in all material particulars in order that the revenue authority may have jurisdiction to sell an immovable property under the Act. The notice of attachment is intended to give, an opportunity to all persons interested in the property to pay up the arrear of revenue within the time mentioned in the notice and thus avoid the sale. This object cannot be achieved if no date is mentioned in the notice within which the amount should be paid. We are, therefore, of opinion that the mandatory provision of Section 24 of the Act was not complied with in this case and that the sale is, therefore, void. The objection memorandum filed by the Plaintiff relating to the direction for deposit of the arrear of revenue has to be rejected for the reasons already given by us. The Plaintiff will be entitled to get mesne profits only from the date of suit. Subject to this modification the judgment and decree of the Court below are confirmed and the appeal, "A.S. No. 222 of 1123 and the objection memorandum are dismissed with costs.

60. A.S. No. 223 of 1123". Exhibit II is the demand notice issued in this case to Narayani Pillai. P. W. 4 is the peon who served that notice. The notice was served on Sankara Pillai. We have already seen that Sankara Pillai was living with his two other wives in Mangalavu Veedu, a mile away from Pallithottathu Veedu where Narayani Pillai was living. P. W. 4 does not say that he took the notice to Pallithottathu Veedu. What he says is that he does not remember at what place

the notice was served on Sankara Pillai. The endorsement on Ex. II does not show that the notice was served on Sankara Pillai at Pullithottathu Veedu. Neither does it show that any attempt was made by the peon to serve the notice personally on Narayani Pillai.

There is also no evidence in the case to show that it was because Narayani Pillai could not be found that the notice was served on Sankara Pillai. The explanation of P. W. 4 for serving the notice on Sankara Pillai is, as already stated, that Narayani Pillai had told the Pakuthi Officers that notices issued to her might be served on her husband. This explanation cannot be accepted for the reasons already given by us. Sankara Pillai was not an agent of Narayani Pillai empowered to accept service of the notice on her behalf. In the circumstances, we have to hold that the service of the notice on Sankara Pillai was not a valid service under Order 5, Rule 15, Code of Civil Procedure. It cannot, therefore, be said that there has been a service of the demand notice on the defaulter as contemplated by Section 23A, Revenue Recovery Act. It follows that the sale was held without jurisdiction and has to be held to be void.

61. The objection memorandum filed by the Plaintiff relating to the direction for the deposit of the arrear of revenue has to be rejected for the reasons already given by us. The Plaintiff will be entitled to mesne profits only from the date of deposit of the amount mentioned in the judgment of the Court below. Subject to this modification the judgment and decree of the Court below are confirmed and the appeal and the objection memorandum in A.S. No. 223 of 1124 are dismissed with costs.

62. A.S. No. 224 of 1123." In this case Ex. XXXIV is the demand notice issued to Madhavi Amma alias Chellamma. The endorsement on it shows that she refused to accept it and that it was served by affixture on the outer door of her house. There is no reason to hold that the service was not proper. Exhibit XXXVIII is the demand notice issued to Narayani Pillai. The endorsement on it is to the effect that it was served on her son Padmanabha Kurup Bhaskara Kurup. According to the learned District Judge the service of this notice was proper. We do not find our way to agree with this view of the learned Judge. The endorsement on Ex. XXXVIII does not show that any attempt was made by the peon to serve the notice personally on Narayani Pillai. It is not stated in the endorsement that Narayani Pillai could not be found. Neither is there anything to show that the peon went to the residence of the defaulter for serving the notice on her or that the notice was served on Bhaskara Kurup at the residence of the defaulter.

It is true that the peon who served the notice was not examined in the case. But the endorsement itself shows that the notice was not served according to the provisions of Order 5, Rule 15 Code of Civil Procedure. With regard to the service of summons under Order 5, Rule 15, CPC this is what Mulla says in his commentaries on the CPC (Edn. 11. page 561).

Where no attempt is made to find the Defendant, and the summons is served on

his son, the summons cannot be said to be duly served. The enquiry as to the whereabouts of the Defendant must not be perfunctory.

In - "Meera v. Narayani Amma" 20 Trav LJ 509 (Z 58) the Travancore High Court held that four conditions should be satisfied before a service could be held to be valid under Order 5, Rule 15, Code of Civil Procedure, namely (1) the rule is applicable only where the Defendant cannot be found after an honest endeavour by the process server to effect personal service of the summons; (2) the rule can be resorted to only in the absence of an agent empowered to accept service of summons; (3) the service would be futile unless made on an adult male member of the Defendant's family; and (4) such member of the family should be one residing with the Defendant. It has been held in various cases that it is only if the Defendant cannot be found in spite of efforts made in that behalf by the process server that summons can be served on an adult member of his family residing with him. Vide - Dharam Chand Gain Vs. Kanaksarkar, - "Hardayal v. Pir Sent Das" 10 Ind Cas 242 (Lah) (Z 60) and - "Makhan Das v. Mannu Lal" 35 All 556 (Z 61). In the absence of anything in the endorsement in Ex. XXXVIII or of any evidence to show that it was because Narayani Pillai could not be found that the notice was served on her son, it has to be held that the notice was not served according to law. What Section 23A requires is that the notice should be served in the manner prescribed by the CPC for serving summonses on Defendants.

In - "34 Cal 787 (Z 27)" which was a case under the Bengal Public Demands Recovery Act the question for consideration was whether the service of notice on an adult member of the family of the Plaintiff u/s 31 of the Act was proper service on the Plaintiff. Woodroffe J. observed thus in that case:

The question is not whether notice is actually served but whether it is served in accordance with the provisions of Section 31.

Similarly what we have to consider in this cases is whether the demand notice was served on the defaulter in the manner prescribed by the Code of Civil Procedure. For the reasons given above we have to hold that the provisions of Order 5, Rule 15, CPC have not been complied with in the service of the demand notice, Ex. XXXVIII. It is true that the Plaintiff's counsel had written down on Ex. XXXVIII that he admitted it. That can only mean that he either admitted the genuineness of the notice or the fact that it was accepted by Narayani Pillai's son Bhaskara Kurup. That would not amount to an admission that the notice was served according to law. We, therefore, hold that there was no proper service of demand notice in this case also.

63. The reason given by the Court below for holding that the sale in this case is void is that the attachment notices, Exs. XIX and XX and the proclamation notice, Ex. XXI, were not properly published. In view of our finding that the demand notice was not served according to law it is not necessary to consider the question whether there has been proper publication of the attachment notice and the proclamation notice. We hold that the revenue sale is void for want of

proper service of the demand notice.

64. The objection memorandum of the Plaintiff relating to the direction for the deposit of the arrear of revenue has to be rejected. The Plaintiff will be entitled to get mesne profits only from the date of deposit of the amount mentioned in the judgment of the Court below. Subject to this modification the judgment and decree of the Court below are confirmed and the appeal and the objection memorandum in A.S. No. 224 of 1123 are dismissed with costs.

65. A.S. No. 448 of 1123." This appeal is 1 the Plaintiff. The Court below held that the revenue sale in this case was not void and that, therefore, the suit was barred by limitation Exhibit XLII and XLIII are the demand notices issued Madhavi Amma alias Chellamma. There is no reason to hold that they were not properly served Exhibits XLI, XLIV and XLVII are the demand", notices issued to Narayani Pillai. Exhibits XLI and XLIV were accepted by her. Exhibit XLVII was accepted by her husband Sankara Pillai. Learned Counsel for the Plaintiff in the Court below wrote down on Ex. XLVII to the following effect:

Service may be accepted as proper.

In view of this admission it is not necessary to go into the question whether Ex. XLVII was properly served on Narayani Pillai. On the basis of this admission we have to hold that the notice was properly served. The attachment notices, Exs. XLV and XLVI and the Proclamation notice, Ex. VII, have also been properly published. It was however, argued for the Plaintiff that the original Thandapper holder, namely, Kanakku Thampi Krishsan Chempakaraman, was alive at the time of the revenue sale and that the demand notices were wrongly served on Narayani Pillai and Madhavi Amma. It is not denied by the Plaintiff that Narayani Pillai and Madhavi Amma were the legal heirs of Krishnan Chempakaraman. "Pokku-varavu" was effected in their names in 1112 as can be seen from Exs. F and G. According to Section 1(c), Revenue Recovery Act

Landholder means the registered holder for the time being of any land, and includes his legal representative.

There was no allegation in the plaint that the demand notices were not issued to the Thandapperholder. What is stated in para 16 of the plaint is this:

(The Notice for the sale has not been properly sent or properly served as required by Section 23, Revenue Recovery Act)

The Plaintiff has filed certain fresh documents in this Court to show that Krishnan Chempakaraman was alive on the date of the revenue sales. We do not think that those documents will establish that Krishnan Chempakaraman was alive on the date of the revenue sales. Anyhow, in view of the fact that the Plaintiff had no such case in the plaint we do not think it necessary to go further into the question. We confirm the judgment and decree of the Court below and dismiss A.S. No. 448 of 1123 with costs.

66. A.S. No. 8S of 1125". The Plaintiffs in O.S. No. 158 of 1121 of the Quilon District Court are the Appellants in this case. The suit is to set aside two revenue sales, one held on 10-11-1111 and the other held on 18-7-1118. The plaint property consists of 60 cents of land. One half of it was sold under the first sale and the other half under the second sale. The property belonged to Plavila Tarwad of P. W. 4. It was outstanding on mortgage in favour of the tarwad of P. W. 2. Exhibit C is the mortgage dated 15-9-1083. P. W. 2 got the mortgage right in family partition. It is alleged that P. W. 4 got the equity of redemption of the property in the partition in his tarwad in 1039. He sold the property to the Plaintiffs under Ex. B dated 18-7-1120. The Plaintiffs filed a suit for redeeming the mortgage. Exhibit D is the copy of the decree in that case. Before the suit was decreed P. W. 2 released his mortgage right in favour of the Plaintiffs under Ex. A dated 11-4-1121. The Plaintiffs filed this suit on 26-11-1121 for declaration that the revenue sales are invalid and for consequential reliefs. The Defendants contended that the Plaintiffs had no title to the property, that the revenue sales were not liable to be set aside and that the suit was barred by limitation.

67. The Plaintiff's title to the property was questioned on the ground that P. W. 4 was not competent to execute the sale deed, Ex. B, in favour of the Plaintiffs. The Defendants did not admit the partition in the tarwad of P. W. 4. The partition deed was not produced in the case. In the absence of evidence to prove the partition the Court below held that P. W. 4 was not competent to execute the sale deed, Ex. B, and that it was not supported by consideration so as to bind his tarwad. The Plaintiffs' case is that they are in possession of the property. Defendant 2 contended that he is in possession of the southern half of the property and that the Plaintiffs are in possession of only the northern half. This contention of Defendants was also accepted by the Court below. It was also held that there were no irregularities in the conduct of the revenue sales. The suit was, therefore, dismissed with costs.

68. So far as the Plaintiffs' title to the property is concerned, it is true that the Plaintiffs have not proved that their vendor P. W. 4 got the property in partition in his tarwad. The partition deed was not produced in the case. The sale deed, Ex. B, refers to the partition deed as document No. 419 of 1089 of the Kunnathoor Sub Registrar's Office, p. w. 4 swears that the property was allotted to his share in the partition. The trend of the cross-examination of P. W. 4 was to the effect that it was his sub-tarwad that got the property in partition and not himself. This question is, however, not of much consequence so far as this suit is concerned. We have only to see whether the Plaintiffs had any interest in the plaint property on the date of suit. It is not disputed that the property was outstanding on mortgage and that the Plaintiffs have got a release of that mortgage right. They have therefore to be deemed to be the assignees of the mortgage right.

But it is argued for the Defendant¹ that the mortgage was extinguished by reason of the revenue sales of 1111 and 1118 and that the Plaintiffs could, therefore, acquire no interest in the property under the release, Ex. A. This will

depend upon the question whether the revenue sales are void or not if it is found that the revenue sales are void the mortgage in favour of P. W. 2 must be held to have been subsisting on the date of the release in favour of the Plaintiffs. Therefore, the real question for consideration in this case is whether the revenue sales of 1111 and 1118 are void or not. The suit was filed more than a. year after the confirmation of the revenue sales and unless it is found that the sales are void the suit will clearly be barred by limitation.

69. The demand notice that preceded the sale of 1111 is Ex. C dated 26-8-1111. The endorsement on the notice by the peon who served it is to the following effect:

(Since he objected to sign the notice when I showed him the notice on 10-9-1111, I effected service by placing a copy in front of him).

This certainly is not one of the modes of service of summons prescribed by the Code of Civil Procedure. There is no provision in that Code authorising process servers to throw the summons before the Defendant when he refuses to accept it. If the Defendant refuses to accept service of the summons the procedure to be adopted by the process server is that contained in Order 5, Rule 17 CPC namely, to affix a copy of the summons, on the outer door or some other conspicuous part of the house in which the Defendant ordinarily resides or carries on business or personally works for gain.

This is not what the peon did in this case. We do not think that the demand notice, Ex. G was served on the defaulter in the manner prescribed by the Code of Civil Procedure. It has, therefore, to be held that there was no service of the demand notice as contemplated by Section 23A, Revenue Recovery Act so far as the sale dated 10-11-1111 is concerned. That sale has therefore to be declared to be void. The Court below held that the service of the demand notices was valid since the person who served the notice was not examined in the case and since the Plaintiffs adduced no evidence to rebut the presumption in favour of the validity of the service. But in the light of the endorsement on Ex. G we do not think that it was necessary for the Plaintiffs to prove that the notice was not properly served on the defaulter. We, therefore, hold that the revenue sale dated 10-11-1111 is void for want of proper demand notice.

70. So far as the second revenue sale is concerned the demand notice that preceded it is Ex. G (3). The endorsement on that notice is that the Thand-apper holder refused to accept service and that it was, therefore, served by affixture on the outer door of his house. This is "prima facie" proper service and in the absence of evidence to the contrary it has to be held to be valid service. There does not also appear to have been any irregularity in the attachment and proclamation so far as the sale dated 18-7-1118 is concerned. It was, however, argued for the Plaintiffs that the Thandapper-holder had died before the date of the second sale and that the alleged service of notice is fraudulent. P. W. 4 has sworn that the Thandapper-holder, namely, Govindan Kesavan, died towards the

end of 1114 or the beginning of 1115. But the Plaintiffs had no such case in the plaint. What is stated in paragraph 5A of the plaint is thus:

(The entire revenue recovery proceedings were done secretly and fraudulently at the instance of the 2nd Defendant auction purchaser and neither the Jenmi nor the Ottidar has received any notice at any appropriate time about the proceedings.)

In the circumstances we do not think that we can accept the argument of learned Counsel for the Appellants that the Thandapper-holder was not alive when the demand notice for the second sale was issued to him. That sale has, therefore, to be held to be valid.

71. The first revenue sale relates to one half of the plaint property, namely, 30 cents. It is not stated in the plaint which particular portion of the property was sold under that sale and which portion was sold under the second sale. In view of our finding that the sale dated 10-11-1111 is void and that dated 18-7-1118 is valid it is necessary to find what portion of the plaint property was sold under the first sale and what was sold under the second sale. The plaint will have to be amended for this purpose. We, therefore, set aside the judgment and decree of the Court below and remand the case to that Court for fresh disposal according to law after allowing the Plaintiffs to amend the plaint in the light of the observations made above. The parties will bear their respective costs of this appeal.