Cases under the former rule 30 cannot be used as precedents because the present rule 3(b) has been materially altered by the addition of the proviso. Formerly the rule tried to serve both the objects by using the word "may" but the word "may" which gave a discretion to the Income-tax Officer could lead to arbitrary actions and the rule is now in two parts, the main rule leaving no discretion and the proviso conferring a power subject to certain conditions.

In the result, I disagree with the High Court in the answer which it gave to the question. The proper answer was in the negative. I agree, therefore, that the appeals be allowed with costs on the respondent here and in the High Court.

Appeals allowed.

BHUSAWAL BOROUGH MUNICIPALITY

v.

AMALGAMATED ELECTRICITY CO. LTD. & ANR.

1963

December 10

(B.P. SINHA, C.J., RAGHUBAR DAYAL, N. RAJAGOPALA AYYANGAR AND J.R. MUDHOLKAR JJ.)

Bombay Electricity Supply (Licensed Undertakings was Costs) Order, 944, cl. 5—Scope of—Construction of document—If question of law.

The Municipality filed two suits to claim refund of two sums of money paid by them to the respondent no. 1 under protest as electricity charges. The defence of the respondent no. 1 was that the dispute between it and the municipality was decided by the Government of Bombay and that under the second proviso to cl. 5 of the Surcharge Order, 1944 the decision of the Government was final and binding both on the appellant and the respondent no. 1. The decision of the Government was communicated to the parties by the letter dated May 22, 1946. The appellant succeeded in both the suits in the trial court as well as the District

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Court. In second appeal, the High Court dismissed the two suits. Hence this appeal.

Held: (*i*) The Municipality was not entitled to claim refund because the dispute between the parties had been decided by the Government under the second proviso to cl. 5 of the Surcharge Order, 1944. The decision of the Government was final and binding on the parties.

(*ii*) The communication dated May 22, 1946 sent by the Government to both the parties was a final decision under the second proviso to cl. 5 of the Surcharge Order, 1944. There is no reason to think that the communication contains nothing but the opinion of the Government.

(*iii*) The second proviso to cl. 5 of the Surcharge Order does not require that the dispute has to be referred by both the parties. Such a dispute can be referred by one of the parties as is clear from the language of the proviso which says "in the event of dispute by any party interested" the decision of the provincial Government shall be final.

(*iv*) The Trial Court and the District Court had wholly misconstrued the document dated May 22, 1946 which is not merely of evidentiary value but is one upon which the claim of the respondent no. 1 for the surcharge is based. Misconstruction of such a document would thus be an error of law and the High Court in second appeal would be entitled to correct it.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 47 and 48 of 1961.

Appeals by special leave from the judgment and decree dated August 5, 1957, of the Bombay High Court in Appeal No. 1085 of 1954 with second Appeal No. 1086 of 1954.

G.S. Pathak and *Naunit Lal*, for the appellant.

I.N. Shroff, for respondent no. 1.

M.S.K. Sastri and *R.H. Dhebar*, for respondent no. 2.

December 10, 1963. The Judgment of the Court was delivered by

Mudholkar J.

MUDHOLKAR J.—This judgment will also govern C.A. no. 48 of 1961. Both the appeals are by special leave from the judgment of the Bombay High Court in second appeal disposing of two appeals which arise out of two separate suits instituted by the appellant, the Borough Municipality of Bhusawal, against

the Bhusawal Electricity Co. Ltd., respondent No. 1 before us, to which suits the State of Bombay was later added as a defendant.

In each of the two suits the appellant had claimed refund of two sums of money paid by them to the respondent No. 1 under protest as electricity charges to which the respondent No. 1 claimed to be entitled by virtue of an order made by the Government of Bombay under the Bombay Electricity Supply (Licensed Undertakings War Costs) Order, 1944 (herein referred as Surcharge Order). The appellant succeeded in both the suits in the trial court as well as the District Court. In second appeal, however, the High Court set aside the decrees passed by the trial court and dismissed the two suits. While doing so, the High Court admitted on record certain documents by way of additional evidence and the only contentions raised before us by Mr. G.S. Pathak for the appellant are firstly that the High Court is incompetent in second appeal to admit additional evidence on record inasmuch as O. XLI, r. 27, Code of Civil Procedure is inapplicable to a second appeal. Secondly, the provisions of O. XLI, r. 27 cannot be used to fill up the lacuna in the evidence left by a party. We may incidentally mention that when the High Court, by its order dated April 30, 1958, decided to admit additional evidence on record, no objection was raised on behalf of the appellant before us.

It seems to us to be wholly unnecessary to decide in this case whether the High Court has the power to admit additional evidence in second appeal and also whether even if it has that power it was right in admitting the evidence in the circumstances of this case. Basing itself on a particular interpretation of the agreements regarding payment of electric charges with respondent no. 1, the appellant claimed refund on the ground that it was not liable to pay the surcharge payable under the Surcharge Order, 1944 in respect of electrical energy consumed by it. The substantial defence of the respondent no. 1 was that the dispute between it and the municipality was

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decided by the Government of Bombay and that under the second proviso to cl. 5 of the Surcharge Order, 1944 the decision of the Government was final and binding both on the appellant and the respondent No. 1. The relevant provisions read thus:

Clause 5: "Upon the rate of the War Costs Surcharge being fixed by the Provincial Government from time to time in accordance with this order, it shall not be lawful for the licensee or sanction-holder concerned to supply energy at other than charges surcharged at the rate for the time being so fixed:"

. . . . . .

Second proviso: "Provided further that no War Costs Surcharge shall be effective upon the charges for the supply of energy under any contract entrered into after the 1st May, 1942, unless such contract provides for the same charges for energy as have been contained in similar previous contracts for similar supply by the licensee or sanction holder concerned (as to which in the event of dispute by any party interested, the decision of the Provincial Government shall be final) or unless and to such extent as such application may be expressly ordered by the Provincial Government."

It is not disputed before us by Mr. Pathak that the decision of the Government upon the dispute is final and binding on the parties. But, according to him, it was not established by the evidence led in the trial Court that the dispute between the parties had at all been referred to the Government and that a certain communication sent by the Government to the parties, Ex. 68 dated May 22, 1946 relied upon by the respondent no. 1, contains nothing but the opinion of the Government. Mr. Pathak further urged that the proviso referred to by us purports to constitute the Govern-

ment into an arbitrator and, therefore, there had to be a reference to the arbitrator by both the parties to the dispute under the provisions of the Arbitration Act, 1940. This latter point, however, had not been taken in the courts below nor is it found in the statement of the case. We have, therefore, not permitted Mr. Pathak to rely upon it before us.

The communication of May 22, 1946 relied upon by the first respondent runs thus:

"No. 6404/36-E1(1). Public Works Department,
Bombay Castel, 22nd May, 1946.

From

The Secretary to the Government of Bombay
Public Works Department (Irrigation).

To

The President, The Borough Municipality,
Bhusawal.

Subject: War Costs Surcharge.

Dear sir,

With reference to the correspondence ending with Government letter no. 6404/36, dated the 10th May, 1946 on the subject mentioned above, I am to inform you that Government has fully considered your case under the second proviso to clause 5 of the Bombay Electricity Supply (Licensed Undertakings War Costs) Order, 1944, and has decided that you should pay the surcharge to the Bhusawal Electricity Co. Ltd., at the rate of 15% fixed in Government Order No. 6331/36 (IV) dated the 15th August, 1944, unless the Company raised its rate of supply of energy for street lighting to more than 4 annas per unit.

Yours faithfully,
Sd/ D.N. Daruwala.
for Secretary to the Govt. of Bombay.

Copy forwarded for information to: Public works Department, the Electrical Engineer to the

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Government with reference to his No. LRM.57/5260, dated the 8th March, 1946. The Accountant General, Bombay with reference to his No. O.A. 2888, dated the 2nd February 1946. Messrs The Bhusawal Electricity Co. Ltd., Bombay with reference to correspondence ending with Government letter No. 6404/36-El. (i) dated the 17th May 1946. CC to E.E. Bhusawal for information sent on 25th May 1946."

It is obvious from this communication that both the parties, that is, the appellant as well as the respondent no. 1 had stated their respective cases before the Government . There was no occasion for them to do so unless they were both purporting to act under the second proviso to cl. 5 of the Order of 1944. After consideration of the cases of both the parties the Government has stated in the aforesaid communication that it had decided that the municipality should pay to the Electricity Company surcharge at the rate of 15% fixed in a certain Government Order unless the Company raised its rate for the supply of energy for street lighting to more than four annas per unit. There is no reason to think that what is on the face of it a decision is nothing but an opinion because if there were anything in the correspondence to which a reference is made in that letter as well as in the endorsement at the bottom which went to show that the appellant did not purport to refer any dispute to the Government, it was for the appellant to produce that correspondence. Its omission to do so must be construed against it. Then Mr. Pathak said that under the Surcharge Order itself the dispute had to be referred by both the parties and not by only one of them. This contention is, however, untenable in view of the clear language of the proviso which says: "In the event of dispute by any party interested" the decision of the Provincial Government shall be final. There is, therefore, no substance in the contention. In our opinion the trial court and the District Court had wholly misconstrued this document which is not merely of evident-

iary value but is one upon which the claim of the respondent no. 1 for the surcharge is based. Misconstruction of such a document would thus be an error of law and the High Court in second appeal would be entitled to correct it. This is what in fact has been done.

There is no substance in the appeals which are dismissed with costs.

Appeals dismissed.

V.R. SADAGOPA NAIDU

v.

BAKTHAVATSALAM & ANR.

(P.B. GAJENDRAGADKAR AND K.C. DAS GUPTA, JJ.)

Hindu Law—Intercaste marriage—Marriage before the Act—If the Act has retrospective effect—The Hindu Marriages Validity Act, 1949 (*Act* 21 *of* 1949), *s.* 3.

The minor respondent no. 1 brought a suit for partition on a claim that on his birth he became a member of the joint Hindu family which his father Sadagopa Naidu, the first defendant, in the suit, formed with the other nine persons impleaded as defendants 2 to 10. His case was that Padmavathi and Sada Gopa were validly married on June 24, 1948 and of that marriage he was born. The case of the defendant was that the impugned marriage was not a valid marriage as Padmavathi was a Brahmin girl and Sada Gopa a Shudra. On these facts the Trial Court passed a preliminary decree for partition in favour of the respondent no. 1. The Trial Court was of opinion that the marriage would be invalid according to the Hindu Law as it stood before the Hindu Marriages Validity Act, 1949. It held however that the position had been entirely changed by s. 3 of the Hindu Marriages Validity Act, 1949 and that the marriage was validated by the Act of 1949. On appeal by the defendants, the High Court affirmed the judgment and decree passed by the trial court. Hence this appeal.

Held: (*i*) The Hindu Marriages Validity Act, 1949 was however in terms retrospective and validated marriages that had taken place before the Act between parties belonging to different