Government or from the person concerned, and, if in any particular case it considers it essential, after hearing him in person, submit its report to the appropriate Government. It is clear therefore that the question whether the Advisory Board should call for any further information from the detenu or should give him an opportunity of being heard in person is left entirely to the discretion of the Advisory Board. It is not incumbent upon the Board to give an opportunity to the detenu to make a representation to them, nor it is incumbent upon them to hear him in person. Therefore, in this particular submission also of Mr. Sule, viz. that no opportunity was given to the detenu for making a representation to the Advisory Board and that therefore the detention from that point onward is bad we find no substance.

The net result therefore is that the application deserves to fail and must be dismissed.

Rule discharged.

M. W. P.

APPELLATE CRIMINAL

Before Mr. Justice Bavdekar and Mr. Justice Chainani.

INDUR DAYALDAS ADVANI (ORIGINAL ACCUSED NO. 1), APPELLANT *v.* STATE.*

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April 6

Indian Penal Code (Act XLV of 1860), s. 161—Taking illegal gratification by a public servant—Representation that he would show favour in an official act—Showing favour not within his power—Whether an offence.

When a public servant obtains gratification other than legal remuneration upon a representation that favour would be shown to the giver in the discharge of his official functions, the public servant is guilty of an offence under s. 161 of the Indian Penal Code, 1860, notwithstanding the fact that the official act was not within the power of the public servant concerned.

* Criminal Appeal No. 855 of 1950.

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In re Pulipati Venkiah,[1] and *Venkatrama* v. *Emperor*,[2] not followed. *Shamsul Huq* v. *King Emperor*,[3] *Kishan Lal* v. *King Emperor*,[4] *Emperor* v. *Ajudhia Prasad*,[5] *Emperor* v. *Ram Sewak*,[6] *The Crown* v. *Phul Singh*,[7] *Gopeshwar Mandal* v. *King Emperor*,[8] *Emperor* v. *Bhagwandas*,[9] referred to.

Criminal Appeal against the conviction and sentence passed by M. J. Gordhandas, Esquire, Presidency Magistrate, 19th Court, Bombay.

The Complainant owned a grocer's shop at Vadgadi in Bombay. The appellant (accused No. 1) and one Thadani (accused No. 2) were Sales Tax Inspectors in B Ward. On January 14, 1950, the appellant went to the Complainant's shop and inquired whether he had a Sale Tax Number. The Complainant replied in the negative and ultimately agreed to produce his books of account at the Sales Tax Office on January 16, 1950. On that day the complainant went to the Sales Tax Office when the appellant sent him to Mr. Khoja, the sales-tax Officer. Mr. Khoja sent for accused No. 2 and under Mr. Khoja's instructions the Complainant showed books for the year 1946 to 1948 to accused No. 2. Accused No. 2 said that the Complainant would have to pay Rs. 10,000 as tax and penalty. The appellant was then at another table. After some talk accused No. 2 said that they would go to his shop that night. The two accused went to the Complainant's shop at night but the Complainant was not there so they left a word asking the Complainant to go to the Sales Tax Office on the next day. On the next day when the Complainant called at the Sales Tax Office accused No. 2 asked him to fill in a form and warned him to remain in the shop that night. On January, 17, 1950, both the accused went to the Complainant's shop. Accused No. 2 suggested that Rs. 5,000 be paid to him and Rs. 5,000 to Government as Tax. After some higgling the appellant reduced the amount of bribe to Rs. 1,000. The Complainant proposed to pay Rs. 100 whereupon both the accused went away in a huff but the appellant came back and said that such a chance would not come again. The Complainant offered to pay Rs. 200 out of which Rs. 100 would be paid first. The appellant said that he would come the next day. On January 18, 1950, the appellant went to the Complainant's

[1] [1924] A. I. R. Mad. 851.
[2] [1929] A. I. R. Mad. 756.
[3] [1921] A. I. R. Cal. 344.
[4] [1904] I. A. L. J. 207.
[5] (1928) 51 All. 467.
[6] (1947) All. 444.
[7] (1941) 23 Lah. 402.
[8] [1947] Nag. 611.
[9] (1907) 31 Bom. 335.

shop at 8 p.m. and asked the Complainant for the moneys. The Complainant said that he could not arrange and took out Rs. 35 to pay to the appellant but he refused. Appellant promised to come on the next day at 1 p.m.

On January 19, 1950, the Complainant went to the Anti-corruption Branch Office where his complaint was recorded. He was searched and after the usual Panchanama was made, the complainant was given Rs. 100 in marked currency notes. A Panch witness accompanied the Complainant. The Police party scattered about. The appellant went to the Complainant's shop and asked whether the money was kept ready. The Complainant replied in the affirmative. Appellant asked the complainant to come out. The Complainant went out and walked along with the appellant. The appellant approached a taxi but the driver refused to take him though the appellant offered to pay anything. The appellant asked the Complainant to pay and the Complainant paid Rs. 100 to the appellant. The appellant then hailed a victoria but before it could arrive a policeman caught the appellant who started struggling and kicking. Appellant took out the moneys and threw away the notes. The Police Officers and the Panchas came and a search was taken. Marked notes were collected from the ground. Appellant was taken to the Anti-corruption Branch Office along with the taxi driver. Accused No. 2 was apprehended later on. Sanctions were obtained against both the accused and prosecution was launched.

The appellant's defence was that even though he had made a report to his superior Mr. Khoja about the case of the Complainant, he was not in charge of the case after January 14, 1950. On the date upon which a trap was laid, he had gone to the Complainant's shop for obtaining a tin of Dalda Vanaspati and as the Complainant was going to the Sales Tax Office he accompanied the Complainant. The Complainant then requested the appellant to speak about him to Thadani and offered Rs. 100 to be paid to him, but he refused and the moneys fell on the ground.

Accused No. 2 denied the charge.

The learned Magistrate convicted accused No. 1 under s. 161 I. P. C. and sentenced him to suffer 4 months' rigorous imprisonment and a fine of Rs. 300 in default further rigorous imprisonment for 2 months.

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Accused No. 2 was given the benefit of doubt.

Accused No. 1 appealed against the order.

Paramanand Kundanmal with *I. K. Kundanmal* for the appellant.

H. M. Choksi, Government Pleader for the State.

BAVDEKAR J. [His Lordship, after dealing with the facts and holding that the appellant obtained Rs. 100 from the complainant as gratification other than legal remuneration, proceeded:]

The learned counsel who appears on behalf of the appellant says however that in this case even so, the prosecution must fail because the appellant had nothing to do with the case of the complainant after January 14, 1950. Now, it is true that Mr. Khoja, the superior of the appellant, gave evidence that he had entrusted the case to the appellant but we do not think that that evidence can be accepted. The complainant's case was that it was Thadani who was dealing with this case. The order of Mr. Khoja which was referred to above has an obvious reference as to what was to be done in case the complainant did not appear. There is nothing from which we can come to the conclusion that the appellant had, at the time when the bribe is alleged to have been taken, anything to do with the complainant's case. It may be that subsequently the case may have been referred to the appellant. Thadani had filed a written statement saying as a matter of fact that he had merely got to go into the accounts and the case would have been dealt with later by the latter. Thadani's statement would not be evidence against the appellant and we obviously cannot use it against him. Even if we are entitled to use it, we find each one would obviously have something to gain by throwing the blame on the other. No reliance could be placed on Thadani's statement. In that case, we must accept that it is not proved that the appellant had anything to do with the case of the complainant. He had indeed, as it was his duty, to inquire into the question as to whether the complainant had paid the sales tax. Upon having found that he had not paid the sales tax, he has made a report to the superior officer and thereafter it would appear that he had nothing to do with the appellant's case.

But in our view, that does not absolve the appellant from the charge under s. 161, Indian Penal Code. The learned counsel who appears on behalf of the appellant urged that before the

appellant could be convicted of an offence under s. 161, Indian Penal Code, in the first instance it must be shown that it was within the power of the appellant to show any favour to the complainant, and he says that if it was not within his power to do so, the appellant could not be held guilty of an offence under s. 161 merely because he took Rs. 100 from the complainant.

Now, the offence under s. 161, if we confine ourselves to the relevant portion of the definition, consists of obtaining any gratification other than legal remuneration "as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show in the exercise of his official function favour or disfavour to any person." The section does not say anything about the official act being within the power of the public servant concerned. Nor does it say anything about it being within the power of the public servant concerned to show favour or disfavour to any person in the exercise of his official function. It is true that the section does not penalise the public servant in obtaining any gratification other than legal remuneration in all cases. The section would have application only when gratification is taken as a motive or reward for doing the things mentioned above. But even though this would exclude the case in which money is accepted, for example in a private capacity or for doing something which is entirely unconnected with the official duties of the taker, we do not think that there is anything in the section which requires the State to prove that the act which was committed was within the power of the public servant concerned. The words "as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show in the exercise of his official function" may constitute the ingredient which English lawyers call *mens rea*. But these words in the first instance do not postulate a state of mind in the public servant that he was going to do the promised official act or he was going to show the promised official favour. That is quite clear from the last explanation to the section which says about the words "a motive or reward for doing" that "a person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words." It would appear therefore that a state of mind in the public servant that he was not going to do anything for the giver of the bribe would not render his act innocuous. These words must, therefore, in our view, be inter-

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preted to mean upon a representation that a particular desired official act will be done or forborne and favour or disfavour will be shown. That impliedly at any rate would include a representation that the act was within the power of the public servant or that it was within the power of the public servant to show favour or disfavour. But if both these representations are there, the only other thing which it is necessary is that gratification should have been taken in order to do an official act as distinguished from a private act or to show favour or disfavour in the discharge of an official function as apart from functions which can be said to be entirely non-official. For example, there was the case of a village watchman who found a widow at the shop of a goldsmith at night, and the goldsmith gave him a reward to hold his tongue to prevent them from being disgraced. Similarly, where a Sub-Inspector helped a candidate for the Legislative Council upon getting what was called a silver tonic, it was held by the Patna High Court that that did not amount to a charge of bribery as canvassing for votes at a council election was not an official act. But these cases obviously are not authorities for the proposition that where a public servant obtains a bribe for himself or for another upon a representation that favour would be shown to the giver in the discharge of his official functions, the public servant is still not guilty, because it is not within his power to show favour. In our view, it makes no difference whether it was not within his power to show any favour because the act falls within the authority of another servant holding a similar office in the same establishment or because the public servant has become *functus officio*.

It is true that a view some times has been taken and especially in Madras that before an offence under s. 161 could be committed, it must be within the power of the public servant to do the official act concerned or to show favour in the discharge of his official functions. The first of these cases was the case of In re: *Pulipati Venkiah*.[1] That was a case in which a Karnam was sentenced for having accepted a bribe of Rs. 20 from a villager giving him to understand that he would get him some land on darkhast. It was observed that granting a darkhast was not an official act of a Karnam, and even though, therefore, he may have cheated the villager into believing that he was the official to grant the darkhast, that did not come out from the evidence and the view of the Sessions Judge that only

[1] [1924] A. I. R. Mad. 851.

his recommendation was paid for was the correct view. There was then an opinion expressed that even if the charge had run that he had accepted a bribe of Rs. 20 for recommending the darkhast in his capacity as a Karnam, that still would not be an official act. We fail with respect to understand that it would not be an official act unless an application for the grant of darkhast land would not even go to a Karnam for report and recommendation. But the fact remains that the decision of the case proceeded not upon the view that it was not an official act for the Karnam to recommend the darkhast but on the ground that the charge which was framed was that he took bribe as a reward for doing an official act, viz., granting the darkhast, and that proposition could not stand because it was not within the power of the Karnam to grant the darkhast. The authority undoubtedly is in favour of the appellant. And as a matter of fact, the Madras High Court has taken a similar view in the case of *Venkatarama* v. *Emperor*.[1] In that case the accused was anxious to be a policeman and his application by the orders of the District Superintendent of Police was referred to the Reserve Inspector who found that he was below the minimum height and rejected his application. The complainant thereupon tendered a five-rupee note to the officer in the hope that the officer would reconsider his decision and make a report to the District Superintendent of Police to that effect. The officer had the man charged. The Madras High Court took the view that the accused had committed no offence, but it seems to have proceeded not upon any fresh ground. The only fresh ground which we find mentioned is that it seems absurd to say that a man abetted an offence which not only is not committed but with the whole transaction in relation to which he indignantly refused to have anything to do. But in India abetment is defined as instigation to commit an offence, and inasmuch as both in India and in England there is a penal offence called criminal conspiracy which punishes conspiracy to commit an offence if certain conditions are satisfied, there is nothing illogical in making it penal to instigate an offence. The next case of the Madras High Court merely says that the law which has been laid down in *Venkataraman* v. *Emperor*,[1] has stood for a long time, and if it was desired to obtain any change in it, the Legislature would obviously have to be moved to enact legislation on the lines of the Fry's Act. The only other High Court in which it is said that a similar view has

[1] [1929] A. I. R. Mad. 756.

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been taken is the Calcutta High Court. But we are not satisfied that as a matter of fact in that case any such view has been taken. The case is the case reported in *Shamsul Huq* v. *King Emperor*[1]. That was a case against the giver of a bribe and the bribe was supposed to have been offered to a sergeant after the case against the accused person had already been dismissed. It was held that the accused had not committed any offence, but the reasoning upon which this conclusion was reached was as follows (p. 344) :

> "Now, on the 21st June it was not within the powers of the Sergeant to show any favour to the petitioner who had already been discharged by the Magistrate and no money could have been paid to him as a motive or reward for doing anything for the petitioner."

The ratio of the case appears, therefore, to be that assuming even that money was paid inasmuch as the offerer was aware that the case against him had been dismissed even if the money had been offered, it could not have been offered as a motive or reward for doing anything for the petitioner. On the other hand taking up the case of an offerer or giver of a bribe, the Allahabad and the Lahore High Courts have taken the view that in case the bribe is given to a public servant for showing favour to the giver in the discharge of his official function, it does not make any difference whether a public servant to whom bribe is offered could or could not show any favour to the giver. These cases are *Kishan Lal* v. *King-Emperor*,[2] *Emperor* v. *Ajuahia Prasad*,[3] *Emperor* v. *Ram Sewak*,[4] and *The Crown* v. *Phul Singh*.[5] The Nagpur High Court took a similar view with regard to the taker in *Gopeshwar Mandal* v. *King Emperor*.[6]

It is true that with the exception of the last case of *Gopeshwar Mandal* v. *King Emperor*,[6] all the cases are cases in which an offence under s. 161 read with s. 116 was to be considered. And so far as that offence is concerned inasmuch as the gist of the offence is any offer to a public servant of gratification other than legal remuneration with a motive that that public servant should show favour in the discharge of his official function, it is argued that the cases can be distinguished from the case in which the person charged is a taker of a bribe. So far as the offerer of the bribe is concerned, the *mens rea* necessarily consists in an intention in the giver of the bribe that the bribe

[1] (1921) A. I. R. Cal. 344.
[2] (1904) 1 A. L. J. 207.
[3] (1928) 51 All. 467.
[4] [1947] All. 444.
[5] (1941) 23 Lah. 402.
[6] (1947) Nag. 611.

should induce the taker to show favour and this state of mind has obviously nothing to do with the question as to whether the taker has or has not power to show any favour. But we think that the same consideration applies to the case of a giver of a bribe also if we consider that s. 161 is aimed at prevention of corruption in public servants and the gist of the offence from the point of view of the taker of the bribe consists in making a representation that if the bribe is paid, favour would be shown and impliedly that power to show favour exists. It is undoubtedly true that one can conceive of a case in which a public servant may obtain a sum of money other than legal remuneration, such sum of money may be obtained as a motive or reward for showing favour in the exercise of a function which is an official function and yet some times it may not amount to an offence under s. 161, Indian Penal Code, because the function in the exercise of which favour is to be shown is not the official function of the public servant concerned. I think that it is from that point of view that in the case of *Emperor* v. *Bhagwandas*[1] the word "his" in the phrase "of his official functions" has been emphasised. If this distinction is borne in mind, no difficulty would be created in dealing with a case in which a public servant misrepresents that he has an official capacity which he does not possess and obtains gratification other than legal remuneration for showing favour in the capacity misrepresented. To give an example, if a constable wore the uniform of a ticket collector and after having obtained access to a railway train took a bribe from a person travelling without a ticket, the bribe would undoubtedly be taken by a public servant and it would be also taken as a motive or reward for showing favour in the discharge on an official function. But even so, the act may not amount to an offence on the ground that the bribe was taken for showing favour in the discharge of a function which even though it was an official function was not the official function of the public servant concerned.

The learned counsel who appears on behalf of the appellant says that even though that is our view, there is nothing in this case to show that the appellant had made a representation that it was within his power to show favour and that he would show favour to the complainant. But we do not think that this contention can be accepted. In the first instance it has got to be remembered that the appellant was the first person who

[1] (1907) 31 Bom. 335, s. c. 9 Bom. L. R. 331.

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drew the attention of Mr. Khoja to the case of the complainant who appears to have escaped assessment of sales tax. At any rate he had not been assessed till then. In the second instance, the complainant said that when on January 16, 1950, he went to the Sales Tax Office, accused No. 2 told him that he would have to pay and at that time the appellant was at another table. He said next that on the 17th Thadani told him that he and the appellant would go to his shop that night and he and the appellant both went to his shop on that night. The complainant said next that after considerable higgling, Thadani said that if Rs. 1,500 were paid to him and the appellant, they would see that he would have to pay as little as possible to the Government as sales tax. The appellant was standing by and this would obviously mean a representation by the appellant that he would also see that if Rs. 1,500 were paid, the complainant will have to pay as little as possible to the Government as sales tax. The complainant then said that subsequently the appellant said that he and Thadani would charge Rs. 1,000. We have got to take into consideration these facts along with the fact that it was the appellant who had reported the complainant's case to Mr. Khoja and the complainant would not have any means of knowing what was the internal arrangement in the Sales Tax Office. In our view, in these circumstances there was a representation by the appellant that it was within his power to show favour and that he would show favour in case the payment was made.

In this view of the case, the appellant was rightly convicted. The sentence passed upon the accused is not excessive. So we dismiss his appeal. The accused should surrender to his bail.

CHAINANI J. I agree. I wish to add a few words with regard to the question whether a public servant, who receives a bribe as a motive or reward for doing an act, which it is not in his power to perform, thereby commits an offence under s. 161, Indian Penal Code. The first part of this section makes it an offence for a public servant to accept or obtain, or agree to accept, or attempt to obtain, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person. The section requires that the gratification must be received by a public servant as a motive or reward for doing or forbearing to do any official act or for showing or

forbearing to show favour or disfavour in the exercise of his official functions. It does not require that the public servant must himself have the power or must himself be in a position to perform the act or show favour or disfavour, for doing or showing which the bribe has been paid to him. One of the explanations to s. 161 provides that a person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within the words "a motive or reward for doing" used in the section. Illustration (c) to the section is as follows :—

"A, a public servant, induces Z erroneously to believe that A's influence with the Government has obtained a title for Z, and thus induces Z to give A money as a reward for this service. A has committed the offence defined in this section."

It is, therefore, not necessary in order to constitute an offence under s. 161 that the act for doing which the bribe is given should actually be performed. It is sufficient if a representation is made that it has been or that it will be performed and a public servant, who obtains a bribe by making such representation, will be guilty of the offence punishable under this section, even if he had or has no intention to perform and has not performed or does not actually perform that act. A representation by a person that he has done or that he will do an act impliedly includes a representation that it was or is within his power to do that act. As therefore the obtaining of a bribe by making a representation that an official act has been or will be performed is sufficient to constitute an offence under the section and as for this purpose it is not necessary that the act should actually be performed, it is immaterial whether the act, which is the consideration for the bribe, is or is not within the power of the public servant receiving the bribe to perform. In the ill. (c) referred to above, the representation by A to Z may be false, either because A had no influence with Government or because even though he had such influence, he had not actually used it. In either case, he is guilty of the offence defined in s. 161, because he obtained an illegal gratification by making a false representation. The essence of the offence therefore consists in making a representation that an official act has been or would be performed or that a favour or disfavour has been or would be shown and not in actually performing that act or actually showing favour or disfavour. If relying on or trusting the representation made to him that an official act has been or

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would be performed or that a favour or disfavour has been or would be shown, a person gives a bribe, the public servant receiving it can, in my opinion, be said to have received it "as a motive or reward for doing" that act or showing that favour or disfavour, within the meaning of these words as used in the section.

The act in respect of which the bribe is paid must, however, be an official act and the favour or disfavour must be shown in the exercise of official functions. The official "act" or official "functions" referred to in the section obviously mean an act or functions which a public servant can perform in his official capacity and not in the capacity of a private citizen. The act, for doing which the bribe is received or paid, must, therefore, have some connection with the office which the public servant receiving the bribe is holding or must be one in regard to which the person giving the bribe can reasonably believe that it could be performed by the public servant receiving the bribe. Thus if a clerk in the District Magistrate's office receives illegal gratification from a person, who has applied to the District Magistrate for an arms licence and who wants a favourable note to be put up on his application by the District Magistrate's office, by wrongly representing to that person that he was dealing with his application and would recommend it to the District Magistrate, even though such applications were actually being handled by another clerk in the District Magistrate's office, he would, in my opinion, be guilty of the offence punishable under s. 161, Indian Penal Code. He has received the bribe by making the applicant believe that an official act will be performed in his favour, viz., that a favourable note will be made on his application. The act, which is the consideration for the bribe, is connected with his office, for it can be performed by another person holding the same office in the same establishment. The applicant is also not likely to know which particular clerk in the District Magistrate's office deals with such applications. The clerk receiving the bribe can therefore be said to have received it as a motive for doing an official act, even though he was not actually in a position to do that act.

I do not think it is necessary for me to refer to the various cases which have been cited at the bar. These have all been discussed in the judgment of my learned brother and with respect, I agree with the view taken by the Allahabad, Lahore

and Nagapur High Courts on this point in *Kishan Lal* v. *King-Emperor*,[1] *Emperor* v. *Ajudhia Prasad*[2], *The Crown* v. *Phul Singh*,[3] and *Gopeshwar Mandal* v. *King Eperor*.[4].

In this case, the appellant had originally inquired into the complainant's case. Thereafter another Inspector was asked to look into the complainant's books. The complainant has stated that the appellant went to him subsequently and demanded a bribe. He has also stated that the appellant told him that he would see that the complainant did not have to pay much amount as sales tax. A representation was therefore made to the complainant that a favour would be shown to him in assessing the amount of tax to be paid by him. As the appellant was also an Inspector in the Sales Tax Department and as he had previously inquired into the complainant's case, the complainant had a reasonable ground for believing that the appellant might be in a position to show him favour or to do something for him. It is, therefore, immaterial whether the appellant was or was not actually in a position to assist the complainant at the time when he received the bribe. In accepting the bribe from the complainant, he has, therefore, committed an offence under s. 161 of the Indian Penal Code.

I, therefore, agree that the appeal should be dismissed.

Appeal dismissed

K B. S.

[1] (1904) 1 A. L. J. 207.
[2] (1928) 51 All. 467.
[3] (1941) 23 Lah. 402.
[4] [1947] Nag. 611.

APPELLATE CIVIL

Before Mr. Justice Bavdekar and Mr. Justice Chainani.

1951
June 20

SHIVAJI NARAYAN HABBU (ORIGINAL PLAINTIFF), APPELLANT *v.* PEEKU LOKAPPA GHADI (ORIGINAL DEFENDANT), RESPONDENT.*

Bombay Tenancy and Agricultural Lands Act (LXVII of 1948) s. 85—Suit by landlord to evict tenant on ground of personal cultivation—Whether jurisdiction of Civil Courts barred—Sections 29 (2) and (3), 70, 71, 72, 73 (2), 74 (1) (m) Effect of.

The jurisdiction of a Civil Court to entertain a suit by a landlord to recover possession of agricultural land from his tenant on the ground that he wants the land for personal cultivation is barred under s. 85 of the Bombay Tenancy and Agricultural Lands Act, 1948.

* Second Appeal No. 164 of 1951.