ORIGINAL CIVIL.

Before Page J.

GOCULDAS

v.

CHAGANLAL AND OTHERS*.

1927
March 31.

Jurisdiction—"Suits for land or other immovable property", meaning of—Equitable jurisdiction of Court to pass decrees in personam—Letters Patent (Calcutta) of 1865, cl. 12.

The term "suits for land or other immovable property" in clause 12 of the Letters Patent of 1865, is not limited to suits in which the plaintiff seeks to recover possession of land or other immovable property.

Yenkoba v. *Rambhaji* (1) and other cases referred to.

The term "suits for land or other immovable property" in clause 12 of the Letters Patent means suits in which, having regard to the issues raised in the pleadings, the decree or order will affect directly the proprietary or possessory title to land or other immovable property.

Delhi and London Bank v. *Wordie* (2) and other cases referred to.

If a suit is brought for the administration of a trust which relates to immovable property situate outside the jurisdiction of the Court, and the only relief sought is that the trustee should be ordered duly to carry out the trust, the suit is not a suit for land. But if the relief claimed is not confined to an order for the enforcement of the trust, and the applicant claims, *e.g.*, a declaration of his right to the possession of trust properties situate outside the jurisdiction, then the suit would be a suit for land, and the Court would have no jurisdiction to entertain it.

Nistarini Dassi v. *Nundo Lall Bose* (3) and other cases referred to.

Both in India and in England the High Courts, for the purpose of doing equity, possess jurisdiction to pass decrees *in personam* which may affect immovable property situate beyond the jurisdiction of the Court. But while this jurisdiction in equity is to be exercised at the discretion of the Court, the Court will act in compliance with limitations upon its discretion which have long been established.

* Original Civil Suit No. 900 of 1923.

(1) (1872) 9 Bom. H. C. R. 12. (2) (1876) I. L. R. 1 Calc. 249.

(3) (1899) I. L. R. 26 Calc. 891.

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Deschamps v. *Miller* (1) and other cases referred to.

The Court will not pass a decree *in personam* which indirectly affects foreign land unless the decree can effectively be enforced by the personal obedience of the defendant within the jurisdiction. It will not pass a decree that will operate in the Courts *loci situs* merely as a *brutum fulmen*.

Norris v. *Chambres* (2) and other cases referred to.

Where in a suit in which no part of the cause of action arose within the jurisdiction of the Court some of the defendants were described as residing within the ordinary original civil jurisdiction of the High Court of Calcutta, while other defendants were described as being beyond the jurisdiction of the Court, and leave under clause 12 of the Letters Patent was obtained :—

Held, that the High Court had no jurisdiction to entertain the suit.

Hadjee Ismail Hadjee v. *Hadjee Mahomad Hadjee* (3) followed.

This was a suit to recover Rs. 6,492 as part of the proceeds of the sale of a dwelling house at Bhawalpore in the Punjab. The defence *inter alia* was that the suit was a suit for land outside the jurisdiction of the Court, and that as some of the defendants did not "dwell or "carry on business or personally work for gain" within the ordinary original civil jurisdiction of the High Court at the commencement of the suit within the meaning of clause 12 of the Letters Patent, the High Court had no jurisdiction to try the suit.

Mr. N. N. Sircar and *Mr. S. C. Bose*, for the plaintiffs.

Mr. S. N. Banerjee, *Mr. N. N. Bose* and *Mr. R. N. Banerjee*, for the defendants.

PAGE J. This is a suit to recover a sum of Rs. 6,492 being part of the proceeds of the sale of a dwelling house at Bhawalpore in the Punjab. The premises in suit are situate in the Native State of Bhawalpore, and are not within the jurisdiction of the High Court at Fort William in Bengal.

(1) [1908] 1 Ch. 863. (2) (1861) 3 D. F. & J. 583.
(3) (1874) 13 B. L. R. 91.

The plaintiffs' cause of action is set out in paragraphs 9 to 12 of the plaint.

PARAGRAPH 9.—"The plaintiffs and the defendants as members of an "undivided Hindu family governed by the Mitakshara School of Hindu "Law had been in joint possession and enjoyment amongst others of the "said ancestral house and premises in Bhawalpore, having inherited the "same from their common ancestor the said Sundar Shah Rathi as stated "above till the same with all additions and alterations and improvements "made thereupon with the advance of time were disposed of about three "years ago as stated below."

PARAGRAPH 10.—"About three years ago the defendant Chaganlal "acting for himself and as the constituted attorney of the other defendants "sold and conveyed the said ancestral house and premises with the said "additions alterations and improvements thereupon part by part to diverse "parties in the months of March and April 1920."

PARAGRAPH 11.—"The said sales were all effected by the defendants "without the consent or knowledge of the plaintiffs or of any of them "and he realised therefrom in all the sum of Rs. 19,476."

PARAGRAPH 12.—"The plaintiffs have been advised and they believe "and submit that they are entitled to one-third of the whole of the said "sum of Rs. 19,476, that is to say the sum of Rs. 6,492."

The relief claimed is—

1. Leave under clause 12 of the Letters Patent (1865) of the High Court at Fort William in Bengal.

2. Decree for the said sum of Rs. 6,492 with such interest thereon as this Court may be pleased to allow.

3 If necessary, an account, and other incidental relief.

The defence of Chaganlal and Kanahyalal, the first and third defendants, is that the plaintiffs and the defendants are members of a joint Hindu family; that they did not sell the right, title or interest of the plaintiffs in the premises in suit, and that any interest that the plaintiffs may have possessed in the said premises has been lost by adverse possession. Sohanlal, the second defendant, by way of defence stated that the family except in respect of the said house at Bhawalpore was not joint and undivided; that the defendant Chaganlal had sold the premises

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in suit, and that Sohanlal had received Rs. 2,000 in respect of his share of the sale proceeds.

Rukmini and Mathurabai, the fourth and fifth defendants, stated in their defence that they were the widows of two of the members of the said family, and that the members of the family for a long time had been living separately, but that there had not been a partition of the joint ancestral property. They stated further that they had received from the defendant Chaganlal Rs. 1,500, part of a sum of Rs. 3,500, which was their share of the sale proceeds of the property in suit; and they denied that the plaintiffs were entitled to any portion of the sale proceeds that had been received by them. The defendants Chaganlal, Sohanlal and Kanahyalal also denied that the Calcutta High Court had jurisdiction to try the suit.

The first question that arises is whether, having regard to the pleadings, this Court possesses jurisdiction to try the issues that fall for determination.

Under Clause 12 of the Letters Patent (1865)—

"The High Court of Judicature at Fort William in Bengal, in the "exercise of its ordinary original civil jurisdiction, shall be empowered to "receive, try and determine suits of every description, if, in the case of "suits for land or other immovable property such land or property shall be "situated, or, in all other cases, if the cause of action shall have arisen, "either wholly, or, in case the leave of the Court shall have been first "obtained, in part, within the local limits of the ordinary original civil "jurisdiction of the said High Court, or if the defendant at the time of the "commencement of the suit shall dwell, or carry on business, or personally "work for gain within such limits."

Leave under clause 12 of the Letters Patent was granted on the 23rd March 1923. In the plaint the defendants Chaganlal and Sohanlal are described as residing in the town of Calcutta, while the other three defendants are described as being beyond the jurisdiction of the Court.

After the suit had been called for hearing learned counsel stated that the plaintiffs were prepared to abandon their claim against the defendants other than Chaganlal and Sohanlal, and as against the defendants 3 to 5 the suit was dismissed with costs. The defendants Chaganlal and Sohanlal contend that in those circumstances this Court has no jurisdiction to try the issues that arise, upon two grounds (*i*) That the suit is a "suit for land" within clause 12 of the Letters Patent (1865); (*ii*) That at the commencement of the suit all the defendants did not "dwell, carry on business, or personally work for "gain" within "the local limits of the ordinary "original civil jurisdiction" of the Court, as required under the provisions of clause 12 of the Letters Patent. It becomes necessary, therefore, to ascertain and determine the meaning of the words "suits for land" as used in clause 12 of the Letters Patent. The term is ambiguous, and in *Yenhoba* v. *Rambhaji* (1) the Bombay High Court held that—

"We think that this is not a suit for land within the meaning of "section 5 of Act VIII of 1859. Comparing that section with sections "223 and 224 of the Code, we think that a suit for land is a suit which "asks for delivery of the land to the plaintiff".

This construction of the term appears to have found favour with the Bombay High Court in *Holkar* v. *Dadabhai* (2), and also with Sanderson C. J. in the case of *Nagendra Nath Chowdhuri* v. *Eraligool Co., Ld.* (3). But *Holkar's case* (2) has recently been overruled by a Full Bench of the Bombay High Court in *India Spinning and Weaving Co., Ld.* v. *The Climax Industrial Syndicate* (4), and, having regard to the *ratio* of the doctrine to be found in the jurisprudence of all civilized countries that questions relating to the title to the ownership or possession of immovable property

(1) (1872) 9 Bom H. C. R. 12.
(2) (1890) I. L. R. 14 Bom. 353.
(3) (1922) I. L. R. 49 Calc. 670, 676.
(4) (1925) I. L. R. 50 Bom. 1.

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should be determined not only by the *lex situs* but also *in foro situs*, I am of opinion that this narrow construction is not correct, and that the term "suits "for land or other immovable property" is not limited to suits in which the plaintiff seeks to recover possession of land or other immovable property. The sanction of the doctrine is to be found in international comity, and

"The principle itself arises from the conception of international law "known as *eminent domain*, by which is meant that the proprietary right of "every sovereign State is not only absolute within its territorial limits, so "as to exclude that of other nations, but also paramount with respect to the "members of the State itself, so as to include the right, in case of necessity "or for public safety, of disposing of all the property of every kind within "the same limits".

(Foote's Private International Law, page 223.)

"The defendant's judge" wrote Vattel—

"is the judge of the place where the defendant has his settled abode "or the judge of the place where the defendant is when any sudden diffi- "culty arises, provided it does not relate to an estate in land, or to a right "annexed to such an estate. In such a case, as property of this kind is "to be held according to the laws of the country where it is situated, and "as the right of granting it is vested in the ruler of the country, contro- "versies relating to such property can only be decided in the State in "which it depends".

(B 2 Ch. 8 Section 103.)

Story lays down that—

"In respect to immovable property, every attempt of any foreign "tribunal to found a jurisdiction over it must, from the very nature of the "case, be utterly nugatory, and its decree must be for ever incapable of "execution *in rem*. We have seen, indeed, that by the Roman Law a suit "might in many cases be brought either where the property was situate "or where the party had his domicile. This might well be done within any "of the vast domains over which the Roman empire extended; for the "judgments of its tribunals would be everywhere respected and obeyed. "But among the independent nations of modern times there would be "insuperable difficulties in such a course. And hence even in countries "acknowledging the Roman law it has become a very general principle that "suits *in rem* should be brought where the property is situate: and this

"principle is applied with almost universal approbation in regard to im- "movable property. The same rule is applied to mixed actions, and to all " suits which touch the realty ".

(Conflict of Laws, s. 551) The learned author says that—

" the inconveniences of an opposite course would be innumerable, and " would subject immovable property to the most distressing conflicts " arising from opposing titles, and compel every nation to administer al- " most all other laws except its own, in the ordinary administration of ' justice ".

(Section 555);

See also Dicey's Conflict of Laws, 4th edition, page 33, Wheaton's International Law (1904), page 260, Westlake's Private International Law, 7th edition 315.

As I apprehend the matter the framers of the Letters Patent of 1865, when prescribing the local limits of the High Courts in India, intended to apply the rule that was followed *ex comitate* in other countries. In my opinion, the term " suits for land or " other immovable property " in clause 12 of the Letters Patent means suits in which, having regard to the issues raised in the pleadings, the decree or order will affect directly the proprietary or possessory title to land or other immovable property; *Delhi and London Bank* v. *Wordie* (1), *Kellie* v. *Fraser* (2), *Sreenath Roy* v. *Cally Doss Ghose* (3), *Land Mortgage Bank* v. *Sudurudeen Ahmed* (4), *Ebrahim Ismail Timol* v. *Provas Chander Mitter* (5), *Lodna Colliery Co.* v. *Bipin Bihari Bose* (6), *Sudamdih Coal Co.* v. *Empire Coal Co.* (7), *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Devi* (8), *Abdul Karim* v. *Badrudeen* (9),

(1) (1876) I. L. R. 1 Calc. 249.
(2) (1877) I. L. R. 2 Calc. 445.
(3) (1879) I. L. R. 5 Calc. 82.
(4) (1892) I. L. R. 19 Calc. 358.
(5) (1908) I. L. R. 36 Calc. 59.
(6) (1912) I. L. R. 39 Calc. 739
(7) (1915) I. L. R. 42 Calc. 942.
(8) (1914) I. L. R. 41 Calc. 972; L. R. 41 I. A. 110.
(9) (1904) I. L. R. 28 Mad. 216.

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Sundara Bai v. *Tirumal Rao* (1), *Vaghoji Kuverji* v. *Camaji Bomanji* (2), *India Spinning and Weaving Co.* v. *Climax Industrial Syndicate* (3), *In Re Hawthorne* (4), *The British South Africa Co.* v. *Campanhia DeMocambique* (5), *Deschamps* v. *Miller* (6).

Thus construed the restriction upon the local jurisdiction of the Indian Courts effected under clause 12 of the Letters Patent conforms to the rule that is observed *ex comitate* by other civilized countries, and is in consonance with what I conceive to be the better opinion of the Courts in India. Further, if the words "suits for land or other immovable property" bear the meaning that I have attributed to them, a simple test is provided for determining in any particular case whether the Court possesses jurisdiction to try the suit. For instance, judged by this test, a suit brought to recover damages for trespass to land beyond the jurisdiction of the Court will or will not be a suit for land according to the issues that fall to be determined. If, having regard to the pleadings, no issue is raised as to the title of the plaintiff, and the issue to be tried is merely whether the *factum* of the trespass by the defendant has been proved, then, if the defendant is within the jurisdiction, the Court will hear the suit, for the suit is not a suit for land. On the other hand, if the right of the plaintiff to be in possession of the land is in issue the Court will have no jurisdiction to try the suit, for the decree will affect directly the title to the land. In *British South Africa Co.* v. *Campanhia DeMocambique* (5), Lord Herschell, L. C. observed that—

"He was not satisfied that either Lord Mansfield or Story would have "regarded an action of trespass to land as a suit for personal damages "only, if the title to the land were in issue, and in order to determine

(1) (1909) I. L. R. 33 Mad. 131.
(2) (1904) I. L. R. 29 Bom. 249.
(3) (1925) I. L. R. 50 Bom. 1.
(4) (1883) 23 Ch. D. 743.
(5) [1893] A. C. 602.
(6) [1908] 1 Ch. 856.

"whether there was a right to damages it was necessary for the Court to "adjudicate upon the conflicting claims of the parties to real estate. In "both the cases before Lord Mansfield, as I understand them, no question "of title to real property was in issue."

Again, if a suit is brought for the administration of a trust which *inter alia* relates to immovable property situate outside the jurisdiction of the Court, and the only relief sought is that the trustee should be ordered duly to carry out the trust, the suit is not a suit for land. But if the relief claimed is not confined to an order for the enforcement of the trust, and the applicant claims, *e.g.*, a declaration of his right to the possession of trust properties situate outside the jurisdiction, then, in my opinion, the suit would be a suit for land, and the Court would have no jurisdiction to entertain it, *Nistarini Dassi* v. *Nundo Lall Bose* (1), *Haralall Banerjee* v. *Nitambini Debi* (2), *Abdul Karim* v. *Badrudeen* (3). I am, of course, aware that—

"Whilst Courts of Equity have never claimed to act directly upon land "situate abroad, they have purported to act upon the conscience of persons "living here. In *Lord Crawstown v. Johnston* (4) Sir R. P. Arden, Master "of the Rolls, said: "*Archer* v. *Preston*, *Lord Arglasse* v. *Muschamp*, and "*Lord Kildare* v. *Eustace*, clearly show that with regard to any "contract made, or equity between persons in this country, respecting lands "in a foreign country, particularly in the British Dominions, this Court will "hold the same jurisdiction as if they were situate in England".

Per Lord Herschell in *British South Africa Co.* v. *Campanhia DeMocambigue* (5), *Norris* v. *Chambres* (6), *Ewing* v. *Orr Ewing* (7), *In Re Hawthorne* (8), *Duder* v. *Armsterdamsch Trustees Kantoor* (9), *India Spinning and Weaving Co.* v. *Climax Industrial Syndicate* (10).

(1) (1895) I. L. R. 26 Calc. 891.
(2) (1901) I. L. R. 29 Calc. 315.
(3) (1904) I. L. R. 28 Mad. 216.
(4) (1774) 1 Cowp. 161, 180.
(5) [1893] A. C. 602, 625.
(6) (1861) 3 D. F. & J. 583.
(7) (1883) 9 A. C. 34.
(8) (1883) 23 Ch. D. 743.
(9) [1902] 2 Ch. 132.
(10) (1925) I. L. R. 50 Bom. 1, 26.

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I am not disposed to limit the jurisdiction of the High Courts. On the contrary, I conceive it to be my duty to maintain, and whenever it is meet so to do to enlarge, the authority of the Court. *Est boni judicis ampliare jurisdictionem.* In my opinion, both in India and in England the High Courts, for the purpose of doing equity, possess jurisdiction to pass decrees *in personam* which may affect immovable property situate beyond the jurisdiction of the Court. But while this jurisdiction in equity is to be exercised at the discretion of the Court, the Court will act in compliance with limitations upon its discretion which have long been established. In *Deschamps* v. *Miller* (1), Parker J. observed that—

"the general rule is that the Court will not adjudicate on questions "relating to the title to, or the right to the possession of, immovable "property out of the jurisdiction. There are, no doubt, exceptions to the "rule, but, without attempting to give an exhaustive statement of those "exceptions, I think it will be found that they all depend on the existence "between the parties to the suit of some personal obligation arising out of "contract, or implied contract, fiduciary relationship, or fraud, or other "conduct which in the view of a Court of Equity in this country would be "unconscionable, and do not depend for their existence on the law of the "*locus* of the immovable property. Thus, in cases of trusts, specific "performance of contracts, foreclosure, or redemption of mortgages, or in "the case of land obtained by the defendant by fraud, or other such "unconscionable conduct as I have referred to, the Court may very well "assume jurisdiction. But where there is no contract, no fiduciary relation-"ship and no fraud or unconscionable conduct giving rise to a personal "obligation between the parties, and the whole question is whether or not "according to the law of the *locus* the claim of title set up by one party, "whether a legal or equitable claim in the sense of those words as used in "English Law, would be preferred to the claim of another party, I do not "think the Court ought to entertain jurisdiction to decide the matter".

In *Vaghoji* v. *Camaji* (2), Jenkins C. J. observed that—

"A Court of Equity in England only assumed jurisdiction in relation to "land abroad, where as between the litigants or their predecessors some

(1) [1908] 1 Ch. 863. (2) (1904) I. L. R. 29 Bom. 249, 256

"privity or relation was established on the ground of contract, trust or "fraud, but in no case of which I am aware has the Court of Equity entertained a suit, even if the defendant was within the limits of its "jurisdiction, where the purpose was to obtain a declaration of title to "foreign land";

See also the instructive judgment of Kay J. in *Re Howthorne* (1).

Moreover, the Court will not pass a decree *in personam* which indirectly affects foreign land unless the decree can effectively be enforced by the personal obedience of the defendant within the jurisdiction.

It will not pass a decree that will operate in the Courts *loci situs* merely as a *brutum fulmen*. *Norris* v. *Chambres* (2), *Exp. Pollard* (3).

"I am not aware" observed Kay J.—

"of any case where a contested claim depending upon the title to "immovables in a foreign country strictly so called, being no part of the "British dominions or possessions, has been allowed to be litigated in this "country simply because the plaintiff and the defendant happened to "be here".

Re Hawthrone (1).

In *the British South Africa Company's case* (4) Lord Herschell L. C. stated that—

"there appear to me, I confess, to be solid reasons why the Courts of "this country should, in common with those of most other nations, have "refused to adjudicate upon claims of title to foreign land in proceedings "founded on an alleged invasion of the proprietary rights attached to it, "and to award damages founded on that adjudication",

and his Lordship added that—

"It is quite true that in the exercise of the undoubted jurisdiction of "the Courts it may become necessary incidentally to investigate and "determine the title to foreign lands; but it does not seem to me to follow "that because such a question may incidentally arise and fall to be "adjudicated upon, the Courts possess, or that it is expedient that they "should exercise, jurisdiction to try an action founded on a disputed claim "of title to foreign lands".

(1) (1883) 23 Ch. D 743, 747.
(2) (1861) 3 D. F. & J. 583.
(3) (1839) Mont. & C. 239.
(4) [1893] A. C. 602, 625, 626.

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In considering whether the present suit is a suit for land within clause 12 of the Letters Patent I have endeavoured to bear in mind the doctrine enunciated in the authorities to which I have referred, and, as I apprehend the matter, the construction that I have placed upon the term "suits for land or other immovable property" in clause 12 of the Letters Patent conforms alike to the principle underlying the decisions of the Courts, and, to the rule of international law that finds its sanction in the comity of nations. Now, applying the test that I have laid down to the issues raised in this case I am clearly of opinion that the present suit is not a suit for land. The claim is to a share of the proceeds resulting from the sale of the ancestral dwelling house at Bhawalpore; and, having regard to the pleadings, no issue arises that can affect the title to the land and premises that have been sold. The title of the purchaser is not challenged. In this suit the plaintiffs do not seek to set aside the sale; on the contrary, both the plaintiffs and the defendants approbate the sale, and claim their share of the proceeds. The real issue to be determined in this dispute is not with respect to the title to the ancestral dwelling house, but whether the plaintiffs at all material times were members of the joint undivided family to which the dwelling house and premises in suit belonged. For these reasons, in my opinion, the suit is not "a suit for land or other immovable property" within clause 12 of the Letters Patent.

The defendants further contend that as it is conceded that no part of the cause of action arises within the local limits of the ordinary original civil jurisdiction of the Court, the Court has no jurisdiction to entertain the suit, because three of the defendants at the time of the commencement of the suit did not "dwell, or carry on business, or personally work for

gain within such limits". In the plaint the third defendant is described as residing at Chinsurah in the district of Hooghly, and the fourth and fifth defendants as residing at Bikaneer; both places being situate beyond the local limits of the ordinary original civil jurisdiction of the Calcutta High Court. This contention must prevail, for, in my opinion, in these circumstances the issue as to the jurisdiction of the Court is concluded against the plaintiffs by the ruling of this Court in *Hadjee Ismail Hadjee* v. *Hadjee Mahomed Hadjee* (1). That case was decided in 1874 and so far as I have been able to ascertain, the correctness of the decision has never been doubted during the 53 years that have passed since the judgment was delivered. Mr. Sircar frankly and properly admitted that the plaintiffs could not reasonably contend that, inasmuch as the suit had been dismissed against the three defendants who reside beyond the jurisdiction of the Court, the suit must be deemed to have commenced from the date when the only defendants remaining on the record were described as residing within the jurisdiction. Learned counsel for the plaintiffs, however, contended that as the first and second defendants were at all material times amenable to the jurisdiction of the Court it was not open to either of those defendants to raise the defence that because they had been joined as defendants with some other persons who are not subject to the jurisdiction of the Court the Court has no jurisdiction to entertain the suit. In *Hadjee's case* (1) the same contention was raised and prevailed before the trial Judge, but it was not accepted by the Court on appeal. In that case, as in the present case, the defendants who were residing beyond the jurisdiction were interested in

(1) (1874) 13 B. L. R. 91, 100.

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the issues that fell for determination, and the Court, (Couch C. J. and Pontifex J.), decided that the suit could not be treated as a suit brought solely against the defendants who were within the jurisdiction, and further held that—

"to say that it is sufficient for one defendant to dwell or carry on "business within the jurisdiction would be to insert something into this "clause which is not there. It would be saying if any of the defendants "or any defendant dwells or carries on business within the limits. It being "necessary to give to the word "defendant" such a meaning as to "include more than one, for the purpose of applying it to suits where "there are several defendants, I think we ought also to hold that the "dwelling or carrying on business must be of all the defendants. The "expression is used not as indicating an individual defendant in a suit, but "the party to the suit defendant, which may be one person or several".

In those circumstances the Court ordered that the plaint be taken off the file of the Court. I am bound by the decision in *Hadjee's case* (1), and I order that the suit be dismissed, and the defendants' costs of and incidental to these proceedings be paid by the plaintiffs.

Attorneys for the plaintiffs: *Mitra & Mitra.*

Attorneys for the defendants: *S. K. Dutt, Dutt & Sen* and *B. N. Bose & Co.*

B. M. S.

(1) (1874) 13 B. L. R. 91.