

## ORIGINAL CIVIL.

*Before Lord-Williams J.*

GALSTAUN

v.

DIANA SARKIES.\*

1928

May 21.

*Originating Summons—Original side Rules, Chapter XIII, rule 1, clauses (b) and (c)—Direction on executors to admit the plaintiff as secured creditor of the estate—Summons transferred to list of suits—Letters Patent, clause 12—Jurisdiction.*

Asking in an Originating Summons for directions as against the executrix and the executor, who had taken out probate of the deceased's will, to treat the plaintiff as a secured creditor of the estate may involve a decision declaring an interest in land. The Originating Summons was transferred to the list of suits for hearing.

*Held*, it is a suit for land within meaning of clause 12 of the Letters Patent and is beyond the jurisdiction of this Court if the land against which the charge is sought to be declared is situated outside Calcutta.

*Kanti Chunder Pal Chaudhry v. Kissory Mohun Roy* (1) followed.

By an order dated 6th July 1927 (*vide* I. L. R. 54 Calc. 1075) this Originating Summons was transferred to the list of suits for hearing with leave to call evidence, but the question of jurisdiction was reserved. The Originating Summons was taken out by the plaintiff John Carapiet Galstaun asking for directions upon Mrs. Diana Sarkies and one Mr. Catachoor the executrix and executor respectively of the estate of the deceased C. M. Sarkies, who had taken out probate of his will, to treat him (the plaintiff) as a secured creditor of the estate. This became necessary as they had denied liability and disputed the debt. They did not agree to the correctness of the facts set forth in the plaint. The plaintiff's learned counsel contended that evidence must be gone into in accordance with the provisions of Chapter XIII, rule 17. The Court while granting this ordered that the Originating Summons

\*Original Civil Suit No. 1365 of 1926.

(1) (1887) I. L. R. 19 Calc. 361, 365.

be transferred to the list of suits for hearing as above stated. The defendants' main contention was that this Court had no jurisdiction to try this suit as the directions if given would involve the declaration of charge on land which is situated at Naraingunge.

*Mr. S. C. Mitter* (with him *Mr. B. C. Kar*), for the plaintiff. This is not a suit for land. The true test to be applied to determine whether a suit is a suit for land is to be found in the question whether the Court can give relief *in personam*. In this case Mrs. Diana Sarkies as the executrix of Mr. C. M. Sarkies' will obtained probate in this High Court. Therefore if the Court is satisfied on the merits that the plaintiff is entitled to the order *ex debito justitiae* then there is no reason whatsoever why this Court should not have jurisdiction. Jurisdiction being a creature of the statute, can it be argued with any force that the relief asked for in this suit is beyond the competence of this Court having regard to the fact that the plaintiff is not asking for any relief concerning land? The test always is—what is the nature of the relief wanted? No declaration of right is being prayed for, but the only point to decide in this suit is, considering the facts of this case, whether the Court should direct the executrix to do a particular thing.

*Mr. W. W. K. Page*, for the defendant Mrs. Diana Sarkies. This is a suit for land within the meaning of clause 12 of the Letters Patent. The question of mortgage or no mortgage will first of all have to be decided. The plaintiff cannot have any relief without that. Refers to *Kanti Chunder Pal Chaudhry v. Kissory Mohun Roy* (1).

LORT-WILLIAMS J. This case started as an Originating Summons which was originally heard by my learned brother Mr. Justice Costello, who made an order on the 6th of July transferring it to the list of suits for hearing, and giving certain orders with regard to discovery, and evidence, and reserving the question of jurisdiction.

(1) (1887) I. L. R. 19 Calc. 361, 365.

1928  
 GALSTAIN  
 v.  
 DIANA  
 SARKIES.  
 LORD WILLIAMS  
 J.

The direction asked for under Rule 1, Chapter XIII of the Rules of the High Court comes under subsection (e) of that rule or alternatively under (b), the one directing executors, administrators, etc., to do or abstain from doing a particular act and the other concerning the ascertainment of any class of creditor, and the principal direction asked for by the plaintiff in this case is a direction to the defendants the executrix and executor to admit him the plaintiff as a secured creditor of the estate of C. M. Sarkies deceased.

I am of opinion that this procedure if allowed would simply amount to a way of avoiding the limitations imposed by the Letters Patent for the High Court of Calcutta, 1865, which under clause 12 ordain that the High Court in the exercise of its Ordinary Original Civil Jurisdiction shall be empowered to try suits for land, if such land shall be situated within the local limits of the ordinary original jurisdiction of the said High Court.

The property in question in this suit is situated outside such local limits. It has been held by the High Court of Calcutta in the case of *Kanti Chunder Pal Chaudhry v. Kissory Mohan Roy* (1), that a suit for declaring any interest in land is a suit for land, and with this decision I agree.

Before I could give the direction asked for, I should have to decide that the plaintiff was a mortgagee of the property, which would be a decision declaring an interest in land and I am satisfied that such a decision would be beyond the powers conferred by the Letters Patent. Therefore I have no jurisdiction to entertain this suit which is accordingly dismissed with costs on scale No. 2.

Attorneys for the plaintiff: *Chatterjee & Co.*

Attorneys for the defendants: *Orr Dignam & Co.*

R. K. C.

(1) (1887) I. L. R. 19 Calc. 361, 365.