criminal misappropriation of an elephant. They were discharged. The Magistrate, however, under s. 517 of the Criminal Procedure Code, ordered the elephant to be given to the Executive Engineer, Durrung, holding that it was the property of Government, and the elephant has consequently been made over to that officer by the police. We are of opinion that the Magistrate was not competent to pass this order under s. 517 of the Criminal Procedure Code, because the elephant was not property produced before him regarding "which any offence had been committed or which had been used for the commission of any offence," the Magistrate having held that no offence was committed regarding this animal. We, therefore, set aside this order, although we are unable to give it any effect by ordering the restitution of the elephant. In this matter we follow the case of *In re Annopurna Bai* (1). The rule is made absolute without costs.

1887

BASUDEB SURMA GOSSAIN v. NAZIRUDDIN.

J. V. W. *Rule made absolute.*

ORIGINAL CIVIL

Before Mr. Justice Trevelyan.

PUNCHANUN MULLICK (PLAINTIFF) *v.* SHIB CHUNDER MULLICK AND OTHERS (DEFENDANTS).*

1887 *July* 15.

Partition, Suit for—Partial partition—Jurisdiction of High Court, Original Side—Properties situate partly within and partly without jurisdiction.

On the Original Side of the High Court a suit for partition of joint estate, part of the property of which estate is situate within and part without the jurisdiction (there having been no leave granted under s. 12 of the Charter to sue concerning the portion outside the jurisdiction) is not liable to be dismissed on the ground that partial partition of a property cannot be granted, but may be decreed as far as the property within the jurisdiction is concerned.

Ruling of JACKSON, J., in *Ruttun Monee Dutt* v. *Broja Mohun Dutt* (2) explained.

THIS was a suit by one Punchanun Mullick for partition of certain properties formerly belonging to his great uncle Gour Kissore Mullick.

It appeared that Gour Kissore died in 1831 possessed of, amongst other properties, a pucca godown in Burra Bazaar, Calcutta; an

* Suit No. 96 of 1887

(1) I. L. R., 1 Bom., 630. (2) 22 W. R., 333.

1887

PUNCHANUN MULLICK v. SHIB CHUNDER MULLICK.

upper roomed house in Banstollah Street, Calcutta; some garden land in Tiljullah in the Suburbs of Calcutta; and a family dwelling, being No. 46, Banstollah Street, Burra Bazaar, Calcutta; and that he by will left to his eight nephews (subject to a life interest in the family dwelling house, which had ceased long prior to the date of suit), a one equal ninth share in the above properties, leaving the remaining one-ninth share to two of his great nephews Prosonno Kumar Mullick and Mohun Lall Mullick in equal shares as tenants in common.

The plaintiff asked for partition of the whole of the properties set out above; but having, however, obtained leave under cl. 12 of the Charter to sue in the High Court with respect to the properties situated out of the jurisdiction.

Some of the defendants raised the objection that, part of the property being outside the jurisdiction, and no leave having been obtained under s. 12 of the Charter, the suit was one for partial partition of the properties formerly belonging to Gour Kissore, and would not therefore lie.

The issues framed, which are necessary for the purposes of this report, were as follows:—

(1) Whether the Court has jurisdiction, inasmuch as part of the property is outside the jurisdiction, and no leave has been obtained under s. 12 of the Charter?

(2) Whether the suit is maintainable, inasmuch as it is one for partial partition?

Mr. *Bonnerjee* and Mr. *Garth*, for the plaintiff.

Mr. *Pugh* and Mr. *K. M. Chatterjee*, for one of the defendants.

Mr. *Allen*, and Mr. *Abdul Rahman*, for others of the defendants.

Others of the defendants appeared in person.

Mr. *Pugh*.—The suit being one for partition of the whole property leave should have been obtained under the Charter, so as to include so much of the property as was outside the jurisdiction. Partial partition is not allowable—Menu, Chapter IX, s. 46; and *Jogendra Nath Mukerji* v. *Jugobundhu Mukerji* (1). [TREVELYAN, J.—That is a mofussil case.] As regards that point there is no difference between the jurisdiction of the Original Side of the High

(1) I. L. R., 11 Calc., 122.

Court and that of the Mofussil owing to the terms of the Charter. The Courts have unanimously held that partial partition is not allowable. See *Nanabhai Vallabdhas* v. *Nathubhai Haribhai* (1); *Narayan Babaji* v. *Nana Manohar* (2); *Ram Lochun Puttuck* v. *Rughoobur Dyal* (3); *Trimbak Dixit* v. *Narayan Dixit* (4); *Radha Churn Dass* v. *Kripa Sindhu Dass* (5); *Parboti Churn Deb* v. *Prun Kristo Nundi* (6); *Ruttun Monee Dutt* v. *Brojo Mohun Dutt* (7); *Ramjoy Ghose* v. *Ram Runjun Chuckerbutti* (8); the only case to the contrary is *Subba Rau* v. *Rama Rau* (9); the case of *Padamani Dasi* v. *Jagadamba Dasi* (10) correctly sets forth the proposition contended for and that has not been altered by the Charter.

The plaintiffs were not called on.

So far as is necessary for the purposes of the report, the following is the judgment of the Court:—

PREVELYAN, J.—This is a suit for partition, but the real question is one of jurisdiction. Mr. Pugh contended on the first issue that I had no jurisdiction.

The suit is brought apparently for partition of all the immoveable property formerly belonging to Gour Kissore, but the intention of the plaintiff is really to seek partition of the family dwelling house. It has been contended by the plaintiff that if a person sues for partition of a *portion* of a property held jointly between him and the defendant that suit must be dismissed. Authorities have been cited for this proposition, and there are some on the opposite side.

The key to this proposition, however, is to be found in the case of *Ruttun Monee Dutt* v. *Brojo Mohun Dutt* (7), where the plaintiff brought a suit in reality to enable him to separate from the joint estate a small portion which he desired to occupy for his own convenience. This suit was dismissed as being not maintainable, but it was contended on his behalf that, if the claim was not allowable, still he might have a declaration as to the extent of

(1) 7 Bom. H. C., 47.
(2) 7 Bom. H. C., 177.
(3) 1 W. R., 111.
(4) 11 Bom. H. C., 69.
(5) I. L. R., 5 Calc., 474.
(6) 9 C. L. R., 170; I. L. R., 7 Calc., 577.
(7) 22 W. R., 333.
(8) 8 C. L. R., 367.
(9) 3 Mad. H. C., 377.
(10) 6 B. L. R., 134.

1887

PUNCHANUN MULLICK v. SHIB CHUNDER MULLICK.

his share. Jackson, J., there says: "If the plaintiff sought a declaration like that, he ought to have framed his suit properly for that purpose; he is not entitled, regard being had to the mode in which he framed his suit and the valuation he put upon it, when the main object of the suit failed, to turn round and ask for that declaration." The reason for the dismissal being that in the mofussil there is an *ad valorem* fee for such suits, and if the relief given should be greater than that covered by the plaint, the Government would be a loser in fees.

There is no doubt of this proposition, that if a man sues for partition of joint property and the defendant alleges that there is other property, the plaintiff is bound to submit to partition of all the properties; and if he sued in the mofussil, he would either have to amend his plaint accordingly, and pay the extra stamp duty, or have his suit dismissed. But there is no *ad valorem* fee in this Court, and as I understand the law, in the absence of authority, if the defendant claims that there is other property to be partitioned, and it turns out that there is other property, that is no reason for the dismissal of the suit. It is a reason for including the other property in the suit if the Court has jurisdiction to deal with such property. Then it appears that one of the properties sought to be partitioned is outside the jurisdiction, and no leave has been granted under the Charter to sue in respect of that property, and it is said that for this reason I must dismiss the suit. The case of *Padmamani Dasi* v. *Jagadamba Dasi* (1) decided by Phear, J., is, I think, an authority as to this point, but if it is not, I should have no difficulty in deciding the case. In *Garrison* v. *Rodrigues* (2), I held that where a person sues in ejectment for properties under the same title, one of such properties being outside the jurisdiction, I can deal with the property within the jurisdiction. There is no authority shown contrary to this view, and the principle is, I think, practically the same in this case. The suit is one for partition of land, and I can deal with so much of the land as is within the jurisdiction. I think, therefore, that I have jurisdiction to deal with this suit. The plaintiff submits to partition

(1) 6 B. L. R., 134. (2) Unreported.

1887

of the property within the jurisdiction, and that is admittedly joint. There will be a decree for partition of those properties.

Suit partially decreed.

Attorney for plaintiff: Mr. *E. J. Fink.*

Attorneys for defendants: Messrs. *Harris & Simmons.*

T. A. P.

Before Mr. Justice Trevelyan.

1887
May 25.

THE DELHI AND LONDON BANK, LD. (PLAINTIFFS) *v.* HEM LALL DUTT (DEFENDANT).°

Easement—Light and air—South breeze—Limitation Acts; Act IX of 1871, *s.* 27; *Act XV of* 1877, *s.* 26—*English Prescription Act,* 2 *&* 3 *Will. IV, c.* 71—*Limitation Act, Effect of, on the pre-existing law as to nature and extent of the right to light or air.*

The Indian Limitation Act, unlike the English Prescription Act, places light and air on the same footing; and the object of the Prescription Act and of the provisions of the Indian Limitation Act is not to enlarge the extent and operation of the easement, but to provide another and more convenient way of acquiring such easements—a mode independent of legal fiction and capable of easy proof in a Court of law; these Acts do not, therefore, alter in any way the pre-existing law as to the nature and extent of the right.

The only amount of light for a dwelling house which can be claimed by prescription or by length of time (whether prior or subsequently to the Limitation Act of 1871) without an actual grant, is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house. Rule laid down in *Bagram v. Khettranath Kushmanik* (1) followed.

The right of air is co-extensive with the right to light. To give a right of action, either prior or subsequently to the Limitation Act of 1871, in a case (where there is no express contract on the subject) for an interference with the access of air to dwelling houses by building on adjoining land, the obstruction must be such as to cause what is technically called a nuisance to the house; in other words, to render the house unfit for the ordinary purposes of habitation or business.

There is no such right as a right to the uninterrupted flow of south breeze, as such.

The "45-degree rule" is not a positive rule of law, but is a circumstance which the Court may take into consideration, and is especially valuable when the proof of the obscuration is not definite or satisfactory.

° Original Civil Suit No. 122 of 1887.

(1) 9 B. L. R., O. C., 41.