1921

EMPEROR v. ANWAR.

different persons, formed one transaction, even though the receipt was not simultaneous with the theft. I agree with the view taken in that decision. I do not find that there is anything in my view contrary to the view expressed by LINDSAY, J., in the case of *Jiwan* v. *Emperor* (1), for there, the actual thief not being charged in the case, there was nothing to connect the three persons. Here it is the fact that Anwar, the actual thief, was charged with the receivers, which justifies the several acts being considered parts of one transaction. On the merits Anwar was clearly proved to have been loitering just before the theft of the bicycles. When the owners returned, the bicycles had disappeared, and Anwar had disappeared. Portions of the stolen bicycles were found in the shop in which he is employed. This being the case I do not see my way to interfere on the merits. I therefore dismiss this application.

Application dismissed.

MISCELLANEOUS CIVIL.

1922

January, 4.

Before Mr. Justice Piggott and Mr. Justice Walsh.

INAYAT-ULLAH KHAN (APPLICANT) *v.* NISAR AHMAD KHAN (OPPOSITE PARTY).*

Civil Procedure Code (1908), section 24—Transfer—Principles guiding a Court in considering an application for the transfer of a civil case.

In the matter of applications for the transfer of civil suits it is the duty of a court to insist upon any litigant applying for transfer making out a strong case in favour of the balance of convenience. On the question of the balance of convenience, the convenience of the parties in the conduct of the litigation is certainly a relevant consideration. *Tula Ram* v. *Harjiwan Das* (2) and *Subba Bibi* v. *Maqbul Husain* (3) followed. *Madho Prasad* v. *Moti Chand* (4) doubted.

THIS was an application under section 22 of the Code of Civil Procedure for transfer of a suit pending in the court of the Subordinate Judge of Shahjahanpur. The facts out of which the application arose are fully set forth in the judgment of the Court.

Pandit *Uma Shankar Bajpai*, for the applicant.

* Civil Miscellaneous No. 297 of 1921.

(1) (1921) 19 A. L. J., 815.
(2) (1882) I. L. R., 5 All., 60.
(3) (1916) 14 A. L. J., 242.
(4) (1919) I. L. R., 41 All., 381.

Babu *Lalit Mohan Banerji*, for the opposite party.

PIGGOTT and WALSH, JJ.:—This is an application which raises both a question of principle and a question of fact of some importance. The defendant, who is the applicant, is the son of one Abdul Jalil Khan, deceased, and the plaintiff is the cousin of the deceased man, who claims to be his heir. Abdul Jalil Khan and the other members of his family were old residents of Shahjahanpur, which appears also to have been the ancestral home of the defendant. For the purposes of this case, however, it may be assumed that the deceased migrated to a place called Pusad in Yeotmal, a district of the Berars, which is now a portion of the Central Provinces, and died there in October of last year, after having made, so the defendant alleges, certain gifts by deed of his property in favour of the defendant. The suit is brought by the plaintiff as heir of the deceased man to set aside these gifts, and it has been brought in the court at Shahjahanpur as a matter of choice by the plaintiff who is of course in all cases *dominus litis*; probably because it is his ordinary home, the language of the court is his language and because, as he says, some of the property is situated in that district. However, the defendant, on the ground that having regard to the issues raised by the suit and the general convenience of the parties in view of the nature of the evidence which will have to be called on both sides in the suit, has applied to this Court to transfer the case from Shahjahanpur and altogether from these Provinces in order that it may be tried in the appropriate court in the Yeotmal district of the Berars in the Central Provinces.

The question of principle raised by the application was not very seriously argued, but our attention was drawn to certain reported cases which make it desirable that we should express our views definitely upon the question. No case is reported on the subject in the authorized reports, Allahabad series, since the year 1882 (I. L. R., 5 Allahabad). There have been decisions which have found their way into modern reports and we prefer to follow the decision reported in *Subba Bibi* v. *Maqbul Husain* (1), a decision by a member of this Court sitting alone

(1) (1916) 14 A. L. J., 242.

1922

INAYAT-ULLAH KHAN v. NISAR AHMAD KHAN.

who followed the view taken by the older case of *Tula Ram* v. *Harjiwan Das*, (1) and the invariable practice as it was then established in England (that old practice has now been codified in England in the form of a special rule), namely, to insist upon any litigant applying for transfer to make out a strong case of the balance of convenience. In *Tula Ram* v. *Harjiwan Das* (1), already referred to, the court recognized that as the real test, although it decided against the transfer. There is one further material case, namely, *Madho Prasad* v. *Moti Chand* (2), (another single Judge decision) where a member of this Court declined to adopt that rule and held without reference to any previous authority that the mere convenience of the parties was not a good test. We come to the conclusion that that view is not a sound one. After all, the convenience of the parties in the conduct of litigation is certainly a relevant consideration, and it is perhaps not too much to say that it is the basis of nearly all statutory jurisdiction on the civil side.

That being the state of the law, the plaintiff in this case, as in every other, has undoubtedly a *primâ facie* right to decide the place of trial. The defendant may show, as he does here, exceptional circumstances. The question is whether those circumstances are such as to make it right to override the wish of the plaintiff and to direct the trial to take place at the most convenient tribunal. The defendant's main contention in this application is that he has to defend the deeds made in his favour against an attack made upon them by the plaintiff, and that both the attack and the defence must in the end turn upon the local evidence in the place where the deeds were executed, the suggestion being that they were executed by the deceased man in a condition of such ill-health as to make him either of not sufficiently sound disposing mind, or subject to the improper influences of some interested party so as to deprive him of the free exercise of his own volition.

To this contention the plaintiff makes several answers :—

Firstly, he alleges that his pedigree has been disputed. As to this the defendant has, by paragraph 6 of his own affidavit sworn on the 20th of December, 1921, admitted the plaintiff

(1) (1882) I. L. R., 5 All., 60. (2) (1919) I. L. R., 41 All., 381.

to be the cousin of the deceased man, and his counsel Mr. *Bajpai* in this Court on this application on his behalf formally admitted the plaintiff to be the heir of the deceased man. These admissions are binding upon both parties to the suit and this issue is, therefore, out of the suit and dispenses with a considerable number of witnesses who would otherwise be necessary from Shahjahanpur.

Secondly, the plaintiff makes the point that the ancestral home of both parties is in Shahjahanpur, that the wives of the deceased Abdul Jalil Khan lived there for the greater part of the time, and that some of the property in suit is situated there. This may be so. The points are really immaterial to the suit. The main issue will be, as we have stated, the condition of health and mind of the donor for some time antecedent to the alleged execution of the deeds and during the period between such execution and his death, and also the extent and nature of the influence exercised upon him during that period. Admittedly, during this period the donor lived at Pusad, according to the plaintiff for six months only, according to the defendant for nearly a year. It, therefore, appears from the position of both parties that the *res gestæ* and the appropriate witnesses on this head are situated at Pusad. Thirdly, the plaintiff makes a point of the language question. This would be a serious if not an insuperable objection to transfer if it were likely to affect the merits or the satisfactory disposal of the suit. The difficulty of language is one which is common to litigation in many parts of India, particularly when the parties belong to and speak the language of one Province and the events in issue occurred in a province where many material witnesses speak an entirely different one. In this case the difficulty to some extent cuts both ways. Moreover, inasmuch as the plaintiff has traded in Pusad for some years through a general attorney, with personal visits of his own, it is inconceivable that he has no one even in his own employ who can interpret Urdu and instruct a local lawyer in the language of the court, particularly when a great part of the necessary instructions can only relate to the collection and preparation of local evidence from people who speak the language of the court. This difficulty can be met by making it part

1922

INAYAT-ULLAH KHAN v. NISAR AHMAD KHAN.

of our order that any special costs of translating the record as it stands up to date, and reasonably to be incurred in employing an interpreter, if the plaintiff has none in his own employment, should be allowed as part of the costs of the suit in addition to those ordinarily allowed by the court.

Fourthly, there is the further point of the danger of delay based evidently upon some dilatory criminal proceedings which have already taken place in the Central Provinces. We have no ground for supposing that the appropriate Civil Court in the Central Provinces, where the plaintiff will have to sue, will be less disposed to prevent avoidable delay than the court at Shahjahanpur. We can at least make it clear that in our view any attempts by the defendant unduly to delay the disposal, if they appear to be made *malâ fide* as the result of this order, ought to be punished in the trial court by special orders as to costs thrown away or unduly incurred.

On the other hand, the defendant alleges that he will have to call more than 20 local witnesses. On the question how many he proposes to call, the plaintiff only mentions Urdu-speaking witnesses in Pusad; but he does not allege that he proposes to call no strictly local witnesses. This is significant. It is almost certain that he will have to call some. He lays stress on 4 or 5 Urdu-speaking witnesses in Pusad, but there is obviously no difficulty about these if an interpreter is present, even if they cannot speak Marathi. One is said to be a medical man whom it is obviously more convenient to keep near his patients as far as possible. The plaintiff also lays stress upon four witnesses whom he will have to call from Shahjahanpur on the question of the deceased man's illness. But as there must be some transfer of witnesses in any event, there seems no great hardship in their attending the court in person as they attended the place where the deceased lay ill.

The question of possession of the house at Shahjahanpur on which the plaintiff also lays stress is clearly a subsidiary one. The three witnesses whom he proposes to call can be duly examined on commission and ought to be so examined, particularly on a point on which evidence of purely eye-witnesses is notoriously vague, irrelevant and unreliable.

1922

INAYAT-ULLAH KHAN v. NISAR AHMAD KHAN.

On the whole, having regard to the attitude adopted by the defendant, and not without hesitation, we come to the conclusion that the balance of convenience is in favour of the Central Provinces and that the case must be transferred from the jurisdiction of these Provinces to enable the plaintiff to sue at the appropriate court in the Central Provinces, the defendant undertaking to do nothing unduly to delay the trial, to contribute Rs. 100 in any event, to the pleaders' fees already paid by the plaintiff to his lawyers, and not to object to the reasonable costs of translation of the present record and of the interpretation of the evidence being made costs in the cause. The costs of this application will abide the event.

Application granted.

APPELLATE CIVIL.

1923
January, 5.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

KASHI PRASAD SINGH AND OTHERS (PLAINTIFFS) v. BALBHADDAR SINGH AND ANOTHER (DEFENDANTS). *

Act (Local) No. II of 1901 *(Agra Tenancy Act), section 177—Suit for ejectment—Decree for ejectment reversed on appeal—Application to Court of Revenue for restitution—Application dismissed—Appeal—Civil Procedure Code (*1908*), section* 144.

An application for restitution of possession under section 144 of the Code of Civil Procedure in consequence of the decree against them having been reversed on appeal was made by the defendants in an ejectment suit to the court of first instance, being a Court of Revenue. That court, however, rejected the application.

Held that the order of the Court of Revenue was not a "decree" and no appeal lay therefrom to a Civil Court. *Zohra* v. *Mangu Lal* (1) referred to.

THIS was an appeal from a judgment of a single Judge of the Court under section 10 of the Letters Patent. The facts of the case are thus stated in the judgment under appeal, which was as follows :—

This is called a second appeal. It is a claim by the appellants for possession of certain land. It is only necessary to state the facts to see that they are clearly entitled to possession.

* Appeal No. 87 of 1921, under section 10 of the Letters Patent.

(1) (1906) I. L. R., 28 All., 753