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to questions relating to the title of only one of the parties which might be made the basis of a prospective suit. It has been held by KNOX and BLAIR, JJ., in *Hanuman Prasad* v. *Bhagwati Prasad* (1) that when it is laid down that the decree must involve directly or indirectly some claim or question to or respecting property of Rs. 10,000 in value or upwards, the reference is to suits in existence and not to suits *in gremio futuri*. In *Rajah of Ramnad* v. *Kamith Ravuthan* (2) SPENCER and KUMARASWAMI SASTRI, JJ., held that the reference in the Civil Procedure Code was evidently to questions arising between the parties to the suit and not to questions affecting the title of one of the parties to the suit or suits that may hereafter be brought but were not then pending. A similar view was taken by RUTLEDGE, C. J., and CHARI, J., in *Bon Kwi* v. *S. K. R. S. K. R. Firm* (3).

We are of opinion that the case now before us does not with reference to its valuation fulfil the requirements of section 110 of the Civil Procedure Code.

It has been next contended that the case is *otherwise* a fit case for appeal to His Majesty in Council and should be certified as such under section 109(*c*) of the Code of Civil Procedure. In special cases, where the points in dispute may not be measurable in money and yet there may be substantial questions of law of sufficient public or private importance, an appeal to the Privy Council may be justified. We have indicated some of the grounds which are sought to be raised in this case and are of opinion that these grounds raise substantial questions of law and are of vital importance to the parties before us. We therefore certify that this case fulfils the requirements of section 109(*c*) of the Code of Civil Procedure.

(1) (1902) I. L. R., 24 All., 236 (238). (2) A. I. R., 1922 Mad., 34.
(3) A. I. R., 1926 Rang., 128.

Before Mr. Justice Sen.

SHIV DAYAL (DEFENDANT) *v.* PUTTU LAL AND ANOTHER (PLAINTIFFS).* 1931 *December,* 15.

Transfer of Property Act (IV of 1882), sections 3 and 59—General Clauses Act (X of 1897), section 3(25)—"Immovable property"—Trees—Mortgage of fruit-bearing trees—Not intended to be cut down and sold—Mortgage of immovable property or an interest therein.

Whether or not a mortgage of fruit-bearing trees is a mortgage of immovable property is a question dependent in each case upon the intention of the contracting parties and cannot be settled by an inflexible rule. Where there is a mortgage with possession of fruit-bearing trees, with the intention that the mortgagee is to remain in possession during the years of the mortgage and enjoy the fruits and should not cut down the trees so as to convert them to either timber or firewood, it must be held that the trees so mortgaged were either immovable property or at least an interest in immovable property, and therefore the mortgage could not be validly effected without the formalities prescribed by section 59 of the Transfer of Property Act.

Mr. *R. C. Ghatak*, for the appellant.

Mr. *U. S. Bajpai*, Dr. *K. N. Malaviya* and Mr. *G. S. Pathak*, for the respondents.

SEN, J. :—The facts of the case which have given rise to this appeal are briefly these. On the 2nd of August, 1902, one Bhola chamar, husband of Mst. Amri defendant No. 2, executed a usufructuary mortgage deed in favour of Maharaj Baldeo Prasad, father of plaintiffs Nos. 1 and 2, for Rs. 400. The mortgaged property consisted of 18 mango trees and one jamun tree. The mortgage bond purported to be attested by four witnesses, including one Baldeo Prasad. The mortgagor, the mortgagee and the four attesting witnesses are all dead. On the 26th of April, 1929, a suit was instituted by Puttu Lal and Banwari Lal, sons of the mortgagee, and by one

*First Appeal No. 186 of 1930, from an order of Kedar Nath Mehra, Additional Subordinate Judge of Farrukhabad, dated the 23rd of August, 1930.

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Rustam kisan to whom the mango crops were sold for one year. They brought a suit in the court of the Munsif of Farrukhabad against Shib Dayal, the zamindar, for a perpetual injunction restraining the latter from interfering with the plaintiffs' possession, for possession in the alternative, and for recovery of Rs. 35 as damages. The suit was resisted *inter alia* upon the grounds that Bhola was not the owner of the trees and that the mortgage bond had not been executed with the necessary formalities. Eight issues were framed by the trial court. The suit was dismissed on the ground that Bhola was not the owner of the trees alleged to have been mortgaged by him and that the plaintiffs' possession was not proved. * * * *

The lower appellate court on appeal held that Bhola was the owner of the trees in dispute, that he was in possession of the property and that the plaintiffs were also in possession of the property under the mortgage in suit. As the lower appellate court was of opinion that the remaining issues had not been properly tried, it remanded the case under order XLI, rule 23, of the Code of Civil Procedure; hence the appeal.

[A portion of the judgment, not material for the purpose of this report, is here omitted.]

Upon these findings, the defendant appellant pleads that there was no valid mortgage executed by Bhola and that the suit in enforcement of a title founded upon the mortgage must fail. The plaintiffs however contend that the property mortgaged under the instrument dated the 2nd of August, 1902, was "standing timber" within the definition of section 3 of the Transfer of Property Act and was therefore not immovable property as defined in the Act. They therefore argue that for the validity of the mortgage it was not necessary to comply with the formalities imposed by section 59 of the Transfer of Property Act.

In section 3 of the Transfer of Property Act the definition of "immovable property" is neither

comprehensive nor exhaustive. All that it says is that immovable property does not include standing timber, growing crops or grass. Here we have a negative definition but it is apparent that standing timber was intended to be *ejusdem generis* with "growing crops" or "grass", and the latter articles not only do not connote the idea of permanence but their use and enjoyment can be secured by the operation of the sickle. In the General Clauses Act (Act X of 1897), section 3(25), "immovable property" has been defined to include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. It has been urged by the defendant appellant that this definition is sufficiently comprehensive to include a fruit-bearing tree so long as it is firmly rooted in the soil. He relies as part of his argument upon a decision of the Judicial Commissioner of Oudh in *Chandi* v. *Sat Narain* (1), in which it has been held that the mortgage of a grove of mahua trees was a mortgage of an immovable property and that a mahua grove was not "timber". "Trees attached to the earth, so long as they are not timber, must fall within the general definition of immovable property." It appears to me that the law in this respect has been stated a little too broadly in this case. Reliance has also been placed upon a dictum of the Privy Council in *Ruttonji Edulji Shet* v. *Collector of Tanna* (2) which runs as follows: "The trees upon the land were part of the land, and the right to cut down and sell those trees was incident to the proprietorship of the land." This pronouncement was made not with reference to the definition of immovable property as contained in either the Transfer of Property Act or in the General Clauses Act, but long before either of these two Acts was placed upon the Statute Book. In this case their Lordships had to construe a lease or *cowl* dated the

(1) A. I. R., 1925 Oudh, 108. (2) (1867) 11 Moo. I. A., 295 (313).

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31st of December, 1845, and all that they held was that, on the construction of this document, the lessee had the right to cut trees growing on the lands demised for the purpose of clearance and cultivation or for repairs and that he had no right to fell and carry away for sale unassessed timber growing on the demised lands. This decision cannot be of any assistance in the present case.

Whether or not a mortgage of fruit-bearing trees is a mortgage of immovable property is a question dependent in each case upon the intention of the contracting parties and cannot be settled by an inflexible rule. Where there is a mortgage with possession of fruit-bearing trees, with the intention that the mortgagee is to remain in possession during the years of the mortgage and enjoy the fruits and should not cut down the trees so as to convert them to either timber or firewood, it must be held that the trees so mortgaged were either immovable property or at least an interest in immovable property.

According to the terms of the mortgage bond in suit, the mortgagee is authorised to remain in continued possession during the whole term of the mortgage. He is authorised to appropriate the fruits. He is also authorised to appropriate the branches when dry. This clearly indicates that the parties never intended that the mortgagee in the exercise of his rights should cut down the trees and convert them into timber. The enjoyment of the fruits during the subsistence of the mortgage could be secured by the continued existence of the trees and would be rendered impossible by the severance of the trees from their native soil. For the continuance of such enjoyment these trees must exist firmly embedded in the earth and inseparable from the soil from which they are to derive continuous nourishment. In *Mathura Das* v. *Jadubir Thapa* (1) certain trees standing in a certain area of land *were sold* and

(1) (1905) I. L. R., 28 All., 277.

the question was whether an interest in immovable property was conveyed by this sale. AIKMAN, J., observed: "In my opinion it is nothing but an agreement by the opposite party whereby he sold the trees standing in a certain area of land. These trees were sold, *not that the produce thereof might be enjoyed*, but simply with a view to their being cut down and removed." The present case however is essentially different, because the rights of the mortgagee were restricted to mere enjoyment of the fruits and he was not competent to cut down and remove the trees. In *Katwaru Chamar* v. *Ram Adhin Upadhia* (1) certain fruit-bearing trees were hypothecated along with other immovable property and it was held by RAFIQUE, J., that they fell within the definition of immovable property as given in the Transfer of Property Act. In *Seeni Chettiar* v. *Santhanathan Chettiar* (2) the principal point in dispute was whether the assignment of a right to cut and enjoy the trees for a period of four years dating from the 1st of January, 1891, purported to convey an interest in immovable property. COLLINS, C. J., observed: "It appears to me that there can be no doubt but that the *yadast* does convey an interest in immovable property; the contrary proposition is not arguable. It has long been settled that an agreement for the sale and purchase of growing grass, growing timber or underwood, or growing fruit, not made with a view to their immediate severance and removal from the soil and delivery as chattels to the purchaser, is a contract for the sale of an interest in land." SUBRAMANIA AYYAR, J., observed: "It is scarcely necessary to observe that though standing timber is, under the Registration Act III of 1877, movable property only, still parties entering into a contract with reference to such timber may expressly or by implication agree that the transferee of the timber shall enjoy, for a long or short period, some distinct benefit to arise

(1) (1912) 10 A. L. J., 516. (2) (1896) I. L. R., 20 Mad., 58.

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out of the land on which the timber grows. In a case like that, the contract would undoubtedly be not one in respect of mere movables, but would operate as a transfer of an interest in immovable property." The general law in this respect has been exhaustively dealt with by Ross, J., in *Ashloke Singh* v. *Bodha Ganderi* (1), in which he held that the question whether a tree given to the plaintiff by one of the proprietors of the village by an unregistered and unstamped *chitthi*, dated the 12th Kartik, 1315, was merely a standing timber or was an interest in immovable property, was a question of intention and that if the intention was that the plaintiffs should enjoy the fruits of the tree and not cut it down as timber, then the property demised was immovable property which could only be conveyed by a registered instrument. He supports his view by a reference to *Marshall* v. *Green* (2) in which is to be found the following statement of law: "The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods." The aforesaid principle has the high authority of Sir EDWARD VAUGHAN WILLIAMS and has a classic flavour about it. This statement of law has been accepted in case after case and is the settled law in English Courts. The decision of Ross, J., was affirmed in *Bodha Ganderi* v. *Ashloke Singh* (3).

The learned counsel for the respondents relies upon the decision in *Krishnarao* v. *Babaji* (4) in which it

(1) A. I. R., 1926 Pat., 125.
(2) (1875) 1 C. P. D., 35.
(3) (1926) I. L. R., 5 Pat., 765.
(4) (1899) I. L. R., 24 Bom., 31.

has been held that a mango tree, which is primarily a fruit tree, might not always come within the term "standing timber" used in the definition of immovable property in section 3 of the Registration Act (XX of 1866), but it may be classed as a timber tree where according to the custom of a locality its wood is used in building houses. In my view whether or not a fruit-bearing tree is movable or immovable property is to be determined having reference to the intention of the contracting parties. The view of PARSONS, J., appears to me to be very guarded and is not necessarily opposed to my view. *Alisaheb Baba Diwakar* v. *Mohidin Sadik Patil* (1) was decided with reference to the peculiar terms of the agreement, dated the 13th of February, 1905, and the decision of AIKMAN, J., in *Mathura Das* v. *Jadubir Thapa* was followed. The terms of this contract were essentially different from the terms of the mortgage bond in suit. It was held by SCOTT, C. J., that a contract for cutting of all kinds of trees to be converted into charcoal upon the ground, *excepting such trees as produce fruit or other forest produce,* was not a contract for the sale of an interest in land but was an agreement relating to movable property and that trees answering the above description were standing timber within the meaning of the Transfer of Property Act, 1882, and as such were not immovable property.

I hold that under the instrument of 2nd of August, 1902, Bhola intended to mortgage the trees as immovable property within the meaning of section 3 of the Transfer of Property Act and section 3(25) of the General Clauses Act, and that the mortgage having been effected without the formalities as prescribed by section 59 of the Transfer of Property Act, no title passed to the mortgagee. The suit, therefore, was bound to fail.

(1) (1911) 13 Bom. L. R., 874.

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I allow the appeal, set aside the order of the Additional Subordinate Judge dated the 23rd of August, 1930, and restore the decree passed by the Munsif dated the 23rd of January, 1930. The appellants are entitled to have their costs of this Court and of the lower appellate court.

Before Justice Sir Shah Muhammad Sulaiman and Mr. Justice Young.

1931 *December*, 17.

LACHHMAN DAS (APPLICANT) *v.* LAKSHMI NARAIN AND OTHERS (OPPOSITE PARTIES).*

Costs—Insolvency—Receiver's suit against a third party dismissed with costs—No direction that costs are to come out of insolvent's assets—Costs payable by receiver personally—Res judicata—*Dismissal of application to execute costs of trial court—Subsequent application to execute appellate court's decree awarding costs of both courts.*

A receiver in insolvency instituted a suit for a declaration that certain property was owned by the insolvent and not by the defendant. The suit was dismissed with costs; there was no direction that the costs were to be recovered from the assets of the insolvent. An appeal by the receiver was also dismissed with costs; the decree of the appellate court specified separately about the costs of each court. The defendant's application to the trial court for execution of the decree for costs of that court was dismissed, as the court was of opinion that the costs were not recoverable personally from the receiver. Subsequently the defendant put the decree of the appellate court for costs in execution.

Held that as the decree passed against the receiver was not an order passed by the insolvency court, whose orders for costs against the receiver ordinarily imply that they ordinarily are to be paid out of the assets of the insolvent, but was passed by the civil court in a suit brought by the receiver against the defendant, and there was no direction or indication that the costs would be recovered only from the assets, the receiver was personally liable to the defendant to pay the costs. Of course it might be open to the receiver to apply to the insolvency court to be reimbursed out of the assets of the insolvent.

*Execution First Appeal No. 270 of 1930, from a decree of Makhan Lal, Subordinate Judge of Moradabad, dated the 15th of February, 1930.