ORIGINAL CIVIL.

Before Mr. Justice West.

1880 *July* 13 *and* 15.

JAIRA'M NA'RA'YAN RA'JE, PLAINTIFF, *v.* A'TMA'RA'M NA'RA'YAN RA'JE, DEFENDANT.*

Jurisdiction—Suit for land—Letters Patent (1865), *Clauses* 12, 13, 14—*Suit for partition where moveables are within and immoveables outside the jurisdiction—Practice—Leave to sue under Clause* 12 *of Letters Patent*, 1865—*Leave to sue as a pauper.*

The plaintiff sued the defendant for partition of family property, which consisted both of moveable and immoveable property. The moveable property was within the jurisdiction, but all the immoveable property was outside the jurisdiction of the Court.

Held that the case did not fall within the provisions of clause 12 of the Letters Patent, 1865, and that the Court had no jurisdiction to hear the suit. The fact that his suit included a claim for moveables, which were within the jurisdiction, did not entitle the plaintiff to sue in the High Court, nor could he obtain leave for that purpose under clause 12 of the Letters Patent.

The words "all other cases" in clause 12 of the Letters Patent, 1865, do not include cases of suits for immoveable *plus* moveable property. They refer to cases in which immoveable property is not involved.

Leave to sue under clause 12 of the Letters Patent, 1865, cannot be implied from the fact that leave to sue as a pauper has been granted to a plaintiff. Leave for the former purpose must be distinctly sought and obtained.

THE plaintiff and defendant were undivided Hindu brothers. On the 8th December, 1875, they executed a written agreement by which the plaintiff agreed to release his share of the family property (both moveable and immoveable) to the defendant, and the defendant, in consideration of such release, agreed to pay to the plaintiff a lump sum of Rs. 200 for the expenses of his marriage and a sum of Rs. 8 *per mensem* for maintenance.

For some months subsequently to the date of this agreement the defendant paid the maintenance money to the plaintiff. Of the sum of Rs. 200 he paid only a portion, and the plaintiff, consequently, sued him upon the agreement for the unpaid balance, and obtained a decree. A quarrel ensued, and the plaintiff brought this suit against the defendant, claiming partition of the family property. The plaint referred to the agreement of 8th December,

* Suit No. 389 of 1879.

1875, but sought partition, not according to the terms therein contained, but according to the provisions of the Hindu law. The defendant in his defence relied on the agreement of the 8th December, 1875, and objected that the immoveable property, of which the plaintiff claimed partition, being situated at Thána, the Court had no jurisdiction to determine the suit.

B. Tyabji and *Telang* for the plaintiff.

Starling and *Jardine* for the defendant.

The following authorities were cited:—12th clause of Letters Patent, 1865; *Juggodumba Dossee* v. *Puddomoney Dossee*(1); *Kellie* v. *Fraser*(2); *Srimati Padamani Dasi* v. *Srimati Jagadamba Dasi*(3).

WEST, J.—The first question is as to the jurisdiction of this Court over this suit. Mr. Tyabji has relied on the cases reported in the sixth and fifteenth volumes of the Bengal Law Reports and on one case reported in the Indian Law Reports, 2 Calc., p. 445. The first of these (*Srimati Padamani Dasi* v. *Srimati Jagadamba Dasi*(3)) was a suit by one of two sisters against the other for partition of property inherited from their father, and situated within the local original jurisdiction of the High Court. It was admitted that the rents and profits of the part of the estate situated beyond the local jurisdiction, were taken in separate shares. It was held by Phear, J., that the suit could be maintained for partition of the property within the jurisdiction, though he thought it possible that, on cause shown, a stay of proceedings might be granted to allow the defendant to file a suit by leave of the Court for a partition of the whole estate. The learned Judge had no doubt that the suit was one "relating to land within the words of the 12th clause of the Letters Patent", which are the same as those in the Letters Patent of this Court. Had the suit been filed for a general partition, that part of clause 12 would have applied to it which allows a suit to be filed by leave of the High Court where the immoveable property is situated in part within the jurisdiction. What is said as to the right to demand a partial partition, if intended to have a general application, is opposed to the doctrine held by this Court, which rests on the necessity,

(1) 15 Beng. L. R., 318. (2) I. L. R., 2 Calc., 445.

(3) 6 Beng. L. R., 134.

1880

JAIRA'M NA'RA'YAN RA'JE v. A'TMA'RA'M NA'RA'YAN RA'JE.

equally in the case of a joint family as of a partnership, of a general account and distribution in order to do complete justice to the co-owners as to any part of the estate[1].

The case of *Juggodumba Dossee* v. *Puddomoney Dossee*[2] was one by trustees against trustees of property dedicated to an idol. The parties were within the local jurisdiction of the High Court, but the lands constituting the endowment were without it. There had been a previous litigation in a Mofussil Court ended by a compromise and a decree embodying it. The plaintiffs, complaining that they had been ousted by the defendants, sought to enforce the agreement, formerly entered into, for a declaration of their joint right as *sebaits*, the settlement of a *salámi*, an injunction, a receiver and an account.

Macpherson, J., before whom the case first came, held that, as the *sebaits* had "no sort of personal beneficial interest in the property", the suit was not one for land or other immoveable property within the meaning of clause 12 of the Letters Patent, "even although the plaintiffs seek to have it declared that they are trustees and managers jointly with the defendants of lands in the Mofussil. If the plaintiffs, as co-trustees, are entitled to an account, from the defendants, of the trust moneys come to their hands and their application thereof, I cannot see how the fact, that those moneys are derived from lands in the Mofussil, can deprive this Court of jurisdiction when the accounting party is personally subject as being a resident of Calcutta. In so deciding I follow the current of decisions in this Court." Again, at page 324, he says: "I think it is not a case in which *pallas* should be ordered. It is not as if the parties had any beneficial interest in the settled property, for this is simply a naked trust of which they are the trustees." By "naked trust" the learned Judge meant one unaccompanied by any beneficial interest[3], not one unattended with active duties.

In appeal it was held that the suit was not one for land. Markby, J., says: "No possession of any land is claimed, and no

(1) West and Bühler (2nd ed,) 299; Printed Judgments for 1878, p. 184; *Ibid.*, p. 188.

(2) 15 Beng. L. R., 318.

(3) See *Morgan* v. *Swansea Urban Sanitary Authority*, 9 Ch. Div. 582.

decree, bearing directly upon land or any interest in land, has been given." The learned Judge even thought that the parties had no interest, either legal or beneficial, in the lands which were to be regarded as the property of the idols. For this doctrine he refers to *Maháranee Shibessouree Debia* v. *Mothooranáth Acharji*[1]. I find it hard to conceive property except as a relation amongst human beings, and in the case that the learned Judges were dealing with, the plaintiffs charged the defendants with having deprived them of joint possession of the dedicated property to which they claimed to be entitled. The Court, moreover, appointed a receiver who must have taken the place of some other corporeal possessor of the estate. But, supposing there was no interest in land outside the jurisdiction on which the Court's decree was to operate, that alone differentiates the case altogether from the present one. Here there is an interest in the lands at Thána, and the plaintiffs seeks a share of those lands by physical division.

In the case of *Kellie* v. *Fraser*[2] a partnership deed had been executed in Calcutta for carrying on a tea plantation at Darjeeling. The partners disagreed, and Mr. Fraser desiring a dissolution, the terms were arranged by arbitration at Calcutta. The question was whether the award could be filed in the High Court. This depended on whether the High Court had jurisdiction over the matter in dispute, and the learned Judges held that it had. Sir R. Garth, however, says that the plaintiff "did not seek to obtain possession of, or to acquire a title to, the tea gardens, because that was already the property of the partnership, and the effect of the award was only to dissolve the partnership, and to dispose of the partnership property on what they considered the most just and reasonable terms." On this ground he distinguishes the case from *The Delhi and London Bank* v. *Wordie*[3] and several other cases in which it had been sought to bring the process of the Court to bear directly on land.

What the award, in the case I have just considered, really established, was the legal relation between the parties and a duty admitting of performance within the jurisdiction. Had they

(1) 13 Moore's Ind. Ap., 270. (2) I. L. R., 2 Calc., 445.

(3) I. L. R., 1 Calc., 249.

1880

JAIRA'M NA'RA'YAN RA'JE v. A'TMA'RA'M NA'RA'YAN RA'JE.

agreed by contract to the terms of dissolution in Calcutta, their agreement would undoubtedly have been one that could be sued on there for some purposes, and the arrangement made for them stood on the same footing. A decree to the same effect could have been fulfilled by personal obedience: Civil Procedure Code (X of 1877), sec. 161. But this leaves the question, that I have to dispose of, untouched. If Mr. Kellie, after the award had been filed, had refused to conform to it and kept possession of a part of the property, the question would then have arisen of the Court in which a suit ought to be brought for his ejectment. In the present case, possession is sought; indeed, it must be sought, as, if the plaintiff's title is good, he is bound to enforce it in that way, not by a merely declaratory suit.

In the case of *Rámchandra Dádá Náik* v. *Dádá Mahádev Náik*[1] Sir M. Sausse, C. J., held that the jurisdiction of the late Supreme Court did not extend to enforcing a partition of immoveable property lying beyond the jurisdiction of the Court. The jurisdiction of the Supreme Court, as expressed in section 29 of its charter, was quite as extensive and, indeed, more unqualified than that of the High Court.

The distinction that subsists between cases in which effect is sought to be given to a contract or personal obligation undertaken by one towards another, touching immoveable property, and those in which a right over property, as such, is asserted, appears from the case of *Norris* v. *Chambres*[2], in which it was held that the English Court of Chancery could declare property out of the jurisdiction, subject to a lien only under special circumstances, and subject to the difficulties which might arise in getting effect given to its decree in a foreign country. In *Whitaker* v. *Forbes*[3] the Court declined, on rather narrow grounds, to exercise jurisdiction over a claim for arrears of a rent charge on lands situated in Australia; while in *The Buenos Ayres Railway Company* v. *The Northern Railway Company*[4] a claim was held cognizable in England, as the parties were within the jurisdiction, on a contract relating, in some measure, to lands

(1) 1 Bom. H. C. Rep., Appx., lxxvi.
(2) 30 L. J. Ch, (N.S.) 285.
(3) 1 C. P. D. 51.
(4) 2 Q. B. D. 210.

situated in South America. But there the special personal relation had arisen. Money had become due from the defendants to the plaintiffs, and effect would be given to the Court's decree by a coercion to be exercised within its own jurisdiction. It is on the same principle that the Courts of Equity proceed in cases of trust or of fraud relating to lands without the jurisdiction. They proceed *in personam* (*Penn* v. *Lord Baltimore*[1]) ; but when possession is sought of immoveable property or for a partition, they remit the parties to the local tribunals. This is the principle on which this Court held, in *Chintáman* v. *Mádhavráo*[2], that a defendant residing in one jurisdiction could be sued by his alleged co-owner for a share of rent arising from lands in another jurisdiction. The question of title arose incidentally ; but the jurisdiction was determined by the nature of the suit, which was not for immoveable property, (unless, indeed, we are to make that term extend amongst Hindus to every case of *nibandha*[3],) but for money which could be paid, and payment of which could be enforced within the local limits of the jurisdiction.

In the present suit the partition of land is the principal object : there is a claim for a partition of moveable property also, but, apparently, of a less substantial kind. Sir M. Sausse seems to have thought that the Supreme Court could decree a partition of the moveable property within its own jurisdiction, while declining jurisdiction as to the immoveable estate which lay beyond it. But, now, we have to be governed by the words of the Letters Patent of the High Court, 1865, which are more definite than those of the earlier charter. Under section 12, this Court has jurisdiction in suits for land if the land is situated wholly or in part within the local jurisdiction, subject, in the latter case, to the leave of the Court being obtained. The section does not say "in suits for land or other immoveable property only" : it applies equally to suits for such property, whether combined or not with other claims. In "all other cases" the cause of action must have arisen wholly or partly within the local limits. "All other cases" I do not understand as including cases of suits for immoveable *plus* moveable property, but those in which im-

(1) White and Tudor L. C. (5th ed.) 939. (2) Bom. H. C. Rep. 29, A. C. J.
(3) See *Balvantráv Purshotum Sideshvar*, 9 Bom. H. C. Rep. 99.

1880

JAIRÁM NÁRÁYAN RÁJE v. A'TMA'RA'M NA'RA'YAN RA'JE.

moveable property is not involved. A different construction would require the interpolation of the word "only" after "immoveable property". That in mixed or compound cases the Court is not intended to exercise jurisdiction, appears from section 14. That section relates, no doubt, to separate causes of action; but the combination which is allowed to bring other foreign causes within the jurisdiction, is denied in the case of land. The object seems to be to confine suits to land strictly to the Courts having jurisdiction over the land, or, at least, over part of the land sought. The suit for moveable property is not allowed to attach to itself a suit for immoveable property, as by leave of the Court another suit for moveable property may in that way be drawn within another than the local jurisdiction. Should a mixed cause—involving a claim to both kinds of property, one within and one without the jurisdiction—be one obviously proper for trial in the High Court, the suit in the Mofussil Court may be withdrawn under section 13 of the Letters Patent, and tried here. The cause of action being single, no objection could arise to a consolidation of the two suits upon the words of section 14.

I do not think, therefore, that the present is a case in which leave to sue in this Court could properly be given. But it was, in fact, not asked for. I am told that I ought to infer it from leave having been granted to the plaintiff to sue as a pauper, but such leave does not by any means necessarily imply that this particular question was judicially considered. The leave of the Court ought to have been as distinctly sought and obtained for the purpose of joining the different elements of the cause of action in a single suit in this Court as for the purpose of suing in *formâ pauperis*. As it is, I must dismiss the suit as to the immoveable property outside the original civil jurisdiction of this Court, for want of jurisdiction.

Attorneys for the plaintiff.—Messrs. *Bálcrishna and Bhagwandás.*

Attorneys for the defendant.—Messrs. *Nanu and Hormusji.*