APPELLATE CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Candy.

KASHINATH GOVIND (ORIGINAL PLAINTIFF), APPELLANT, *v.* ANANT SITARAMBOA (ORIGINAL DEFENDANT), RESPONDENT.*

1899. *December* 11.

Jurisdiction—Suit to establish right to a share in certain income—Property having a foreign origin—Incomes received within the jurisdiction of the Court—Question of title not involved—Jurisdiction of the Court to entertain the suit—Civil Procedure Code (Act XIV of 1882), Secs. 16 and 17.

All property having a foreign origin is not outside the jurisdiction of a British Court.

"The Courts of Equity in England are, and always have been, Courts of conscience, operating in *personam* and not in *rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction." The jurisdiction of Courts in India is governed and must be ascertained by the same principles except so far as they may be at variance with legislative enactment.

Ewing v. *Orr Ewing* (1) followed.

The plaintiff sued in the Court at Násik in British India to establish his right to a share in the income derived from certain grants of land situate outside of British India, but received by the defendant within the jurisdiction of the Násik Court.

Held, that the suit was within the jurisdiction of the Court, there being no dispute as to title.

Keshav v. *Vinayak* (2) distinguished.

SECOND appeal from the decision of Ráo Bahádur D. G. Gharpure, Assistant First Class Subordinate Judge of Násik with appellate powers, reversing the decree of Ráo Sáheb L. K. Nulkar, Second Class Subordinate Judge of Násik.

The plaintiff, who was a member of one of three branches of pujáris (worshippers) attached to the temple of Rám at Násik, sued to establish his right to a third share in four incomes and also to recover the arrears due to his share. One of the said incomes consisted of the revenue of a village called Bhagatvádi in the Nizám's territory and another of an annuity from the Chief of Rámdurg.

* Second Appeal, No. 300 of 1899.

(1) (1883) 9 A. C., 34. (2) (1897) 23 Bom., 22.

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The defendant answered (*inter alia*) that the Court had no jurisdiction to entertain the suit; that the properties were acquired by his ancestors after a division had been effected between the branches of the pujári families; that the plaintiff had, therefore, no right to sue; and that the claim was time-barred.

The Subordinate Judge found that the claim as regards the right to a share in the incomes as well as to arrears thereof for three years previous to the suit was not time-barred; that the jághír of Bhagatvádi and the annuity from Rámdurg were acquired by the defendant's branch for the idol of Rám at Násik and were in their possession, but not as the self-acquired property of that branch; that the two other properties were acquired by the defendant's ancestors as their self-acquisitions after partition; that the Court had jurisdiction to entertain the suit; and that the plaintiff was entitled to a third share in the Bhagatvádi and Rámdurg incomes only and to his share of arrears in those incomes for three years prior to the suit. He, therefore, awarded the claim to the extent above mentioned and rejected the rest.

On appeal by the defendant the Judge reversed the decree and dismissed the suit *in toto* on the ground that the Court had no jurisdiction to entertain the suit. The following is an extract from his judgment:—

"Bhagatvádi village is admittedly out of the local jurisdiction of any Civil Court in British India. The same is the case with the Rámdurg treasury from which the allowance in suit is received. These are the only two properties with which this appeal is concerned, there being no appeal by plaintiff against the dismissal of his claim in regard to other properties. Being situate out of British India, British Courts have no jurisdiction to entertain a suit regarding the former properties. The case *Keshav* v. *Vinayak* (Printed Judgments, 1897, page 425) is on all fours with the present. It is urged by Mr. Vaidya (plaintiffs' pleader) that plaintiff's suit is concerned with the money received here in Násik although from sources outside the jurisdiction of this Court. This was precisely the argument used by Mr. Chaubal in *Keshav* v. *Vinayak*, and their Lordships disallowed it. I do not think that there is any real distinction between that case and the present, and I, therefore, hold that this Court has no jurisdiction."

The plaintiff preferred a second appeal.

Robertson with *N. B. Pendse*, for the appellant (plaintiff):—The only question in the case is whether the Subordinate Judge's Court at Násik had jurisdiction to entertain the suit. We con-

tend that it had. The allowances in suit were granted for the performance of the puja, the offering of *naivedya*, and for defraying the expenses of the idol of Rám at Násik. The plaintiff, defendant and a third person are pujáris and they incur expenses in equal shares. The Judge has relied upon *Keshav* v. *Vinayak*[1]. But that decision has no application to the present case. In that case there was a dispute as to title, while in the present case our title is not denied, and what we claim is that our one-third share in the allowances should be declared. Virtually this is a suit for money had and received by the defendant. The sources of the income are, no doubt, situate beyond British India, but the incomes are received in British India. Therefore Courts in British India have clearly jurisdiction to entertain a suit like the present. The parties are bound by contract, and, further, they are in the position of trustees—*Penn* v. *Lord Baltimore*[2].

Daji A. Khare, for the respondent (defendant) :— In the plaint a declaration is sought in connection with property situate outside British India. The property in suit consists of allowances which have been held to be immoveable property. According to section 16 of the Civil Procedure Code a suit for immoveable property must be filed in the Court within the local limits of whose jurisdiction the property is situate. Therefore the Court at Násik had no jurisdiction to entertain the suit.

Robertson, in reply :—Civil Procedure Code applies to property in British India. The properties in dispute being situate within the territories of the Nizám and the Chief of Rámdurg, section 16 of the Civil Procedure Code has no application. All the parties reside at Násik and the allowances are also receivable at that place. Therefore section 17 of the code applies.

JENKINS, C. J. :—The plaintiff has brought this suit to establish his right to a one-third share of four incomes and to recover Rs. 2,761-10-8 from the defendant as his share of those incomes. In the first Court a decree was passed in his favour, but on appeal that decree was reversed on the ground that the Court had no jurisdiction. From this reversal the present appeal is preferred.

(1) (1897) 23 Bom., 22. (2) (1750) 1 W. and T. L. C., 755.

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The judgment of the lower Appellate Court purports to proceed on the case of *Keshav* v. *Vinayak* [1], and on the assumption that it is on all fours with the present case the Judge held that there was no jurisdiction. It is to be regretted that the lower Appellate Court should not have gone more closely into the facts and have determined what they actually were, for though the judgment under appeal may in the end prove to be justified by the facts when they have been ascertained, the judgment is of such a meagre character that we have no alternative but to send it back. No doubt the case on which the lower Appellate Court relied bears a superficial resemblance to the present; but had the Judge closely examined that case, he would have perceived that the reasoning on which it was based has no application to the case the appellant seeks to establish.

In fact, this case only illustrates how important it is that Courts should first ascertain with accuracy and appreciate the facts under consideration before turning their attention to the authorities. Now all that was decided in *Keshav* v. *Vinayak* is that a Court will not determine the title to land situate in a foreign jurisdiction: the learned Judges did not purport to lay down any new principle, but they simply applied to the facts of that case a well-established and elementary rule of law.

It is conceded here that the ostensible title to the land is with the respondent; but it is claimed that the rents, when they are received, are burdened with an obligation arising out of contract or trust, as a result of which the plaintiff is entitled to succeed in the claim he makes. The appellant may or may not succeed in making out this case; but the lower Appellate Court has failed to entertain it. When the Court has determined what the true facts are, then it will be time enough to consider whether they fall within the rule which governed the decision in *Keshav* v. *Vinayak*.

The lower Appellate Court seems to have thought that all property which had a foreign origin was outside the jurisdiction of the Court: this, however, is not a correct view of the law.

(1) (1897) 23 Bom., 22.

The general principle is clearly stated by Lord Cottenham in *Ex parte Pollard*[1], where he says (pp. 250-1): "If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities." Then, again, it is laid down by Lord Selborne in *Ewing* v. *Orr Ewing*[2]: "The Courts of Equity in England are, and always have been, Courts of conscience, operating in *personam* and not in *rem*: and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction. They have done so, as to land, in Scotland, in Ireland, in the Colonies, in foreign countries."

In my opinion the jurisdiction of Courts in this country is governed and must be ascertained by the same principles except so far as they may be at variance with legislative enactment.

But, then, it has been argued by Mr. D. A. Khare that regard must be had to section 16 of the Code of Civil Procedure. In my opinion, however, that section presents no difficulty. The suit, I agree, does not fall within the terms of that section, because it is excluded by the explanation; still the principle enunciated by Lord Cottenham shows that it is a suit that will lie; and as section 16 has no application, the forum is to be determined by reference to section 17 of the Civil Procedure Code. It is not suggested that the provisions of that section have not been observed in this case.

For the reasons I have expressed, the decree of the lower Court must be reversed and the case remanded that it may be disposed

(1) (1840) Mont. and Chit., 239. (2) (1883) 9 A. C., 34 at p. 40.

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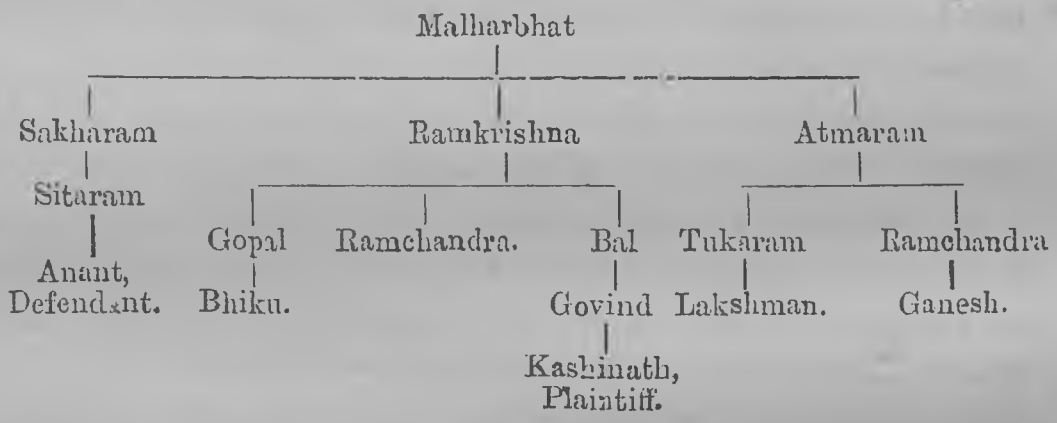
of according to the merits. The costs of this appeal will follow the result.

CANDY, J.:—The subject-matter of this appeal is the income from the jághír village of Bhágatvádi in the Nizám's dominions and certain money remitted annually by the Rámdurg treasury, which are received by the defendant, one of the pujáris of the well-known temple of Rám in Panchwati (Násik). Plaintiff is another pujári of the same temple, Ganesh Ramchandra (called also Ganpatibova) being the third. These parties are related as shown in the following "tree":—



It is admitted that the above-mentioned income and cash allowances are endowments of the said temple, and that they were grants to defendant's father and grandfather after defendant's branch had separated from the branches of Ramkrishna and Atmaram. Defendant, therefore, is the grantee and entitled to receive the said items of endowment.

But plaintiff alleges that by express agreement between the members of the family, and by the custom of the pujári yatan, all endowments are shared by the three pujáris for the expenses of the worship, and that after deducting such expenses, the balance is divided among the three branches. Defendant denied this allegation, and pleaded (*inter alia*) that the endowments in question were under his sole management, while admitting that the said endowments were for the services and expenses of the god.

This was the main issue in the Court of first instance; and the Subordinate Judge found in favour of the plaintiff.

On the question of jurisdiction he said: "The plaintiff only seeks to establish his right to share in the incomes after they

come into the hands of the defendant, and to get arrears of the incomes already received by defendant in Panchwati, Násik. This Court has, therefore, jurisdiction."

In appeal to the District Court the Subordinate Judge, A. P., reversed that decision, holding, on the authority of the case of *Keshav* v. *Vinayak*[1], that the Courts in British India had no jurisdiction.

This is the question which has been argued in second appeal.

In my opinion the case of *Keshav* v. *Vinayak* is clearly distinguishable from the present case. In that case the grants had been made to a common ancestor of the parties, and the question for decision was whether the grant was to the grantee and his heirs to the exclusion of collaterals, or whether it was a grant to the grantee and all the members of the family.

Here there is no such question. The grants were admittedly to the father and grandfather of defendant. There is no dispute as to title. If the plaintiff's allegations are correct, to refer him to the Nizám's or the Rámdurg Courts will amount to a denial of justice. For those Courts would naturally say, we have nothing to do with any arrangement which the grantee and his co-pujáris, the members of his family, make when the funds are received at Násik: all we know is that the grant was to A B for the worship of the temple and the income is remitted to A B's representative. There is thus no claim to be determined according to the law in force at Rámdurg or in the Nizám's dominions. In *Keshav* v. *Vinayak* the Judges were careful to note that in the case before them the defendants were in no fiduciary relations with the plaintiffs, nor bound by contract with them. In the present case evidence was produced—whether reliable or not—with the object of showing that by express contract and also by implied contract, as shown by the custom of the vatan, the three pujáris were bound—to adopt the expression used by the learned counsel—to "pool" all endowments. That is the question for decision. It is obviously not one for the determination by any foreign Court. Hundreds of shrines in British India receive large endowments from States outside

(1) (1897) 23 Bom., 22.

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British India. The management and expenditure of those endowments are continually the subject of arrangement and contract between the various parties who conduct the management of the shrines. To say that the Court, in whose local jurisdiction the money is received and expended and the parties reside, has no power to determine questions as to the management of the funds quite apart from the title to the grant, which may not be in dispute, seems to me to amount to a denial of justice.

In the view which I take of the facts, this is not a suit in respect of immoveable property, and, therefore, section 16 of the Civil Procedure Code does not apply.

I would reverse the decision of the lower Appellate Court and remand the case for decision by the District Court on the merits. Costs to abide the result.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

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RANCHODDAS AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* JUGALDAS AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS *

Mahomedan law—Shaffa—Pre-emption—Right of support, "appendages of property"—Easement—"Participator in the appendages of property."

The right of *shaffa* (or pre-emption) belongs first to a partner in the property sold, secondly to a participator in its appendages, and thirdly to a neighbour.

The right of support is not an appendage to property; it is merely included in the incident of neighbourhood.

A's house adjoined the house in dispute towards the east. B's house adjoined the house in dispute towards the south, and was separated from it only by a wall. B's house was subject to the easement of support in favour of the house in dispute. A's house was subject to the easement of receiving and carrying off the rain-water falling from the roof of the disputed house.

Held that A as owner of the servient tenement was a "participator in the appendages" of the house in dispute, and, as such, had a preferential right to purchase the house in dispute over B, who was a mere neighbour.

* Second Appeal, No. 492 of 1899.