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land may not be trespass as was decided in *Pickering* v. *Rudd*[1].

The reasoning in *Nritta Kumari Dassi* v. *Puddomoni Bewah*[2] favours the respondent's rather than the appellant's contention.

In *Harvey* v. *Walters*[3] the right is treated as an easement.

For these reasons we affirm the decree of the lower Court and dismiss the appeal with costs.

Decree affirmed.

G. B. R.

(1) (1815) 4 Camp. 219. (2) (1903) 30 Cal. 503.
(3) (1873) L. R. 8 C. P. 162.

ORIGINAL CIVIL.

Before Mr. Justice Darar.

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August 17.

ZULEKABAI (PLAINTIFF) v. EBRAHIM HAJI VYEDINA AND OTHERS (DEFENDANTS).*

Letters Patent (amended) of the Bombay High Court, section 12—Ordinary original civil jurisdiction of the Bombay High Court—Suits for land and other immoveable property—Title-deeds—Suit to compel the delivery of title-deeds to land outside the ordinary original jurisdiction of the Bombay High Court.

In a suit *inter alia* to enforce the delivery to the plaintiff of the title-deeds of certain immoveable property situated outside the ordinary original civil jurisdiction of the Bombay High Court, where it appeared on the pleadings that the substantial point to be decided in the suit was the title of the plaintiff to the property to which the title-deeds related,

Held, that the suit, in so far as it related to such title-deeds was a suit for land or other immoveable property and that the Bombay High Court had no jurisdiction to entertain the same.

* Suit No. 332 of 1910.

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THIS suit was brought by the plaintiff *inter alia* to compel the defendants to deliver up the title-deeds of certain immoveable property in Mauritius. The plaintiff was the widow of one Haji Oomer Ebrahim who died in or about the year 1882, leaving besides the plaintiff two sons, Elias and Oomer, and one daughter Amibai. Haji Oomer Ebrahim at the date of his death was possessed of certain immoveable property in Mauritius beside other property. Elias died in or about the year 1884 and Oomer in or about the year 1899, both minors and unmarried. The plaintiff claimed that after the death of Haji Oomer Ebrahim she had taken possession of the Mauritius property and had managed the same on behalf of the minor sons until their respective deaths and that on the deaths of the minor sons the plaintiff became entitled to a Hindu mother's estate in the property. In the year 1906 the plaintiff requested the husband of Amibai, Kadoo Vyedina, to proceed to Mauritius to recover the rents of the property and gave the title-deeds of the Mauritius property to him. Kadoo Vyedina then went to Mauritius. Afterwards the plaintiff called on Kadoo Vyedina to return the title-deeds and to pay over the rents he had recovered but he failed to comply with her requests and on the 26th of December 1908 he died. Amibai died in Bombay on the 31st of January 1909. After Amibai died the defendants took possession of the title-deeds and of the rents and refused to hand them over to the plaintiff and laid claim to them.

The defendants put in separate written statements but all denied that the devolution of the property in Mauritius was governed by Hindu Law or that the plaintiff was entitled to a Hindu mother's estate and submitted that the plaintiff was only entitled to a small interest in the property as one of the heirs of Oomer, Elias and Amibai.

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On the suit coming on for hearing the following issues *inter alia* were raised :—

1. Whether if this suit be regarded as a suit for land this Court has jurisdiction to entertain it as the land and houses in question are situated in Mauritius.

2. Whether if it is not so regarded the suit is maintainable as far as it claims possession of the title-deeds of the said land and houses.

Bahadurji, with him *Kanga*, for the plaintiff :—

This is not a suit for land but for possession of the title-deeds.

The plaintiff gave the title-deeds to her son-in-law and went to Mecca : her son-in-law died, the defendants took possession of the title-deeds and would not return them.

A suit on the basis that I am the owner of title-deeds is not a suit for land and does not come within section 12 of the Letters Patent : *Juggernauth Doss* v. *Brijnath Doss*[1] followed in *Rungo Lall Lohea* v. *Wilson*[2] ; *Hunsraj* v. *Runchordas*[3] ; *H. H. Shrimant Maharaj Yashwantrav Holkar* v. *Dadabhai Cursetji Ashburner*[4], referred to.

The Bombay High Court has held that in such a case there will be a decree *in personam* directing the defendant to hand over the title-deeds.

In *Vaghoji* v. *Camaji*[5] the test is whether a Court of Equity would entertain such a suit in England.

See the rule laid down in Dicey's Conflict of Laws, 2nd Edition, at p. 204 : Lewin on Trusts, 12th Edition, at pp. 49 and 51.

(1) (1878) 4 Cal. 322 at p. 325.
(2) (1898) 26 Cal. 204 at p. 218.
(3) (1905) 7 Bom. L. R. 319.
(4) (1890) 14 Bom. 353.
(5) (1904) 29 Bom. 249 at pp. 254 and 256.

Balaram v. *Ramchandra*[1]; *Gledhill* v. *Hunter*[2]; *Srinivasa Moorthy* v. *Venkata Varada Ayyangar*[3]; *Bapuji Raghunath* v. *Kuvarji Edulji Umrigar*[4], referred to.

Jardine (Acting Advocate General), with him *Jinnah*, for the second defendant :—

The passage cited from Dicey is an exception to a general rule given on page 201. The cases cited for the plaintiff depend on contract: *The Delhi and London Bank* v. *Wordie*[5]; *Hara Lall Banerjee* v. *Nitambini Debi*[6].

The Court has to see what is the real object of the suit: *Ebrahim Ismail Timol* v. *Provas Chander Mitter*[7]; *Sundara Bai Sahiba* v. *Tirumal Rao Sahib*[8]; *Vaghoji* v. *Camaji*[9].

British South Africa Company v. *Companhia De Mocambique*[10].

Juggernauth Doss v. *Brijnath Doss*[11] is peculiar; the plaintiff there was the true owner.

Bahadurji in reply cited *Reiner* v. *Marquis of Salisbury*[12].

The first defendant did not appear.

The third defendant appeared in person.

DAVAR, J.:—Haji Oomer Ebrahim, a Cutchi Memon, died about twenty-eight years ago leaving him surviving his widow Zulekabai, the plaintiff herein, two sons named Elias and Oomer, and a daughter named Asibai also called Amibai. At the time of his death, he was

(1) (1898) 22 Bom. 922.
(2) (1880) 14 Ch. D. 492.
(3) (1906) 29 Mad. 239.
(4) (1890) 15 Bom. 400.
(5) (1876) 1 Cal. 249 at p. 263.
(6) (1901) 29 Cal. 315.
(7) (1908) 36 Cal. 59.
(8) (1909) 33 Mad. 131.
(9) (1904) 29 Bom. 249.
(10) [1893] A. C. 602.
(11) (1878) 4 Cal. 322.
(12) (1876) 2 Ch. D. 378.

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possessed of two immoveable properties situated at Mauritius. Two years after the death of Haji Oomer, his son Elias died and the other son Oomer died in 1899. They were both minors and unmarried at the time of their death. Oomer's daughter Asibai was married to Kaderdina *alias* Kadoo Vyedina, a brother of the defendants herein. Asibai died on the 31st of January 1909 childless and intestate and Kaderdina died on the 26th of December 1908. The plaintiff claims that on the deaths of both her sons she became entitled to the Mauritius properties "for a Hindu mother's interest therein." She has filed this suit praying, amongst other things, "that the defendants may be ordered to deliver to the plaintiff forthwith the title-deeds of the Mauritius properties."

All the three defendants have filed their written statements. The first defendant did not appear at the hearing. The third defendant appeared in person. Evidently they have left the fight in the hands of the second defendant who is admittedly in possession of the title-deeds relating to the Mauritius properties. All the written statements run on very much the same lines except for one or two small differences in details. I propose to confine my attention to the second defendant's written statement. With regard to the Mauritius properties he denies that the plaintiff took a Hindu mother's interest therein. He says that succession to those properties is governed not by Hindu Law but by Mahomedan Law, and contends that on the death of Haji Oomer, the Mauritius properties devolved on his heirs, namely, his widow, his two sons and his daughter, and that on the respective deaths of those two sons, the widow and the daughter of Haji Oomer got by inheritance additions to their original shares in the said properties. He further sets up an agreement between the plaintiff and her daughter Amibai whereby the

plaintiff agreed to sell her interest in the Mauritius properties to her daughter Amibai for Rs. 1,062. As one of the heirs of Amibai he says he is ready and willing to pay to the plaintiff Rs. 1,062 and counter-claims that on payment of this sum to the plaintiff she may be ordered to execute the necessary conveyance. He has added two of his remaining brothers as parties to the counterclaim.

On behalf of the second defendant the first two issues raised by the learned Advocate General are :—

(1) Whether if this suit be regarded as a suit for land this Court has jurisdiction to entertain it as the land in question is situated at Mauritius ; and

(2) Whether if it be not so regarded the suit is maintainable so far as it claims possession of title-deeds of the said land.

As these issues raised purely a question of law they were first argued before me and I reserved judgment. The question involved in the trial of these issues is : Is this a "suit for land or other immoveable property" in so far as it prays that the defendants may be ordered to deliver up the title-deeds of the Mauritius properties to the plaintiff? Clause 12 of the Amended Letters Patent deals with the ordinary original civil jurisdiction of this Court. It enacts that : "The High Court of Judicature at Bombay, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property such land or property shall be situated...within the local limits of the ordinary original jurisdiction of the said High Court."

In this suit there is no question that the immoveable properties are situated beyond the local limits of the ordinary original civil jurisdiction of this Court. The main contention of the learned counsel for the plaintiff is that this is not a suit for land or other immoveable property within the language and meaning of clause 12.

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It is true that the plaint asks for no direct relief so far as the properties themselves are concerned, but is that enough to establish that this suit is not for land or other immoveable property? It is transparent on the reading of the plaint that the learned counsel who drew the plaint was conscious of the difficulty of including relief in respect of these properties in a suit in the Bombay High Court and he has, therefore, very adroitly left out the proper and necessary prayers which would, and ought to, have been there in order, if possible, to steer clear of the question of jurisdiction. Paragraph 10 of the plaint specifically states that:—

"The defendants have set up the false case that the said properties at Mauritius belonged absolutely to the said Asibai. The plaintiff discovered that the said Kadoo Vyedina when he went to Mauritius had appointed one Mokhi Moosa to recover the rents in future on his own account and had put forward his wife as the owner of the said Mauritius properties."

This establishes that Asibai in her lifetime claimed to be the owner of these properties. Asibai and her husband went to Mauritius in 1906. Plaintiff herself went to Mecca in 1907. According to her own statement in her plaint she had been trying to recover the accumulated rent which her daughter and son-in-law recovered at Mauritius and the title-deeds which were in their possession ever since her return from Mecca. She has not been in possession of these properties or in the enjoyment of the rents and profits thereof anyhow since 1906. Under these circumstances what would one expect in a plaint drawn in the ordinary way? Even an unexperienced draftsman could not omit to pray first that it may be declared that plaintiff is the owner of the properties in question, that she has a Hindu mother's estate in the said properties, that the defendants have no interest in the same, and that she is entitled to receive the rents and profits thereof. The next prayer would be that the defendants may be ordered

to hand over possession of the properties to the plaintiff and account to her for the rents and profits received and recovered by them and then would follow the prayer for handing over the title-deeds of the said properties to the plaintiff. The prayer for title-deeds would be merely ancillary to the main prayers for declaration of ownership and for possession of the properties. Prayers such as I have set out would necessarily have been in the plaint if the property in question had been within the jurisdiction of this Court. The plaint is drawn by a member of the Bar whose experience in drafting pleadings is second to none in Bombay, and it appears to me that the learned draftsman has deliberately omitted them in order to steer clear of the difficulties consequent on the properties being outside the jurisdiction of the Court. However that may be, in order to ascertain the true nature of the suit, the Court is bound to look further than the four corners of the plaint. Does a suit fall out of the category of a "suit for land or other immoveable property" because the plaint is so drawn as to enable the plaintiff to say: "I am not suing for the recovery of the land—I am only asking for the delivery to me of title-deeds relating to that land"? The defendants say "plaintiff is not the owner. She had a very small share which she has agreed to sell to the party through whom we claim. We are prepared to carry out the agreement and she is not entitled to the possession or custody of the title-deeds." I cannot decide the question as to who is entitled to the possession of those title-deeds without deciding to whom the properties at the date of the suit belonged. This necessarily involves the investigation of the title to those properties amongst rival claimants. Before I could order the defendants to deliver up the title-deeds to the plaintiffs, I must hold that the devolution of the properties at Mauritius

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is governed by Hindu Law as the plaintiff asserts and not by Mahomedan Law as the defendants contend and ascertain who is now entitled to the ownership and possession thereof. I was told that a Commission had been issued in this suit and the Commission evidence leads to a third alternative that the devolution of immoveable property in Mauritius takes place according to French Civil Law. Does the clause of the Charter which governs and settles the ordinary original civil jurisdiction permit of my going into these questions when the lands lie in a Foreign country?

There has been very considerable conflict of opinion as to the meaning and construction of the words "suits for land and other immoveable property." The Calcutta and other High Courts have taken very different views to those taken by the Bombay High Court till the year 1905. The Bombay High Court in its ordinary original civil jurisdiction has given to the words in clause 12 of the Letters Patent a very limited and restricted meaning and has for many years entertained suits of all kinds relating to land only stopping short where the suit related directly and specifically to the recovery or disposal of immoveable property outside its jurisdiction. For this we have the high authority of the judgment of Sir Charles Sargent, Chief Justice, who, sitting with Mr. Justice Scott, held in the case of *Holkar* v. *Dadabhai Cursetji Ashburner*[1], that the Court had jurisdiction to try a suit for specific performance of an agreement relating to land situated outside the ordinary original civil jurisdiction of this Court. We have decisions very much to the same effect in earlier cases but the judgment of Sir Charles Sargent settled the practice of entertaining suits for a variety of purposes relating to land outside the ordinary original civil jurisdiction of this

(1) (1890) 14 Bom. 353.

Court and this case was followed by Mr. Justice Strachey in *Sorabji* v. *Rattonji*[1], though not without great doubt and hesitation, in a suit for foreclosure of land outside the jurisdiction of the Court. Although the Calcutta and Madras High Courts took different views, the decision of Sir Charles Sargent was followed by our Courts till we come to the judgment of Sir Lawrence Jenkins in *Vaghoji* v. *Camaji*[2]. In that case the Chief Justice, Sir Lawrence Jenkins, in a considered judgment, sitting with Mr. Justice Batchelor, has reviewed all the authorities and pronounced judgment by which, in the words of Sir R. S. Benson, Chief Justice, Madras, in *Sundara Bai Sahiba* v. *Tirumal Rao Sahib*[3], the authority of the decision in *Holkar* v. *Dadabhai* "is considerably shaken if not overruled".

I think it would be here useful to consider some of the leading cases on this subject decided by the other High Courts. In *The Delhi and London Bank* v. *Wordie*[4], the Chief Justice, Sir Richard Garth, after discussing several English cases as to the jurisdiction of Equity Courts, makes some observations which are very pertinent to the question I am now considering. He says :—

"But those cases are all more or less distinguishable from the present, which depends not so much upon the jurisdiction generally exercised by Courts of Equity, as upon whether this suit is brought *substantially* 'for land'; that is, for the purpose of acquiring title to, or control over, land, within the meaning of a particular clause in the Charter; and we think, having regard to what is the *real object of the suit*, and to what are the rights and contentions of the respective parties, it is impossible to say that this is not substantially a suit for land."

In *Hara Lall Banerjee* v. *Nitambini Debi*[5], which was a suit for construction of a will and the administration of

[1] (1898) 22 Bom. 701.
[2] (1904) 29 Bom. 249.
[3] (1909) 33 Mad. 131.
[4] (1876) 1 Cal. 249 at p. 263.
[5] (1901) 29 Cal. 315.

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the testator's estate and wherein possession of properties outside the limits of the ordinary original civil jurisdiction of the Calcutta High Court was one of the prayers, it was held that that was a suit for land within the meaning of clause 12 of the Letters Patent and the suit was dismissed.

Ebrahim Ismail Timol v. *Provas Chander Mitter*[1] was a case wherein the plaintiff sought to recover rents and profits pending termination of the lease of land beyond the jurisdiction of the Court. The learned Judge hearing the suit, in the course of his judgment at p. 65, makes these observations :—

"What the plaintiff is seeking to do is to do something, which will directly affect the property, namely, to obtain possession of it by receipt of rent. Under these circumstances I hold that this is a suit for land outside the jurisdiction of this Court and consequently that it cannot be brought as far as prayers 3 and 4 are concerned."

In *Nalum Lakshimikantham* v. *Krishnasawmy Mudaliar*[2] Mr. Justice Moore goes further and says :—

"I would indeed be prepared to go further and to hold that the phrase 'suit for land or other immoveable property' as used in clause 12 of the Letters Patent includes all suits mentioned in clauses (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) in section 16 of the present Code of Civil Procedure."

In the case of *Sundara Bai Sahiba* v. *Tirumal Rao Sahib*[3], to which I have already referred above, the Chief Justice and Mr. Justice Sankaran Nair held that a suit for maintenance by a widow praying that it may be a charge on a specified immoveable property would be a suit for that immoveable property as the decree would operate directly on the land.

The decision of our Court in *Vaghoji* v. *Camaji*[4] is in harmony with the decisions of the Calcutta and Madras Courts to which I have referred, and whether it overrules

(1) (1908) 36 Cal. 59.
(2) (1903) 27 Mad. 157 at p. 161.
(3) (1909) 33 Mad. 131.
(4) (1904) 29 Bom. 249.

the decision in *Holkar* v. *Dadabhai* or merely distinguishes the case which Sir Lawrence Jenkins had in hand from that case, it is not for me to say, but it lays down in very clear and explicit language that the words "suit for land" do not mean only suits for the recovery of land. Whatever may have been the doubts and difficulties in other cases it seems to me, however, quite clear that this suit, so far as it relates to the title-deeds of the Mauritius properties, though ostensibly a suit for the recovery of the title-deeds alone, is not only substantially a suit for land but is in effect and in reality a suit for establishing title to that land and the recovery of the possession of that land.

The third issue raised by the Advocate General is whether in any event the plaintiff is entitled to possession of the title-deeds as against the second defendant. If I find on the first two issues in favour of the plaintiff I would have to enter into an enquiry as to what law governs the devolution of immoveable property of a Cutchi Memon, situated in Mauritius, whether the title-deeds changed hands in 1906 under the circumstances alleged by the plaintiff or by virtue of the agreement set up by the defendants, who is the present owner of these properties and who is interested in the rents and profits thereof and who is entitled to the present possession of the said properties. Under the guise of a claim to title-deeds the suit clearly involves the trial of questions of title to land and seeks the recovery of that land. That land is beyond the ordinary original civil jurisdiction of this Court and under clause 12 of the Letters Patent I have no jurisdiction to entertain the suit so far as it relates to the title-deeds of the Mauritius properties.

I find the first issue in the negative and for the defendants. In view of this finding it is unnecessary to find on the second issue.

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I will deal with costs of the trial of these issues when I dispose of the rest of the suit.

Suit to be on Board this day week as a part-heard case for hearing on the other issues.

[The suit was subsequently placed on Board and with the plaintiff's consent dismissed with costs.]

Attorneys for the plaintiff: *Messrs. Ardeshir, Hormusji, Dinshaw & Co.*

Attorneys for the defendant: *Messrs. Jehangir & Seervai.*

H. S. C.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Heaton.

1912.
October 4.

THE SPECIAL OFFICER, SALSETTE BUILDING SITES, APPLICANT, *v.* DOSSABHAI BEZONJI MOTIVALLA, OPPONENT.*

Land Acquisition Act (I of 1894), section 54—High Court—Decision by High Court on appeal—Appeal to Privy Council—Leave to appeal—Letters Patent, clause 39.

An appeal does not lie to His Majesty's Privy Council from the decision of the High Court on appeal under section 54 of the Land Acquisition Act (I of 1894).

Rangoon Botatoung Company, Ld. v. *The Collector, Rangoon*(1), followed.

THIS was an application for leave to appeal to His Majesty's Privy Council.

The facts are stated in the report of the judgment of the High Court, at I. L. R. 36 Bom. 599.

On a reference made under section 19 of the Land Acquisition Act, by the Special Collector of Thana, the Assistant Collector held that Rs. 21,254-4-0 should be

* Civil Application No. 442 of 1912.

(1) (1912) 40 Cal. 21.