

## ORIGINAL CIVIL.

*Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and  
Mr. Justice Crump.*

MAHOMEDALLY ADAMJI MASALAWALLA AND OTHERS, APPELLANTS  
v. ABDUL HUSSEIN ADAMJI MASALAWALLA AND OTHERS,  
RESPONDENTS<sup>a</sup>.

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August 16.

*Letters Patent, clause 12—Administration suit—Part of immoveable properties in suit outside High Court's Original Civil Jurisdiction—Leave of Court under clause 12 not obtained—Whether High Court can determine question of title to such properties.*

The High Court can, in an administration suit, determine the question whether certain immoveable property situated outside the territorial limits of its jurisdiction belonged to the deceased at the time of his death, even though leave under clause 12 of the Letters Patent was not obtained.

*Benode Behari Bose v. Nistarini Dassi*<sup>(1)</sup>, followed.

## ADMINISTRATION suit.

One Adamji, a Broach Mahomedan, died intestate leaving him surviving several sons and daughters and property including immoveable property at Kurla outside the Ordinary Jurisdiction of the High Court.

One son having claimed the Kurla property as his own stating his father had made a gift of it to him, his brother, the plaintiff, with another brother and sister brought a suit for the administration of the father's estate making the son who claimed the property and the remaining children defendants.

In this suit a preliminary objection was taken that as no leave had been obtained under clause 12 of the Letters Patent the Court had no jurisdiction. The Judge, Kincaid J., before whom the suit was tried held that the suit being an administration suit no leave was required and on appeal his decision was upheld (see 46 Bom. 772) but the Court of appeal added that as the

<sup>a</sup> O. C. J., Appeal No. 20 of 1923 ; Suit No. 3062 of 1920.

<sup>(1)</sup> (1905) 33 Cal. 120.

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declaration in the decree appeared to decide the question of title to the Kurla property such declaration was premature and ought to be deleted which was done.

The matter thereafter went before the Commissioner for taking accounts who entered upon the question of title to the Kurla property. Objection having been taken before him he made a report to the Court asking it to determine the question.

On coming before the Court the original objection was again taken that the Court had no jurisdiction to determine the question of title as the property was outside the Ordinary Jurisdiction of the High Court and no leave had been obtained.

The learned Judge of the first instance, Kajiji J., upheld the contention whereupon the plaintiff appealed.

*Munshi*, for the appellants.

*Kania*, for the respondent No. 1.

*Kanga*, Advocate-General, for the respondent No. 2.

SHAH, AG. C. J.:—This appeal arises out of a suit filed for the administration of the estate of one Adamji Massalavalla. The suit was filed on October 25, 1920, by the two sons and a daughter of the deceased Adamji against his two other sons and another daughter.

On behalf of defendant No. 1 an objection was taken that as the properties of the deceased included a house situate at Kurla, the Court had no jurisdiction to entertain the suit. It was contended on his behalf that it was really a suit for land within the meaning of clause 12 of the Letters Patent. But that objection was overruled and a preliminary decree was passed which contained a declaration that the Court had jurisdiction to administer the said Kurla property.

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From this preliminary decree defendant No. 1 preferred an appeal to this Court: *Abdul Hussein v. Mahomedally Adamji*<sup>(1)</sup>. In that appeal it was held that a suit for the administration of an estate was not a suit for land, and that the Court had jurisdiction to proceed with the suit; but it was held that any declaration as to the Court having jurisdiction to administer the Kurla property was premature at that stage. The following observations in the judgment are pertinent:—

"It is only when the reference commences before the Commissioner on the accounts being filed that it can be ascertained what are the contentions of the parties and whether the accounts filed together with the objections and surcharges show that there are properties either inside or outside the jurisdiction belonging to the estate. When claims to such properties are raised before the Commissioner, then it is a matter for him to decide what action to take, and even if he is of opinion that he has jurisdiction to decide questions of title to immoveable property, it will be open to the parties to ask him to make a reference for the opinion of the Court, when the Court will be in a position to decide how the disputed questions of title should be tried."

Thereafter the matter went to the Commissioner, and apparently after some hearing the Commissioner made a special report and directed the first defendant to bring it before the Court to try the question of title to the said immoveable property at Kurla.

It appears that defendant No. 1's case before the Commissioner was that this property was given over to him by his father in the year 1906 by way of gift, and that at the date of the death of Adamji it did not form part of his estate.

On this special report, the matter was brought before the Court by notice of motion; and the learned Judge decided that the Court had no jurisdiction to entertain a suit with reference to the land outside the Original Civil Jurisdiction of this Court, that no leave under clause 12 was asked for and none was granted, and that the Court ought not to give leave now. The learned

<sup>(1)</sup> (1921) 46 Bom. 772.

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Judge declined to give any special leave to the Commissioner to determine the question of title to the property at Kuria on the ground that the Court had no jurisdiction to entertain such suit.

The plaintiffs have appealed from this decision.

It is urged on behalf of the plaintiffs that the Court has jurisdiction to determine the question as to whether this property belonged to the deceased at the date of his death and formed part of his estate, that the question of title to this property is merely an incident of the administration of the estate, and that it has really no reference to clause 12 of the Letters Patent.

On the other hand it is urged that though an administration suit may not be a suit for land, where any question as to title to immoveable property situate outside the Original Civil Jurisdiction of this Court arises, it is, in substance, a suit for land or other immoveable property within the meaning of clause 12 of the Letters Patent, and that as in this case no leave has been or could be obtained as the property is situate outside the island of Bombay, the Court has no jurisdiction to direct any inquiry as to title to this property in this suit.

On a consideration of the arguments on both sides I am satisfied that the Court has jurisdiction to determine in this suit whether the property belonged to the deceased Adamji or not. It appears from the form of the decree in an administration suit given in Seton on Decrees, Vol. II, page 1412 (7th Edition) and also in the Schedule I, Appendix D, of the Code of Civil Procedure that among the inquiries contemplated in the course of the administration the inquiry as to what immoveable property the deceased was seized of or entitled to at the time of his death is included. The question to my mind is not now whether the suit in respect of this property so far as it relates to this

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property is a suit for land or not, but whether such an inquiry is appropriate in an administration suit. It must be taken now, as held by this Court in *Abdul Hussein v. Mahomedally Adamji*,<sup>(1)</sup> that an administration suit as such is not a suit for land within the meaning of clause 12. This question is really an incident of the administration suit. This is supported by the following observations of their Lordships of the Privy Council in *Benode Behari Bose v. Nistarini Dass*<sup>(2)</sup> :—

“The primary object of the suit was the administration of the estate of a deceased person resident within the jurisdiction, the principal executor being also resident there and the actual administration going on there. The High Court of Calcutta, in its Ordinary Jurisdiction, had a right to order administration of this estate, and, as ancillary to such an order, to set aside deeds obtained by the fraud of the executor. Nor does the circumstance that a decree had been granted by the Court of the 24-Pergunnahs making a fraudulent award an order of Court protect that decree from the jurisdiction of the Calcutta Court, when redressing that fraud. In like manner, their Lordships consider the Calcutta Court entitled, for the due administration of the estate, to set aside leases of land outside the territorial limits of their jurisdiction, those leases having been made as an incident of the same fraud.”

The effect of these observations is sought to be got over by the consideration, that in that case, in fact, leave was obtained under clause 12, and that the leave was obtainable because a part of the property was situate at Calcutta, and secondly, it was really a question of fraud, and that could properly be dealt with as between the parties by the High Court at Calcutta. It is quite true that the judgment of the Court of Appeal at Calcutta in that case proceeded upon two grounds one of which was that leave in fact was obtained. That ground, however, has not been referred to by their Lordships of the Privy Council, and the jurisdiction of the Court is determined on the general ground that the question as to title to the property outside Calcutta was really an incident of the administration of the deceased's estate. It is hardly

<sup>(1)</sup> (1921) 46 Bom. 772.

<sup>(2)</sup> (1905) 33 Cal. 180 at pp. 191, 192.

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necessary to refer to the decision of this Court in *Motibhai Shankerbhai v. Nathabhai Naranbhai*<sup>(1)</sup> where also it was held that the question as to title of the property can be appropriately considered in an administration suit.

Mr. Kania has relied upon the observations in *Vaghoji v. Camaji*<sup>(2)</sup>. That was a case for establishing title to possession of land and to secure that possession from molestation. It was held that that was a suit for land within the meaning of clause 12. There are certain observations, however, upon which great reliance is placed on behalf of respondent No. 1. I have read the judgment in this case carefully, and I am unable to accept the contention for respondent No. 1 that this case is an authority in support of the proposition which he contends for. The whole argument on behalf of respondent No. 1 is based upon the assumption that the scope of the powers of the Court in dealing with an administration suit is to be determined with reference to the question as to whether, if it were a suit for land, it would be within the jurisdiction of the Court. It is quite true that if it had been simply a suit in respect of this immoveable property by one of the heirs against another person who claimed to be the owner of this property, it would be a suit for land outside the jurisdiction of this Court. But it does not follow that because the determination of the question as to whether the property belonged to the deceased at the date of his death is involved in an administration suit, to that extent it becomes a suit for land in the sense that if that property is situate outside the jurisdiction of the Court, this Court cannot deal with the question. No authority has been cited which really touches the point. But even assuming for the sake of argument, that the observations in *Vaghoji v. Camaji*<sup>(2)</sup>

<sup>(1)</sup> (1926) 45 Bom. 1053.

<sup>(2)</sup> (1904) 29 Bom. 249 at p. 258.

afford some guidance in determining whether the Court has jurisdiction to determine the question of title or not, I am unable to hold that there is anything in those observations which really helps the respondent. The observations are these :—

“Taking the words therefore in their fair natural meaning, can there be any doubt that this is a suit for land? Its leading purpose is to establish a title to possession of land and to secure that possession from molestation, and it is important to note that this claim is based not on any contract, trust or fraud, or any circumstance giving rise to privity between the parties, but is brought to vindicate rights resulting from ownership and possession alleged to be with the plaintiffs.”

Apart from the consideration that these observations were not made with reference to an administration suit, it is clear that it could not be said in this case that there are no circumstances giving rise to privity between the parties in this case. It is quite true that this is not a case of fraud. But this is a case of privity between the parties to the suit where one of the heirs contends that the property was given over to him by way of gift by his deceased father and the other heirs contend that it continued to form part of the estate of the deceased. In such a case it is difficult to say that on the strength of the observations in *Vaghoji v. Camaji*<sup>(1)</sup> it can be held that the question between the parties so situated relating to the question of title would be outside the jurisdiction of this Court even though the immoveable property may be beyond the limits of the territorial jurisdiction of this Court. Reference was also made to the decision in *Abdul Karim Sahib v. Badrudeen Sahib*<sup>(2)</sup>. In that case, however, it was expressly held that the suit which the Court had to deal with was not an administration suit, and the question whether in an administration suit the Court could deal with any dispute between the parties

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(1) (1904) 29 Bom. 249 at p. 258.

(2) (1904) 28 Mad. 216.

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to the suit relating to the title to any immoveable property, which is said to have belonged to the deceased, was not decided in that case. On the whole, therefore, I do not feel any doubt that the Court in administering the estate of the deceased in this suit has power to inquire as to whether the particular immoveable property belonged to the deceased at the time of his death. As it is a question relating to the title to immoveable property, it is common ground that if the question can be determined in this suit, it ought to be determined by the Court, and not by the Commissioner.

I may add that because the Court has the power to determine the question of title to immoveable property situate outside its territorial jurisdiction in an administration suit, it does not necessarily follow that that Court itself will always determine the question. That must be decided with reference to the circumstances of each case. It may be more convenient in a given case to have it determined in a suit filed in the Court in whose jurisdiction the property is situated by the receiver in the administration suit or by any of the parties. In the present case the property is situated at Kurla, and having regard to the circumstances of this case the determination of the question by this Court is at least as convenient as, if not more convenient than, having it determined by the Court at Thana.

I would, therefore, allow this appeal and direct that an inquiry be made by the trial Court as to whether the property at Kurla now in dispute formed part of the estate belonging to the deceased at the time of his death. It may be, as was pointed out in the course of the argument, for instance, that this Court could not effect division of this property by metes and bounds as prayed for in the suit. That, however, is a question



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which does not arise at this stage, and it is possible that even if the property is found to belong to the deceased at the time of his death, there may be no necessity for partition by metes and bounds. That question can be dealt with only when the question as to title is decided. It will be for the trial Court to give further directions to the Commissioner, if necessary, which would be appropriate to his finding on this question.

Respondent No. 1 to pay the costs of the plaintiffs in this appeal and of the Notice of Motion.

CRUMP, J. :—I agree entirely with the judgment just pronounced and the reasoning on which it is based. But as we are reversing the judgment of the learned trial Judge, I desire to state my reasons briefly.

It is necessary at the outset to set out precisely what was the effect of the judgment of this Court in the appeal that previously came before it. Now, it is quite clear that there were two points for consideration in that case. The first question was whether an administration suit was a suit for land within the meaning of clause 12 of the Letters Patent. The second question was whether the Court, if it had jurisdiction to entertain the suit, had jurisdiction to decide questions of title to property outside the territorial limits of its jurisdiction. The decision of the Court upon the first point clearly was that an administration suit was not a suit for land and it follows therefore that the Court had jurisdiction to entertain such a suit, even though the property was situated outside the territorial jurisdiction by virtue of clause 12 of the Letters Patent. As to the second question the Court held that the question whether the title to the Kurla property could or could not be decided, had not really arisen for decision at that stage of the case, and that matter

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therefore was left open. It is that second point which has now been decided adversely to the plaintiffs in the appeal which has come before us for our consideration. Now if an administration suit as regards property situated outside the jurisdiction can be entertained by this Court, it appears to me to follow almost of necessity that the question as to title of this property must be determined. It is impossible for the Court to administer the estate without deciding what the estate is, and until the question of title has been settled, the Court does not know as to what property its orders are to operate. When that second question is decided, it will be for the Court to consider in what manner the administration should be effected. That is a stage which we have not yet reached, and as to which such directions as may be necessary will have to be given by the Court after the question of title is determined. To hold otherwise, would, in my opinion, lead to absurdity, for it would be a necessary conclusion that though the Court can entertain an administration suit as regards property outside the territorial jurisdiction, it cannot, in that suit, decide whether that property belongs to the estate or not. I know of no authority which forces me to that conclusion, and none has been cited. It appears to me clear that the decision of the Privy Council in *Benode Behari Bose v. Nistarini Dassi*<sup>(1)</sup> is an authority in a contrary sense. For these reasons, therefore, I agree with the orders proposed.

Attorneys for appellant: Messrs. *Mulla & Mulla*.

Attorneys for respondent No. 1: Messrs. *Soonderdas & Co.*

Attorneys for respondent No. 2: Messrs. *Mansukhlal, Hiralal & Mehta*.

*Appeal allowed.*

V. G. R.

<sup>(1)</sup> (1905) 33 Cal. 180.