

1902  
MARCH 6.  
TESTAMENTARY  
JURISDICTION.  
29 C. 311.

to be legible. This difficulty may be obviated by a photographic *facsimile* probate.]

Under the ruling of Lord Penzance in *In re Hall* (1) I can only allow to be copied the portions that are legible, and regarding which I can say they represent the testator's disposing mind. Under that ruling portions rubbed out must be treated as revoked.

[*Mr. Woodroffe*. Will your Lordship decide what is legible?]

No. I will leave that to the Registrar. He can have a copy made and submitted to you, and, if any question arises, it can be referred to me.

*Probate granted.*

Attorney for the applicants : *Frank Williamson*.

29 C. 315.

[315] ORIGINAL CIVIL.

*Before Mr. Justice Harington.*

HARA LALL BANERJEE *v.* NITAMBINI DEBI.\*  
[18th, 19th, 20th, 21st and 24th June, 1901].

*Jurisdiction—Letters Patent, 1865, cl. 12—“Suits for land or other immoveable property”—Cause of action—Suits for title to land situate outside the original jurisdiction of the High Court—Jurisdiction of the High Court as limited by the Charter—Suit for administration.*

The plaintiff brought this suit in the High Court for a declaration that he is entitled to immediate and absolute possession of properties, both moveable and immoveable, the latter being wholly situated outside the local limits of the ordinary original civil jurisdiction of the Court, for the construction of his grandfather's Will under which he claimed, for an account by the executrix of the Will, for the administration of the testator's estate and other reliefs, alleging, *inter alia*, that the principal defendant was residing in Calcutta, and that there was personal property if the testator's within the jurisdiction of this Court at the time of the institution of the suit :

*Held*, that this was a 'suit for land' within the terms of cl. 12 of Letters Patent, 1865, and the High Court had no jurisdiction to entertain it.

The meaning of the words "suits for land or other immoveable property" in clause 12 of Letters Patent, discussed.

*Delhi and London Bank v. Wordie* (2) *Kellie v. Fraser* (3), *Seshagiri Rau v. Rama Rau* (4) referred to.

ONE Kunja Lall Banerjee died on April 9, 1894, leaving considerable immoveable property in the District of Hooghly. He left a Will appointing his wife, Nitambini Debi (the principal defendant in the present suit), his executrix.

On July 24, 1894, the said Nitambini Debi obtained from the High Court probate of the Will of her deceased husband on the allegation that there was at that time moveable property belonging to the estate of Kunja Lall within the jurisdiction of this Court; and took possession of the whole estate in due time.

[316] On March 31, 1898, the plaintiff Hara Lall Banerjee (the grandson of Kunja Lall) instituted this suit for the construction of his grandfather's Will, for declaration of the rights of the respective parties

\* Original Civil Suit No. 247 of 1898.

(1) (1871) L. R. 2 P. & D. 256.

(3) (1877) I. L. R. 2 Cal. 445, 468.

(2) (1876) I. L. R. 1 Cal. 249, 268.

(4) (1896) I. L. R. 19 Mad. 448.

mentioned therein for the administration of Kunja Lall's estate, for an account to be rendered by the executrix, for a declaration that he was entitled to absolute possession of the properties left to him under the will of his grandfather subject to the provisions for the religious trusts and the widow's rights to maintenance, and the payment of the legacies, and other reliefs; but there was no prayer for the delivery of possession of such properties to the plaintiff.

The plaintiff in his plaint alleged that the defendant Nitambini resided at 109, Beniatollah Street, in the town of Calcutta, as well as at Baboogunge, in the district of Hooghly (where the whole of the immoveable property of the testator was situated) and as some personal property of the testator's was within the jurisdiction of this Court at the time of the institution of this suit, the plaintiff's cause of action arose in Calcutta.

The defendant Nitambini in her written statement took the objection that this Court had no jurisdiction to entertain the suit, and denied the plaintiff's allegations as to her residence in Calcutta and to the existence of any moveable property belonging to her husband within the jurisdiction of this Court; and she alleged that this being a suit for land within the meaning of cl. 12 of the Charter, 1865, this Court could not entertain it; and that regard being had to the provisions of s. 42 of the Specific Relief Act, the suit as at present framed was not maintainable.

[At the hearing of the case, Counsel for Nitambini having taken the preliminary objection as to the jurisdiction of the Court, evidence was allowed to be gone into on that point only.]

Mr. *Chakravarti* (with him Mr. *B. C. Mitter*) for the defendant. I dispute the jurisdiction of this Court. This is a suit for land, and as no part of it is within the local limits of the jurisdiction of this Court, it cannot entertain the suit and no leave should be given under cl. 12 of the Charter, [317] see *Jairam Narayan Raje v. Ataram Narayan Raje* (1), *Seshagiri Rau v. Rama Rau* (2), *Prasanmamayi Dasi v. Kadambini Dasi* (3), *Jagadamba Dasi v. Padmamani Dasi* (4). As to what is a 'suit for land,' see *Delhi and London Bank v. Wordie* (5), at page 255.

The plaintiff seeks for construction of the will and title to land. Where a person is desirous of acquiring title to, and immediate possession of, land no part of which is within the jurisdiction of this Court, it has no jurisdiction to entertain his claim.

The case of *Nistarini Dassi v. Nundo Lall Bose* (6) does not touch the present case, as that was a case for administration of the estate, where the title to the property was not questioned. In the plaint there is no allegation that there was personal property belonging to the testator within the jurisdiction of this Court, nor is any tangible evidence given that there was such property, on which the Court is to hold that there were assets at the time of the institution of the suit to pass an administration decree; and therefore this Court has no jurisdiction to entertain this suit. Moreover, the plaintiff has failed to show that Nitambini resided within the local limits of the jurisdiction of this Court on March 31, 1898, when this suit was filed, or that any part of the cause of action arose in Calcutta; and having regard to the provisions of s. 42 of the Specific Relief Act, the suit as at present framed is not maintainable for

1901  
JUNE 18, 19,  
20, 21 & 24.  
ORIGINAL  
CIVIL.  
29 C. 315.

(1) (1880) I. L. R. 4 Bom. 482, 487.

(2) (1896) I. L. R. 19 Mad. 448.

(3) (1868) 3 B. L. R. O. C. 85.

(4) (1871) 6 B. L. R. 686.

(5) (1876) I. L. R. 1 Cal. 249.

(6) (1893) I. L. R. 26 Cal. 891.

1901 a mere declaration of the plaintiff's title without seeking to recover possession; see *Raj Narain Das v. Shama Nando Das Choudhry* (1).  
 JUNE 18, 19, 20, 21 & 24.

ORIGINAL  
 CIVIL.

29 C. 315.

Mr. Mittra (Mr. Sinha with him) for the plaintiff. The cases cited by my learned friend do not apply to this case. The question is whether this Court has jurisdiction to entertain the suit. The definition of the word "jurisdiction," as given in *Kellie v. Fraser* (2) at page 451, is "the power of receiving, trying, [318] and determining suits." I submit that this is a suit for administration; and, if that is so, the question of jurisdiction, as I will show, does not arise at all, although the whole of the property in suit be outside the local limits of the jurisdiction of this Court.

Probate of the will of Kunja Lall, the plaintiff's grandfather, was granted by this Court to the defendant Nitambini as the executrix of the will. Could it be said that, when she failed to administer the estate of his grandfather, the plaintiff had no right to come to the same Court for relief? No authority has been cited to show that in an administration suit the question of jurisdiction arises.

In an administration suit both moveable and immoveable properties are looked upon as assets. In this suit the plaintiff prays for construction of the will of his grandfather, for an account, and also for the residue which is at present an unknown thing. I am not asking for any specific property, but for the residue, whatever that may be. This is not therefore a suit for recovery of immoveable property, but one for administration, which the Court has jurisdiction to entertain; see the Civil Procedure Code s. 213; Form No. 131, cl. 3; Story on Equity Jurisprudence (2nd Eng. edition), pp. 352, 353.

The undertaking to administer the estate of Kunja Lall properly originated when Nitambini obtained the probate.

In the case of *Peary Charan Mitter v. Ambica Charan Mookerjee* (3), dated February 13, 1882, in which there was a prayer for partition of the residue of the property and for possession, it was held by WILSON, J. that that was an administration suit, and this Court had jurisdiction to entertain it, although all the immoveable properties were outside the local limits of the jurisdiction of this Court, it not being a suit for land; see also *Ewing v. Orr Ewing* (4); *Nistarini Dasi v. Nundo Lali Bose* (5); *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahamed Hadjee Jossob* (6); *Hukm Chand's Civil Procedure Code* (1898), p. 281.

Mr. Knight (Mr. Henderson with him) for the defendant Dedraj Agarwalla. An administration suit does not necessarily become a suit for land. The true test to be applied to determine [319] whether a suit is a suit for land is to be found in the question—can the Court give full relief *in personam*? In this case Nitambini, as the executrix of the will, is the trustee of the immoveable property, and her possession is the plaintiff's possession. And before it can be held that this is a suit for land, it must be shown that Nitambini has had adverse possession as against the plaintiff: *Bex v. Johnson* (7).

HARINGTON, J. The plaintiff in this suit is the grandson of one Kunjo Lall Banerjee, and the principal defendant (Sreemutty Nitambini Debi) is the widow of Kunjo Lall Banerjee. Kunjo Lall Banerjee died on the 9th April 1894, leaving considerable immoveable property, which was situated outside the jurisdiction of this Court.

(1) (1899) I. L. R. 26 Cal. 845.

(2) (1877) I. L. R. 2 Cal. 445, 451.

(3) Unreported.

(4) (1868) L. R. 9 A. C. 34.

(5) (1899) I. L. R. 26 Cal. 891.

(6) (1874) 13 B. L. R. 91

(7) (1805) 6 East Rep. 583.

The principal defendant, Sreemutty Nitambini Debi, applied for probate of his will and obtained a grant on July 24th, 1894, on the allegation that there was at that time moveable property within the jurisdiction of this Court.

On the 31st March 1898 the present suit was filed, and in this suit the plaintiff asks for an account and administration, that the will may be construed and the rights of the parties therein be declared, and that various other reliefs may be given.

The whole of the immovable property being outside the jurisdiction of this Court, it was necessary for the plaintiff to allege in his plaint some facts which would show that the cause of action arose within the jurisdiction of this Court. Accordingly he describes the defendant Sreemutty Nitambini Debi as residing at No. 109, Beniatollah Street, in the town of Calcutta, as well as at Baboogunge, Hooghly, where the immovable property of the testator was situated. He also alleges that there was personal property of the testator's within the jurisdiction of this Court at the time that the suit was instituted, and he states that the cause of action arose from day to day in Calcutta. The written statement of Sreemutty Nitambini was filed on the 9th June 1898, and in her written statement she takes the objection that the Court has no jurisdiction to entertain the suit, and she denies the allegations of fact which have been made as to her residence and as to the presence of moveable property [320] belonging to the testator within the limits of the jurisdiction of this Court. At the present stage of the suit, the only question gone into has been that of jurisdiction.

The defendant's Counsel contends that this is a suit for land, and therefore that there is no jurisdiction under cl. 12 of the Charter to entertain it, and he goes on to argue that, if it is not a suit for land, the plaintiff has failed to show that Sreemutty Nitambini Debi, the principal defendant, dwelt within the local limits of the jurisdiction of this Court on the 31st March 1898, or that any part of the cause of action has arisen within the jurisdiction. He also took objection to the frame of the suit on the ground that the suit was not maintainable in its present form, having regard to s. 42 of the Specific Relief Act.

Now the question which goes to the root of the jurisdiction is, is the present suit a suit for land? It has been argued by Mr. Knight, who, though appearing for one of the defendants, is supporting the case for the plaintiff, that the true test to be applied to ascertain whether a suit is a suit for land or not is to be found in the question, can the Court give full relief *in personam*? He argues that in the present case the defendant as the executrix of the will is the bare trustee of the immovable property, and her possession is really the plaintiff's possession, and that, before it can be said that this was a suit for land it would be necessary to say that there was adverse possession as against the plaintiff. I do not agree with that argument, because I think the true test of finding out whether a suit is a suit for land or not is to look at the plaint and see what the plaintiff is asking. If he is asking for relief which falls within the description of the words "suits for land or other immovable property" as interpreted by this Court, then, I think, his suit is a suit for land. On the other hand, if he is not asking for such relief, then the suit does not come within the description I have indicated.

Paragraph 9 of the plaint is as follows :—

"That the plaintiff submits that upon the true construction of the said will he is entitled to immediate and absolute possession of the said estate,

1901  
JUNE 18, 19,  
20, 21 & 24.

ORIGINAL  
CIVIL.

29 C. 318.

1901  
JUNE 18, 19,  
20, 21 & 24.

ORIGINAL  
CIVIL.

29 C. 315.

both moveable and immoveable, subject to the provisions for the religious trusts and the maintenance of the defendant Sreemutty Nitambini Debi, and the payment of legacies contained in the said will, and that in any event [321] he is entitled to immediate and absolute possession of the said properties allotted to him by way of maintenance as aforesaid."

The properties which are alleged to have been allotted to him for maintenance are described in paragraph 4 of the plaint as immoveable properties.

The plaint contains other allegations which it is not necessary to deal with for the purpose of deciding this question. At the end of the plaint are prayers setting forth the reliefs asked for, and the important one is the prayer (f), in which it is prayed that the said will be construed and the rights of all parties ascertained and declared.

Now the right which the plaintiff is setting up, and he is a party to this suit, is that found in paragraph 9, that is, a right for immediate possession of immoveable property. Now the meaning to be attached to the words "suits for land or other immoveable property," which occur in cl. 12 of the Charter, was considered by Sir Richard Garth in the case of the *Delhi and London Bank v. Wordie* (1), and in that case, dealing with the question of jurisdiction, he says: "The question 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."

Now in this suit the plaint, after setting out the death of the testator, the relations that he left, and his will, and the provisions of the will, the fact that the defendant (Sreemutty Nitambini Debi) obtained probate and took possession of the estate, charges the defendant with acts of non-feasance and misfeasance, and then goes on in paragraph 9 of the plaint to set out what the plaintiff's contention is.

In the case of *Kellie v. Fraser* (2) the same learned Judge, in describing suits that fall within the description of "suits for land or other immoveable property" within cl. 12 of the Charter, says—"It will be observed, however, that in all or almost all the cases upon which the appellant relies, the suit was brought for the purpose of acquiring the possession of, or establishing a [322] title to, or an interest in, the property which was the subject of dispute."

The question is, having regard to the reliefs asked for in this Court, does it come within the description which I have just read? I confess, I think it does. It appears to me, where the plaintiff says under a will I am entitled to immediate possession of immoveable property, construe that will and declare my rights, it is impossible to say that he is not seeking to establish a title to, or a right in, the immoveable property, and, if that is so, his suit falls within the terms of cl. 12 of the Charter, and there is no jurisdiction to entertain it, if the immoveable property is outside the jurisdiction of this Court.

The jurisdiction of this Court, it must be borne in mind, is limited by the express terms of the Charter.

The question therefore, has to be decided by reference to the words of the Charter and not by a consideration of the jurisdiction exercised by Courts of Equity in England. Inasmuch as in my opinion this Court has no power by cl. 12 of the Charter to entertain this suit, it becomes unnecessary to discuss the other questions which have been argued.

(1) (1876) I. L. R. 1 Cal. 249, 263.

(2) (1877) I. L. R. 2 Cal. 445, 463

I agree with the construction put upon cl. 12 by Mr. Justice Shephard in the case of *Seshagiri Rau v. Rama Rau* (1), viz., that the words "in all other cases" in cl. 12 of the Charter exclude suits for immoveable property, and therefore that this is a suit for immoveable property, and the question as to whether the defendant dwelt at the time the suit was brought, or whether any cause of action arose, within the jurisdiction, in respect of which personal relief might have been given, becomes irrelevant. In my view, it appears from the plaint that the declaration of the plaintiff's right of possession of immoveable property is asked for: the suit is a suit for land, and it does not become less a suit for land or immoveable property within the words of the Charter because there is also asked, as ancillary to the declaration asked by the plaintiff, that the Will under which he claims should be construed, and that the estate should be administered by the Court, and that an account should be rendered by the executrix.

[323] I express therefore no opinion on the question as to the residence of the principal defendant.

Upon the question raised under s. 42 of the Specific Relief Act, because of the view I take, it is unnecessary to say anything.

The result therefore will be that this suit will be dismissed with cost.

Attorney for the plaintiff: *Preonath Bose*.

Attorneys for the defendants: *K. S. Mookerjee and U. L. Bose*.

*Suit dismissed.*

29 C. 323.

#### APPEAL FROM ORIGINAL CIVIL.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Banerjee and Mr. Justice Hill.*

BOISOGOMOFF v. NAHAPIET JUTE COMPANY.\*

[4th March, 1902.]

*Damages—Proof of inferiority of quality—Examination of samples from portions of bulk—Method of ascertaining damages—Method established and recognized in the trade.*

In a suit for damages by a purchaser of goods on the ground of their being below the guaranteed standard of quality, if it is clear from the evidence that such is not necessary for the plaintiff to prove the alleged inferiority in quality by an examination of the entire bulk: an examination of a fair number of samples taken from different portions of the bulk is sufficient for the purpose.

In a case of this class, if the method of ascertaining damages appears to be established and recognized in the trade, the plaintiff need not show how he has dealt with the goods delivered to him, and whether he has suffered any and what loss by reason of the goods not being up to the warranted standard.

THE plaintiff J. Boisogomoff appealed.

This action was brought to recover damages for alleged breach of warranty. The plaintiff, a jute merchant in Calcutta, purchased from the defendant company in September and October 1900 three lots of jute containing in the aggregate 7,000 bales. [324] According to the contracts the jute was to be of the standard quality of the mark known as T. S. N. 2. This mark is guaranteed to

\* Appeal from Original Civil No. 27 of 1901 in Suit No. 4 of 1901.

(1) (1896) I. L. R. 19 Mad. 448.