

In this view of the case it is unnecessary to consider the plea of the appellant that the plaintiff cannot have a son, who can offer oblations to her father.

The case of *Bhagwant Singh v. Kallu* (1) would not seem to be any authority in favour of the plaintiff in this case, because we do not hold that the plaintiff is disqualified from inheriting by reason of change of religion, but merely because she has put herself in a position in which she cannot, according to Hindu Law, inherit a share in her father's property.

We, therefore, allow this appeal with costs.

*Appeal allowed.*

32 C. 375 (=9 C. W. N. 705.)

[875] APPELLATE CIVIL.

*Before Mr. Justice Ghose and Mr. Justice Holmwood.*

BIDYA MOYEE DEBYA CHOWDHURANI v. SURJA KANTA ACHARJI.\*

[5th, 6th and 19th April, 1905.]

*Transfer—District Judge—Additional Judge—Transfer of part-heard appeal to Additional Judge, legality of—Assignment of "functions" to such Judge—Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), ss. 8, 10, 11, 21 (3) and 22—Civil Procedure Code (Act XIV of 1882), s. 25.*

A District Judge has no jurisdiction under s. 8 of the Bengal, N.-W. P. and Assam Civil Courts Act to transfer a case partly heard before himself to an Additional Judge for disposal.

Where, therefore, the District Judge admitted an appeal, heard the arguments and reserved judgment on a certain date, but on the next day, upon the application of the appellant, deputed an amin and a pleader to make a survey and identify some lands, to prepare a map and to take certain evidence, and after the receipt of their report fixed a date for further hearing, but ultimately transferred the appeal to the Additional Judge for disposal:

*Held that the order of transfer was without jurisdiction.*

*Kumarasami Reddiar v. Subbaraya Reddiar* (2); *Sita Ram v. Naini Dulaiya* (3); *Dumree Sahoo v. Jugdharee* (4); *Mouki Abdool Hye v. Macrae* (5); *Kishore Mohun Sett v. Gul Mohamed Shaña* (6) referred to.

A District Judge may under section 8 assign to the Additional Judge the function of hearing any particular class of cases, but it is extremely doubtful whether he can transfer to such Judge any particular case pending before himself.

[*Ref.* 13 I. C. 542; 10 C. W. N. 12; *Commented on*: 10 C. W. N. 841; *Dist.* 8 C. L. J. 34; *Expl. & Diss.* 36 Cal. 193=5 C. L. J. 611.]

APPEAL by the plaintiff.

The plaintiff-appellant, Bidya Moyee Debya, instituted a suit in the Court of the First Subordinate Judge of Mymensingh to [876] recover possession of certain lands alleged to be part of a *bhil* appertaining to her estate, and obtained a decree for a portion of such lands.

\* Appeal from Appellate Decree No. 547 of 1902 against the order of Babu Dwarka Nath Mitter, Officiating Additional District Judge of Mymensingh, dated the 6th December 1901, reversing the order of Babu Mohendra Nath Roy, First Subordinate Judge of Mymensingh, dated the 31st January 1898.

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| (1) (1888) I. L. R. 11 All. 100. | (4) (1870) 13 W. R. 398.         |
| (2) (1899) I. L. R. 23 Mad. 314. | (5) (1874) 28 W. R. 1.           |
| (3) (1899) I. L. R. 21 All. 290. | (6) (1867) I. L. R. 15 Cal. 177. |

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32 C. 878=9  
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The defendant appealed to the District Judge of Mymensingh, who admitted the appeal on the 22nd April 1898. It was heard in part on the 14th November 1899, and postponed to the 20th instant, on which date the arguments were concluded and the judgment reserved. On the next day, however, the appellant before him filed a petition praying that an amin be sent to the locality to make a fresh survey, and a Civil Court amin and a junior pleader were deputed; the former to make a survey, to identify certain lands referred to in some kabuliats filed by the respondent and to prepare a map; the latter to take evidence as to the local names of the places, and to compare the map with the *thak* and survey maps. On the 22nd May 1900, the amin's and pleader's fees not having been paid, the District Judge passed an order that, if they were not paid within a week, the appeal would be dismissed. On the 25th July 1900, after directing the payment of certain fees and allowances, he required the amin and the pleader to submit their final report by the 31st July, and adjourned the case until the 7th August for further hearing. Nothing appears to have been done until the 10th January 1901, when he transferred the case to the Additional Judge for disposal, and the latter, after hearing the arguments on both sides, on several dates in January, finally decreed the appeal with costs on the 6th December.

The plaintiff, Bidya Moyee, thereupon appealed to the High Court.

Mr. Hall (Dr. *Rash Behari Ghose*, Babu *Jogesh Chandra Roy* and Babu *Sotish Chunder Ghose* with him) for the appellant. Under s. 8 of the Bengal Civil Courts Act, the Additional Judge may discharge any of the "functions" assigned to him by the District Judge. What is assignable under the section are the *functions* of the Judge. The term seems referable to classes of cases only and not to particular cases. Then s. 21 (3) provides that where the "function of receiving any appeals which lie to the District Judge" has been assigned to an Additional Judge, [877] the appeals may be preferred to him. The section contemplates the transfer of a class of cases, *viz.*, appeals, and not of a particular appeal. The wording of s. 22 (1) is different. No reference is made here to "functions," and a particular appeal may, under that section, be transferred to a Subordinate Judge. At all events the District Judge is not empowered by s. 8 to transfer a part-heard case to the Additional Judge. See *Kumara-sami Reddiar v. Subbaraya Reddiar* (1); *Sita Ram v. Nairni Dulaiya* (2); *Kishori Mohun Sett v. Gul Mohamed Shaha* (3); *Dumree Sahoo v. Jugdharee* (4); *Moulvie Abdool Hye v. Macrae* (5); *Sakharam v. Gangaram* (6); *Amir Begam v. Prahlad Das* (7); *Nandan Prasad v. Kenney* (8).

The *Avvocato-General* (Mr. O'Kinealy) (with him Babu *Dwarkanath Chakrabaty* and Babu *Govinda Chunder Roy*) for the respondent. The position on the day the District Judge sent the case to the Additional Judge was that it would have had to be argued *de novo* with reference to the evidence of the amin. It was, therefore, a pending appeal, which was not ready for judgment. There is no limitation in s. 8 of the Bengal, N. W. P. and Assam Civil Courts Act to any kind of work assignable to the Additional Judge. There is nothing in the section to cut down its operation to certain classes of work only. Further, there is no question of transfer, as there is really one Court; the Additional Judge taking over work from the District Judge to relieve the pressure on him. The cases cited by

- (1) (1899) I. L. R. 28 Mad. 314.  
(2) (1899) I. L. R. 21 All. 230.  
(3) (1887) I. L. R. 15 Cal. 177.  
(4) (1970) 13 W. R. 398.

- (5) (1874) 23 W. R. 1.  
(6) (1889) I. L. R. 13 Bom. 654.  
(7) (1902) I. L. R. 24 All. 304.  
(8) (1902) I. L. R. 24 All. 356.

Mr. Hill have no application upon the question of the assignment of work by the District Judge to the Additional Judge. The case of *Kumarasami Reddiar v. Subbaraya Reddiar* (1) was decided under s. 13, prov. (2) of the Madras Act. [GHOSE, J. That is practically the same as s. 25 of the Civil Procedure Code.] S. 25 of the Civil Procedure Code deals with withdrawals, whereas s. 8 of the Bengal Civil Courts Act with distribution of business; and it empowers the District Judge to assign any particular case. The ruling in *Kishori Mohun Sett v. Gul Mohamed Shaha* (2) was a case of execution proceedings. The [878] other cases referred to by Mr. Hill were cases either of re-transfer or of execution proceedings. There was, therefore, no want of jurisdiction in the District Judge. If there was any irregularity, it would be cured by s. 578 of the Civil Procedure Code.

Mr. Hill in reply. The order of the 20th November shows that there was a complete hearing of the appeal. The order of the 21st instant for additional evidence is not within s. 568 (b) of the Civil Procedure Code, as it was the appellant, who moved for it, and not the Appellate Court. The cases cited show that powers of transfer are conferred by special sections of the law, and do not exist apart from them. The powers are granted under s. 25 of the Civil Procedure Code and certain sections of the Bengal Civil Courts Act. Under the former the District Judge may withdraw a suit and refer it to a subordinate Court. Section 8 of the latter Act empowers him to confer the power of trying classes of cases, but not to transfer a particular case. The learned Advocate General argued that it was not a case of transfer as the Additional Judge was the *alter ego* of the District Judge. But the Courts of the District Judge and of the Additional Judge are different. The Additional Judge has not the same powers as the District Judge, but only such of them as are conferred on him by the latter. [GHOSE, J. Has the District Judge an inherent power to transfer a particular appeal: if he has, the question is whether he could exercise the power in a case nearly tried out.] He has no inherent power, but only a statutory one under different sections. The power does not flow from his appellate jurisdiction, otherwise s. 25 of the Civil Procedure Code and s. 22 of the Bengal Civil Courts Act would be useless.

GHOSE and HOLMWOOD, JJ. This appeal is by the plaintiff, and it arises out of a suit instituted by her for the recovery of possession of certain lands said to be part of a *bhil*, Dharia Chuthul, appertaining to the plaintiff's property at Kushtia. According to the case of both the parties the lands in suit have come out of a *bhil*. The plaintiff says it is Dharia Chuthul, the defendant says it is Taratia or Kala Bhil belonging to him, as appertaining to his property Taratia.

[879] The plaintiff's case seems to have been that she was in possession of these lands through tenants, until dispossessed in Aughran 1296 (November 1889) by the tenants of the defendants. The defendant, on the other hand, pleaded that the land belonged to him, that the plaintiff's claim was barred by the law of limitation, and that he had been in possession thereof adversely to the plaintiff for more than twelve years.

The amin, who was in the first instance sent to the locality under orders of the subordinate Judge, found, on a comparison of the *thak* and survey maps, that a considerable portion of the lands in suit fell within the plaintiff's property. The plaintiff in support of her case produced certain *kabuliats* of the year 1278 (1871), said to have been executed by certain tenants, as referable to the lands in suit, but the amin was unable

(1) (1899) I. L. R. 23 Mad. 314.

(2) (1887) I. L. R. 15 Cal. 177.

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to identify them with those described in the kabuliats. The Subordinate Judge, however, looking into the general boundaries and features of the lands, was of opinion that they were included within the kabuliats. He thought at the same time that the plaintiff was dispossessed not in 1889, as alleged in the plaint, but in 1886, and the suit having been brought within twelve years from that time, he gave the plaintiff a decree for such of the lands as fell within the property according to the report of the amin.

The defendant appealed to the District Judge, and that officer heard the case on the 14th and 20th November 1899 and, after the conclusion of the argument, reserved judgment. On the 21st November 1899, the defendant-appellant presented a petition to the District Judge asking that another amin might be sent to the locality for a fresh local investigation; and the Judge made an order as prayed for, and directed, among other matters, that the lands referred to in the kabuliats filed by the plaintiff be shown on the map that he might prepare. It would appear that up to the 22nd May 1900 the appellant had not deposited the amin's fees; and the Judge, on that date, ordered that, if the fees be not paid within a week, the appeal would be dismissed. Subsequently, the required fees were paid, and a local investigation was held. In the course of this investigation the plaintiff's agent was called upon by the amin to point out the lands covered by the kabuliats, but he was unable to do so saying that the defendant had [880] obliterated the boundary marks. However that may be, the amin found that a portion of the lands in suit was covered by the *thak* and survey maps of the property belonging to the plaintiff.

The amin submitted his report on the 31st July 1900; but the matter was not taken up by the District Judge, until the 10th January 1901, when he ordered that the case be transferred to the Additional District Judge for disposal.

The Additional Judge heard the appeal between the 11th and 19th January 1901, and on the last mentioned day reserved judgment; but the judgment was not delivered until the 6th December 1901, when it may be presumed he had very nearly forgotten all about the arguments in the case. He held that the plaintiff's claim was barred by the law of limitation, and for reasons which, in the view that we have adopted and which we shall presently express, it is not necessary to discuss, he reversed the decree of the Sub-Judge and dismissed the suit entirely.

The chief point that has been taken before us by the learned Counsel for the appellant is that the District Judge had no jurisdiction to transfer the case for trial to the Additional District Judge; at any rate he could not do so at the stage he did, when he had full seizin of the case, and had already heard arguments on both sides.

Under section 25 of the Code of Civil Procedure the High Court or District Court may withdraw any suit, whether pending in a Court of first instance or in a Court of appeal, and try the suit itself or transfer it for trial to any other subordinate Court competent to try it. This section, in terms, does not apply in the circumstances of this case.

Under the Bengal, N.-W. P. Civil Courts Act (XII of 1887), it is provided that when the business pending before any District Judge requires the aid of an Additional Judge for its speedy disposal the Local Government may appoint such Additional Judges as may be requisite, and that "Additional Judges so appointed shall discharge any of the functions of a District Judge which the District Judge may assign to them, and in the

discharge of those functions they shall exercise the same powers as the District Judge."

[881] The question here arises whether, when the District Judge is empowered to assign to an Additional Judge any of his "functions," he is authorized to transfer to such Additional Judge any particular case pending before him, more especially a case, which has been heard by him.

Section 10 of the Act provides for an event, such as death, resignation or removal of the District Judge, or of his being incapacitated by illness or otherwise; and in such an event, the Additional Judge is authorized to take charge of the office of the District Judge, and to exercise any of the powers of the District Judge. There are one or two other sections in the Act, which may be as well referred to in this connection; and they relate to the power of the District Judge to transfer proceedings and appeals to Subordinate Judges. They are sections 11 and 22. Under the former section the District Judge may transfer, in certain events, all or any of the proceedings pending in the Court of a Subordinate Judge, either to his own Court, or to the Court of any other Subordinate Judge. Under the other section the District Judge may transfer "any appeals" pending before him to a Subordinate Judge, and he may withdraw any appeal so transferred, and try it himself or transfer it to some other Court under his control competent to dispose of it.

It will be observed that a District Judge has no inherent power to transfer a case either from his own file or from the file of an officer under his administrative control: the power must be one conferred by statutes. Under section 25 of the Code of Civil Procedure, he is entitled to transfer a case pending in a Court subordinate to him to his own Court, but not to transfer a case pending in his own Court to some other Court subordinate to him: see *Sakharam v. Gangaram* (1). Then looking at the various sections of the Civil Courts Act, to which we have already referred, it does not appear that the District Judge, though he has the power to assign any of his "functions" to an Additional Judge, is entitled to transfer any particular case pending before him to that officer for disposal. He is authorized under section 21 of the Act to assign to the Additional Judge the "function" of receiving appeals. And he may perhaps assign to him the function of [882] hearing any particular class of cases. But it is extremely doubtful whether he can transfer to him any particular case pending in his Court. It will be observed that the power of the District Judge to transfer appeals to a Subordinate Judge stands upon a different footing from the power that he exercises when he assigns to an Additional Judge any of his own functions. But however that may be, and without expressing any decisive opinion upon the question, whether a District Judge has authority to transfer any particular appeal pending before him to an Additional Judge, we are of opinion that he cannot transfer a case, which has been heard by him. In our judgment there is no authority for him to do so. If we had to deal with the matter under the old Code of Civil Procedure (Act VIII of 1859), there could be no doubt upon the authorities that a District Judge has no power to transfer a case even to his own file after the evidence has been partly recorded by a subordinate Court: see *Dumree Sahoo v. Jugdharee* (2), *Moulvie Abdool Hye v. Macrae* (3), *Kishori Mohun Sett v. Gul Mohamed Saha*. (4) And the like rule, we think, applies under the new Code of Civil Procedure and the Civil Courts Act, in respect of an appeal

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(1) (1889) I. L. R. 13 Bom. 654.  
(2) (1870) 13 W. R. 398.

(3) (1874) 23 W. R. 1.  
(4) (1897) I. L. R. 15 Cal. 177.

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which the District Judge has already heard, though it may be said in this case in part. The question of the right of transfer by a District Judge of a case partly heard by him was considered by the Madras High Court in the case of *Kumarasami Reddiar v. Subbaraya Reddiar* (1) under the Madras Civil Courts Act, which contains provisions somewhat similar to those in the Bengal and N.-W. P. Civil Courts Act; and it was held the District Judge had no power to transfer to a subordinate Judge an appeal, which had been partly heard by him. In this connection we might also refer to the case of *Sita Ram v. Nauni Dulayya* (2). There, a District Judge had transferred a case from the Court of the subordinate Judge to his own Court, and against his decree an appeal having been preferred to the High Court, that Court remanded the suit under section 562 of the Code of Civil Procedure to the District Judge; but the latter transferred the case so remanded to the subordinate Judge. And [883] it was held that the District Judge had no power to transfer the suit, but was bound to try it out himself. In the present case, it will be borne in mind that after the District Judge had made an order upon the application of the defendant, the appellant before him, for local investigation by a second amin, and when the defendant failed to deposit the amin's fees, he recorded an order to the effect that the appeal would be dismissed, if the fees were not deposited within a given time—indicating clearly that, upon the materials that then stood before him, he was not prepared to disagree with the conclusion, which had been arrived at by the subordinate Judge, and that he should have to dismiss the appeal if further materials were not forthcoming. In this state of things, we fail to see how the Judge, when the report was received from the second amin appointed by him, could transfer the appeal to the Additional Judge. He was, we are of opinion, bound to consider the fresh materials that were afforded by the second amin's investigation, and determine the appeal one way or the other.

In this view of the matter, the order of transfer, and necessarily, the judgment of the Additional Judge, which followed upon such order of transfer, were without jurisdiction, and should, therefore be set aside.

The result is that the judgment of the Additional Judge is set aside, and the case remanded to the District Judge for being heard and decided according to law. Costs will abide the result.

*Case remanded.*

32 C. 884 (=2 C. L. J. 56.)

[884] APPELLATE CIVIL.

*Before Mr. Justice Stephen and Mr. Justice Mookerjee,*

SITARAM MARWARI v. THOMPSON.\*

[30th May, 1905.]

*Contract—Jurisdiction—Civil Procedure Code (Act XIV of 1872), s. 17, expl. iii, clause (2)—Suits arising out of contract—Cause of action—Place where the offer is accepted—Contract Act (IX of 1882), ss. 8, 10 and 25.*

\* Appeal from Appellate Decree No. 1623 of 1903, against the decrees of R. R. Pope, Judicial Commissioner of Chota Nagpore, dated the 11th of July 1903 modifying the decree of Mohendra Nath Roy, Subordinate Judge of Furulia, dated the 21st of March 1903.

(1) (1899) I. L. R. 23 Mad. 314.

(2) (1899) I. L. R. 21 All. 230.