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to sell a certain portion of certain trust premises for the purpose of raising money to pay for some necessary repairs.

The application is opposed on the ground that the Indian Trustees Act is by section 3 limited in its operation to those cases in which the English Law is applicable; it is said that that law is **[145]** not applicable to a trust in which the trustees and *cestuis que trustent* are all Hindus, and that, therefore, there is no jurisdiction to grant the application.

This argument rests on the proposition that English Law is inapplicable in the case of a trust created in a form valid under English Law if the settlor, the trustees and the *cestuis que trustent* are Hindus.

It has been considered that English Law, Civil and Criminal, was made applicable to Indians within the limits of Calcutta by the Charter, 13 George I, in so far as that law is not inconsistent with the Hindu or Mahomedan Law.

It cannot be said, therefore, that English Law is, of necessity, inapplicable in the present case ; it must be shewn, to exclude the applicability of English Law, that the trust is one which violates some provision of Hindu Law. Had it been intended to exclude all Hindus from the operation of the Indian Trustees Act, I should have expected a clause like that contained in section 331 of the Succession Act.

The application is granted.

Attorney for the applicant : *J. N. Dutt.*

Attorneys for the opposite party : *Bonnerjee & Bonnerjee.*

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[146] CIVIL RULE.

Before Mr. Justice Brett and Mr. Justice Mookerjee.

ZAMIRAN *v.* FATEH ALI.*
[22nd November, 1904.]

Practice—Petition—Affidavit, necessity of—High Court Rules 1, 3 & 4, Ch. XII—Civil Procedure Code (Act XIV of 1882), ss. 17, 20, 57 & 622—Cause of action—Plaint, return of—Jurisdiction—High Court, jurisdicion of.

When a petition to the High Court states facts which are matters of record and which are supported by copies of the order passed by the Court below, such a petition need not be supported by an affidavit.

A brought a suit for dower in the Court of the Subordinate Judge of Saran alleging that the marriage as well as the divorce took place in that district. The defendant objecting to the suit on the ground that he worked and resided at Calcutta, the Subordinate Judge returned the plaint to be presented to the Presidency Small Cause Court. The District Judge, on appeal, declined to interfere with the order of the first Court :—

Held, that s. 17, cl. (*a*) of the Civil Procedure Code applied to the case ; and the order returning the plaint was bad in law, the cause of action having arisen in the district of Saran.

Held, further, that inasmuch as the Subordinate Judge had failed to exercise jurisdiction vested in him by law by refusing to accept the plaint, and that the District Judge erred in law in confirming the decision of the first Court, the High Court had authority to interfere, under s. 622 of the Civil Procedure Code.

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* Civil Rule No. 2602 of 1904, against the order of G. Gordon, District Judge of Chupra, affirming an order of Karuna Das Bose, Subordinate Judge of that district, dated Jan. 19, 1904.

[Fol. 8 C. L. J. 308; 13 I. C 657; 39 Mad. 195; Ref. 43 All. 334=19 A. L. J. 110=61 I. C. 36 Fol. 65 I. C. 122, 1 Pat. 232.]

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RULE granted to the petitioner Musammat Zamiran.

The petitioner brought a suit in the Court of the Subordinate Judge of Saran claiming Rs. 2,000 as dower from her husband, on the ground that she had been divorced from him on the 21st September, 1900. The plaint was filed on the 19th September, 1903, and the plaintiff alleged that the marriage as well as the divorce had taken place in the district of Saran.

The defendant, who worked and resided at Calcutta, denied the marriage, and prayed that the suit might be tried at Calcutta.

[147] The learned Subordinate Judge, relying on the Expln. III to s. 17 of the Civil Procedure Code, and Illustration (*b*) under that section, by an order dated the 19th January, 1904, returned the plaint to the petitioner for presentation to the proper Court which he held to be the Presidency Court of Small Causes, Calcutta.

The plaintiff preferred an appeal against this order to the District Judge who dismissed it on the 11th April 1904. His judgment was as follows:—

"I am of opinion, after hearing both parties, that it would not be giving the appellant a fair chance to send her to Calcutta to prove a marriage and a divorce alleged to have taken place in this district in the years 1268 and 1308 respectively, but the cause of action arose on the 24th September, 1900, and there is no explanation why there was a delay in filing the proper court-fees which were not deposited until 16th November. The respondent has also been put to considerable trouble by an attempt on the part of the appellant to sue in *forma pauperis*. In consideration of all these facts, I decline to interfere with the order of the lower Court.

Against this decision the petitioner moved the High Court and obtained this Rule.

Maulvie *Shamsul Huda*, for the opposite party, took a preliminary objection that the Rule should be discharged as the petition on which it was granted was not verified as is required under Chapter XII, Rule 3, of the High Court Rules.

Babu *Dwarka Nath Mitter*, for the petitioner (*contra*). With regard to the preliminary objection, I submit that the object of Rule 3 is to require affidavits or verifications in those cases where facts stated in the petition do not appear in the certified copy of the proceedings which are filed with the petition. Here, I do not rely on a single fact which is not borne out by the certified copies of the judgments of the Courts below filed along with the petition. It was never intended by the said Rule that the facts which might be found in the proceedings should again be sworn to or verified. The petition is in perfect conformity with the practice of this Court.

On the merits, I submit, that the Subordinate Judge has clearly failed to exercise jurisdiction vested in him by law in declining to entertain the plaint of the petitioner on the sole ground of convenience of the opposite party. Both the [148] marriage and the divorce are alleged to have taken place in the district of Saran, and the Saran Court has full jurisdiction to entertain the plaint. The Subordinate Judge has acted illegally in the exercise of his jurisdiction in returning the plaint, and in doing so he has contravened the provisions of s. 57 of the Code of Civil Procedure. The learned District Judge having held that the cause of action arose in the Saran district, has also acted illegally in not sending the case back to the Subordinate Judge for trial on the merits.

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Maulvie *Shamsul Huda*. The Subordinate Judge was right in returning the plaint. He had jurisdiction to do so under s. 57, cl. (*c*) of the Code of Civil Procedure. Here, the defendant does not dwell, or carry on business, or work for gain within the district of Saran; the comma before the word " and " shows that the word " and " is disjunctive and is equivalent to " or." So in this case, although the cause of action did arise in Saran yet as none of the defendants resided there, the Court had the discretion to return the plaint. Assuming that the Subordinate Judge had declined jurisdiction, the orders of the District Judge to whom an appeal lay under s. 588 of the Code, cannot be set aside as made in the exercise of his jurisdiction illegally and with material irregularity, simply because his decision as to the jurisdiction of the first Court was erroneous: I rely on *Mathura Nath Sarkar* v. *Umes Chandra Sarkar* (1).

BRETT AND MOOKERJEE, JJ. The petitioner in this Rule filed a plaint in the Court of the Subordinate Judge of Saran on the 19th September 1903, in a suit in which he claimed to be entitled to recover a certain sum as dower from her husband by reason of the fact that she had been divorced from him on the 21st of September, 1900. The sum claimed as dower was Rs. 2,000 and the plaint bore a stamp of Rs. 10 only. The Subordinate Judge held that the stamp was insufficient, and gave the petitioner time up to 16th November within which to file the deficit court-fee of Rs. 115. The deficit court-fee was subsequently put in and the suit was proceeded with in that Court to this extent that summons [149] was issued to the defendant, and he appeared in the Court of Subordinate Judge. On the 19th January, 1904, the Subordinate Judge recorded a judgment in which he gave various reasons for holding that the petitioner should not have filed the suit in his Court, but that she should prosecute the suit in the Small Cause Court at Calcutta. He on the same date returned the plaint to the petitioner with an order recorded thereon that the plaint was returned to her for presentation to the proper Court in Calcutta.

The petitioner appealed against this order to the District Judge, but her appeal was dismissed on the 11th April, 1904. She then came to this Court with an application under section 622 of the Code of Civil Procedure, contending that the Subordinate Judge was not justified in law in refusing to entertain her plaint, and the District Judge also was not justified in law in upholding on appeal the illegal order passed by the Subordinate Judge against her. A Rule was issued in her favour on the opposite party to show cause why the order of the Subordinate Judge of Saran, dated the 19th January, 1904, which was upheld by the District Judge in appeal, should not be set saide, and why the said Subordinate Judge should not be directed to entertain the plaint of the petitioner, and allow the suit to proceed in his Court.

The opposite party has appeared to show cause against this Rule and a preliminary objection has been taken that the petition ought not to have been accepted in this Court, as it failed to comply with the Rules of this Court which require that every application to the Court, if founded on any statement of the facts, shall be supported by affidavit or shall itself be verified. In the present case the facts with the exception of one stated in the last ground for the issue of the Rule are all facts which are matters of record and which are supported by the copies of the orders passed by lower Courts. We are of opinion that it was not contemplated by this Court that

(1) (1897) 1 C. W. N. 626.

it should be necessary to support by affidavit facts such as these in the present case because they are in themselves matters of record and are proved by the copies of proceedings filed with the application. The only fact which was not supported is that there was no cross appeal by the respondent opposite party in the Court of the District Judge. This appears to be an **[150]** incorrect statement, though we must say that, as the judgment of the District Judge contains no mention of any such cross appeal and no order on any such cross appeal, there was reason why the petitioner should have fallen into the error of supposing that there was no cross appeal in the Court of the District Judge. We have, however, allowed the vakil for the petitioner to strike out that statement of fact from the petition, and we are of opinion that after that statement has been struck out there is no objection to the admission of the application under the Rules of this Court.

In support of the Rule it has been argued that the Subordinate Judge's order fails to set out any ground justifying him in law in returning the plaint to the petitioner and refusing to entertain her suit. In his judgment the Subordinate Judge relies on Explanation III to section 17 of the Code of Civil Procedure and Illustration (*b*) under that section. We do not think that Explanation III contains any provision authorising him to refuse to exercise jurisdiction in trying the suit, and so far as illustration (*b*) is concerned we are of opinion that it has no possible application to the facts of the present case.

It has, however, been suggested on behalf of the opposite party that the Subordinate Judge relied on the proviso which follows clause (*c*) of the section, and it certainly appears that he must have relied on that proviso or otherwise he could not have been of opinion that illustration (*b*) applied to this case. That proviso, in our opinion, clearly applies to clause (*c*) only of the section, and certainly cannot be taken to apply to clauses (*a*) and (*b*). Clause (*a*) provides that the suit shall be instituted in a Court within the local limits of whose jurisdiction the cause of action has arisen. In this case the marriage of the petitioner is alleged to have taken place in the district of Chupra and the divorce, out of which the cause of action arose, is alleged to have taken place in the same district. The petitioner as plaintiff in the suit would be entitled, subject to the provisions of the law, to select her own Court for the trial of the suit, and the proviso on which the Subordinate Judge appears to have relied has no application whatever, in our opinion, to cases falling under clause (*a*) of the section. The Subordinate Judge in the conclusion **[151]** of his judgment gives a further reason for his order which is that it was made to suit the convenience of the defendant; but under section 17 of the Code of Civil Procedure there is no provision which under the circumstances of this case would have justified him in returning the plaint for presentation in another Court in order to suit the convenience of the defendant at the sacrifice of the convenience of the plaintiff.

The District Judge in dealing with the appeal differs from the Subordinate Judge in his opinion on this point, and holds that the order directing the return of the plaint to the plaintiff with directions to file it in the Calcutta Court was not fair to the plaintiff. He goes so far as to say that in his opinion "it would not be giving the appellant a fair chance to send her to Calcutta to prove a marriage and a divorce alleged in this district in the years 1286 and 1308 respectively." The District Judge therefore distinctly disagreed with the opinion at which the Subordinate Judge had

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arrived and the ground on which the Subordinate Judge had thought fit to return the plaint to the petitioner. The District Judge, however, goes on to say that "the cause of action arose on the 24th September 1900, and there is no explanation of the delay in filing the proper court-fees which were not deposited until 16th November. The respondent has also been put to considerable trouble by an attempt on the part of the appellant to sue in *forma pauperis*: In consideration of all these facts I decline to interfere with the order of the lower Court."

It has been contended on behalf of the petitioner that neither the order of the Subordinate Judge nor the order of the District Judge can be supported in law, as neither order appears to have been passed in accordance with the provisions of any of the sections of the Code of Civil Procedure.

The learned vakil who appears to oppose the Rule has suggested that possibly section 57 would cover the case, or, if not that section, then section 20. We are of opinion that section 57 cannot be taken to cover a case like the present. The only clause in that section which at all appraoches the facts of the present case is clause (*c*). That clause runs as follows:—"If, in any other case, it appears that the cause of action did not arise, and that none of the defendants are dwelling or carrying on business, or personally **[152]** working for gain, within such local limits," then the plaint may be returned. But in this case it has not been contended, and cannot be contended, that the cause of action did not arise within the limits of the jurisdiction of the Subordinate Judge's Court at Saran, and the mere fact that the defendant was working in Calcutta would not by itself be sufficient under that clause to justify the Court in returning a plaint for presentation to the Court in Calcutta. We are therefore of opinion that the provisions of section 57 do not apply to the present case. Nor do we think that the provisions of section 20 can be held to apply. That section distinctly provides that "if the Court, after hearing such of the parties as desire to be heard, is satisfied that justice is more likely to be done by the suit being instituted in some other Court, it may stay proceedings, &c." Neither in the judgment of the District Judge nor in the judgment of the Subordinate Judge is it anywhere stated that the Judges of those Courts were satisfied that justice would more likely be done in the Court at Culcutta than in the Court at Chupra; and, in fact, if the judgment of the District Judge means anything at all, it certainly goes a long way to support the view that justice was much more likely to be done to the plaintiff, the petitioner, in the Subordinate Judge's Court at Chupra than in the Small Cause Court in Calcutta.

We hold, therefore, that the judgments of both the lower Courts fail to show any ground for the return of the plaint covered by the provisions of section 20 or section 57 of the Code of Civil Procedure.

It has, however, further been suggested that, even if the provisions of those sections did not support the judgments in question and the grounds contained therein, still this Court has no authority to interfere under section 622 of the Code, because what the lower Courts have done is merely to commit errors in law. We do not, however, think that in this case the contention holds good.

The learned vakil relies on the case of *Mathura Nath Sarkar* v. *Umes Chandra Sarkar* (1) to support his contention that this Court has no authority to interfere under section 622 on the ground that

(1) (1897) 1 C. W. N. 626.

[153] the lower Courts have not acted in the exercise of their jurisdiction illegally or with material irregularity. In our opinion the Subordinate Judge had exercised a jurisdiction not vested in him by law by returning the plaint, and has failed to exercise a jurisdiction vested in him by law by refusing to accept the plaint and to try the suit, and the District Judge has erred in law in confirming his decision. Both have also acted illegally in the exercise of their discretion, the Subordinate Judge by returning the plaint to the petitioner for presentation to another Court for reasons which are not justified under the provisions of the law, and the District Judge in confirming that decision for reasons not covered by any provisions of the Code of Civil Procedure.

We therefore make the Rule absolute and direct that the order of the Subordinate Judge dated the 19th of Jaunary, 1904, as well as the order of the District Judge confirming that order, be set aside.

The plaint has been filed before us on behalf of the petitioner. We direct that it be sent down to the Court of the Subordinate Judge of Chupra with directions to entertain it and to allow the suit to proceed in his Court according to law.

Rule absolute.

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32 C. 154.

[154] CRIMINAL REVISION.

Before Mr. Justice Pratt and Mr. Justice Handley.

UMATAL FATIMA v. NEMAI CHARAN BANERJEE.*
[10th June, 1904.]

Division of Crops, order for—Jurisdiction of Magistrates—Criminal Procedure Code (Act V of 1898), s. 144—Irrevocable order.

An order for division of crops between the tenants and a rival zemindar does not come within the purview of s. 144 of the Criminal Procedure Code; nor is a Magistrate empowered to make an order of an irrevocable nature under that section.

RULE granted to Musammat Umatal Fatima, the petitioner.

The petitioner was originally the holder of a mokarari tenure of certain villages. The tenure consisted of two distinct holdings, which she held separately under different proprietors. The rent of one of these, constituting eight annas of the whole, having fallen in arrear a decree was obtained against her, and her interest therein was put up for sale in execution thereof. To save the tenure from sale, the objector, Nemai Charan Banerjee (who was a money-lender by profession and a creditor of the petitioner's), paid up the decretal amount, and was subsequently, on his application, put into possession as a mortgagee, under s. 171 of the Bengal Tenancy Act.

Some litigation between the parties followed, the last proceeding before the date of the order complained of being an execution case before the Subordinate Judge of Gaya.

The Subordinate Judge after reviewing the facts of the case, on the 1st March, 1903, recorded a finding that each party was in possession of a moiety of the mokarari of the villages, and effect was given to his order accordingly. A further question of the claims of Nemai Charan Banerjee

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*** Criminal Revision No. 533 of 1904, against the order of Banka Behari Bukshi, Deputy Magistrate of Gaya, dated May 2, 1904.**