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things attached to the earth or permanently fastened to anything which is attached to the earth; but not standing timber, growing crops, nor grass," and moveable property means "standing timber, growing crops, grass, fruit upon trees, and property of every other description except immoveable property." In Act I of 1868, "The General Clauses' Act," immoveable property means "land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;" and moveable property is defined to be "property of every description, except immoveable property." In the Indian Penal Code, Act XLV of 1860, "the words moveable property are intended to include corporeal property of every description, except land and things attached to the earth, or permanently fastened to anything which is attached to the earth."

All these Acts are of general application; and excepting perhaps Act XX of 1866, the definition of immoveable property in each of them, after mentioning certain particular things by name, concludes with the general words "things attached to the earth, or which are permanently fastened to anything attached to the earth." The fact that a thing can be removed from the earth would not make it according to these definitions moveable property. The test is whether the thing can be removed in its existing state, without changing its nature. A hut is a thing permanently attached to the earth. When it is removed, it is not a hut, but simply a collection of materials. A hut would, according to these definitions, be immoveable property. These definitions, except the one in Act XX of 1866, are of general application and are the same. See *Rajchandra Bose* v. *Dharmo Chandra Bose* (1). *Rahini Kant Ghose* v. *Mahabharat Nag* (2)

(1) *Ante*, p., 510.

(2) *Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.*

The 17th August 1868.

RAHINI KANT GHOSE (PLAINTIFF) v. MAHABHARAT NAG AND OTHERS (DEFENDANTS.)*

THE following case was submitted, for the opinion of the High Court, by the Judge of the Small Cause Court of Jessore:—

This is an action brought by the plaintiff as auction-purchaser to recover from the defendants the thatched huts purchased by him, or their value, under the circumstances mentioned in the plaint, which runs as follows:—

"This is a suit for the recovery of Rs. 30 which are due to plaintiff on account of

* Reference by the Judge of the Small Cause Court at Jessore.

and *Thakur Chandra Paramanik* v. *Ramdhun Bhuttacharjee* (1).

The decision on the first point referred would settle the second. It may be urged by the respondent that the judgment-debtor acquiesced in the jurisdiction of the Small Cause Court, by not objecting to the sale. When there is no jurisdiction, acquiescence or silence of a party cannot give a Court jurisdiction.

Baboo *Chandra Madhab Ghose* for the respondents.—The subject-matter of suit is not a building of a permanent nature, such as with tiled roofs or mud walls, but an ordinary hut. Taking the definitions as given in the several Acts cited

the huts, as the price thereof, purchased by him at an auction-sale. Plaintiff, in execution of decree No. 1311 of 1866 of this Court against Mahabharat Nag and others, caused attachment of the three huts as *per* schedule annexed at foot of the plaint, and having purchased them at the auction held of the huts on the 14th Jaishta 1274, for Rs. 19-12, by giving credit for this sum in the amount of the decree, went to break and bring away the huts on the 20th Jaishta, when the defendants did not allow him to do so; and as the huts remained in the defendants occupancy, the plaintiff now seeks to recover the huts or the value thereof."

One of the defendants, as regards one of the huts, pleads property in himself, and as regards the other two huts, not guilty: and the two other defendants plead not guilty.

Although no question was raised that this was cognizable by this Court, I of my own motion took the objection, as it appeared to me that the suit did not fall within the definition of personal property in the sense in which that term is used in section 6, Act XI of 1865. I therefore did not enter into the merits of the case; but as it is urged by the plaintiff's pleader that actions like the present have been entertained by my predecessors, I think it proper to refer the question for the decision of the High Court.

He referred to *George Meeres* v. *Ackobur Sheik* (*a*), and *Thakur Chandra Paramanik* v. *Ramdhun Bhuttacharjee* (1).

The judgment of the Court was delivered by

PEACOCK, C.J.—We think that the Small Cause Court Judge properly held that the suit as laid did not appear to fall within the cognizance of the Small Cause Court. It was brought for not allowing the plaintiff to remove the huts, in consequence of which the plaintiff sought to recover the huts or the value. If the huts belonged to the judgment-debtor, and were in his possession, and the plaintiff was put into possession of them by the officers of the Court, and the defendant afterward without any right took possession, and forcibly prevented the plaintiff from pulling them down, he might be liable to an action for damages. Nothing of the sort however was stated in the plaint.

(1) B. L. R., Supl. Vol., Case No. 108 of 1865.

(*a*) S. C. C. Rul., p. 29.

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by the appellant, the question is whether a hut is attached to the earth, or permanently fastened to any thing attached to the earth. A hut is not attached to the earth in the sense that a tree is. [JACKSON, J.—See section 233 and 235 of Act VIII of 1859 passed before the passing of Act XLII of 1860. The word house is used without stating what kind of a house. COUCH, C.J. —When does a house cease to be so, and therefore cease to be immoveable property?] It depends upon the construction of the building and the right of removal. [COUCH, C.J.— Would a house be moveable or immoveable according to the custom or agreement of the parties?] Yes. When the hut can be removed without injury to the soil.

In the case of *George Meares* v. *Ackobur Sheik* (I), it was held that huts are generally regarded as moveable property. In *Kasi Chandra Dutt* v. *Jadu Nath Chuckerbutty* (2), the same view was taken. According to these rulings, by the general practice and custom, such huts are considered as moveable property.

As to the second point referred in this particular case, none of the parties doubted the jurisdiction of the Small Cause Court to sell the hut at the time of the sale. The record shows that the judgment-debtor considered that the Small Cause Court sale passed everything.

Baboo *Nallit Chandra Sen*, in reply .—In the case of *George Meares* v. *Ackobur Sheik* (1), the particular point referred in this case was not raise.

In the other case cited by the respondent, *Kasi Chandra Dutt* v. *Jadu Nath Chuckerbutty* (2), the question was whether a special appeal would lie, the suit being for the materials, and not whether a hut is moveable or immoveable property.

The opinion of the Full Bench was delivered as follows:—

COUCH, C.J.—Two questions have been submitted to the Full Bench in this case (*reads*).

(1) S.C. C. R., 29. (2) *Ante*, p. 512.

Section 19 of the Small Cause Court Act provides that, when a decree is passed in any suit of the nature and amount cognizable under this Act, the Court passing the decree may order immediate execution thereof by the issue of a warrant directed either against the person of the judgment-debtor, if he is within the local limits of the jurisdiction of the Court passing the decree, or against his moveable property within the same limits. If the warrant be directed against the moveable property of the judgment-debetor, it may be general against any personal preperty of the judgment-debtor wherever it may be found within the local limits of the jurisdiction of the Court, or special against any personal property belonging to the judgment-debtor within the same limits, and which shall be indicated by the judgment-debtor. Now it is to be observed that, in the latter part of this section, there is a change in the phraseology; instead of the words "moveable property," we find "personal property." But I think that the words "personal property" are used synonymously with moveable property and in their proper sense, namely to mean goods, money, or other things of a lik nature which may attend the owner's person wherever he thinks proper to go; they are not used in the sense in which they are used in English law where some things are included that cannot be moved. On this account I think that the words do not extend the meaning of the words "moveable property." Wee have, therefore, to consider whether huts in this country are moveable or immoveable property. The distinction between moveable and immoveable property is well known to the laws of all countries, but it is not so strictly observed in English law. What is moveable property? Physically, moveable things are such as can be moved from the place which they presently occupy, without an essential change in their actual natures, and immoveable things are such as cannot be moved from their present places, or cannot be moved from their present places without an essential change in their actual natures. For instance, a field is immoveable, because it cannot be moved; a house also is immoveable, not because it cannot be moved, but because it cannot be moved without an eesential change in its actual nature. You can move a house; but if you do, there is

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an essential change in its nature. The materials remain, but it is no longer a house. So, when you remove a hut, you take away the materials of which it is built; but there is an essential change in their nature; and between a house and a hut, there is only a difference of degree. They are both attached to the ground, both capable of being moved, but, neither can be moved without undergoing an essential change in its actual nature.

The distinction between moveable and immoveable, which is referred to by Sir Banes Peacock in his judgment in the case of *Rachandra Bose* v. *Dharmo Chandra Bose* (1) is noticed in the English case of *Lee* v. *Risdon* (2). Any one acquainted with the decision of the English Courts will know the great difficulty of making a distinction between moveable and immoveable property in the case of fixtures, which, although coming within the definition of immoveables, belong to the executor and not to the heir, and, in the case of a lessee becoming a bankrupt, belong to his assignees, and not to the lessor. In the case of *Lee* v. *Risdon* (2), the question, what are immoveables, arose in a technical way upon the form of a pleading. The question was whether the price of fixtures to a house could be recovered under a declaration for goods sold and delivered. The Court held that they could not. Chief Justice Gibbs in his judgment says:—"I was struck by one proposition of the Solicitor-General, that these (the fixtures) would pass to the executor, because the line is drawn the strictest, as Lords Ellenborough, CJ., observes in *Elwes* v. *Maw* (3) between heir and executor, and whatever is fixed cannot be severed: And, it is to be recollected, that the right between landlord and tenant does not altogether depend upon this principle, that the articles, continue in the state of chatetels; may of these articles, though originally goods and chattels, yet, when affixed by the tenant to the freehold, cease to be goods and chattles by becoming part of the freehold." And, continuing, he notices the distinction made by Sir Barnes Peacock in his judgment in the case of *Rajchandra Bose* v. *Dharmo Chandra Bose* (1) between moveables and things which there is a right to remove, saying:—"And though it is in his power to reduce them to the state of goods

(1) *Ante*, p. 510. (2) 7 Taunton's Rep., 188. (3) 3 East, 38.

and chattels again by severing them during his term, yet until they are severed, they are a part of the freehold, as wainscots screwed to the wall, trees in a nursery ground, which, when severed, are chattels, but standing, are part of the freehold." The rule stated is that these things which are called fixtures, as soon as they are severed become goods and chattels; but so long as they remain attached to the freehold, they are immoveable property.

There are several decisions that seem to have favored the view that, in considering whether huts are moveable or immoveable property, the usage of the country must be taken into consideration. At one time during the argument, I was inclined to take this view of the question, but after considering the matter, it seems to me that the actual annexation and total disconnection of the thing is the most certain and practical rule. A departure from the ordinary meaning of the word moveable will introduce many difficulties. In each case it will be necessary to enquire whether, by the custom of the district, or sometimes of a trade, the thing annexed to the land can be rightfully removed. For these reasons I would answer the first question which has been submitted to us by saying that huts are not moveable property within the meaning of section 19 of Act XI of 1865.

But I wish to notice a decision of the High Court of Bombay in *Kàshidâs Govindbhài* v. *The B. B. and C. I. Railway Company* (1) to which I was party, which seems to conflict with my opinion in this case. In that case it was held that a suit for damages for injury to crops is a suit for damages for injury to personal property within the meaning of clause 2 of section 1 of the Limitation Act. In coming to that conclusion I had in my mind the English law as to standing crops, and which is stated in Williams on Executors, page 670, note (1) :—

"They are, in fact, not only in this respect, but in most others, looked upon as chattels; for the rule seems now to be established that all those vegetables which go to the executor, and not to the heir, are for most purposes considered mere chattels. They may consequently be seized and sold

(1) 6 Bom. H. C. Rep., 114.

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under a *fieri facias*, and the sale of them while growing is not a contract or sale of any lands, tenements, or hereditaments, or any interest in or concerning them, within the 4th section of the Statute of Frauds; but a sale of goods, wares, and merchandize within the meaning of the 17th section." The learned author then refers to several decisions of the English Courts in which this was held. It was for this reason that, in applying the Limitation Act, I considered that growing crops should be held to be personal property. It was a choice between one year and six years as the period of limitation. If the crops were cut, although still on the ground, the suit would have to be brought within one year; but if the injury were done to them while standing, although about to be cut, and they were not to be considered as personal property, six years would be allowed for bringing the suit. This will not be so under the new Law of Limitation (1). And the propriety of the decision is I think, shown by the Registration Act, 1866, having defined moveable property as including growing crops. Possibly, if I had to consider the question again, I might feel obliged to adhere to the strict meaning of personal property, and hold that it does not include standing crops, and take the consequence of anomaly in the periods of limitation resulting from it. I have thought it desirable to advert to this case to show to what extent that ruling went should the case come to be cited hereafter as an authority. I think it is possible that, in passing the General Clauses' Act I of 1868, property of this description was overlooked.

As to the second question which has been referred to us, I am of opinion that the purchaser acquires no title to huts by a sale in execution of a decree of a Court of Small Causes. Such Court has no jurisdiction to deal with immoveable property, and no title can accrue to the purchaser by the sale of property which the Court has no jurisdiction to sell.

GLOVER and MITTER, J J., concurred.

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L. S. JACKSON, J.—I concur in the answer given by the learned Chief Justice and generally in the reasoning on which the answer to the first question is rested.

MACPHERSON, J.—I concur in the proposed answers. But I desire to rest my decision that "huts" are "immoveable" on that ground that they are "houses" and that in Act VIII of 1859, houses are classed with land and other immoveable property. Act XI of 1865, section 47, declares that, except as provided by that Act, the Code of Civil procedure shall apply to cases in the Small Cause Courts. It is enacted in section 233 of Act VIII of 1859 that, "when the property shall consist of goods, Chattels, or other moveable property," attachment shall be made in a particular manner. Similarly provision is made in section 235 for cases in which "the property shall consist of lands, houses or other immoveable property." And these two expressions occur in various other sections of the, Act. From this we may take it that, under the Code af Civil Procedure, and consequently under the Small Cause Court Act (1), lands, houses, and the like are "immoveable property while goods and chattels are "moveable." According to this definition, if a hut, such as is the subject of the present reference, is to be deemed "a house," then, no doubt, it is "immoveable" property, and not liable to attachment by the Small Cause Courts. But the question is whether such a hut is a house within the meaning of section 235, or whether it comes under the head of goods, chattles, or other "moveable" property. It may be contended that this is a question to which no certain general answer can be given, and that everything will depend on the circumstances of each particular case. It may be said shat if the hut is of a permanent character, solid and lasting in its construction, it is a house falling under the head of "immoveable" property; and that on the other hand, if it is not solid or permanent in its construction, but can be readily removed and erected elsewhere, it is not such a house as is "immoveable" property. Such "huts" have, in fact,

(1) Act XI of 1865.

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not always been deemed identical with houses. Thus, in Act VI of 1863 (B. C.), section 55, we have the expression "houses, buildings, lands, and huts," and a like use of the word huts occurs in other sections of that and others of the Bengal Municipal Acts. But it appears to me to be impossible to say that a common hut, whether its walls be of mud or of mat, is not for ordinary purposes a house, And I think that we are not justified in introducing modifications and limitations into the definition given in Act VIII of 1859, when there is nothing to lead to the conclusion that the Legislature intended that the word house should not be read in any other than its widest sense. And, doubtless, by reading it in its widest sense we avoid a vast sea of difficulty, inasmuch as no other certain rule can be laid down : and any departure from it would necessitate a special enquiry in each case, before it could be determined whether any particular hut was or was not "immoveable."

There is to my mind considerable difficulty in dealing with this question. In *George Meares* v. *Ackobur Sheik* (1), Bayley and Morgan, J J., said :—"We understand, from the statements in the case, that the huts are made by the ryots, and afterwards at will removed by them ; that the construction of the huts is not solid or permanent ; and that, according to the ordinary usage and understanding of the people of the district, such huts are treated and regarded as moveable property. Under such circumstances we are of opinion that, according to law, such huts are moveable property." And the same view of the matter has been taken substantially by the Court in several subsequent cases. So, according to the practice of the Calcutta Court of Small Causes, mat huts have for many years been treated as personal property, as goods and chattrls,and have been seized and sold in execution of decrees of that Court. This practice has been based on the fact that huts in Calcutta are not usually permanent or solid in their construction, consisting merely of posts, mats, and thatch, removeable easily and at will, the custom of the place treating them always in the case of tenants, as the property of the tenant who erects them, and not as the property of the

(1) S. C. C R., 29

landlord, or as in any way following the land. In Temple's "Practice of the Calcutta Small Cause Court," published in 1860, it is stated that it was at one time the practice to seize tiled and thatched huts under the writs of the Court of Small Causes but that the practice had been altered (1). I believe that I am correct in saying that the old practice, if ever really departed from, has been revived, and has been uniformily followed for years past, in fact, ever since about the date of the publication of Mr. Temple's work. It is to be borne in mind, however, that the Calcutta Small Cause Court has a procedure of its own, under Act IX of 1850, which differs widely from that of the Code of Civil Procedure, and that the High Court on its original side, in executing decrees under the Civil Procedure Code, does not in practice treat huts as moveable property.

The present reference has arisen out of a decision of Peacock, C. J., and Mitter, J., to the effect that huts are "immoveable" property. This was in the case of *Rajchandra Bose* v. *Dharma Chandra Bose* (2). The same question had arisen before the same Judges a short time previously in the case of *Rahini Kant Ghose* v. *Mahabharat Nag* (3), but in that case no opinion one way or other was expressed by the Court on this point.

As I have said, I prefer to base my decision that huts are immoveable upon the ground that they are houses; and that in Act VIII of 1859, houses are classed with land and other immoveable property. I do not base my decision on the ground that a hut is attached to the earth, nor on any of the various definitions of "moveable" and "immoveable" property. The words have been defined in no less than five different Acts (namely the Penal Code, the Succession Act, the General Clauses Act, the Registration Act, 1866, and the Registration Act, 1871), and no two of the definitions given are precisely the same.

BAYLEY, J.—I concur in the views expressed by Mr. Justice Macpherson in his judgment. I think that, although the former decisions were based on the prevalent custom, still the proper definition of a hut occupied as a house is that it is immoveable property.

(1) At p. 116. (2) *Ante*, p. 510. (3) *Ante* p. 514.