

ants are entitled to so much of the accreted land as lies on the south-east of that line; and that She should remit the causes to the High Court, with a direction to put the parties in possession, and to settle the amount of wasilat payable and receivable by either, in conformity with the above declaration. And declare further, that the costs of both the suits in the Zilla Court should be paid and received by the parties according to the practice of the High Court, in the proportion which the amount recovered by the plaintiff bears to the amount claimed by him, and that each party should bear his own costs in the High Court; credit to be given for any costs which have been already paid; and that there should be no costs of either appeal.

1871

PAHALWAN
SINGH
v.
MAHARAJAH
MUHESUR
BUKHSH
SINGH
BAHADOOR.
—
MAHARAJAH
MUHESUR
BUKHSH
SINGH
BAHADOOR
v.
MEGHURN
SINGH.

Order accordingly.

Agent for appellant in the first appeal and respondent in the second appeal: Mr. *Wilson*.

Agents for respondent in the first appeal and appellant in the second appeal: Messrs. *Burton, Yeates, and Hart*.

[APPELLATE CIVIL.]

Before Mr. Justice Markby and Mr. Justice Ainslie.

IN THE MATTER OF THE PETITION OF S. J. LESLIE.*

1872
July 12.

Suit for Land—Act VIII of 1859, s. 5—Jurisdiction—Mortgage—Form of Decree.

A suit brought upon a mortgage praying for a decree for the amount due thereunder, and that in default of payment the land mortgaged may be sold, is a suit for land within the meaning of s. 5 of Act VIII of 1859, and is rightly brought in the Court of the district within which the land is situate.

See also
15 B.L.R. 326.
9 B.L.R. 68.

By a deed dated the 13th September 1869, S. J. Leslie, in consideration of Rs. 25,000, conveyed to the land Mortgage Bank of India a house called "Fairy Hall" in Dum-Dum, in the 24-Pergunnas, by way of mortgage, and there-

* Motion on *Rule Nisi*, No. 348 of 1872.

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by covenanted to repay the said sum of Rs. 25,000, with interest thereon, at the rate of 12 per cent. per annum, and also to pay all costs and charges ; and, in default of such payment, he authorized the Land Mortgage Bank to sell the mortgaged premises, and to apply the proceeds of sale towards payment of the principal, interest, and costs. By another deed of mortgage dated the 3rd February 1871, Leslie conveyed the said house to one H. Dear, of Monghyr, to secure repayment of a sum of Rs. 2,000 and interest.

The present suit was instituted in the Court of the Subordinate Judge of 24-Pergunnas, by the Land Mortgage Bank of India, described as of 3, Mangoe Lane, Calcutta, against S. J. Leslie, described as of Calcutta, attorney-at-law, and H. Dear of Monghyr, to recover from Leslie the amount due under the mortgage, and the Revenue which the bank had had to pay to Government for the mortgaged premises, and the plaint prayed (*inter alia*) that a decree might be made for the payment by Leslie to the plaintiffs of the sum of Rs. 29,070-5-6, with interest and costs of suit ; that, in default of such payment by a time to be fixed by the Court, the property mortgaged might be sold by the Court to the highest bidder, and that at such sale the plaintiffs might be at liberty to bid for the property ; that the amount to be realized by such sale might be applied in payment of the amount to be decreed to the plaintiffs, and that if the plaintiffs became the purchasers, might be set off against the said decree ; that the plaintiffs might be at liberty to execute the decree against Leslie or his property for any balance that might remain owing ; that, in case the property be sold, all proper parties might be ordered to concur in the conveyance to the purchaser ; that a Receiver should be appointed to manage the property ; and that, if necessary, an account should be taken.

The defendant Leslie did not appear, and the Judge passed a decree *ex parte* against him, declaring that the plaintiffs were entitled to recover from him the principal sum with interest together with their costs in this suit ; and that upon payment within two months into Court of the amount of principal and interest and costs, the plaintiffs should re-convey the mortgaged premises, and in default thereof the mortgaged premises should

be put up for sale ; and that, in the event of the proceeds of sale being less than the total amount of principal and interest and costs, the plaintiffs should be at liberty to execute the decree against the defendant Leslie or his property for the balance which might remain due.

The defendant Leslie applied to the Judge under s. 119 of Act VIII of 1859, to set aside the decree passed by him, on the ground that he was a resident of Berhampore, a place about 120 miles from Calcutta ; that he had not sufficient time from the date of service of summons to the date of hearing for preparing his defence. On the 12th October 1871, the Judge rejected the application. The defendant Leslie then applied to the High Court, under s. 15 of 24 & 25 Vict., c. 104, to set aside the decree of the Judge on the ground that it had been made without jurisdiction. This application was rejected by a Division Bench (Glover and Mitter, J.J.), who held that, under s. 119, Act VIII of 1859, Leslie was entitled to prefer an appeal to the High Court from the order passed by the Judge rejecting the application for re-hearing. Leslie thereupon preferred such appeal, but it was dismissed by the High Court (L. S. Jackson and Mitter, J.J.), on the ground that the defendant had failed to appear after due service of summons upon him ; and the learned Judges stated that, if there was any defect in the jurisdiction which ought to have the effect of nullifying the proceedings of the Court below, that defect should be brought before the Court in the proper way.

Mr. *Branson* for Leslie moved the High Court (L. S. Jackson and Markby, J.J.), for and obtained a rule calling upon the Land Mortgage Bank of India “ to show cause why the decree of the Judge of the 24-Pergunnas, dated the 10th October 1871, should not be set aside upon the ground that the decree was made without jurisdiction.”

The rule came on for hearing before Markby and Ainslie, JJ. The *Advocate-General* (*offg.*) for the land Mortgage Bank, in showing cause, contended that the dismissal of the appeal from the order rejecting the application of re-hearing under s. 119, Act VIII of 1859, was final between the parties. *Ex parte* decrees can

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only be set aside under s. 119, Act VIII of 1859, and not by an application by way of motion under 24 & 25 Vict., c. 104, s. 15. On appeal the decree of the Judge was held to be valid. The Court which tried the case must be considered to have tried the question of jurisdiction—*In re Foy* (1). The defendant had been duly summoned, and without just cause failed to appear, therefore the decree was final. If the suit had been brought in Calcutta, there would have been an objection taken to the jurisdiction, as the property to be sold was in the 24-Pergunnas. The suit was one for sale in the ordinary form. The question turned upon the wording of s. 5; Act VIII of 1859 (2). The word "for" could not be construed merely in the sense "for possession of," but also meant "in respect of" land. A suit for redemption has been held to be a suit for land—*Sreemutty Lal money Dossee v. Judoonauth Shaw* (3). Suits for for enclosure have been considered as suits for land—*Beebee Jawn v. Meerz a Mahomed Hadee* (4) and *Blaquiere v. Ramdhone Doss* (5). It was doubtful whether an order for sale of land situate in the Mofussil could be made by the High Court in its original jurisdiction—*Denonauth Ruckhit v. Mutty Lal Paul* (6). In cases of doubtful jurisdiction, objection must be taken in time—*Bagram v. Moses* (7). This suit being for sale of mortgaged property, it was rightly brought in the Court within whose jurisdiction the property was situate—*Story's Conflict of laws*, s. 538. The decree of any other Court would not bind the property—*Story's Conflict of Laws*, s. 543. No suit for land in Calcutta could have been brought in any Civil Court in the Mofussil—*Reg. III of 1793*, s. 17. So much of that section as prevented the Dewanny Adawlut of the Zilla of the 24-Pergunnas from entertaining a suit against a person who

(1) 1 Tay. & Bell, 219.

(2) "Subject to such pecuniary or other limitations as are or shall be prescribed by any law for the time being in force the Civil Courts of each grade shall receive, try, and determine all suits hereby declared cognizable by those Courts, if, in the case of suits for land or other immoveable property, such land or pro-

perty shall, be situate within the limits to which their respective jurisdiction may extend."

(3) 1 I. J., N. S., 319.

(4) *Id.*, 40.

(5) Bourke's Rep., 319.

(6) 1 Hyde's Rep., 158.

(7) *Id.*, 284.

might become a resident within the limits of the town of Calcutta after the suit might be commenced, has been repealed by Act XXII of 1843, but no more. Nor could suits for land in the Mofussil against a person subject to the jurisdiction of this Court be brought in the High Court.

The question of jurisdiction cannot be raised after the order of Glover and Mitter, JJ.

Mr. *Branson* (in support of the rule).—The suit was for recovery of money. The decree was in the first part for money, and in the latter part relief was granted against Leslie personally. S. 5, Act VIII of 1859, relates to suits for possession of land. There is a difference in the wording of s. 5, Act VIII of 1859, and the wording of cl. 12. s. 1, Act XIV of 1859. The words in the latter are “recovery of immoveable property or of any interest in immoveable property.” Under s. 5, Act VIII of 1859, neither a suit for foreclosure, nor a suit for redemption, is a suit “for” land, though the decisions are the other way. The decree in a suit for land can be executed only under ss. 190, 199, 223, and 224, Act VIII of 1859. None of these sections applies to the decree made in this suit. The suit was for recovery of money by enforcing a contract; and if the money was not paid, then for sale of the land. It was not for recovery of possession if the money was not paid. The defendant was described in the plaint as of Calcutta, therefore on the face of the plaint the question of jurisdiction arose. [MARKBY, J.—Can we set aside a decree in part, part being for sale of land, and part being a personal decree?] It was so set aside in *Mannu Lal v. Pegue* (1) for want of juris-

(1) Before Mr Justice L, S. Jackson and Mr. Justice Mitter.

Baboo *Debendro Narayan Bose* for the appellants.

The 18th November 1868.

Mr. C *Gregory* and Baboo *Ashuto sh Chatterjee* for the respondents.

I. L. R.
1 Cal 166.

MANNU LAL (PLAINTIFF) v. MR. T. W. PEGUE AND OTHERS (DEFENDANTS)*

JACKSON, J.—The Courts below have

* Special Appeal, No. 1211 of 1868, from a decree of the Officiating Judge of Patna, dated 18th December 1867, affirming a decree of the Principal Sudder Ameen of that district, dated the 13th February 1867.