

It is admitted that rent is in arrear, and the only question is how far back, having regard to the statute of limitation, the plaintiff can claim. The point has not been argued before me, but article 110 of the Indian Limitation Act of 1877 imposes a limit of three years. The only question is whether section 14 applies. The plaintiff has made no attempt to satisfy me on this point, nor do I know why his suit in the Small Cause Court was withdrawn. I therefore see no reason for allowing him to carry back his claim more than three years from the institution of this suit.

There will also be judgment for mesne profits, the amount of which must be determined by a reference to the Registrar, and the defendant must pay the costs of the action.

Attorneys for the plaintiff : Messrs. Kally Nath Mitter & Sarbadhicary.

Attorney for the defendant : Babu S. K. Deb.

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APPELLATE CIVIL.

Before Sir Francis William Maclean, Knight, Chief Justice, and Mr. Justice Banerjee.

SHIBU HALDAR AND ANOTHER (DEFENDANTS) v. GUPI SUNDARI DASYA (PLAINTIFF).*

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February 17.

Jurisdiction—Suit for rent of a fishery—Uncertainty as to jurisdiction—Code of Civil Procedure (Act XIV of 1882), section 16A—Immoveable property—Right of fishery.

A suit for rent of a fishery is a suit for immoveable property within the meaning of section 16A of the Code of Civil Procedure. *Fadu Jhala v. Gour Mohun Jhala* (1) referred to.

A suit for rent of a fishery was brought in a certain Court, and there was reasonable ground of uncertainty as to the jurisdiction of that Court to entertain the suit. On an objection that the suit ought to fail for want of jurisdiction :—

Held, that the conditions required by section 16A of the Civil Procedure Code had been satisfied in the case, and that the objection as to jurisdiction ought not to be entertained.

* Appeal from Appellate Decree No. 70 of 1895 against the decree of J. Posford, Esq., District Judge of Faridpur, dated the 28th of August 1894, affirming the decree of Babu Beni Madhub Roy, Munsif of Goalundo, dated the 11th of December 1893.

(1) I. L. R., 19 Calc., 544.

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THESE appeals arose out of suits brought by the plaintiff for the recovery of rent of a fishery. The allegation of the plaintiff was that the fishery was situated in *mehal* No. 104 on the *tozri* of the Collectorate of Zillah Pubna in Perganna Islampore appertaining to Zillah Pubna and Faridpur, and that, according to the custom prevailing in respect of the said *jalkar*, the first season for plying nets was in the months of Baisak, Joisto and Assar, and the second season was in the months of Magh, Falgoon and Chait, and that the defendants who plied nets in these seasons were liable for the rents thereof. These suits were instituted in the Court of the Munsif at Goalundo within whose jurisdiction the plaintiff alleged the *jalkar* lay. The defendants *inter alia* pleaded that the *jalkar* did not lie within the district of Faridpur, therefore the Munsif had no jurisdiction to try the suit.

The Munsif disallowed the objection, and decreed the suit of the plaintiff. An appeal was preferred, but the District Judge of Faridpur dismissed it, holding that as the plaintiff would be entitled to institute the suit either in the Pubna or in the Goalundo Court, therefore under section 164 of the Code of Civil Procedure the Munsif had jurisdiction to try the suit.

The material portion of his judgment was as follows:—

"The cause of action was fishing in the Pudma. In what Court's jurisdiction does that river lie from the Chandra to Goalundo? Appellants are dissatisfied because the Munsif did not let them refer to the *Calcutta Gazette* of September 16th, 1874. I have referred to it, and on page 1,417 it says, 'Zillah Faridpur. The north and north-eastern boundary of this Zillah shall be the river Ganges or Pudma.' That river is a strip of water half a mile or more wide, at times miles in width. The notification may, I think, be read as indicating that the river between this district and Pubna is within the jurisdiction of the Courts in Faridpur. Section 164 of the Code would allow of the suit being brought in either a Pubna or a Goalundo Court. It is, moreover, in evidence that fish is landed at Belgachi and consigned to Calcutta. Everybody knows that any amount of fish caught in the river is sent to Calcutta from Goalundo. Thus I think there is no fault to be found with a Goalundo Munsif trying these suits. No notification is known of as laying down the Pubna boundary. If the river is also considered as the boundary of that district, a suit such as those now in hand may be brought either in Pubna or in Goalundo, or else a tract extending over thirty or more square miles is outside the jurisdiction of any Court."

From this decision the defendants appealed to the High Court.

The *Advocate-General* (Sir Charles Paul) and Babu Haru Chunder Chuckerbutty for the appellants.

Mr. Jackson and Babu Jasoda Nundun Pramanick for the respondents.

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The *Advocate-General*.—The suit should have been brought in the Munsif's Court at Pubna where the defendants reside. The *jalkar* appertains to the zemindary of Islampore, which is also within the jurisdiction of the Pubna Court. Under such circumstances the suit not having been brought in the Munsif's Court at Pubna, it ought to have been dismissed. Section 16A of the Code of Civil Procedure does not apply. There is no question of doubt in the present case.

Mr. Jackson for the respondent.—Section 16A of the Code of Civil Procedure applies, as there is reasonable ground of uncertainty as to which Court has jurisdiction. The boundary is to be ascertained from the circumstances of each case. See *Sreemutty Dossee v. Lalunmonee* (1).

The *Advocate-General* in reply.—Section 16A of the Code does not apply, as it refers to cases for recovery of immoveable property, and *jalkar* is not immoveable property within the meaning of that section. See *Fadu Jhala v. Gour Mohun Jhala* (2).

The following judgments were delivered by the High Court MACLEAN, C.J., and BANERJEE, J.) :—

MACLEAN, C.J.—There are three points raised in this appeal. The first and the principal one is the question whether the Court below had jurisdiction to entertain the suit. The appellants contend that the suit ought to have been brought in the Pubna Court, whilst in fact it was brought in the Goalundo Court. The respondents, however, urge that, be that as it may, if there be any reasonable ground for uncertainty as to the Court having jurisdiction with respect to the subject-matter of the suit, then it is open to this Court, under section 16A of the Code of Civil Procedure, not to allow that objection to be raised. What we really have to consider then first is, whether there was any reasonable ground for uncertainty as to which Court had jurisdiction. I am by no means satisfied that the District Judge was not right

(1) 12 Moo. I. A., 470 (473).

(2) I. L. R., 19 Calc., 544.

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in finding that the Goalundo Court had jurisdiction to try the suit: but, if not, I think upon the facts that there is a reasonable ground for uncertainty as to which Court had jurisdiction, and, if so, I think we ought not to allow the objection to be raised. The mere fact that a serious argument has been addressed to us as to which was the proper Court in which to bring the suit shows *per se* that there is reasonable ground for uncertainty on the matter. When two Courts have held that they have jurisdiction to try the case, a third Court, as the Advocate-General frankly admitted, is not likely to look with a very favourable eye upon an appeal on that point, and I think the section I have referred to was expressly framed to meet objections of this class, if there be any reasonable ground for uncertainty upon the question of jurisdiction. I think we ought not to allow this question to be now raised. So much then for the first and main ground of appeal.

The second question is as to the amount of the rent which both Judges below had found to be payable. The appellants say that, although the Munsif had arrived at his decision upon evidence, apparently oral evidence, in addition to a particular document which was put in, namely, a decree in another suit, in which one of the co-sharers was the plaintiff, but to which the defendants were not parties, the District Judge relied upon this decree alone as evidence as to the amount of rent. But I think it is clear that the District Judge did not arrive at his conclusion upon the evidence afforded by the decree alone. He apparently considered the other evidence which had been adduced before the Munsif, and he arrived at his conclusion upon a consideration of all the evidence. I think that the appeal on this point also fails.

The only other point urged before us was as to the question of damages. That was not raised in the Court below, and it is not one of the grounds stated in the memorandum of appeal, and under the circumstances I do not think that we ought to give special leave to appeal upon this point. Looking at the amount of damages allowed I do not think the defendants are likely to suffer by our not allowing this point to be now raised. I think, therefore, that on these grounds the appeal fails, and that it ought to be dismissed with costs.

BANERJEE, J.—I am of the same opinion. I only wish to add a few words on the question of jurisdiction.

It was contended for the appellants that the Faridpur Court had no jurisdiction to try the case, and that the suit ought to have been brought in the Pubna Court ; and the ground of this contention is two-fold.

In the first place, it was argued that the suit being one for rent of a fishery, it ought to have been brought in the Court within whose jurisdiction the defendant was residing, the suit not being one for immoveable property in any sense.

And it was in the second place contended that, even if the suit lay properly in the Court which had jurisdiction over the fishery, still the objection as to jurisdiction should prevail, as a fishery was not immoveable property within the meaning of section 16A of the Code of Civil Procedure, relied upon for the respondent, and as the other requirements of the section had not been satisfied in this case, there being no uncertainty in the matter of jurisdiction.

The suit being one for arrears of rent of a fishery, the provisions of the Bengal Tenancy Act applicable to suits for the recovery of arrears of rent are made applicable to it by section 193 of that Act ; and one of the provisions of the Act applicable to suits for arrears of rent is to be found in section 144, which enacts that “the cause of action in all suits between landlord and tenant as such shall, for the purposes of the Code of Civil Procedure, be deemed to have arisen within the local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the suit is brought.” That Court, therefore, had jurisdiction to try this suit for arrears of rent, which has jurisdiction to try a suit for possession of the fishery ; and if a fishery is immoveable property within the meaning of section 16A, section 16A would be applicable to this case, and would be a complete answer to the appellant’s contention, provided the other requirements of the section have been satisfied.

I am of opinion that a fishery comes within the definition of “immoveable property” in the General Clauses Act (I of 1868), section 2, clause 5. That clause says : “Immoveable property

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shall include land, benefits to arise out of land," &c., &c., and a right of fishery comes within the description, "benefits arising out of land covered with water." The view I take is in accordance with the observations of the majority of the Full Bench in the case of *Fadu Thala v. Gour Mohun Thala* (1). Though a majority of the Full Bench were of opinion that a fishery does not come within the meaning of the term "immoveable property" as used in section 9 of the Specific Relief Act, still four of the five learned Judges who composed the Full Bench say that a fishery comes within the definition of "immoveable property" as given in the General Clauses Act. And there is nothing repugnant in the subject or context of section 16A of the Code to make the definition of "immoveable property" in the General Clauses Act inapplicable to the term as used in that section.

It remains then to see whether the other conditions required by section 16A of the Code of Civil Procedure have been satisfied. That section in sub-section (2) provides that where there has been no statement, such as the first sub-section contemplates, recorded in the Court below, a Court of Appeal or Revision shall nevertheless disallow the objection on the ground of want of jurisdiction, if it appears to such Court that there was a reasonable ground for uncertainty as to the Court having jurisdiction with respect to the subject-matter.

In this case it is impossible to say that there was no reasonable ground of uncertainty upon the question. The Appellate Court, in its judgment, observes, after referring to the boundaries, as declared in the *Calcutta Gazette*, of the District of Faridpur that "no notification is known of as laying down the Pabna boundaries." That, at any rate, creates a reasonable uncertainty in the matter. I think that the conditions required by section 16A have been satisfied in this case, and that the objection as to jurisdiction ought not to be entertained.

MACLEAN, C. J.—I should like to add that I entirely agree with Mr. Justice Banerjee that a right of fishery such as this is "immoveable property" within the meaning of section 16A of the Code of Civil Procedure. I do not think there can be any doubt about it.

(1) I. L. R., 19 Calc., 544.

It is admitted that the appeal numbered 71 will be governed by this decision. That appeal, therefore, will also be dismissed with costs.

S. C. G.

Appeal dismissed.

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ORIGINAL CIVIL.

Before Mr. Justice Sale.

E. D. SASSOON AND OTHERS (PLAINTIFFS) v. HURRY DAS
BHUKUT (DEFENDANTS).

1896
September 4.

Presidency Small Cause Court Act (I of 1895), sections 37 and 38—New trial—Jurisdiction—Powers of Bench sitting on application for new trial—Ground for new trial—Question of Evidence.

The Fourth Judge of the Presidency Small Cause Court, in a suit tried by him, delivered judgment for the plaintiff. The defendant applied under section 38 of the Presidency Small Cause Court Act (I of 1895) for a new trial, and the Judges (the First and Fourth) on such application set aside the judgment and dismissed the plaintiff's suit with costs, and on the plaintiff's application the Full Bench of the Small Cause Court refused to interfere.

Held, by the High Court that the Judges exercised the powers of an Appellate Court in setting aside the original decree, and exceeded the jurisdiction vested in them by section 38 of the Act, such jurisdiction being a revisional jurisdiction only.

Held, also that, where the question is one of evidence, the judgment of the Original Court could be reversed, and a new trial directed, only when such judgment is manifestly against the weight of evidence.

Sadasook Gambir Chund v. Kannayya (1), followed.

IN this case the defendants entered into a contract with the plaintiff on the 17th September 1894 for the purchase of certain bales of *dhooties* to arrive by November and December shipment. The vessel containing the *dhooties* arrived, and was entered at the Custom House on Saturday, the 22nd December 1894. The plaintiffs, belonging to the Jewish faith, transacted no business on Saturday. The 23rd December being a Sunday the Custom House was closed, and remained so until the 28th of December, upon which date the plaintiffs applied for delivery of the goods. The goods, however, in the meantime became liable to duty; the Indian Tariff Act (III of 1896) having

(1) I. L. R., 19 Mad., 96.