

1897.
January 29
and
February 9.

TIRIMANDURA *v.* DISSANAIKE.

D. C., Tangalla, 357.

Jurisdiction of Court—Purchaser of property mortgaged—Residence—Place of execution of bond.

A, a resident at Matara, purchased certain lands situate at Matara, which had been mortgaged by a bond executed at Tangalla.

The mortgagee sued the mortgagor in the District Court of Tangalla and made A also a party to the action.

Held by LAWRIE and WITHERS, J.J., that the District Court of Tangalla had no jurisdiction to entertain the action as against A, who was not resident within the local limits of its jurisdiction, and against whom no cause of action had arisen within its jurisdiction, and whose lands were not situate within its jurisdiction.

Fernando v. Waas (9 S. C. C. 189) referred to.

THE facts appear in the judgments.

Dornhorst, for appellant.

Wendt and Blazé, for respondent.

Cur. adv. vult.

9th February, 1896. LAWRIE, J.—

This is an action brought in the District Court of Tangalla to enforce a mortgage bond executed within that district. The plaintiff called as defendants the mortgagor and a purchaser from him since the mortgage, alleged to be in possession at the date of the institution of this action. The plaintiff has no direct cause of action against the second defendant. All he asks for against him is a declaration that the lands are bound by the mortgage, and that the second defendant is entitled to redeem the lands by payment of the mortgage debt.

Now, this second defendant does not reside in the district of Tangalla, neither are the lands purchased by him within that district. The second defendant pleads to the jurisdiction. By the Charter of 1833, section 24, District Courts had jurisdiction to determine all suits in which the party or parties defendants shall be resident within the district.

Sir Charles Marshall, p. 258, cites a case in which an action relating to land in the district of A was brought in the District Court of B against two defendants, one of whom lived in B and the other in A.

The defendant who lived in B disclaimed title, and the Supreme Court ordered the action to be transferred to the District Court of A, "as being the Court under the jurisdiction of which the "decision of the case properly fell."

The case is also reported in *Morgan's Dig.*, p. 45. The next case I find on this point is a judgment of Oliphant, C.J., 19th February, 1890, reported in *Austin's Reports*, p. 136 :—

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“ The District Judge of Kandy said :— ‘ The Court is of opinion “ that one of the defendants having been served with process “ within the District of Kandy, this Court has jurisdiction in the “ matter over all the defendants.’

“ In appeal set aside.

“ The 24th clause of the Charter is quite clear on the point at “ issue, and the Supreme Court does not perceivé that this case “ comes within it.”

So stood the law until the Ordinance No. 11 of 1868.

By the 65th section District Courts have jurisdiction in suits in which the party defendant shall be resident within the district.

It is to be noticed that the Charter said “ the party or parties ” defendant ; the Ordinance of 1868 bears “ the party defendant.” This may be due to the Ordinance No. 1 of 1852, where it was enacted, “ that in all Ordinances words importing the singular “ shall be deemed to include the plural unless the contrary is “ expressly provided.”

I do not know of any decision interpreting the 65th section of the Ordinance No. 11 of 1868 respecting the residence of defendants. Then came The Courts Ordinance of 1889 : “ Every District Court “ shall have cognizance of and full power to hear and determine “ all pleas, suits, &c., in which a party defendant shall be resident “ within the district in which any such suit, &c., shall be brought,” and in the Civil Procedure Code, section 9, “ actions shall be, “ instituted in the Court within the local limits of whose jurisdiction “ a party defendant resides.”

In *Fernando v. Waas* (9 S. C. C. 189), Burnside, C.J., said : “ One of the defendants, a party defendant, resides within the “ jurisdiction of the Court, and the Court has therefore jurisdiction “ over the matter of the suit.” Now, of course the District Court of Tangalla has jurisdiction in this action between the plaintiff and the first defendant, because the contract sought to be enforced was entered into in Tangalla. The question is, Has the Tangalla Court any jurisdiction to pronounce an order affecting the second defendant ?

I think not, because the Legislature has not expressly given jurisdiction. I do not read either The Courts Ordinance or the dictum of Sir Bruce Burnside, as asserting more than that the Court has jurisdiction over the subject-matter of a suit where one of the defendants lives within the district. The Ordinance and the decision do not necessarily mean that the Court has

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jurisdiction over an absent defendant : the suit can go on as against the defendant's property before the Court. I find nothing which gives jurisdiction against a man who is not resident unless he be interested in land within the district in respect of which the action is brought, or unless he be party to a cause of action which arose in the district, or was a party to a contract made with it.

I was disposed to transfer this action to the District Court of Matara, and I thought we had powers to do so under sub-section (c) of section 46 of The Courts Ordinance. I thought that this would be a just exercise of our equitable powers facilitating the speedy and economical decision of the issues between the parties. But as my brother Withers dissents from this procedure, I am content to strike the name of the second defendant out of this action.

WITHERS, J.—

The question we are called upon to decide is whether the District Court of Tangalla had jurisdiction to try the claim against the second defendant in the following circumstances.

The first defendant is a resident within the jurisdiction of the District Court of Tangalla. The second defendant is a resident at Matara outside the jurisdiction of that Court.

The action against the first defendant is on a mortgage bond, and the claim is to have him adjudged liable to pay a certain sum of money, and in default to have the lands which are specially hypothecated to secure the payment of the principal amount and interest due on the bond sold in satisfaction of the sum adjudged to be paid. Some of the lands so mortgaged are situate in the District of Matara, and they were bought by the second defendant in execution of a judgment against the first defendant. The plaintiff being desirous of following those lands in the possession of the second defendant, and having them declared bound and executable for the defendant, alleged to be due and owing under the first defendant's bond to him, joined him in this action. The second defendant specially pleaded to the jurisdiction, but the District Judge repelled his plea relying in the 35th section of the Civil Procedure Code ; but this section is not in point.

The Court's jurisdiction to try an action must be determined by the provisions of The Courts Jurisdiction Ordinance, No, 1 of 1889. Those relating to the jurisdiction of the District Court are to be found in section 65 of that Ordinance :—

“ Every district court shall have cognizance of and full power
 “ to hear and determine all pleas, suits, and actions in which a party
 “ defendant shall be resident within the district in which any

“such suit or action shall be brought, or in which the cause of action shall have arisen within such district, or where the land in respect of which the action is brought lies, or is situate wholly or partly, within such district.”

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Now, this party defendant does not reside within the Tangalla district. The cause of action against him did not arise within that district; it arose within the district of Matara, by reason of his being a tenant of lands there secured by third party's mortgage which the plaintiff was desirous of realizing. Lastly, all the lands so bought and held of the second defendant are wholly within the district of Matara. Section 9 of the Civil Procedure Code lays down rules conforming to those provisions. It enacts that actions shall be instituted in the Court within the local limits of whose jurisdiction (a) a party defendant resides or (b) the land in respect of which the action is brought lies or is situate in whole or in part; or (c) the cause of action arises; or (d) the contract sought to be enforced is made.

This action was brought against the second defendant in defiance of those rules. Counsel who supported the judgment in appeal pressed upon us the case of *Fernando v. Waas* reported in 9 S. C. C. 189.

This at first sight seemed to favour his contention, but when examined it will not be found to help him.

A plaintiff had bought a land from A, which B, who claimed A's half share, would not let him enjoy. The land was in the Chilaw district, and so apparently was the residence of B.

The plaintiff sued A in the District Court of Negombo. He resided in that district. The prayer against A was, that if the plaintiff was evicted by the Court in his suit to get possession of the land from B, A might be adjudged to restore the price of the land. A moved to have the plaint taken off the file because the plaintiff had improperly joined two distinct causes of action, one against himself and one against B. B did not plead to the jurisdiction.

The Appeal Court overruled the objection because A was a party defendant who resided in the district of Negombo, where the action was brought, and because the alternative claim was one well directed against him.

Mr. Wendt argued as if the words “a party defendant” were equivalent to the words “any one of the parties defendant,” and he referred us to the Indian Ceylon Penal Code, section 17, which enacts that, “subject to the limitations aforesaid, all other suits shall be instituted in a Court within the local limits of whose jurisdiction—

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“(b) All the defendants reside.

“(c) Any of the defendants resides.”

WITHERS, J. This Act, however, relates to procedure, and as our Legislature was not minded to follow its language, I think the difference of language works against Mr. Wendt.

The question is, What is meant by the words “ a party defendant ? ” In the 65th section of The Courts Ordinance, can it mean anything else than “ a party defendant or parties defendant.”

In the Ordinance No. 11 of 1868, which Ordinance No. 1 of 1889 repealed, the words where “ the party defendant.” Is there any substantial difference ? Section 65 does not say where any of the defendants resides ; “ a ” does not necessarily mean “ any.” Why should we declare it does or ought to ? It cannot be that a court of justice is competent to touch a person who does not reside in its jurisdiction, and against whom no cause of action has arisen within its jurisdiction, and in whose jurisdiction there is no immovable property with which the non-resident party is so connected as to bring him, it may be, into some jural relations with the party plaintiff. It seems to me clear beyond all doubt that the District Court of Tangalla had no jurisdiction over the second defendant, and his name should be struck out of the record, the plaintiff paying his costs in the Court below and in appeal. The judgment against him, and the lands alleged to have been acquired by him within the district of Matara, must be set aside.
