

CIVIL REFERENCE.*Before Newbould and Panton JJ.*

1922

Feb. 28.

KEDARNATH PARAMANIK

v.

HEM NATH KARMAKAR.*

Attachment before Judgment—Immovable Property—Power of the Provincial Small Cause Court—Civil Procedure Code (Act V of 1908), s. 7 and Order L.

The Provincial Small Cause Courts can attach before judgment any immovable property under the Code of Civil Procedure, 1908.

Kumud Behary Pal v. Hari Charan Sardar (1) referred to.

CIVIL REFERENCE.

The facts of the case are set out fully in the Reference, the material portion of which is as follows :—

"The plaintiff in the Small Cause Suit noted in the margin[§] seeks to attach before judgment some immovable property belonging to the defendant. As I entertain some doubt as to whether a Provincial Small Cause Court under the present Civil Procedure Code can attach, before judgment, any immovable property, I think fit to refer the point to the Hon'ble High Court for an expression of its opinion. Under the old Code a Small Cause Court could not attach immovable property before judgment. But the law on the subject appears to have been altered by the new Code of 1908 : section 7 and Order L of the present Code, which may be looked upon as the counter-parts of section 5 of the old Code, do

* Civil Reference No. 2 of 1921 under Order XLVI, rule 1 of the Code of Civil Procedure by the District Judge of 24-Pergannahs on the report of Basanta Kumar Ray, Munsif of Basirhat, in Small Cause Courts Suit No. 72 of 1921.

§ S. C. C. Suit No. 72 of 1921.

not say which particular provisions of the new Code are to apply to the Provincial Small Cause Courts, but simply lay down that certain provisions are not applicable to such Courts. So in order to determine the applicability of the provisions of the present Civil Procedure Code to Provincial Small Cause Court as to which the Code is silent, we must turn to the Provincial Small Cause Court Act, 1887. Section 17 of the latter Act recommends the adoption by a Provincial Small Cause Court of the procedure prescribed in the chapters and sections mentioned in the second schedule of the Code of 1882 ; but that Code now having been repealed, it now follows under section 8 of the General Clauses Act, that the provisions of the present Code corresponding to the said chapters and sections should control the procedure in the Provincial Small Cause Courts. Therefore, though the present Civil Procedure Code is silent as to the applicability of its provisions to the Provincial Small Cause Courts, still such of its provisions as correspond with the second schedule of the old Code will apply to such Courts, if they do not fall within the limitations of the aforesaid section 7 and Order L. On examining section 7, it will be found that it speaks of only certain provisions of the body of the Code as contrasted with the Code which includes rules as well. Now Order XXXVIII, rules 5 to 12 which provide for attachment before judgment, do not fall within the body of the Code. So naturally these rules do not come within the limitation of section 7. If, however, this summary dismissal of section 7 be taken exception to, let us follow its provisions, clause after clause. We may safely pass over the clause (a). As to the clause (b), it simply specifies certain sections of the body of the Code and prohibits their extension to Provincial Small Cause Courts, viz., section 9, 91, 92, 94 and 95 (so far as they relate to injunctions and interlocutory orders) and sections 96 to 112 and 115. From a reference to sections 9, 91 and 92, it will necessarily appear that they are inapplicable to Small Cause Courts. Section 94 has five sub-clauses. Of these sub-clauses (c) and (e) will not extend to Small Cause Courts under section 7. The other sub-clauses dealing with attachments, arrest, etc., will necessarily apply to Small Cause Courts. Moreover, sub-clause (b) of section 7 sanctions attachment of any property. The word 'any' implies both movable and immovable property. From a reference to Order L, we find that Order XXVIII does not come within the purview of that Order, and such omission, if not accidental, makes all the provisions regarding attachment before judgment applicable to Small Cause Courts irrespective of any consideration for different kinds of property. So it will not be wrong to maintain that the old law prohibiting the attachment of immovable property by a Small Cause Court before judgment has been repealed by the present Code. But as the point is not free from doubt, I refer it to the Hon'ble High Court for its decision."

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The Senior Government Pleader (Babu Dwarkanath Chakravarti), for the Crown, supported the Reference and cited *Kumud Behary Pal v. Hari Charan Sardar* (1).

NEWBOULD AND PANTON JJ. This is a reference under Order XLVI, rule 1, Code of Civil Procedure made by the Munsif of Basirhat, 2nd Court, for decision of the question whether the Provincial Small Cause Court under the present Code of Civil Procedure can attach before judgment any immovable property. This Bench has already decided in the case of *Kumud Behary Pal v. Hari Charan Sardar* (1) that a Provincial Small Cause Court has power to attach movables before judgment. Under the present Code of Civil Procedure no distinction can be drawn between the power of the Provincial Small Cause Court to attach immovable property before judgment, and for the reasons given by us in the case cited, we answer the point referred by saying that the Provincial Small Cause Court can attach before judgment any immovable property.

S. M.

(1) (1918) I. L. R. 46 Cal. 717.