

ORIGINAL CIVIL.

Before Buckland J.

BHICUMCHAND CHURURIA

v.

DEEPCHAND DOOGAR.*

1931.

July 7, 8.

Jurisdiction—Court of Small Causes—Claim case—Pecuniary jurisdiction—Effect of order without jurisdiction—Presidency Small Cause Courts Act (XV of 1882), ss. 18, 37—Calcutta Small Cause Court, Rules of Practice, rule 96.

It is not open to the Court of Small Causes to entertain claim suits in cases where property exceeding Rs. 2,000 in value is attached and the total decretal amount for which the decree can be executed also exceeds Rs. 2,000.

Ismail Solomon Bhamji v. Mahomed Khan (1), Khetra v. Muntaz Begam (2), Phul Kumari v. Ghanshyam Misra (3) and Minakshi Naidu v. Subramanyu Sastri (4) referred to.

The facts of the case and arguments of counsel appear sufficiently from the judgment.

N. N. Sircar, Advocate-General, S. M. Bose and N. C. Chatterji for the plaintiff.

L. P. E. Pugh and Sudhir Roy for the defendant Padamchand Pannalal.

B. C. Ghose and J. C. Hazra for the defendant Matichand Fulchand.

BUCKLAND J. The plaintiff sues to recover Rs. 10,000 for principal and interest under an instrument of hypothecation, dated the 17th February, 1930, and for other sums said to be due from the defendant Deepchand Doogar, which instrument was made between the plaintiff and the defendant Chimniram Halaschand of the one part and the defendant Deepchand Doogar of the other part. In addition to Deepchand Doogar and Chimniram Halaschand there are 4 other parties,

* Original Civil Suit, No. 934 of 1930.

(1) (1891) I.L.R. 18 Calc. 296.

(3) (1907) I.L.R. 35 Calc. 202 ;

(2) (1915) I. L.R. 38 All. 72.

L.R. 35 I.A. 22.

(4) (1887) I.L.R. 11 Mad. 26 ; L. R. 14 I.A. 160.

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Padamchand Pannalal, Matichand Fulchand, Ramkissen Jaikissen and Labhchand Rekubchand, who may briefly be described either as attaching creditors or as creditors who have instituted proceedings or obtained decrees against Deepchand Doogar. The only defendants who have appeared by counsel at the hearing are Padamchand Pannalal and Matichand Fulchand.

The short facts of the case are that Deepchand Doogar, the son of Indirchand, who is said to have been born on the 28th January, 1910, was carrying on a business in Calcutta known as the New East Bengal Store, by his uncle and attorney Chandanmull, to whom he had granted a power of attorney, dated the 15th August, 1929, under which Chandanmull executed the deed of hypothecation in suit, the consideration for which was Rs. 20,000, of which Rs. 10,000 were advanced by Chimmiram Halaschand and Rs. 10,000 by the plaintiff.

On the 11th February, 1930, Padamchand Pannalal instituted, in the Court of Small Causes, Calcutta, Suit No. 2987 of 1930 to recover the sum of Rs. 1,951-2 for the price of goods sold and delivered. In that suit, an *ex parte* decree was made on the 26th February next ensuing, and on the 11th March, property said to be subject to the deed of hypothecation was attached in execution of the decree. On the 17th March, 1930, Bhicumchand Chururia instituted in the Court of Small Causes proceedings, which have been termed a claim case, to establish his right to the property attached and to have the attachment removed. On the 17th March, the learned Chief Judge of the Court of Small Causes made an order: "Let the property attached be released to the claimant on his furnishing security to the satisfaction of the Registrar for the value of the goods seized." Thereupon, on the 20th March, 1930, Bhicumchand Chururia executed a security bond as required and the attachment was removed and Bhicumchand Chururia's proceedings came to an end.

Matichand Fulchand instituted a suit at Benares on the 31st March, 1930, and on the 25th April, 1930, obtained an *ex parte* decree for Rs. 3,338. He also has attached the property in execution of his decree, but as against him no proceedings other than this suit have been instituted by Bhicumchand Chururia.

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As regards the other defendants, there is no need to refer to details. No relief is claimed against them beyond the declaration for which the plaintiff prays.

The suit is brought under section 42 of the Specific Relief Act, for a decree against Deepchand Doogar for Rs. 10,601-4 and an account, and for a declaration that the stock-in-trade, goods, goodwill, furniture and other assets of the business, carried on under the name and style of the New East Bengal Store, and goods and stock lying at 87-2, College Street, Calcutta, are charged in favour of the plaintiff with the repayment of the money due, and in default of payment for the sale of the property hypothecated.

The defendant Padamchand Pannalal submits that the suit is not maintainable against him in view of what happened in the Court of Small Causes, and alleges that the deed of hypothecation is a fraudulent document and was not made *bona fide*. Matichand Fulchand has also filed a written statement, in which it is charged that the deed of hypothecation is fraudulent.

Yesterday, when the case first came on for hearing, the following issues were submitted by learned counsel on behalf of Padamchand Pannalal and Matichand Fulchand:—

1. Is Padamchand Pannalal a necessary party?
2. If so, is the suit barred or *res judicata*?
3. Was Deepchand Doogar of full age when the mortgage was executed?
4. Was there consideration for the mortgage?
5. Was the mortgage duly executed by a properly constituted attorney?

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These issues were accepted on behalf of the plaintiff, but this morning, on the resumption of the hearing, Mr. Pugh appeared on behalf of Padamchand Pannalal and informed me on behalf of his client that he proposed to raise no issue on the facts and he relied exclusively upon the defence comprised in the first issue. The issues were, however, adopted by Mr. Hazra on behalf of Matichand Fulchand, and he desired to add a further issue, *viz.*,—Is the deed of hypothecation of the 17th February, 1930, a fraudulent deed executed at the instance of Indirchand and Chandanmull? The written statement contains no particulars of fraud, and I, accordingly, enquired of learned counsel if he was in a position to give such particulars, and he informed me that if there was consideration for the mortgage it had been appropriated by Indirchand and Chandanmull.

The learned Advocate-General was prepared to accept this issue, but protested against its being tried to-day, because, in the circumstances, the witnesses whom he could have called upon such an issue were no longer in attendance. I decided, however, that the hearing should proceed and said that, if necessary, I would give him an opportunity of bringing his witnesses, the burden of proving this issue being on Matichand Fulchand. Upon the conclusion of the evidence of the witnesses called on behalf of this defendant, the learned Advocate-General said that he did not desire to call any evidence.

The case of Padamchand Pannalal gives rise to questions to which I find some difficulty in furnishing replies. Reference is made to section 37 of the Presidency Small Cause Courts Act, which provides that "Save as otherwise provided by this chapter or "by any other enactment for the time being in force, "every decree and order of the Small Cause Court, "in a suit, shall be final and conclusive." On that it is contended that the order made by the Court of Small Causes on the claim of Bhicumchand Chururia

is final and conclusive with the result that no suit such as this is maintainable.

I have already had occasion to consider this matter, which I did somewhat briefly, in suit No. 2045 of 1929 (*Bijankumari Biswas v. Nirodekrishna Basu*) on the 9th January last, when I was referred to a judgment of Wilson J. [*Ismail Solomon Bhamji v. Mahomed Khan* (1)] in which he held that an order made under this section upon a claim to property attached by the Court of Small Causes was final, subject only to the right to apply for a new trial, and that no suit under section 283 of the Civil Procedure Code, which has since been replaced by Order XXI, rule 63 of the Civil Procedure Code of 1908, was maintainable. For a reason which will appear later, I desire to refer to the observation of the learned Judge, that the Small Cause Court, with the sanction of this Court, has made rules for dealing with claims, the effect of which is that the claimant files a plaint, and the matter is thus treated as a suit. Now, when I refer to the claim of Bhicumchand Chururia in the Court of Small Causes, I find that it takes the form of a plaint, though it appears that there is nothing in the rules of the Small Cause Court or in the Court Fees Act requiring it to be stamped with an *ad valorem* stamp or an *ad valorem* fee to be paid, as in the case of a plaint whereby a suit is instituted. Were this necessary, it might not be conclusive as to the value of the suit, though it possibly would have some value in determining a point to be considered. I further observe that the claim appears to bear its own number as Suit No. 5237 of 1930, whereas Padamechand Pannalal's suit is No. 2987 of 1930, and that the date of institution is given as the 17th March, 1930, that the amount of the claim is stated to be Rs. 4,000 and in all respects it appears to conform to a plaint such as has to be filed on the institution of a suit in the Court of Small Causes.

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Mr. Pugh has argued that, on the authority cited, this suit is incompetent, but, in reply to this, the learned Advocate-General has contended that the order of the Court of Small Causes is a nullity on the ground that the Court of Small Causes had no jurisdiction to entertain such a suit at the instance of Bhicumchand Chururia. He bases himself upon rule 96 of the Rules of Practice of the Court of Small Causes, which provides: "When a claim is preferred or objection made under Order XXI, rule 58, * * * in respect of any property attached or seized, or in respect of the proceeds or value thereof, the claimant or objector shall file a plaint in which the claimant or objector shall be the plaintiff and the execution creditor, or person who obtained the warrant, the defendant, and the matter shall then be treated as a suit."

The claim, according to the plaint, was for Rs. 4,000. Ordinarily, therefore, it would be beyond the pecuniary jurisdiction of the Court of Small Causes as laid down by the Presidency Small Cause Courts Act, section 18, and at first sight it would appear that this is conclusive. But Mr. Pugh has drawn my attention to *Khetra v. Mumtaz Begam* (1), where it was decided that the value of the subject matter of a suit under Order XXI, rule 63, for the purpose of jurisdiction is not the alleged purchase price or actual value of the property but the amount of the decree, since only so much of the property could be sold as would be sufficient for the realisation of the amount of the decree. The learned Judges quoted a passage from the judgment of the Privy Council in *Phul Kumari v. Ghanashayam Misra* (2) in which though the question directly involved was as to the proper court fee and did not relate to jurisdiction, their Lordships held that the value of a suit under section 283, Civil Procedure Code, must mean the value to the plaintiff.

(1) (1915) I. L. R. 38 All. 72.

(2) (1907) I.L.R. 35 Calc. 202 ;
L.R. 35 I. A. 22.

Though I am in no way concerned with a suit under Order XXI, rule 63, the same principle would, I conceive, apply, and if it does not, the foundation of the argument is gone, for Mr. Pugh has submitted that, assuming that the question of jurisdiction arises, nevertheless the case was within the jurisdiction of the Court of Small Causes, because the original claim was under Rs. 2,000.

He also suggests that the claim case of Bhicumchand Chururia was not a suit but merely a proceeding to be treated as or in the nature of a suit in the execution proceedings. This is an argument which cannot be reconciled with the decision upon which he relies in *Ismail Solomon Bhamji's* case (1) which depends for its force and effect upon such a proceeding being a suit, for section 37 of the Presidency Small Cause Courts Act, which Wilson J. had occasion to apply, refers to "Every decree and "order * * * in a suit."

The learned Advocate-General, however, points out that I am relieved from the necessity of determining this question, which presents considerable difficulty from either point of view. If the claim was the full value of the attached property, Rs. 4,000, as stated by Bhicumchand Chururia in his plaint, if that is the value to be considered, then clearly the Court of Small Causes had no jurisdiction. If, on the other hand, the judgment of the Allahabad High Court be followed and the proper valuation for the purposes of jurisdiction is the amount for which the decree may be executed, then the decree could be executed for the original amount of the claim, Rs. 1,951-2 and the costs which, it is not disputed, amount to about Rs. 200, resulting in the amount, for which the decree was capable of being executed, exceeding Rs. 2,000. Even if, in the words of the learned Judges, the object of Bhicumchand Chururia's proceedings was to relieve the property from a burden which the decree-holder was seeking to impose upon it by attaching the

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property, such burden exceeded Rs. 2,000 and was of an amount exceeding the pecuniary jurisdiction of the Court of Small Causes.

I see no means whereby the judgment of Wilson J. and the other authorities can otherwise be reconciled. I cannot say that I have not come to this conclusion without some reluctance, for, though it should still be possible, where the property attached exceeds Rs. 2,000 in value but the amount for which the Small Cause Court decree may be executed is less than Rs. 2,000, for the Small Cause Court nevertheless to entertain a claim suit, a point which I need not now examine, there must be cases where property exceeding Rs. 2,000 in value is attached and the total decretal amount for which the decree can be executed also exceeds Rs. 2,000, and in the view which I feel myself compelled to take, it would not be open to the Court of Small Causes to entertain claim suits in such cases, with the result that the procedure whereby a claim can be dealt with expeditiously by the Court of Small Causes, is not open to parties making such claims, and they will be obliged to institute proceedings in some other Court, which may prolong, and must almost certainly have the effect of delaying, execution of the decree of the Court of Small Causes. In my judgment, the Court of Small Causes had no jurisdiction, for, as was pointed out in *Minakshi Naidu v. Subramanya Sastri* (1): "When the Judge "has no inherent jurisdiction over the subject-matter "of a suit, the parties cannot, by their mutual consent, "convert it into a proper judicial process." The learned Judge of the Court of Small Causes having no jurisdiction his order in the claim suit must be treated as a nullity.

In these circumstances, and having regard to the form of the written statement and the position taken up until to-day, I am not prepared to say that Padamchand Pannalal was not properly made a party to this suit.

(1) (1887) I. L. R. 11 Mad. 23 (36); L. R. 14 I. A. 160 (167).

I now turn to the case made on behalf of Matichand Fulchand and will deal with the issues *seriatim*. The first is as to the age of Deepchand. His father and mother have both been examined on commission. The only witness called on behalf of the defendants on this point says that by his appearance he formed the opinion that he was of 14 or 15 years of age. It would be impossible to attach any weight to such evidence in the face of the sworn testimony of both parents, and I hold that Deepchand was of full age when the mortgage was executed.

As regards consideration, the books of account of the firm have been duly proved. Malchand, the *munib gomástá* of the plaintiff, has given evidence and has definitely stated that the Rs. 20,000 were advanced; likewise the power of attorney in favour of Chandanmull has been admitted. It has been sought to interweave the issue as to consideration with the allegation of fraud. I have found considerable difficulty in following learned counsel's cross-examination on the accounts, and I am unable to appreciate that there is any foundation whatever for the allegations of fraud, and I hold that there was consideration for the deed in question.

There will be judgment against Deepchand Doogar for Rs. 10,601-4; and as against all the defendants a declaration in the terms of prayer C to the plaint.

There will be an order for costs against Deepchand Doogar, Matichand Fulchand and Padamchand Pannalal, but as against the last named the costs of the hearing will be limited to one day's costs.

Suit decreed.

Attorney for plaintiff: *O. C. Ganguli.*

Attorneys for defendants: *K. K. Sen, N. C. Bural & Pyne.*

S. M.

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