

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Shephard.

KRISHNASAMI CHETTI (PLAINTIFF), APPELLANT,

1893.
August 22.

v.

THE NATAL EMIGRATION BOARD (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, s. 114—Presidency Small Cause Courts Act—Act XV of 1882, ss. 22, 41.

The plaintiff, a landlord, relying on a provision in a lease, gave the defendants, his tenants, notice to quit. Within seven days the defendants tendered rent, interest and costs. The plaintiff, nevertheless, filed this suit to eject the defendants. The defendants subsequently paid the full amount due into Court :

Held, that, under the terms of the lease, the defendants were not liable to forfeiture, and that, since the suit should have been brought under chapter VII, section 41 of the Presidency Small Cause Courts Act, plaintiff must pay the defendants' costs as between attorney and client under section 22 of that Act :

Held, on appeal (1) that there having been a tender and payment into Court of the full amount due, the plaintiff proceeded with the suit at his risk under section 114 of the Transfer of Property Act ;

(2) that the suit not being cognizable by the Small Cause Court, section 22 of Act XV of 1882 did not apply, an application under chapter VII of that Act not being a suit under section 22 thereof.

APPEAL against the judgment of Wilkinson, J., sitting on the original side of the High Court in civil suit No. 242 of 1892. The facts of the case appear sufficiently for the purpose of this report from the judgment delivered by Mr. Justice Wilkinson.

WILKINSON, J.—“The plaintiff is one of three brothers, “from whom the defendant company leased certain property in “1887. There was subsequently litigation between the brothers “which terminated in plaintiff becoming the sole owner of the “property. Thereupon, in March 1891, plaintiff applied to the “defendants' head clerk for instructions as to the form in which “he should draw up the bills for rent. First witness supplied him “with a form (II-A), and from the 18th March 1891 up to 16th

* Appeal No. 8 of 1893.

" March 1892 plaintiff duly presented a bill for rent on or about
 " the 15th of each month and was duly paid. No bill was presented
 " in April 1892 for the rent due, and the defendants omitted to
 " send a cheque for it. Thereupon the plaintiff, on the 10th May,
 " sent a notice to the defendant to quit, relying on a provision in the
 " lease that 'if any part of the rent reserved should be in arrear
 " ' for 21 days, whether the same shall have been legally demanded
 " ' or not, the lessors may re-enter and the demise shall absolutely
 " ' determine.' On the 17th May, the defendants through their
 " attorneys tendered rent with interest and costs, but the plain-
 " tiff refused to accept it and has filed the present suit in this Court,
 " notwithstanding the provisions of section 41 of the Presidency
 " Small Cause Court Act. The first question is whether there has
 " been any breach of the condition of the lease. Strictly speaking,
 " there does not appear to me to have been any such breach, for,
 " according to the terms of the lease, rent is payable on the 1st of
 " each month and the defendant has 21 days' grace. The last
 " cheque which the plaintiff accepted was one dated 4th April.
 " The next cheque was dated 13th May. It was in time, but was
 " refused. But it is argued that according to the course of dealing
 " which has grown up between the parties, as proved by the evi-
 " dence of the defendants' witness and by exhibits II and III, ever
 " since the plaintiff has been sole owner, the custom has been for
 " the plaintiff to send or present his bill for rent on or about the
 " 15th of the month and for the defendants to issue a cheque on
 " the day on which bill was presented or the day after. Plaintiff
 " having omitted to present his bill on or about the 15th April, no
 " cheque for the rent was issued, but I do not think that the defend-
 " ants are, therefore, liable to forfeiture. The strict terms of the
 " lease had, by the consent of the plaintiff, been departed from, and
 " as the defendants were always ready and willing to pay, it would
 " be most inequitable to hold that their omission to send a cheque
 " for the rent in April entitles plaintiff to cancel the lease. Admit-
 " tedly the defendant company have always been most regular in
 " the payment of rent, and though, legally speaking, they were not
 " entitled to a bill, but were bound to pay rent as stipulated, yet I
 " hold that, looking at all the circumstances of the case, they would
 " not be liable to forfeiture even if they had been bound to pay on
 " 15th April and had omitted to pay till 10th May. The suit is
 " one which ought to have been brought in the Small Cause Court.

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“and in dismissing it with costs, I direct plaintiff to pay defendants’ costs as between attorney and client.”

Krishnasami Chetti for appellant.

Mr. W. Grant for respondents.

JUDGMENT.—It appears that on 13th May 1892 there was a valid tender of rent, interest and costs, and that on 3rd November there was a payment into Court of the full amount due up to the 15th November. This being so, the defendants have brought themselves within the terms of section 114 of the Transfer of Property Act. After the tender on the 13th May the plaintiff proceeded with the suit at his risk. The only other question is as to costs between Attorney and client given by the learned Judge. In our opinion this suit was not cognizable by the Small Cause Court and therefore section 22 of the Act does not apply. An application under chapter VII is not a suit within the meaning of section 22.

We must vary the decree accordingly. Each party will bear his own costs of this appeal.

Wilson and King, Attorneys for respondents.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

UNHAMMA DEVI (PLAINTIFF), APPELLANT,

v.

VAIKUNTA HEGDE AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Notice to quit.—Assertion of Mulgeni (permanent) tenure—Entitlement to notice.

The setting up of a Mulgeni right by a tenant is not a disclaimer of title such as disentitles him to a notice to quit in determination of the tenore.

SECOND APPEAL against the decree of W. C. Holmes, Acting District Judge of South Canara, in appeal suit No. 405 of 1890, confirming the decree of S. Raghunathaya, District Munsif of Karkal, in original suit No. 323 of 1889.

* Second Appeal No. 34 of 1893.