REVISIONAL CIVIL.

1892
March 25.

Before Mr. Justice Mahmood and Mr. Justice Knox.

MIHR ALI SHAH (PETITIONER) *v.* MUHAMMAD HUSEN AND OTHERS (OPPOSITE PARTIES).*

Revision—Powers of High Court—Jurisdiction—Act IX of 1887 (*Small Cause Courts Act*), *sch. ii, cl.* (18).

Unless the facts from which want of jurisdiction on the part of a subordinate Court may be inferred are patent upon the face of the record, the High Court will not interfere in revision.

A suit by a Muhammadan to obtain a share in property distributable under the terms of a certain endowment is a suit of the nature contemplated by clause (18) of schedule ii of the Provincial Small Cause Courts Act (IX of 1887), and therefore not cognizable by a Court of Small Causes.

The facts of this case sufficiently appear from the judgment of Mahmood, J.

Pandit *Sundar Lal* and Maulvi *Ghulam Mujtaba*, for the applicants.

Mr. *D. Banerji*, for the opposite parties.

MAHMOOD, J.—This is an application under s. 622 of the Code of Civil Procedure invoking the aid of this Court as a Court of Revision to disturb the decrees of the Munsif of Agra and the Subordinate Judge of that district as the Appellate Court which disposed of the case in appeal.

The solitary ground upon which such interference is invoked is, that the Court of the Subordinate Judge and the Munsif at Agra had no jurisdiction to try this suit, which was exclusively cognizable by the Court of Small Causes at Agra. In arguing this matter much ability has been displayed on behalf of the appellant by Pandit *Sundar Lal* and Mr. *Ghulam Mujtaba*, and in resisting it we have to deal with the argument of Mr. *Dwarkanath Banerji*, who appears for the opposite party.

The facts out of which this dispute has arisen are very simple. It is admitted that to the tomb and shrine of Shah Vilayat Shah is

* Application No. 28 of 1891 for revision, under s. 622 of the Civil Procedure Code, of a decree of Babu Ganga Saran, Subordinate Judge of Agra, dated the 3rd April 1891, varying a decree of Maulvi Muhammad Shafi, Munsif of Agra, dated the 28th November 1890.

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attached certain property of which the profits have to be devoted to the *dargah*, and that such property is not only devoted to the expenses contingent upon the ritual of the Muhammadans in respect of such matters, but is also distributed among his descendants, among whom the parties to this litigation are admitted to be. It is also admitted that in respect of such properties the plaintiff has no right of personal ownership, but that the right by which he collects the income of the property is in the capacity of *sajjada-nashin*, or, to use the phrase employed by the lower Courts, as *mutawalli*, and, to use the English simple phrase, he would be called the trustee of the property.

It seems that the parties to this litigation are not on friendly terms, because this very suit shows that the share claimed by the plaintiffs, respondents, being the share to which they were entitled under the object of the *waqf*, though found to be due to them, has not been paid by the defendant *sajjada-nashin*. There is not one question pressed upon us showing that the concurrent findings of both the lower Courts are wrong upon the merits as to the amount due to the plaintiffs whom Mr. *Banerji* represents.

But it is argued that although the plaintiffs might have had such a right of claiming the money that they did claim in this suit, yet the suit was of a character not entertainable in an ordinary Court of Civil Judicature because of s. 16 of the Provincial Small Cause Courts Act (Act No IX of 1887), and it is then argued that because the suit was not a suit of an ordinary civil character, therefore we should now set aside the decrees of both the Courts below, leaving it open to the plaintiffs, respondents, to bring any action in the Small Cause Court at Agra.

Now I have no doubt that the provisions of s. 16 of the Provincial Small Cause Courts Act (Act No. IX of 1887) require that suits cognizable by the Small Cause Courts should be entertainable by those Courts and those Courts alone, but I am also satisfied that the provisions of s. 11 of the Code of Civil Procedure (Act No. XIV of 1882) require that unless it is shown that a cause does not fall within the ordinary jurisdiction of a Civil Court, the cause being,

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as it is here admitted and conceded, a cause of a civil nature, the Court is not to decline jurisdiction, so that, if I understand these two clauses aright, the following question arises :—

Is there anything in the Provincial Small Cause Courts Act (Act No. IX of 1887) to have ousted the jurisdiction of the Munsif of Agra as a Court of first instance or of the Subordinate Judge of Agra as a Court of appeal by reason of there being a separate Small Cause Court?

In arguing this point to show that such was the case, Pandit *Sundar Lal* and Mr. *Ghulam Mujtaba*, on behalf of the petitioner, have relied upon two of my own judgments in *Jai Devi* v. *Mathura Das* (1) and in *Mesum Ali* v. *Mohsin Ali* (2). The argument in regard to these rulings on behalf of the petitioner has been that the principle applies to this case also, and that, therefore, the ruling of the Bombay High Court in *Bibi Ladli Begam* v. *Bibi Raje Rabia* (3) requires us to set aside the decrees of the Courts below with the effect that matters would stand exactly as they did before the litigation ever was started, irrespective of what happened in the Courts below.

Now, in the first place, there is much in the judgment of Markby, J., in the case of *Drobo Moyee Dabee* v. *Bipin Mundul* (4) which may have to be considered as to whether or not at this stage a plea such as that raised in this application is to be entertained; because it must be remembered that the Act upon which that ruling proceeded was the one which preceded the present enactment and was *in pari materiâ*.

It is, however, not upon this ground that I wish to dispose of this case. The petitioner never raised the question of jurisdiction, either in the Court of first instance or in the lower appellate Court, and the mere fact of contending that there was a want of jurisdiction at a stage such as this, under s. 622 of the Code of Civil Procedure, is not sufficient to decide whether that Court had or had not jurisdiction. Therefore, there was no material and no findings

(1) Weekly Notes, 1888, p. 193.
(2) Weekly Notes, 1890, p. 201.
(3) I. L. R. 13 Bom., 650.
(4) 10 W. R., c. r. 6.

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in the concurrent judgments of the lower Courts to enable the petitioner to sustain his plea that there was any want of jurisdiction in this case. The powers exerciseable by this Court as a Court of revision have been the subject of consideration by me in numerous cases where I have held that, unless facts ousting jurisdiction are patent from the pleadings of the parties and the findings of the Court, this Court, as a Court of revision, should desist from interfering. Adopting the same views and applying them to this case, I do not think that there is any reason to interfere.

I wish, however, to mention as to clause (18) of the second Schedule of the Provincial Small Cause Courts Act (Act No. IX of 1887) excluding suits relating to a trust, that I regard this suit as presented by the pleadings of the parties in this cause to be a suit of that character, and that upon a former occasion also the same view was adopted by Stuart, C.J., and Turner, J., in Miscellaneous No. 33B of 1877. The case is, therefore, not shown to be a fit case for cognizance by the Small Cause Court, and therefore the Courts below had jurisdiction, and I would decline to interfere. I therefore reject this application with costs in all the Courts.

KNOX, J.—The pleadings in this case, in my opinion, show that it is one of those cases which by clause (18), sch. ii, attached to the Provincial Small Cause Courts Act (IX of 1887) was in distinct terms excluded from the cognizance of the Small Cause Court. The parties before us in a previous case, to which my brother Mahmood has alluded, contended over property of the same nature, and in that case it was determined by this Court that the case was not one for rent, but one relating to a trust, and therefore under the Act then in force (Act No. XI of 1865) a suit which Courts of Small Causes could not hear and determine. Bearing these facts in mind and for similar reasons to those already given, I am of opinion that this case is one in which there is no cause for us to interfere, and I would concur in dismissing the application with costs in all Courts.

Application rejected.