

1884

such as would be inconsistent with, or in excess of, the relation of landlord and tenant, the suit was not cognizable by the Civil Court.

GANGA RAM

v.

BENI RAM.

For these reasons we uphold the decrees of the lower Courts dismissing the suit, and dismiss this appeal with costs.

Appeal dismissed.

FULL BENCH.

1883

August 7.

Before Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

GODHA AND ANOTHER (PLAINTIFFS) v. NAIK RAM AND ANOTHER (DEFENDANTS).*

Suit for personal property—Suit to establish right—Small Cause Court suit—Civil Procedure Code, s. 283—Act XI of 1865, s. 6.

A person, who had claimed moveable property attached in execution of a decree as his own, and whose claim had been investigated and disallowed under ss. 278 to 281 of the Civil Procedure Code, sued, the property being under attachment, the decree-holder and the judgment-debtor in a Court of Small Causes for the property or its value. *Held* that the suit could not properly be regarded as a suit "for personal property or for the value of such property," within the meaning of s. 6 of Act XI of 1865, but must be regarded as a suit to establish the plaintiff's right, in the sense of s. 283 of the Civil Procedure Code, inasmuch as the plaintiff could not recover the property without clearing out of his way the order of attachment, which he could only do by establishing his right in the sense of s. 283, and therefore the suit was not one cognizable in a Court of Small Causes.

Janakiammal v. Vitenadien (1), *Kundeme Naine Booshe Naidoo v. Ravoo Lutchmeepaty Naidoo* (2), *Gordhan Pema v. Kasandas Balmukundas* (3), *Chhaganlal Nagardas v. Jeshan Rav Dalsukhram* (4), *Balkrishna v. Kisansing* (5), and *Radha Ki hen v. Chotey Lal* (6) dissented from.

THIS was a reference by Babu Promoda Charan Banarji, Judge of the Court of Small Causes at Agra, under s. 617 of the Civil Procedure Code. The question of law referred was "whether a suit under s. 283 of the Civil Procedure Code, for establishment of right to, and recovery of, moveable property, by an unsuccessful claimant, is cognizable by a Court of Small Causes, where the value of the property is within the pecuniary limit of the jurisdiction of such Court." The facts which gave rise to the reference were

* Reference under s. 617 of the Code of Civil Procedure, by Babu Promoda Charan Banarji, Judge of the Court of Small Causes at Agra, dated the 15th May, 1883.

(1) 5 Mad. H. C. Rep., 191.

(2) 8 Mad. H. C. Rep., 36.

(3) 1. L. R., 3 Bom., 179.

(4) 1. L. R., 4 Bom., 503.

(5) 1. L. R., 4 Bom., 503.

(6) N.-W. P. H. C. Rep., 1871, p. 156.

these:—Naik Ram, who held a decree for money against Murli Singh, caused certain crops to be attached in execution of that decree. Godha and Bidha objected to the attachment, claiming the crops as their own. The Court executing the decree, under ss. 278-281 of the Civil Procedure Code, disallowed the objection. Thereupon Godha and Bidha brought the suit in which this reference was made, in the Court of Small Causes at Agra, against Naik Ram, the decree-holder, and Murli Singh, his judgment-debtor. They prayed that the crops might be declared to belong to them, and might be delivered to them, or they might be awarded Rs. 200 as their value, in case the crops could not be delivered to them. The Judge of the Small Cause Court, being doubtful whether the suit was cognizable in a Court of Small Causes, made the present reference to the High Court. The reference came before a Full Bench for disposal.

The plaintiffs did not appear.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the defendant Naik Ram.

The following judgment was delivered by the Full Bench:—

STRAIGHT, OLDFIELD, BRODHURST, and TYRRELL, JJ.—The question submitted to us by the Division Bench arises as follows:—The plaintiffs allege that certain crops cultivated by them, worth Rs. 200, were caused to be attached by Naik Ram, defendant, as the property of his judgment-debtor, Murli Singh, defendant, under an order of the Subordinate Judge of Agra, and that they objected to such attachment under s. 278 of the Civil Procedure Code, but such objection was rejected on the 13th June, 1882. They therefore pray “that the produce or crop specified hereafter be declared to be the plaintiffs’ property, and be delivered to them; and in case of this prayer being impracticable, Rs. 200, value thereof, may be awarded to the plaintiffs against the defendants.”

The point for our determination is, whether such a suit is to be regarded as one “for personal property or for the value of such property,” within the meaning of s. 6 of Act XI of 1865, and, as such, exclusively cognizable by a Small Cause Court. We may premise by observing that it must now be taken as settled law that a suit by a decree-holder to have the right of his judgment-debtor

1883

 GODHA
 v.
 NAIK RAM.

1888

GODHA
v
NAIK RAM,

declared to property, attachment of which has been raised, cannot be determined by a Small Cause Court—*Ram Dhun Biswas v. Kefal Biswas* (1), a decision of Sir Barnes Peacock, is the leading authority upon this point—and the same view was expressed in *Ram Gopal v. Ram Gopal* (2). On the other hand, a suit by the owner of property which has been attached, after disallowance of his objection to the attachment, either against the decree-holder or an auction-purchaser, to recover such property, seems to have been generally held to be exclusively cognizable by a Small Cause Court, as the following authorities show. In the case of *Woomesh Chunder Bose v. Muddun Mohun Sircar* (3), the plaintiff sued to recover bricks under these circumstances. So in *Shiboo Narain Singh v. Muddun Ally* (4), Garth, C. J., and McDonell, J., held that where goods had been illegally seized and sold in execution, a suit by the owner thereof against the purchaser for the goods or their value will lie in a Small Cause Court, if the value of the goods is within the amount for which that Court has jurisdiction. In the course of the judgment, Garth, C. J., remarked:—“A person whose goods are illegally sold under an execution does not lose his right to them, although he may have claimed them unsuccessfully in the execution-proceedings. He may follow them into the hands of the purchaser or any other person, and sue for them or their value without reference to anything which has taken place in the execution-proceedings, except that, under art. 11 of the Limitation Act, he must bring his suit within a year from the time when the adverse order in the execution-proceedings was made.” The learned Chief Justice further ruled that “if the plaintiff makes the decree-holder and judgment-debtor parties to the suit, and requires a declaration of his right to the property, such a suit will not lie in the Small Cause Court.”

This decision appears to have been followed in *Akbar Ali v. Jezuddin* (5) by Garth, C. J., and Pontifex, J., the former remarking: “A man whose goods have been taken and sold in execution has a right to bring a suit in the Small Cause Court for the recovery of those goods against any one into whose hands they have come

Sections 280 and 281 of the Civil Procedure Code relate only to

(1) 10 W. R., 141. (3) 2 W. R., 44.
(2) 9 W. R., 136. (4) I. L. R., 7 Calc., 608.
(5) I. L. R., 8 Calc., 399.

1883

 GODHA
 v.
 NAIK RAM.

execution-proceedings, and have no application to a substantive suit, which is brought to establish a mere right. But in this case, although the plaintiff asks in form for a declaration of his right, he is really suing, not for a declaratory decree, but to recover possession, &c." There are two Madras cases, one *Janakiammal v. Vithenadien* (1), in which Scotland, C. J., and Innes, J., held that, where the property of *N* having been attached, and the plaintiff (his wife) having objected to such attachment, and her objection being disallowed, her suit, before sale could take place, for removal of the attachment and recovery of the property, was cognizable by the Small Cause Court; and the other, *Kundeme Naine Booche Naidoo v. Ravoo Lutchmepaty Naidoo* (2), in which Morgan, C. J., and Kindersley, J., took a similar view. The Bombay cases are also important. In *Nothu Ganesh v. Kalidas Umed* (3) the plaintiff was the owner of property attached in execution of decree, whose objection had been rejected under s. 246 of Act VIII of 1859, and he sued the decree-holder for possession thereof. Westropp, C. J., after examining the authorities, observes:— "We do not think that the concluding passage in s. 246 of Act VIII of 1859, which leaves it open to a party against whom an order upon an application under that section has been made, to bring a suit to establish his right at any time within one year from the date of the order, prevents a tribunal, before which such a party might have brought his suit, if there had not been any application made under that section, from entertaining it. Whenever a person sues to recover property alleged to have been wrongfully taken from him, he sues to establish his right to it, and if he did not so establish his right, he could not recover it *in specie* or compensation by way of damages for it. Whether the new Civil Procedure Code (Act X of 1877) allows such a suit as the present, by an alleged owner, to be brought in a Court of Small Causes, it will be time enough to say when the question arises." In *Gordhan Pema v. Kasandas Balmukundas* (4) Melvill and Kembell, JJ., held, in advertence to ss. 283 and 57 (*n*) of Act X of 1877, that a suit by a defeated claimant to establish his right to, and for possession of, attached moveable property, against the decree-holder, must be instituted in a Small Cause Court, and the accuracy of this

(1) 5 Mad. H. C. Rep., 191.

(3) I. L. R., 2 Bom., 365.

(2) 8 Mad. H. C. Rep., 36.

(4) I. L. R., 3 Bom., 179.

1883

GODHA
v.
NAIK RAM.

ruling was recognised in *Chhaganlal Nagardas v. Jeshan Rav Dalsukhram* (1) by Melvill and Pinhey, JJ. "The reason for that decision was," they remark, "that a suit, by the owner, for the recovery of attached property may properly be regarded as a suit 'for personal property.' But a suit by a decree-holder to establish his right to attach and sell certain property, as belonging to his judgment-debtor, cannot be called a suit for personal property." This decision was followed in *Balkrishna v. Kisansing* (2) (Melvill and Kembell, JJ.). In this Court, in the case of *Balmokund v. Lekhraj* (3), the plaintiff sued to set aside an order in execution under s. 246 of Act VIII of 1859, releasing a boat from attachment, and to obtain its sale in execution as the property of one Buljeeta, judgment-debtor of the plaintiff. The defendant Lekhraj was an auction-purchaser at a sale in execution of another decree against Baljeeta. The Full Bench held that such a suit was not cognizable by a Court of Small Causes; but incidentally, in reference to the case of *Ram Dhun Biswas v. Kefal Biswas* (4), it was remarked:—"The effect of that decision is, that a decree-holder cannot, in order to obtain satisfaction of his decree, sue in the Small Cause Court to establish his judgment-debtor's title to property seized in execution and afterwards released. Had the plaintiff there himself possessed any right of property in the goods, and had the suit been brought to vindicate that right, the decision might have been different. Such a suit to establish right and to obtain relief either by recovery of the property or of damages, appears to be cognizable by a Small Cause Court." This latter expression of opinion, which would seem to be a mere "*obiter dictum*," was treated by Turner and Turnbull, JJ., in *Radha Kishen v. Chotey Lall* (5), as an authoritative ruling that "a suit brought by an owner to recover moveable property, of which he has been dispossessed by an attachment order, may, when the value is less than Rs. 50), be maintained in a Court of Small Causes, it being a suit for personal property."

In *Makund Lall v. Nasiruddin* (6), the plaintiff, alleging himself to be the owner of a cart, his objection to the attachment of which had been disallowed, sued the decree-holder, who had

(1) I. L. R., 4 Bom., 503.

(4) 10 W. R., 141.

(2) I. L. R., 4 Bom., 505.

(5) N.-W. P. H. C. Rep., 1871, p. 155.

(3) N.-W. P. H. C. Rep., 1871, p. 156. (6) Weekly Notes, 1882, p. 93.

1883

 GODHA
 v.
 NAIK RAM

attached it as the property of one Nabi Bakhsh, his judgment-debtor, for recovery thereof and damages, and to set aside the order disallowing his objections to the attachment. Straight and Brodhurst, JJ., held that "as the suit was not for personal property, pure and simple, as mentioned in s. 6 of Act XI of 1865, but the further relief was prayed that the order in execution disallowing the plaintiff's objections in respect of the property might be set aside, the suit was not cognizable in a Court of Small Causes."

The latest case is that of *Elliaz v. Sita* (1), of which the Subordinate Judge speaks in his referring order. There the plaintiffs claimed, as owners, certain attached property, after their objection to its attachment had been disallowed. Oldfield and Brodhurst, JJ., observed that the suit was one "brought, with reference to the provisions of s. 283 of the Civil Procedure Code, to have a right declared in property under attachment by a Civil Court, and for its recovery by removal of attachment. It is not, in our opinion, a suit cognizable by a Court of Small Causes." This completes the authorities bearing upon the question before us, and, summarising the effect of them, it would seem that the Calcutta and Bombay Courts hold that, not only under s. 246 of Act VIII of 1859, but under s. 283 of Act XIV of 1882, a suit by the owner of moveable property, wrongly attached in execution of decree, to recover the same from a purchaser, after disallowance of his objection to the attachment, lies in the Small Cause Court. The Bombay and Madras rulings appear to go further, and to hold that such a suit may be maintained in the Small Cause Court against the decree holder, while the goods are under attachment, though the decisions of the latter Court are confined to Act VIII of 1859; and this seems to be the view of Turner and Turnbull, JJ., in the case already mentioned. Both Garth, C. J., and Westropp, J., lay down that the owner of goods does not lose his title to them because they have been illegally attached or sold, and his objection to their attachment has been disallowed. It must be remembered that the latter's remarks, however, were specifically limited to s. 246 of Act VIII of 1859, and he in terms declined to express any opinion in reference to the language of s. 283 of the present Civil Code.

(1) Weekly Notes, 1883, p. 115.

1883

GODHA
v.
NAIK RAM.

It is after all no more than a truism to say that every person who goes into a Small Cause Court to sue for personal property or its value, must, in order to succeed, establish his right to, that is to say his ownership of, such property. The difficulty in dealing with the question referred to us is to understand how, having regard to the language of ss. 280, 281, 282 and 283 of the Procedure Code, and art. 11 of the Limitation Law, a suit against a decree-holder, while attachment is subsisting, if it is to have any practical effect, can be regarded as other than one to establish the right mentioned in s. 283. In *Shiboo Narain Singh v. Mud-dun Aily* (1) Garth, C. J., intimates that, "if a suit by an owner is brought against a purchaser in the Small Cause Court, it must be instituted within a year from the time when the adverse order in the execution-proceedings was made."

We confess our inability to reconcile this passage in his judgment with what immediately precedes it, namely, that the suit may be brought "without reference to anything which has taken place in the execution-proceedings." It seems to us that, if art. 11 of Act XV of 1877 supplies the limitation, such a suit must be considered as for "the establishment of right to, or the present possession of," property in respect of which an order has been passed under ss. 280, 281 or 282. But if it is to be treated as a suit for personal property, pure and simple, against the purchaser, irrespective of anything that may have happened in execution, then surely the limitation to be applied to it should be that provided in art. 48. It must be conceded that the order passed under s. 283 is only conclusive as between the parties to the proceeding under ss. 280, 281, 282, and for the purpose of answering this reference it is not necessary to discuss how far, when unreversed by a suit, it confers, through a subsequent auction-sale, a good title on a purchaser. However this may be, in the case before us, the property is still under attachment, and the decree-holder and the judgment-debtor, between whom and the plaintiffs an order conclusive of the right to the property, subject to a suit, has been passed in execution, are the defendants. It is impossible for the plaintiffs to reach the property, without clearing out of their way the order of attachment, which is still subsisting, and

(1) I. L. R., 7 Calc., 608.

this they can only do by establishing their right in the sense of s. 283. We do not think such a suit is cognizable by a Small Cause Court, or that it can be properly regarded as simply one for "personal property" or its value. Were we so to hold, the result must follow that a decree of a Small Cause Court could override orders in execution of the ordinary Civil Courts passed under ss. 280, 281 and 282—a form of procedure that could not but be most inconvenient. In expressing the above view, we regret to have formed a different opinion to that of the Courts of Madras and Bombay, though it does not appear to be in conflict with the Calcutta rulings to which we have referred. The reference may be answered as indicated above.

1883

 GODHA
 v.
 NAIK RAM.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

1884

November 1.

CHUNNI LAL (PLAINTIFF) v. CHAMMAN LAL (DEFENDANT).*

Civil Procedure Code, ss. 108, 136—Decree against defendant under s. 136—"Ex-parte" decree.

A defendant failing to comply with an order to answer interrogatories, the Court, under s. 136 of the Civil Procedure Code, struck out his defence, and, proceeding *ex-parte*, passed a decree against him. *Held* that the decree could not be treated, in respect of the remedy by appeal, as an *ex-parte* decree, and therefore, under the ruling in *Lal Singh v. Kunjan* (1), not appealable, but that an appeal would lie from the decree.

THE facts of this case are sufficiently stated in the judgment of the Court.

Babu *Sital Prasad* and *Munshi Hanuman Prasad*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

OLDFIELD, J.—The plaintiff instituted this suit in the Court of the Munsif of Etawah, and the defendant was called upon by the Munsif to answer certain interrogatories, and, having failed to comply with the order, the Munsif proceeded, under s. 136, Civil Proce-

* First Appeal No. 51 of 1884, from an order of Maulvi Muhammad Basit Khan, Subordinate Judge of Mainpuri, dated the 5th May, 1884.

(1) I. L. R., 4 All., 387.