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not the tenant of the former. Therefore, the defendant was not the co-tenant of the plaintiff but his sub-tenant. The plaintiff rightly described him as his sub-tenant in the Rent Court, and the defendant never challenged the jurisdiction of the Rent Court to try the suit. The plaintiff should have appealed from the decision of that court. The Rent Court was the only court having jurisdiction. If it were held that the defendant was a co-tenant, even then the suit would not be cognizable by the Court of Small Causes, as it would be a suit for profits against a co-sharer in respect of agricultural land and would be cognizable only by the Revenue Courts.

Babu *Jogindro Nath Mukerji*, was not heard in reply.

PIGGOTT, J.—This was a suit for money in a Court of Small Causes. That court has refused to entertian it on the ground that it is not cognizable by that court, being a suit for rent. It presumably refers to paragraph (8) of the second schedule to the Provincial Small Cause Courts Act, No. IX of 1887. If it were a suit for rent at all it would be cognizable by a Revenue Court under the provisions of the Tenancy Act, and the Revenue Court has already refused to entertain a claim for this money, though the defendant is not to blame for this. On the plaint as drafted the claim is for damages for breach of a contract. I set aside the order of the court below and direct that court to re-admit the suit on to its file of pending cases and to dispose of it according to law. Costs here and hitherto will abide the event.

Application allowed and cause remanded.

Before Mr. Justice Piggott.

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July, 3.

MUNIR-UD-DIN (DEFENDANT) *v.* SAMIR-UN-NISSA BIBI (PLAINTIFF).*

Act No. IX of 1887 (Provincial Small Cause Courts Act), schedule II, article 38—Suit relating to maintenance—Jurisdiction.

Plaintiff's father-in-law left by his will certain property to plaintiff's three brothers-in-law charged with the payment of Rs. 36 per annum to the plaintiff during her life. Subsequently the brothers-in-law agreed amongst themselves to divide their liability for payment of this annuity, so that each became liable individually for the payment of Rs. 12 per annum. *Held*, on suit brought by the annuitant to recover arrears of her maintenance allowance

* Civil Revision No. 34 of 1917.

against one of her brothers-in-law, that the suit was "a suit relating to maintenance" and that the cognizance thereof by a Court of Small Causes was barred by article 38 of schedule II to the Provincial Small Cause Courts Act, 1887. *Mahadeo Rai* v. *Deo Narain Rai* (1) and *Masum Ali* v. *Mohsin Ali* (2) distinguished.

THE plaintiff's father-in-law bequeathed by his will certain property to the defendant and others and charged the property with the payment of Rs. 36 per annum to the plaintiff for her life. Subsequently the donees entered into an agreement among themselves by which they divided their liability to pay the said sum; the defendant promising, for his part, to pay to the plaintiff Rs. 12 per annum out of the Rs. 36 for her maintenance. The plaintiff brought a suit in a Court of Small Causes to recover from the defendant Rs. 36, being three years' arrears of payment due from him. The defence was (1) want of consideration entitling the plaintiff to sue, and (2) that the plaintiff had assigned no reason entitling her to relinquish the charge and seek a personal decree. The Court of Small Causes decreed the suit. The defendant applied in revision to the High Court.

Dr. *S. M. Sulaiman*, for the applicant:—

On the facts found the claim is for recovery of arrears of maintenance fixed by agreement Such a suit comes within the category of "a suit relating to maintenance" specified in clause 38 of the second schedule to the Provincial Small Cause Courts Act; *Amritomoye Dasia* v. *Bhogiruth Chundra* (3), *Bhagvantrao* v. *Ganpatrao* (4), *Saminatha Ayyan* v. *Mangalathammal* (5) and *Baldeo Sahai* v. *Jumna Kunwar* (6). Secondly, the plaintiff was no party to the agreement referred to in the plaint. Therefore, unless the plaintiff chooses to enforce her claim as a charge upon the property she is not entitled to sue upon the said agreement as a mere contract; and a suit to enforce a charge is not cognizable by a Court of Small Causes.

The Hon'ble Maulvi *Raza Ali*, for the opposite party:—

Clause 38 of the second schedule to the Provincial Small Cause Courts Act refers to a suit which is both in form and

(1) (1905) 2 A. L. J., 697.
(2) Weekly Notes, 1890, p. 201.
(3) (1887) I. L. R., 15 Calc., 164.
(4) (1891) I. L. R., 16 Bom., 267.
(5) (1896) I. L. R., 20 Mad., 29.
(6) (1901) I. L. R., 23 All., 495.

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substance a suit for maintenance. In the present case the plaint does not even mention or show that the claim was one for maintenance. The suit is for money due under the agreement; the obligation arises from the agreement, and the claim is not for maintenance as such. Clause 38 does not apply to such a suit; *Mahadeo Rai* v. *Deo Narain Rai* (1) and *Masum Ali* v. *Mohsin Ali* (2). Unless where the claim originated in a legal right to get maintenance as such, a claim to recover an annual payment is a claim for an annuity and not for 'maintenance' within the meaning of clause 38; *Saminatha Pandaram* v. *Kuppu Udayan* (3). Although the payment was charged upon immovable property, it was quite open to the plaintiff to give up the charge and sue for a simple money decree in a Small Cause Court. Further, the decree of the lower court is a just and proper one and no substantial injustice has been caused to the defendant. It was submitted that in such circumstances the court should not interfere in revision; *Muhammad Bakar* v. *Bahal Singh* (4).

PIGGOTT, J.—The plaintiff in this case is the widow of a deceased brother of the defendant. It appears that the plaintiff's husband died during the life-time of his father. The first paragraph of the plaint alleges that, under the will of their deceased father, the defendant and his brothers took certain property subject to a charge of Rs. 36 a year in favour of the plaintiff. The second paragraph of the plaint states that, in virtue of an agreement therein referred to, the defendant was bound to pay to the plaintiff Rs. 12 a year out of the Rs. 36 a year already referred to. An examination of this agreement shows that the defendant and his brothers in distributing this charge of Rs. 36 per annum amongst themselves, expressly referred to it as an allowance for the maintenance of this plaintiff. It is quite clear that the money in respect of which the suit is brought is claimed as part of an annuity due to the plaintiff. The only point about which there can be any controversy is whether this annuity is of such a nature as to make suit for the recovery of a portion of it a suit "relating to maintenance" within the meaning of article 38 of schedule II to the Provincial Small Cause Courts Act, No. IX

(1) (1905) 2 A. L. J., 697.

(2) Weekly Notes, 1890, p. 201.

(3) (1904) 13 M. L. J., 471.

(4) (1890) I. L., R. 13 All., 277.

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of 1887. The suit was filed in a Court of Small Causes, and no objection to the jurisdiction of that court was taken by the defendant. The application now before me assails the jurisdiction of the court below to entertain the suit. The point ought certainly to have been taken in that court; but at the same time I am not prepared to hold that jurisdiction can be conferred by consent of parties. I think that, if the plea had been taken, as it ought to have been, it is exceedingly probable that the court below would have regarded the question as at least so far open to doubt as to warrant an order under section 23 of Act No. IX of 1887. I think the defendant, who is the applicant before this Court, is entirely to blame for the necessity he has been under of bringing this question of jurisdiction before this Court, and that notice should be taken of this fact in the Court's order as to costs. I am of opinion, however, that the suit is one the cognizance of which by a Court of Small Causes was barred by article 38 aforesaid. I do not see that this conclusion can be avoided by any line of reasoning which would not involve raising, in the alternative, the question whether the jurisdiction of the Small Cause Court was not barred by article 11 or article 28 of the same schedule. On behalf of the plaintiff I have been referred to two cases of this Court; *Mahadeo Rai* v. *Deo Narain Rai* (1) and *Masum Ali* v. *Mohsin Ali* (2). Both cases are clearly distinguishable. In the former the claim was for arrears of an allowance originally granted in favour of one person, by a plaintiff who claimed to be entitled to continue in receipt of that allowance as the heir of the person in whose favour the allowance had originally been granted. Either therefore the plaintiff was not entitled to this money at all, or he could not be said to be entitled to it as maintenance; for a maintenance allowance necessarily comes to an end with the death of the person in whose favour it was granted. In the other case the learned Judge of this Court who decided it laid great stress upon the fact that the circumstances of the suit were such that neither the right of maintenance nor the amount of maintenance were matters in issue requiring determination in that case. In the present case the question of the plaintiff's right to receive this annuity required determination and has been determined by

(1) (1905) 2 A. L. J., 697. (2) Weekly No 1890, p. 201.

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the court below. If therefore this annuity was of the nature of a maintenance allowance, the cognizance of the Court of Small Causes was barred. In my opinion it was so barred. I set aside the decree of the court below and in lieu thereof direct an order to be passed returning the plaint for presentation to a regular Civil Court having jurisdiction to entertain the same. The defendant will in any event bear all costs hitherto incurred in the court of first instance and his own costs of this application.

Decree varied.

FULL BENCH.

Before Justice Sir George Knox, Acting Chief Justice, Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

1917
July, 17.

MUHAMMAD FAIYAZ ALI KHAN (PLAINTIFF) *v.* BIHARI AND ANOTHER (DEFENDANTS)*

Evidence—Statement in wajib-ul-arz—Suit to recover 'Parjot'.

Plaintiff sued as owner of the *abadi* of a village to recover a certain number of maunds of cotton seed from the defendants, who were banias having shops in the said *abadi*, and his claim was based mainly upon an entry in a wajib-ul-arz framed some fifty years before suit, to the effect that tenants living in the village did not pay '*kiraya*' (rent of a house), but '*parjot*' (ground-rent), which, for banias, was one maund of cotton seed a year for each shop.

Held that the entry in the wajib-ul-arz was reliable evidence of the liability of the defendants to pay '*parjot*' to the zamindar in the manner described, and that the use of the word indicated that the origin of the payment was an agreement between the inhabitants of the *abadi* and the zamindar rather than a custom.

THE plaintiff was the sole zamindar of village Balika and owner of the whole of the *abadi*. The defendants were banias who occupied grocery shops in the *abadi*. The plaintiff alleged that there was a custom according to which the banias of the bazar were liable to deliver to the zamindar one maund of *binaula* (cotton seed) per shop at the end of each year, and that the custom was recorded in the wajib-ul-arz of 1866, prepared at the former settlement. Paragraph 2 of the wajib-ul-arz stated as follows:—"*Reyaya bashinda deh se kiraya nahin liya*

* Second Appeal No. 357 of 1916, from a decree of Durga Dat Joshi, First Additional Judge of Aligarh, dated the 1st of December, 1915, confirming a decree of Kauleshar Nath Rai, Munsif of Bulandshahr, dated the 25th of August, 1915.