

In the present case, although the security was deposited without obtaining any previous direction, the court ordered notice to issue before the period expired. It must accordingly be deemed to have by implication given the necessary direction.

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Of course, the question whether the security is sufficient and satisfactory need not be finally determined during the period of thirty days. Indeed, the plaintiff decree-holder may come in afterwards and challenge its sufficiency. The mere fact that it is found afterwards that the security was sufficient, would not make the deposit of the security within the time in any way defective.

Sulaiman,
A. C. J.

BY THE COURT.—The application in revision is dismissed with costs.

*Before Sir Shah Muhammad Sulaiman, Acting Chief Justice,
Mr. Justice Mukerji and Mr. Justice Boys.*

BHAGWATI PANDE (DEFENDANT) v. BADRI PANDE
AND ANOTHER (PLAINTIFFS).*

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*Provincial Small Cause Courts Act (IX of 1887), section 35—
Suit instituted in Munsif's court exercising Small Cause
Court powers—Succeeding Munsif did not have such
powers but the Subordinate Judge had Small Cause Court
powers—District Judge directed suit to be tried by the
successor Munsif as a regular suit—Order and trial
ultra vires—Appeal—Civil Procedure Code, section 24.*

While a suit was pending before a Munsif exercising small cause court powers, he was transferred and was succeeded by another Munsif who had no such powers. There was at the time a Subordinate Judge with small cause court powers whose local jurisdiction extended to the Munsif in question. The District Judge passed an order directing the new Munsif to try the small cause court cases which were pending before his predecessor, as regular suits. The new Munsif accordingly tried the suit as a regular suit and decreed it. The defendant preferred an appeal but the appellate court declined to entertain it on the ground that no appeal lay. *Held*, in revision,—

The direction given by the District Judge to the new Munsif was not an order of transfer within the meaning of

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section 24 of the Civil Procedure Code, and clause (4) of that section had no application to the case.

As on the date of the transfer of the Munsif there was a Subordinate Judge exercising jurisdiction as a small cause court Judge, the suit should, under section 35 of the Provincial Small Cause Courts Act, have gone to the file of that Subordinate Judge, and the trial of the suit by the new Munsif was without jurisdiction and therefore an appeal would lie.

When a judicial officer, who does not possess small cause court powers, hears and decides, in the absence of an order of transfer under section 24 of the Civil Procedure Code, a suit which was pending before his predecessor in office exercising small cause court jurisdiction, the decree is appealable.

Quære, whether it is possible under section 24 of the Civil Procedure Code to order the transfer of a case from a court of small causes which has ceased to exist, or from the court of an officer invested with small cause court powers who has been transferred and there is no other officer possessing such powers in that locality, to another court.

The following is the referring order in accordance with which the case was referred to a Full Bench :—

SULAIMAN, A. C. J., and BAJPAI, J. :—This case has been referred to a Division Bench by a learned Judge of this Court in view of the importance of the subject and a certain amount of conflict of opinion.

The plaintiffs instituted a suit for recovery of Rs. 182 principal and interest in the court of the Munsif of Bansi who was invested with small cause court powers. After he was transferred from the district another Munsif took over charge, who was not invested with such powers. There was an Additional Subordinate Judge at Bansi at that time who was invested with small cause court powers. The Additional District Judge on the 1st of July, 1928, directed the new Munsif to transfer all the cases pending on the small cause court side of the Munsif's court to the regular side. His order was in the following terms: "The small cause court cases pending in the court of the Munsif of Bansi will be tried by the present incumbent of the office as regular suits, as he has not got the small cause court powers. The attention of the said learned Munsif be drawn to section 35 of the Small Cause Courts Act and these cases would be dealt with as provided by the Small Cause Courts Act."

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In pursuance of this order the Munsif transferred this particular case from the small cause court side to the regular side and decreed the claim. An appeal was preferred to the District Judge by the defendants, but he transferred the appeal to the Subordinate Judge for disposal. The learned Subordinate Judge declined to entertain the appeal on the ground that no appeal lay to him.

The defendants have come up in revision and urge that an appeal lay to the lower appellate court and it has wrongly refused to exercise jurisdiction. If the appeal did lie, then undoubtedly it would be a fit case for interference under section 115 of the Code of Civil Procedure.

A large number of cases of this High Court, leaving aside cases of the other High Courts, have been cited before us. It must be conceded that there is to some extent a conflict of opinion on the true interpretation of section 35 of the Provincial Small Cause Courts Act and section 24 of the Code of Civil Procedure. In the case of *Mangal Sen v. Rup Chand* (1) the learned Judges seemed inclined to think that, no matter whether section 35 of the Provincial Small Cause Courts Act applied or section 24 of the Code of Civil Procedure applied, there would be no appeal from the decree. This case was dissented from in the case of *Sarju Prasad v. Mahadeo Pande* (2) but appears to have been followed in the case of *Sukha v. Raghunath Das* (3).

Although the facts of each case are somewhat different, it may be broadly stated that in the cases of *Sarju Prasad v. Mahadeo Pande* (2), *Zamir-ul-Hasan Khan v. Imdad Ali Khan* (4), *Allah Bakhsh v. Karim Bakhsh* (5) and *Faqir-Ullah v. Hikmat-Ullah* (6) section 35 of the Provincial Small Cause Courts Act was applied and it was considered that an appeal lay from the first court's decree. On the other hand, in the cases of *Udho Singh v. Mul Chand* (7), *Chhotey Lal v. Lakhmi Chand Magan Lal* (8), *Sukha v. Raghunath Das* (3), *Chaturi Singh v. Mst. Rania* (9), *Ram Charan Banwari Lal v. Kishori Lal Ram Sarup* (10) and *Jai Narain Misra v. Sarda Pershad* (11) section 24 of the Code of Civil Procedure was considered to be applicable and the trial court's decree was considered to be final. Of course most of these cases are either reconcilable with or distinguishable from each other.

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| (1) (1891) I.L.R., 13 All., 324. | (2) (1915) I.L.R., 37 All., 450. |
| (3) (1916) I.L.R., 39 All., 214. | (4) (1921) I.L.R., 44 All., 59. |
| (5) (1926) I.L.R., 48 All., 818. | (6) (1925) I.L.R., 47 All., 925. |
| (7) (1916) 14 A.L.J., 705. | (8) (1916) I.L.R., 38 All., 425. |
| (9) (1918) I.L.R., 40 All., 525. | (10) (1928) I.L.R., 50 All., 810. |
| (11) (1928) 26 A.L.J., 839. | |

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There is, however, one aspect of the question which does not appear to have been considered in these cases. No doubt sections 4, 32 and 33 of the Provincial Small Cause Courts Act make it clear that the same officer if invested with small cause court powers is to be deemed to be different courts, viz., a court of small causes and an ordinary civil court.

Section 35 of the Provincial Small Cause Courts Act is subject to the provisions of the Code of Civil Procedure, and would not be applicable where there is any special provision in the Code. *Prima facie* section 35 deals with a case where either a court of small causes or a court invested with such jurisdiction has ceased to have jurisdiction. It provides that any proceeding which would have been taken in the court which has now ceased to have jurisdiction "may be had" in the court which, if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try it. It would seem to follow that if the court of small causes has ceased to exist, or the officer invested with such powers has been transferred, then the proceeding would be had in the new court which would have jurisdiction to try the suit if it were filed on that date afresh. Accordingly if there is in the district any other court or officer invested with powers to try the small cause court suits in that area, it is that court or officer who would have jurisdiction to continue the proceeding. On the other hand if no such court or officer remains in the district then the suit if filed would have to be filed in the ordinary civil court and the proceeding accordingly would be cognizable by court.

The use of the word "may" might indicate that all the cases pending in the court of small causes or of the officer who has ceased to have jurisdiction need not automatically go over to the new court, but that pending any order by a superior court a party may take any proceeding in the court indicated by the section.

It would also seem that the new court, unless it were a court of small causes or a court invested with such jurisdiction, would not necessarily be deemed to be a court of small causes so as to make its decree non-appealable under section 27 of the Provincial Small Cause Courts Act.

Section 24 of the Code of Civil Procedure gives power to the High Court or the District Judge to transfer a case pending in one subordinate court from that court to itself or to another subordinate court and sub-section (4) provides that a

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court trying any suit transferred or withdrawn under this section from a court of small causes shall, for the purposes of such suit, be deemed to be a court of small causes. It follows that the court to which the suit has been transferred under section 24 being a court of small causes, would dispose of the suit as such and no appeal would lie from its decree.

Section 150 of the Code of Civil Procedure also lays down that the court to which the business is transferred shall have the same powers and shall perform the same duties as those of the court from which the business was so transferred. Section 17 of the Bengal, North-Western Provinces and Assam Civil Courts Act confers jurisdiction on the court to which the business has been transferred.

It may not necessarily follow that the court to which such business has been transferred and which has the same powers and duties as the former court necessarily itself becomes a court of small causes so as to make its decree final.

One would be inclined to think that section 24 contemplates the transfer of a case from one existing court to another existing court. But if a court of small causes or an officer invested with small cause court powers does not exist in the district it would be difficult to imagine that there is any court of small causes in existence from which a suit can be transferred to an ordinary civil court. When such a contingency arises section 35 would empower the court which for the time being would have entertained the suit, if freshly filed, to deal with the case. At the same time it would also appear that if a court of small causes or another officer invested with such powers is already available in the district who can take cognizance of the suit or proceeding, then the successor of the officer recently transferred, who himself does not possess the powers of small cause court, would not be entitled under section 35 of the Provincial Small Cause Courts Act to take it up *suo motu*. An order of the District Judge would be required to transfer the case to his file.

In many cases where a Munsif or Subordinate Judge has been transferred there is in the district some other officer invested with the powers of small cause court for the particular area concerned. Under section 35 it would be such officer who would have authority to entertain the proceeding. It would therefore seem to follow that in such a case the new Munsif cannot try the case by merely himself transferring it from the original side of his predecessor to his own regular

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side. In such cases an order by the District Judge under section 24 of the Civil Procedure Code would be indispensable before the new Munsif can proceed with the suit.

The order of the District Judge quoted above, which affects numerous cases, is capable of two interpretations. If it was not an order under section 24, then there is undoubtedly a conflict of opinion as to the legal position. Even if that interpretation be not accepted, there would be the question whether an order of his must be deemed to be an order under section 24 of the Code of Civil Procedure, although it expressly refers to section 35 of the Provincial Small Cause Courts Act, when the latter section was not at all applicable. We think that this case raises substantial questions of law for reference to a Full Bench.

We accordingly direct that this case be laid before the CHIEF JUSTICE for the constitution of a Full Bench.

Mr. *Harnandan Prasad*, for the applicant.

Mr. *Shiva Prasad Sinha*, for the opposite parties.

MUKERJI, J. :—This is an application in revision by the defendant in a suit instituted in the court of the Munsif of Bansi exercising the powers of a Judge, small cause court.

While the suit was pending, the Munsif exercising the powers of a Judge, small cause court, namely, Mr. Shyam Behari Lal, was transferred. He was succeeded by a gentleman who was not invested with the powers of a Judge, small cause court. This was Mr. Jamil Ahmad. At the date already mentioned, namely, the 16th of June, 1928, the Subordinate Judge of Basti sitting at Basti was invested with the powers of a Judge, small cause court, up to the pecuniary jurisdiction of Rs. 500, and his local jurisdiction extended up to Bansi.

On the transfer of Mr. Shyam Behari Lal, the Additional District Judge of Gorakhpur sitting at Basti gave certain directions in respect of the cases pending in the court of Mr. Shyam Behari Lal. So far as the small cause court cases were concerned, his order was as follows : "The small cause court cases pending in the court of the Munsif of Bansi will be tried by the

present incumbent of the office as regular suits, as he has not got the small cause court powers. The attention of the said learned Munsif be drawn to section 35 of the Small Cause Courts Act, and these cases should be dealt with as provided by the Small Cause Courts Act."

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In pursuance of this order or direction, the Munsif, Mr. Jamil Ahmad, took cognizance of the case and tried it as a regular suit. He decreed the claim of the plaintiffs, and the defendant filed an appeal before the Additional District Judge at Basti. He transferred it to the court of the Subordinate Judge at Basti, and that learned Subordinate Judge declined to entertain the appeal on the ground that no appeal lay.

Mukerji, J.

The defendant has come up in revision, and several points of law have arisen out of this application.

The first question to be considered is whether the order of the Additional District Judge at Basti was an order of transfer within the meaning of section 24 of the Civil Procedure Code. The reason for this enquiry is that where a small cause court case is transferred from a court exercising that jurisdiction to a court not exercising small cause court jurisdiction, the court trying the suit is to be treated as a small cause court for purposes of that suit. It follows that no appeal is maintainable. On the other hand if section 24 does not apply, there is a difference of opinion as to whether an appeal is maintainable from the ultimate decree that may be passed in the suit.

We have already read the order that was passed by the learned Additional District Judge, and we are of opinion that this order was not an order of transfer within the meaning of section 24 of the Civil Procedure Code, but was merely drawing the attention of the Munsif to the fact that there was a provision in the Small Cause Courts Act in section 35 to the effect that the successor of the Judge, small cause court, should try the suit.

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Mukerji, J.

Such being our opinion, we need not consider the fact whether the Additional District Judge at Basti had or not jurisdiction to order a transfer of a case from one court to another. Nor is it necessary to consider whether it is possible under the law to order the transfer of a case from a court which no longer exists to another court. These questions do not any longer arise for determination.

The next question that we have to consider is whether the decree of the learned Munsif, Mr. Jamil Ahmad, was appealable under the law.

We have already mentioned that at the date, the 16th of June, 1928, the Subordinate Judge of Basti was exercising jurisdiction as a Judge, small cause court, up to Rs. 500. That being so, under section 35 of the Small Cause Courts Act the suit under consideration should have gone to the file of the said Subordinate Judge exercising small cause court jurisdiction. In this view, the learned Munsif should not have tried the suit. The suit having been tried without jurisdiction, an appeal would lie, and therefore the learned Subordinate Judge was in error in holding that an appeal was not competent.

The next question is whether, when an officer without possessing small cause court jurisdiction hears a case which was pending before his predecessor in office exercising small cause court jurisdiction, and makes a decree, the decree is appealable? On this point there is some difference of opinion. In this Court in *Mangal Sen v. Rup Chand* (1) the view was taken that the decree would be unappealable, being a decree of a court of a small cause court jurisdiction. This view was dissented from in *Chhotey Lal v. Lakhmi Chand Magan Lal* (2). It is necessary to consider this point, in view of the fact that the learned Munsif decided the case.

We are of opinion that the decision in *Chhotey Lal v. Lakhmi Chand Magan Lal* (2) laid down the better

(1) (1891) 2 L.R., 13 All., 324.

(2) (1916) I.L.R., 39 All., 325.

law. The fact that no appeal is permitted from a decree made by a Judge, small cause court, is due to the provision of section 27 of the Small Cause Courts Act. That rule does not apply when a case is decided by a successor of a Judge of a court of small causes under section 35 of the Act. Section 35 comes after section 27, which reads as follows: "Save as provided by this Act, a decree or order made under the foregoing provisions of this Act by a court of small causes shall be final." Section 27 not being applicable, and the officer actually making the decree not being invested with the powers of a Judge, small cause court, we fail to see why a finality should attach to a decree made by him. We accordingly hold that the case of *Chhotey Lal v. Lakhmi Chand Magan Lal* (1) lays down the better law.

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Mukerji, J.

We have ascertained that the present Munsif at Bansi exercises small cause court jurisdiction up to the amount of Rs. 100 only. The present suit, therefore, will not be cognizable by him. We have also ascertained that the jurisdiction of the Subordinate Judge at Basti exercising small cause court powers has been limited to Basti Munsifi, and does not extend to Bansi Munsifi. We have now to decide where we should send the case back for retrial, for there must be a retrial because the trial was by an officer who had no jurisdiction to hear the case.

Applying section 35 of the Small Cause Courts Act, that court should have jurisdiction to hear the case now, which would have jurisdiction to hear the suit in case it were now instituted. It should follow that the Munsif of Bansi should hear the case as a regular suit, the decree in which would be appealable.

As a matter of precaution, however, we, having set aside the order of the Subordinate Judge of Basti declining jurisdiction to hear the appeal, remand the case to the court of the Additional District Judge at Basti.

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He will cause the suit to be transferred to the court of the Munsif of Bansi or to such other court as may have jurisdiction over the subject matter, having regard to the principle laid down above.

Mukerji, J. We are not aware of the jurisdiction that the learned Additional District Judge at Basti has, in the matter of ordering transfers of suits and appeals. The jurisdiction that is vested under section 24 is vested in the District Court, which, according to the definition given in the Civil Procedure Code, is the principal court of original civil jurisdiction. There can be only one principal court of original civil jurisdiction in a judgship, and that must be the court of the District Judge of Gorakhpur. If the learned Additional District Judge at Basti finds that having regard to the provisions of section 24 he has no jurisdiction to transfer the case, he will obtain an order from the District Judge at Gorakhpur for the transfer of the case to the proper court.

As none of the parties are to blame for what has happened, we direct that the costs here and hitherto shall abide the result.

SULAIMAN, A. C. J. :—I concur in the order proposed. Where section 24 of the Code of Civil Procedure can apply, the District Court would have power to transfer a case pending in one subordinate court to another subordinate court. If the case is transferred or withdrawn from a court of small causes, then under subsection (4) the court to which it is transferred for trial shall, for the purposes of such suit, be deemed to be a court of small causes. It follows that the court to which the suit has been transferred under section 24 would dispose of the suit as a court of small causes, and no appeal would lie from its decree. This result would not follow where there is no transfer under section 24 of the Code of Civil Procedure.

Obviously section 24 contemplates the transfer of a case from one existing court to another existing court. If, therefore, a court of small causes has ceased to exist or the officer invested with small cause court powers has been transferred from the district and there is no other officer possessing such powers, there would be no court from which the District Court can under section 24 of the Code of Civil Procedure transfer the case to an ordinary civil court. The contingency where no court or officer invested with small cause court powers exists is provided for in section 35 of the Provincial Small Cause Courts Act.

Section 35 of the Provincial Small Cause Courts Act is subject to the provisions of the Code of Civil Procedure and would not be applicable where there is any special provision in the Code. *Prima facie* section 35 deals with a case where either a court of small causes or a court invested with such jurisdiction has ceased to have such jurisdiction. It provides that any proceeding which would have been taken in the court which has now ceased to have jurisdiction "may be had" in the court which, if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try it. It follows that if the court of small causes has ceased to exist or the officer invested with such powers has been transferred, then the proceeding would be had in the new court which would have jurisdiction to try the suit if it were filed on that date afresh. Accordingly if there is in the district any other court or officer invested with powers to try the small cause court suits in that area, it is that court or officer who would have jurisdiction to take cognizance of the suit and continue the proceeding. In such a case the successor of the officer recently transferred, who himself does not possess the powers of a small cause court, would not be entitled under section 35 of the Provincial Small Cause Courts Act to take it up *suo motu* and can only act if the case were transferred to him under section 24. On

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the other hand, if no such court or officer remains in the district then the suit if filed would have to be filed in the ordinary civil court, and the proceeding accordingly would be cognizable by such court.

Sulaiman,
A. C. J.

In many cases where a Munsif has been transferred, there is in the district a Subordinate Judge invested with the powers of a small cause court for the area within the jurisdiction of the Munsif. Under section 35 of the Provincial Small Cause Courts Act it would be such a Subordinate Judge who would have authority to entertain the proceeding. A new Munsif who comes to take the place of the Munsif transferred but who does not possess the small cause court powers would have no jurisdiction himself to transfer the case from the small cause court side of his predecessor to his own regular side. The case would go automatically to the Subordinate Judge who is invested with small cause court powers. If there is such a Subordinate Judge it would be open to the District Judge to transfer the case from the court of the Subordinate Judge with small cause court powers to that of the new Munsif without such powers. If there is no such Subordinate Judge with small cause court powers, the Munsif will under section 35 of the Provincial Small Cause Courts Act have to try it on the original side, and the District Judge would have no power at all to act under section 24 so as to transfer the case to the new Munsif and make him a court of small causes. He can, of course, transfer the case from the Munsif's file to any other court, but the suit would cease to be a small cause court suit. An appeal in such cases would lie to the District Judge.

BOYS, J. :—I concur in the judgment of and order proposed by Mr. JUSTICE MUKERJI.

BY THE COURT :—We set aside the order of the Subordinate Judge of Basti declining jurisdiction to hear the appeal, and remand the case to the court of the Additional District Judge at Basti. He will cause the

suit to be transferred to the court of the Munsif of Bansi or such other court as may have jurisdiction over the subject matter, having regard to the principle laid down in the above judgments. If the Additional District Judge finds that he has no jurisdiction to transfer the case, he will obtain an order from the District Judge at Gorakhpur for the transfer of the case to the proper court. We direct that the costs here and hitherto shall abide the result.

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*Before Sir Shah Muhammad Sulaiman, Acting Chief Justice,
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LILA (OBJECTOR) v. MAHANGE (APPLICANT).*

Civil Procedure Code, section 115—Revision—Other remedy available—Practice—Succession Act (XXXIX of 1925), sections 193, 195—Appointment of curator—Order failing to set forth grounds—Irregularity.

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Section 115 of the Civil Procedure Code is no doubt discretionary and therefore it is open to the High Court to decline to interfere in particular cases. As a matter of practice, ordinarily the High Court would not interfere if another convenient remedy is open to an applicant, particularly when that remedy is by way of appeal to a lower court. But it cannot be laid down as a general proposition that the High Court has no power of interference at all or should not interfere where there is another remedy by way of a suit open to the applicant. The remedy by way of a separate suit would involve a protracted litigation and is not always a convenient remedy. Each case must be considered on its own merits and if the court below has acted without jurisdiction or with material irregularity and the applicant has been seriously prejudiced and interference is called for in the interests of justice, there is no reason why the applicant for revision should be driven to a more circuitous remedy by way of a separate suit.

Where an order for the appointment of a curator under section 195 of the Succession Act was passed after the applicant was examined and there were materials before the District Judge on which he could be satisfied as to the existence of the conditions required by sections 193 and 195, but the order did not specifically set forth the grounds on which he