

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

MAHAMAYA DASIA (PLAINTIFF) PETITIONER *v.* NITYA HARI DAS
BAIRAGI AND OTHERS (DEFENDANTS) OPPOSITE PARTIES.*

1895
June 20.

Small Cause Court, Mofussil, Jurisdiction of—Provincial Small Cause Courts Act (IX of 1887), section 23—Jurisdiction of Small Cause Court to return a plaint for presentation to an ordinary Civil Court when the title of the plaintiff is questioned—Suit for damages for use and occupation—Code of Civil Procedure (Act XIV of 1882), sections 646A, 646B.

In a suit for damages on account of use and occupation of land brought in a Court of Small Causes, exception was taken to the plaintiff's title. The plaint was returned by the Judge, under section 23 of the Provincial Small Cause Courts Act (IX of 1887) for presentation in the ordinary Civil Court, and it having been presented to the Munsif, he tried the suit, and passed a decree in favor of the plaintiff. On appeal, the Subordinate Judge reversed that decree, holding that the Munsif had no jurisdiction to try the suit.

Held, that under section 23 of the Provincial Small Cause Courts Act the order of the Small Cause Court Judge was regularly made, and the Munsif had therefore jurisdiction to entertain the plaint.

Semle.—Having regard to the provisions of sections 646A and 646B of the Code of Civil Procedure it is doubtful whether the Appellate Court would have been right in dismissing the suit for want of jurisdiction, even supposing that the order made under section 23 of the Provincial Small Cause Courts Act had not expressly conferred jurisdiction upon the Munsif.

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

Babu *Saroda Churn Mitter* and Babu *Har Kumar Mitter* for the petitioner.

Babu *Govind Chunder Das* for the opposite party.

The judgment of the High Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

The facts of this case are as follow: In 1889 or 1890 the plaintiff sued the defendant for damages on account of the use and occupation of land in the Court of the Munsif of Dacca

* Civil Rule No. 603 of 1895.

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and obtained a decree. That decree was affirmed by the Subordinate Judge, but on second appeal to this Court the decree was reversed and the suit dismissed on the ground that the suit being cognizable by the Court of Small Causes the Munsif had no jurisdiction to try it. That was on 11th February 1892.

The plaintiff then instituted his suit in the Small Cause Court at Dacca, the Judge of which Court returned the plaint with this order: "It appears that the defendant takes exception to the plaintiff's title to the land. Unless that question is settled by a Court of competent jurisdiction, this Court cannot consistently assess damages for use and occupation of land. It is therefore meet to return the plaint to the pleader filing it under section 23 of the Provincial Small Cause Courts Act for presentation in the ordinary Civil Court."

The plaint was accordingly presented to the Munsif, who proceeded to try the suit and gave the plaintiff a decree. That decree, however, has been reversed by the Subordinate Judge on the ground that the Munsif had no jurisdiction to try the suit.

We are of opinion that under the provisions of section 23 of the Provincial Small Cause Courts Act (IX of 1887) the Munsif had jurisdiction to try the suit. Sub-section (1) of that section runs as follows: "Notwithstanding anything in the foregoing portion of this Act, when the right of a plaintiff and the relief claimed by him in a Court of Small Causes depend upon the proof of a title to immovable property or other title which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title." The object and effect of this provision is obviously to give jurisdiction to the ordinary Civil Courts to hear and decide suits in respect of which a Court of Small Causes has made an order under the section. In the present case the order was regularly made by the Small Cause Court Judge, and the Munsif had therefore jurisdiction to entertain the plaint.

The rule must therefore be made absolute to set aside the order of the Subordinate Judge, who will proceed to hear the appeal upon the merits. The plaintiff will have the costs of this rule.

We may add that, having regard to sections 646A and 646B of the Code of Civil Procedure it seems to us to be at least doubtful whether the Appellate Court would have been right in dismissing the suit for want of jurisdiction, even supposing that the order made under section 23 of the Provincial Small Cause Courts Act had not expressly conferred jurisdiction upon the Munsif in this case.

S. C. C.

*Rule made absolute.**Before Mr. Justice Trevelyan and Mr. Justice Beverley.*

E. DALGLISH AND OTHERS (DEFENDANTS) v. GUZUFFER HASSAIN AND OTHERS (PLAINTIFFS.) *

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January 2.

Right of occupancy—Transfer of right of occupancy—Bengal Tenancy Act (VIII of 1885), sections 183 and 178, sub-section (3), clause (d)—Custom or usage—Local usage—Evidence to prove usage—Evidence Act (I of 1872), sections 42, 48—Judgment as to transferability of tenures in adjoining villages.

In a suit by the landlords to avoid the sale of an occupancy holding in their *mouza* and eject the purchaser thereof, one of the questions was as to the existence of a custom or usage under which the raiyat was entitled to sell such a holding. *Held*, with reference to the expressions "custom or usage," in section 183 and "local usage" in clause (d), sub-section (3), section 178 of the Bengal Tenancy Act (VIII of 1885):—

- (1) The word "usage" would include what the people are now or recently in the habit of doing in a particular place.
- (2) In deciding on the evidence of such a custom or usage, regard should be had to section 48 of the Indian Evidence Act (I of 1872).
- (3) A judgment of the High Court as to the transferability of similar tenures in an adjoining village of the same *pergunnah* is admissible as evidence of such usage under section 42 of the Evidence Act.

EDWARD DALGLISH and others, defendants (first party) in this case, purchased an occupancy holding in *mouza* Paur from Janki Gope, defendant (second party), under a private sale in 1883. In 1891 they gave a notice to the *zemindars* (plaintiffs) informing them of their purchase, and asking for registration of the transfer in the *zemindari serishta*. In the plaint in this case the

* Appeal from Appellate Decree No. 368 of 1894, against the decree of Babu Juguddurlabh Mozumdar, Subordinate Judge of Tirhoot, dated the 29th of December 1893, reversing the decree of Babu Jugul Kishore Dey, Munsif of Samastipur, dated the 30th of June 1892.

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