

FULL BENCH (CIVIL).

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Mya Bu, and
Mr. Justice Sen.

IN RE MAUNG PO KYUN

v.

MA SHWE.*

1935

July 18.

Appeal—Second appeal to the High Court—“Suit of the nature cognizable by Courts of Small Causes”—Suit for rent of agricultural land—Special jurisdiction of Small Causes Court by Government notification—Provincial Small Cause Courts Act (IX of 1887), s. 15, art. 8, second schedule—Civil Procedure Code (Act V of 1908), ss. 100, 102.

In s. 102 of the Civil Procedure Code the words “any suit of the nature cognizable by Courts of Small Causes” mean any suit in which the claim is cognizable by Courts of Small Causes as such. Under s. 15 and art. 8 of the second schedule of the Provincial Small Cause Courts Act a suit for the recovery of rent other than house rent is expressly excepted from the cognizance of Courts of Small Causes as such. Therefore a suit to recover the rent of agricultural land is not a suit of the nature cognizable by Courts of Small Causes, and in such a case, although the amount may be less than Rs. 500, a second appeal lies to the High Court under s. 100 of the Code.

Under art. 8 of the second schedule of the Provincial Small Cause Courts Act a Judge of the Court may be expressly granted by the Local Government jurisdiction to try suits for the recovery of rent other than house rent, but in such an event the Court does not possess that jurisdiction because it is a Court of Small Causes, but because by notification the Local Government has invested it with special jurisdiction in that behalf.

Raja Narendra Bahadur v. Bafati, I.L.R. 45 All. 7; *Ramchandra v. Abaji*, 6 Bom. H.C.R. (App. Civ. Jur.) 12; *Sadanand v. Deb Nath*, 1922 Pat. H.C. Cases, Sup. 154; *Sahadara Mudiali v. Nabin Chand*, I.L.R. 42 Cal. 688; *Sein Thong v. Shwe Kun*, 3 L.B.R. 47; *Uma Churn v. Bewah*, I.L.R. 15 Cal. 174; *Vedachala v. Ramasami*, I.L.R. 22 Mad. 229—*referred to*.

Soundaram Ayyar v. Sennia Naickan, I.L.R. 23 Mad. 547—*dissented from*.
Ma Pan v. Maung Ne U, I.L.R. 3 Ran. 390—*overruled*.

The following order of reference for the decision of a Full Bench was made by

MOSELY, J.—This second appeal has been brought under section 11 of the Burma Courts Act against the decree of the District Court, which reversed the decree of the Township Court in a suit for rent of agricultural land, the amount involved being less than Rs. 500. The preliminary point has been argued whether a second appeal

* Civil Reference No. 9 of 1935 arising out of Civil Second Appeal No. 30 of 1935 of this Court.

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lies. It was decided in *Ma Pan v. Maung Ne U* (1) that a second appeal would not lie. I am in doubt whether the decision in that case was correct and consider that it needs reconsideration.

As was said in *Ma Pan's* case, "The law regulating such second appeals so far as this Court is concerned is contained in section 102 of the Code of Civil Procedure, which says that no second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees," and in section 11 of the Burma Courts Act, which says: "In addition to the second appeals permissible under section 100 of the Code of Civil Procedure, 1908, a second appeal shall lie to the High Court from an appellate decree of a Court subordinate thereto on any ground which would be a good ground of appeal if the decree had been passed in an original suit, whenever the decree of the Appellate Court varies or reverses otherwise than as to costs the decree of the Court below; provided that no such second appeal shall lie:

- (a) in the case of a small cause, unless the value of the cause exceeds five hundred rupees, or
- (b) in the case of an unclassified suit, unless the value of the suit exceeds five hundred rupees or the suit is of the nature described in section 13, sub-section (1), of the Burma Laws Act, 1898."

The Calcutta High Court in *Sahadora Mudiali v. Nabin Chand Boral* (2) and the Allahabad High Court in *Auseri Lal v. Mullhan and others* (3) have held that such a suit is excluded from the cognizance of Small Cause Courts, and that a second appeal may lie. The matter was not discussed in these cases, and the only rulings in which I have been able to find a discussion are *Soundaram Ayyar and another v. Sennia Naickan and others* (4) and the case which it overruled, *Velachala Mudali v. Ramasami Raja* (5). In *Ma Pan's* case (1) Mr. Justice Heald followed *Soundaram Ayyar's* case (4).

Section 15 of the Provincial Small Cause Courts Act of 1887 deals with the jurisdiction of Courts of Small Causes. Section 15 (1) enacts as follows:

"A Court of Small Causes shall not take cognizance of the suits specified in the second schedule as suits excepted from the cognizance of a Court of Small Causes."

(1) (1925) I.L.R. 3 Ran. 391.

(3) (1924) I.L.R. 46 All. 369.

(2) (1914) I.L.R. 42 Cal. 638.

(4) (1900) I.L.R. 23 Mad. 547.

(5) (1899) I.L.R. 22 Mad. 229.

Section 15 (2) reads :

“ Subject to the exceptions specified in that schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes.”

The second schedule deals with suits excepted from the cognizance of a Court of Small Causes, and Article 8 excepts a suit for the recovery of rent, other than house rent, unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto.

It may be noted that the previous Small Cause Courts Act (XI of 1865) enacted affirmatively that a suit for rent shall be cognizable by Courts of Small Causes. The present Act does not specify what suits shall be tried by a Small Cause Court, or what the nature of the suits triable by a Small Cause Court is, but merely lays down that all suits of a certain pecuniary jurisdiction shall be cognizable by a Court of Small Causes, with certain exceptions specified in the second schedule. Suits for the recovery of agricultural rent are among those exceptions, unless any particular judge or judges in general of Courts of Small Causes have been expressly invested with jurisdiction by the Local Government. In the Madras case, it is to be noted that all subordinate Courts in the Madras Presidency have been invested with jurisdiction under Article 8.

In *Ma Pan's* case (1) Heald J. remarked :

“ It appears, therefore, that the learned Judges in Calcutta regarded clause 8 of the second schedule as excepting suits for rent (other than house rent) from the cognizance of Courts of Small Causes with an exception to that exception in the case of Small Cause Courts where the Judge had been specially empowered to exercise jurisdiction in respect of such suits, while the Full Bench of Madras, looking at the ‘ nature ’ of the suit, regarded clause 8 rather as a restriction on the cognizance of such suits by particular Small Cause Courts than as a declaration that such suits were not of the nature cognizable by Courts of Small Causes.”

I find it myself difficult to extract any consistent principle from the three assenting judgments in *Soundaram Ayyar's* case (2). Sir Arnold White C.J. held that where Government, by notification, had removed the bar on jurisdiction in the case of any Judge, all

(1) (1925) I.L.R. 3 Ran. 390, at p. 396. (2) (1900) I.L.R. 23 Mad. 547.

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suits for agricultural rent became of the nature cognizable by Court of Small Causes, provided that they were within the pecuniary limit or jurisdiction of the tribunal. In the case of *Musa Miya Saheb v. Sayad Gulam Husein Mahamad* (1) where, under the old Act, suits to which the Collector was a party had been removed from the jurisdiction of the Small Cause Court, it was held that the nature of the suit, by which must be understood the jural relations between the parties, remained unaltered, and that the suit was one of the nature cognizable by a Small Cause Court. Shephard J. in *Soundaram Ayyar's* case (2) said that cases cognizable by a Small Cause Court did not form a class of cases having inherent and distinctive qualities in common, and that when it was said that a suit was of the nature of suits cognizable by Small Cause Courts, what must be meant was that it was not such a suit as is named in the schedule. Benson J. said that the words in question meant suits which the Legislature had determined to be suits of such a character or nature that they are or may be made triable in Courts of Small Causes without any further action on the part of the Legislature itself, though further action may be necessary by the Local Government in establishing a Small Cause Court, or by investing an existing regular Court with small cause powers, or by investing the Judge of the Small Cause Court with power to try suits for rent as small cause suits. These, he said, were all matters which depend on the will of the Local Government, but do not affect the character or nature of the suits.

Subrahmania Ayyar J. who dissented, referred to his previous judgment in *Vedachala Mudali v. Ramasami Raja* (3), where he said that suits for rent, other than house rent, are cognizable by certain Judges exercising the powers of a Small Cause Judge, not by virtue of the provisions of the Provincial Small Cause Courts Act themselves, but by virtue of the authority conferred on such Judges by the Local Government. Suits for rent, other than house rent, are, by section 15 of the Act and the first part of Article 8, expressly excluded from the cognizance of Small Cause Courts as a rule. The last part of the Article contains a qualification; but by it the Local Government is empowered, not to bring such suits within the category of suits generally cognizable by a Court of Small Causes, but only to vest a Judge exercising powers of a Judge of a Small Cause Court with authority to try that class of suits. In

(1) (1882) I.L.R. 7 Bom. 100.

(2) (1900) I.L.R. 23 Mad. 547.

(3) (1899) I.L.R. 22 Mad. 229.

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Ayyar's case (1), he went on to remark "How then can held that the legal relation which gives rise to a claim for rent is in any way affected by the circumstance that the claim may be taken cognizance of by a particular Court only under certain circumstances?"

There is no such thing as a class or type of suits cognizable by Small Cause Courts. All suits are so cognizable unless they are excluded from cognizance. The word "nature" I apprehend, can mean no more in this context than "within the category of."

The question, briefly stated, I think is this: "Whether the expression 'suits of the nature cognizable by Courts of Small Causes' means suits which are generally so cognizable, or whether it can be extended to include suits which, though generally excepted as non-cognizable, can be made expressly cognizable by notification by the Local Government."

In *Ma Pan's case*, Heald J. admitted that the learned Judges in the Madras case had overemphasized the meaning of the word "nature," and that it is possible that it meant no more than "kind" and that, if so, the arguments would carry less weight. He found it difficult to come to a definite conclusion, but on general principles was in favour of the Madras view. He did not say what those general principles were, and no doubt was influenced by the anomaly that if the other interpretation was correct, there would be no appeal in a suit for house rent, but two appeals in a suit for agricultural rent.

The anomaly must be admitted, but I am bound to say that on the interpretation of the words I am inclined to agree with Subrahmania Ayyar's view that under the present Act the words "of the nature cognizable by Courts of Small Causes" mean suits which have been excluded from the general cognizance of Small Cause Courts, subject to the power of the Local Government to remove that exclusion in the case of particular Judges. As a Bench of this Court in *Ma Pan's case* has taken a different view, I would refer the following question to a Bench or a Full Bench as his Lordship the Chief Justice may direct:

"Whether in a suit for rent of agricultural land, of an amount less than Rs. 500, a second appeal will lie under section 100 of the Code of Civil Procedure and section 11 of the Burma Courts Act."

Chan Htoon for the appellant. The question for determination is whether a second appeal lies in a

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(1) (1900) I.L.R. 23 Mad. 547, at page 562.

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course, excepted by the second schedule. The view adopted by the Madras High Court in *Soundaram Ayyar's* case represents the correct view and should be followed.

In *Maung Kan Gywe v. Chettyar* (1), a suit for a share in the produce of land was held to be not a suit for rent, and therefore cognizable by a Court of Small Causes. See also *Jadab Chandra v. Gopal Chandra* (2).

PAGE, C.J.—The question propounded is

“whether in a suit for rent of agricultural land of an amount less than Rs. 500 a second appeal will lie under section 100 of the Civil Procedure Code and section 11 of the Burma Courts Act.”

But for the fact that an opinion upon this question different from that which commends itself to us has been expressed by the majority of a Full Bench of the Madras High Court in *Soundaram Ayyar and another v. Semia Naickan and others* (3), I should have thought that the answer to the question is plain and free from difficulty.

It is unnecessary to consider section 11 of the Burma Courts Act because for the purpose in hand it is not *ad rem*, the claim in the present case being “unclassified” and less than Rs. 500 and not within section 13 (1) of the Burma Laws Act.

The material provisions are sections 100 and 102 of the Code of Civil Procedure, 1908, and section 15 and article 8 of the second schedule to the Provincial Small Cause Courts Act (IX of 1887). These provisions run as follows :

“Section 100.—Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force,

(1) I.L.R. 6 Ran. 660.

(2) 28 C.W.N. 848.

(3) (1900) I.L.R. 23 Mad. 547.

an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds"

Section 102.—No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

"*Section 15.*—(1) A Court of Small Causes shall not take cognizance of the suits specified in the second schedule as suits excepted from the cognizance of a Court of Small Causes.

(2) Subject to the exceptions specified in that schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes.

(3) Subject as aforesaid, the Local Government may, by order in writing, direct that all suits of a civil nature of which the value does not exceed one thousand rupees shall be cognizable by a Court of Small Causes mentioned in the order."

"Second Schedule. Suits excepted from the cognizance of a Court of Small Causes.

Article 8.—A suit for the recovery of rent other than house-rent, unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto."

The answer to the question referred depends upon the meaning of the words "any suit of the nature cognizable by Courts of Small Causes" in section 102 of the Code. Those words, in my opinion, indicate and mean "any suit in which the claim is cognizable by Courts of Small Causes as such." It appears to me that the obvious intention of the Legislature was to refer to suits cognizable by Courts of Small Causes generally, and it is necessary therefore to ascertain from section 15 and the second schedule to the Provincial Small Cause Courts Act what are the claims that are cognizable by Courts of Small Causes as such. Now, it is to be observed that section 15 commences by prohibiting Courts of Small Causes from taking cognizance of

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suits specified in the second schedule, and by article 8 "a suit for the recovery of rent other than house-rent" is expressly excepted from the cognizance of Courts of Small Causes as such. It follows, therefore, that a suit to recover the rent of agricultural land is not a suit of the nature cognizable by Courts of Small Causes. In the course of the argument I asked the learned advocate for the respondent if under the Provincial Small Cause Courts Act a Court of Small Causes as such is invested with jurisdiction to take cognizance of a suit to recover the rent of agricultural land, and the learned advocate inevitably answered that no such jurisdiction under the Provincial Small Cause Courts Act was conferred upon Courts of Small Causes. In my opinion, in such circumstances the answer to the question propounded must necessarily be in the affirmative.

It is, of course, provided under article 8 that a Judge of a Court of Small Causes may be expressly granted by the Local Government jurisdiction to try suits for the recovery of rent other than house-rent; but in such an event the Court does not possess that jurisdiction because it is a Court of Small Causes, but because by notification the Local Government has invested it with special jurisdiction in that behalf. The view that we take of this matter is in consonance with that expressed by the Bombay High Court in *Ramchandra Raghunath v. Abaji bin Rasty* (1), by the Calcutta High Court in *Uma Churn Mandal v. Bijari Bewah* (2) and *Sahadora Mudiali v. Nabin Chand Boral* (3), by the Allahabad High Court in *Raja Narendra Bahadur Pal v. Bafati* (4),

(1) 6 Bom. H.C.R. App. Civil Jur. 12.

(2) (1889) I.L.R. 15 Cal. 174.

(3) (1914) I.L.R. 42 Cal. 638.

(4) (1922) I.L.R. 45 All. 7.

by the Patna High Court in *Sadamand Tewari and others v. Deb Nath Manjhi and others* (1), by the Chief Court of Lower Burma in *Sein Thoung v. Shwe Kam* (2) and by the Madras High Court in *Vedachala Mudali v. Ramasami Raja* (3).

In *Soundaram Ayyar and another v. Sennia Naickan and others* (4), however, the majority of the Full Bench of the Madras High Court, (Subrahmania Ayyar J. dissenting), held upon the construction of section 15 and article 8 of the second schedule to the Provincial Small Cause Courts Act that a suit for the recovery of rent other than house-rent of an amount less than Rs. 500 was "a suit of the nature cognizable by Courts of Small Causes." The foundation of the judgment of the majority of the Judges in that case appears to have been the importance that was attached to the word "nature" in section 102 of the Code and section 32 of the Provincial Small Cause Courts Act. Sir Arnold White, who delivered the leading judgment, observed :

"The words 'any suit of the nature cognizable' as used in section 586 of the Code may be paraphrased thus : Any suit relating to a subject-matter over which a Court of Small Causes would have jurisdiction if the claim were within the pecuniary limits of its jurisdiction."

With that statement I respectfully agree. The learned Chief Justice, however, further held that under section 15 of the Provincial Small Cause Courts Act the scheme of the Legislature was to make cognizable by the Small Cause Courts all suits of whatever nature subject to the exceptions specified in the second schedule ; and inasmuch as a suit for rent was a suit based on a contract, and as suits

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(1) (1922) Pat. H.C. Ca., Sup. 154.

(2) (1904) 3 L.B.R. 47.

(3) (1899) I.L.R. 22 Mad. 229.

(4) (1900) I.L.R. 23 Mad. 547.

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for house-rent were suits of which a Court of Small Causes as such could take cognizance, and as a suit for the recovery of rent other than house-rent could be heard and determined in a Court of Small Causes if, as in Madras, such Court was expressly invested with jurisdiction in that behalf by the Local Government, it followed that suits for the recovery of rent whether in respect of agricultural land or of houses were suits of the nature cognizable by Courts of Small Causes. His Lordship added,

“The view that the effect of the notification is to render suits for rents suits ‘of the nature cognizable in Courts of Small Causes’ does not, in my judgment, involve the proposition that, as soon as Government by notification empowers any Judge to try rent suits on the small cause side, all such suits throughout the Presidency cease to be suits excepted from the cognizance of Courts of Small Causes and become suits of the nature cognizable in such Courts. It does involve the proposition that all suits for rent become ‘of the nature cognizable’; but whether a given suit for rent ceases to be a suit excepted from the cognizance of a Court of Small Causes must depend, first, upon the question whether the tribunal before which the suit is instituted is included in the notification and, secondly, upon the question whether the amount of the claim is within the pecuniary limit of the jurisdiction of that tribunal.”

I confess that I cannot construe the material provisions of the relevant statutes in that sense. The effect of adopting the view taken by the majority of the Full Bench of the Madras High Court in *Soundaram Ayyar and another v. Sennia Naickan and others* (1) would be to render article 8 for the purpose in hand nugatory. Indeed, the learned advocate for the respondent contended that a notification by the Local Government investing any particular Court or Courts of Small

(1) (1900) I.L.R. 23 Mad. 547.

Causes with jurisdiction under article 8 was immaterial for the purpose of ascertaining whether a suit for rent of agricultural land was a suit of "the nature, cognizable" by Courts of Small Causes, although it might be material for the purpose of finding out whether the suit was in fact cognizable by such Courts. Notwithstanding that section 15 (1) commences with an exclusion of jurisdiction in respect of suits such as the one under consideration, and that article 8 expressly provides that a suit for the recovery of rent other than house-rent shall not be within the cognizance of a Court of Small Causes the learned Judges of the Madras High Court, as I understand their judgment, laid down that under section 15 the Legislature had determined that such suits should be triable by a Court of Small Causes and that such a determination connoted that such suits were suits of a nature cognizable by Courts of Small Causes. To my mind to advance such a contention is, with all respect, to fly in the teeth of the very words which the Legislature has used in section 15; and so far from the Legislature, when enacting the Provincial Small Cause Courts Act, determining that suits for the recovery of rent other than house-rent should be triable by Courts of Small Causes it provided ~~in~~ express terms that such suits should not be within the cognizance of Courts of Small Causes as such. For these reasons with great respect to the learned Judges who decided *Soundaram Ayyar and another v. Sennia Naickan and others* (1) the view which they took, in my opinion, cannot be sustained having regard to the language in which the material provisions of the relevant statutes are couched.

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Deo Bahadur Zamindar of Tarla v. Kanda Barikivadu
(1) Sadasiva Ayyar J. observed :

" Clause (2) of section 15 is the important clause in that section, and, in my opinion, it shows that where any of the exceptions specified in the schedule to the Act or any provision of any other enactment for the time being in force excludes the subject-matter of a suit from the cognizance of a Court of Small Causes, then a suit relating to that subject-matter is not one of a nature cognizable by the Small Cause Court within the meaning of section 102 of the Civil Procedure Code. Now, if we turn to schedule 2 of the Small Cause Courts Act, clauses 8 and 44 of that schedule clearly exclude a suit of which the subject-matter is rent due to a landlord under the Estates Land Act by his tenant from the category of 'suits of the nature cognizable by the Small Cause Courts.' The observations of the learned Chief Justice and of the majority of the other Judges of the Full Bench in *Soundaram Ayyar v. Sennia Naickan* (2), in my opinion, support the above interpretation of section 102, Civil Procedure Code."

If that were so *cadit quæstio* ; but I cannot persuade myself that such a conclusion, with which I should respectfully agree, was arrived at by the majority of the Full Bench in *Soundaram Ayyar v. Sennia Naickan* (2). The decision in *Soundaram Ayyar v. Sennia Naickan* (2) was followed by a Bench of the Bombay High Court in *Ramkrishna Yeshwant Kamat Adarkar v. The President of the Vengurla Municipality* (3), although in that case neither *Ramchandra Ragumath v. Abaji bin Rastya* (4) nor *Uma Churn Mandal v. Bijari Bewah* (5) nor *Sahadora Mudiali v. Nabin Chand Boral* (6) appear to have been cited ; and Heaton J., in concurring with the view expressed by Scott C.J., observed :

" I think that the intention of the Legislature is given effect to by the decision proposed, though I am not unmindful of the

(1) (1920) I.L.R. 44 Mad. 697.

(2) (1900) I.L.R. 23 Mad. 547.

(3) (1916) I.L.R. 41 Bom. 367.

(4) 6 Bom. H.C.R. (App.) 12.

(5) (1889) I.L.R. 15 Cal. 174.

(6) (1914) I.L.R. 42 Cal. 638.

force of some of the arguments used by Mr. Justice Subrahmania Ayyar in the Madras Full Bench case of *Soundaram Ayyar v. Sennia Naikan* (1)."

In *Ma Pan v. Maung Ne U* (2) Heald and Rutledge JJ. with some hesitation followed *Soundaram Ayyar v. Sennia Naikan* (1); but in that case the material authorities to which I have referred with the exception of *Sahadora Mudiali v. Nabin Chand Boral* (3) were not cited, and no reference was made to the decision of Thirkell White C.J. and Fox J. in *Sein Thoung v. Shwe Kum* (4). For the reasons that I have given, in my opinion, the law was not correctly laid down in *Ma Pan v. Maung Ne U* (2), and in so far as the judgment in that case is not in consonance with our decision in the present case that case must be treated as overruled. I am of opinion, therefore, that a second appeal does lie under section 100 of the Code of Civil Procedure, and I would answer the reference in that sense. The costs, five gold mohurs, will abide the result of the second appeal.

SEN, J.—I agree.

MYA BU, J.—I agree.

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(1) (1900) I.L.R. 23 Mad. 547.

(2) (1925) I.L.R. 3 Ran. 390.

(3) (1914) I.L.R. 42 Cal. 638.

(4) (1904) 3 L.B.R. 47.