

## [APPELLATE CIVIL.]

*Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Melvill.*

NATHU GANESH (PLAINTIFF) *v.* KA'LIDA'S UMED (DEFENDANT).\*

1877,  
November 27.

*Suit by plaintiff as owner to recover moveable property under Rs. 500—  
Jurisdiction—Court of Small Causes—Act X. of 1877.*

The plaintiff was owner of moveable property attached in execution of a decree, and his claim to such property having been rejected under section 246 of Act VIII. of 1859, he brought this suit to recover possession. *Held* that the suit was cognizable by a Mofussal Court of Small Causes.

*Quere*—Whether the new Civil Procedure Code (Act X. of 1877) allows such a suit, by an alleged owner, to be brought in a Court of Small Causes.

THIS case was submitted for the opinion of the High Court by Cursetji Manekji, Judge of the Small Cause Court at Ahmedabad, with the following remarks :—

“ In this suit the plaintiff sues to recover possession of certain property, or the price of the same. The said property was attached in execution of a decree of this Court, obtained by the defendant against one Vanarsi Rungji and others. The plaintiff had applied, under section 246 of the Civil Procedure Code (VIII. of 1859), for the release of his said property, but was unsuccessful. Under the provisions of the latter part of the said section 246, the plaintiff now brings his suit to recover the property. The defendant takes a preliminary objection that such a suit cannot be entertained by this Court.

“ The question, therefore, is—has this Court jurisdiction to entertain this suit? I am of opinion that it has.

“ This is a suit which comes well within the provisions of section 6, Act XI. of 1865, which distinctly gives jurisdiction over suits for ‘ personal property or for the value of such property.’

“ The defendant’s vakil has cited a case (which was referred by this Court and is reported in 6 Bombay High Court Reports, 27 A. C. J.) as being in support of his contention. But, I submit, that the case does not apply, as it can very well be distinguished from

\* Small Cause Court Reference No. 115 of 1877

1877.

NATHU  
GANESH  
v.  
KALIDA'S  
UMED.

the case now under consideration. That was a case in which it was the decree-holder, who being unsuccessful under section 246, sued to establish, *not his own* right to the property attached, but the right of his judgment-debtor.

“The difference that exists between the suits that may be brought under the provisions of the latter part of section 246 is plain and obvious. Either the defeated decree-holder may sue to establish his judgment-debtor's right to the property released from attachment, or the unsuccessful claimant under section 246 may seek to recover his own property or its value. The relief sought in each of these suits is very different. In the first the relief sought is the declaration of the title to the property of some person other than the plaintiff. In the second it is the declaration of plaintiff's own title. The distinction between the two is clear and legitimate. In the one case this Court would have no jurisdiction; in the other, I submit, it has, provided the property is personal, and its value less than Rs. 500.

“In the case above cited the Judge, Mr. Gapálráv, appeared to think that certain decisions of the Calcutta High Court on the point were in conflict. But I think, with due deference, that this is not really the case. The learned Judge appeared not to have taken into account the plain and broad distinction existing between the two classes of cases, as pointed out in the preceding paragraph.

“In *Woomesh Chunder Bose v. Muddun Mohan Sircár* (1) the plaintiff sued to recover certain bricks, his own property, after his claim to the same under section 246 had been rejected. The property being moveable, and in value less than Rs. 500, it was held that he was bound to bring his suit in the Small Cause Court. The subsequent decisions of the Calcutta High Court do not, I submit, conflict with or overrule this decision. This case, which may be called the ‘brick case,’ is precisely on all fours with the case which is the subject of this reference.

“In *Rám Gopál v. Rám Gopál* (2) the plaintiff was the unsuccessful decree-holder, seeking to establish a lien on certain buffaloes which

(1) 2 Cal. W. R. 44 Civ. Rul.

(2) 9 Cal. W. R. 136 Civ. Rul.

had been attached under a decree of his, but released under section 246. In *Rám Dhum v. Kefal Biswas* <sup>(1)</sup> it was again the decree-holder seeking to establish his *judgment-debtor's* right to property seized in execution and released under section 246. It is quite clear that both these suits, as well as the suit in which reference was made by this Court (6 Bom. H. C. Rep. 27 A.C.J.), were suits that did not come within the purview of section 6 of Act XI. of 1865; and differing, as these do, materially from the class of cases, such as the one under consideration and the 'brick case,' the decisions cited in this para. cannot, I submit, be held to govern the latter class of cases.

1877.

NATHU  
GANESH  
v.  
KALIDAS  
UMED.

"There is, however, another case, *Moozideen Gázee v. Dinobundhoo Gossámee* <sup>(2)</sup> which apparently conflicts with the 'brick case' (cited above). This was a suit precisely of the same sort as the one now before me, brought by the unsuccessful claimant for the recovery of personal property belonging to himself. The Small Cause Court Judge at Jessore referred the case for the opinion of the Calcutta High Court, because he considered that the case of *Rám Dhum v. Kefal Biswas* <sup>(3)</sup> was opposed to the 'brick case.' The Honourable the High Court will observe that the Jessore Judge was clearly under a misapprehension as to the nature of the two cases, and that the decision of the Calcutta High Court, which followed on this reference, is unsatisfactory for the same reason. Mr. Justice Jackson in his judgment says that the case of *Rám Dhum v. Kefal Biswas* was 'precisely on all fours' with the case referred by the Jessore Judge. Here, as their Lordships will observe, the Judges of the Calcutta High Court lost sight of the distinction between the two classes of cases, which arise under section 246, and, therefore, their decision is open to objection.

"The decision of Scotland, C.J., and Innes, J., in *Janakidammal v. Vithenádien* <sup>(4)</sup> supports the view taken in the 'brick case.' In this case the plaintiff, wife of a judgment-debtor, having been unsuccessful under section 246, sued to recover the property which had been attached in execution of a decree against her husband. The Madras Judges held that the Small Cause Court had jurisdic-

(1) 10 Calc. W. R. 141 Civ. Rul.

(2) 13 Calc. W. R. 99 Civ. Rul.

(3) 10 Calc. W. R. 141 Civ. Rul.

(4) 5 Mad. H. C. Rep. 101.

1877.

NATHU  
GANESHI  
v.  
KALIDAS'S  
UMED.

tion. This case was followed in *Kundemo Naine v. Rávoo Latchmipati*.<sup>(1)</sup>

"A recent decision, not reported, of the Honourable the High Court of Bombay is also in support of the same view. A gold necklace was attached under a decree of this Court. One Kesowlál came in as claimant under section 246, but was unsuccessful. He then filed his suit in the Court of the Subordinate Judge of Ahmedabad for the recovery of the necklace, and obtained a decree. On appeal to the Assistant Judge, the said decree was reversed. Kesowlál preferred a special appeal to the High Court. The High Court dismissed the special appeal on the ground that the suit was in the nature of a Small Cause Court suit, and the special appeal did not lie. On review this order was confirmed by J.J. Melvill and Pinhey (special appeal No. 291 of 1876. Dismissed 11th August 1876. Final order 14th December 1876.)

"As the question is of considerable importance, and as an express decision of the Honourable the High Court of Bombay on the point is desirable, I make this reference."

No counsel or pleader appeared on either side.

WESTROPP, C.J. :—The plaintiff sued in the Ahmedabad Court of Small Causes, as alleged owner of certain moveable property under Rs. 500 in value, to recover that property or its value from the defendant, Kalídás Umed, who had caused it to be attached in execution of a decree obtained by him against Vanarsi Rangji.

The question is, whether the Court of Small Causes has jurisdiction to entertain the suit, it appearing that the plaintiff's claim had been rejected upon an application made by him under section 246 of Act VIII. of 1859, in the cause in which the decree, under which the attachment had been made, was passed. The Judge is of opinion in the affirmative, but has referred the question to this Court. *Woomesh Chunder Bose v. Muddan Mohun Sircár* (2) is in point—the suit there having been brought, as here, by the alleged owner of the property attached—and supports the jurisdiction of the Court of Small Causes. *Rám Dhun Biswas v. Kefal Bis-*

(1) 8 Mad. H. C. Rep. 36.

(2) 2 Calc. W. R. 44 Civ. Rul.

1877.

---

 NATHU  
GANESH  
v.  
KALLIDA'S  
UMED,

was<sup>(1)</sup> is distinguishable, on the ground that the plaintiff there was not the alleged owner of the property, but the attaching decree-holder. The Judge, who referred that case to the High Court of Calcutta, did, expressly on that ground, distinguish it from *Woomesh Chunder Bose v. Muddun Mohun Sircár*.<sup>(2)</sup> Peacock, C.J., in his judgment does not notice that case; but his brief remarks would, so far as we understand them, appear to place no weight on the distinction, inasmuch as his decision appears to proceed upon the ground that "the suit, which by section 246 of Act VIII. of 1859 is given to a party against whom an order under that section is made, is 'a suit to establish his right,'" which suit Peacock, C.J., and Mitter, J., thought "not maintainable in a Small Cause Court." *Jethábhái Bháichand v. Báí Lakhu*,<sup>(3)</sup> for which no reasons were given, also was a suit by a decree-holder, and, therefore, is not in point. *Rám Gopál Sháh v. Rám Gopál Sháh and others*<sup>(4)</sup> was a suit to enforce a mortgage lien, and, therefore, is not in point. In January 1870, L. Jackson, J., and Glover, J., in *Moozdeer Gáree v. Dinobundho Gossámee*,<sup>(5)</sup> which seems to have been a suit by the alleged owner of the property, treated that case as on all fours with *Rám Dhun Biswas v. Kefal Biswas*,<sup>(6)</sup> and they, accordingly, held that the Small Cause Court at Jessore could not entertain the suit; but, if we be right in gathering from the terms of the reference made by the Judge of that Court that the plaintiff there was the alleged owner of the property, that case does not seem to be on all fours with *Rám Dhun Biswas v. Kefal Biswas*,<sup>(7)</sup> which was a suit by a decree-holder.

*Janakiámmal v. Vithenáijen*,<sup>(8)</sup> decided in February 1870, is in point here—it being a suit by the alleged owner complaining of a wrongful seizure. The High Court of Madras (Scotland, C. J., and Innes, J.,) held that the Court of Small Causes had jurisdiction. That decision was followed in 1875 by Morgan, C.J., and Kindersley, J., in *Kundeme Naine v. Rávoó Latchmipati*<sup>(9)</sup> which also was a suit by the alleged owner to recover the property or its

(1) 10 Calc. W. R. 141 Civ. Rul.

(2) 2 Calc. W. R. 44 Civ. Rul.

(3) 6 Bom. H. C. Rep. 27 A. C. J.

(4) 9 Calc. W. R. 136 Civ. Rul.

(5) 13 Calc. W. R. 99 Civ. Rul.

(6) 10 Calc. W. R. 141 Civ. Rul.

(7) 10 Calc. W. R. 141 Civ. Rul.

(8) 5 Mad. H. C. Rep. 191.

(9) 8 Mad. H. C. Rep. 36.

1877.

NATHU  
GANESH  
v.  
KALIDA'S  
UMED.

value. The reports of those Madras cases do not show that any of the Calcutta decisions above mentioned or the Bombay decision were brought to the notice of the Madras High Court. We do not think that the concluding passage in section 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. And we refrain from giving any opinion on the question whether or not an attaching decree-holder, against whom an order has been made under section 246 of Act VIII. of 1859, can maintain a suit in the Court of Small Causes to establish his right to retain his attachment. We concur in the opinion of the Judge of the Court of Small Causes at Ahmedabad, that he may entertain the present suit.

---

[APPELLATE CIVIL.]

*Before Mr. Justice West and Mr. Justice Pinhey.*

November 19. KHANDONA RA'YA N KULKARNI (ORIGINAL DEFENDANT), APPELLANT v  
APAJI SADASHIV KULKARNI (ORIGINAL PLAINTIFF), RESPONDENT.\*

*Bombay Hereditary Offices Act III. of 1874—Jurisdiction—Suit for declaration of right to officiate as sole representative of a branch of a vatandar family.*

From the date of the coming into force of the Bombay Hereditary Offices Act III. of 1874, it is not competent to the civil Court to entertain a suit for a declaration of right to officiate as the sole representative of a branch of a vatandar family, the Act constituting the Collector a judge for this and other purposes of the Act.

\* Special Appeal No. 32 of 1877.