"all suits of a civil nature" when the amount or value of the subject-matter does not exceed Rs. 2,000, subject only to the exceptions in section 19, none of which have any application to the present case, which raises only the question whether there has been an incomplete gift of the moneys secured by the notices. We have, therefore, no doubt that the Court of the Small Causes has jurisdiction to entertain the plaintiff's claim, on the ground that there was an incomplete gift, and must answer the question referred to us in the affirmative.

Attorneys for the plaintiff:—Messrs. *Wádia and Ghándy.*

Attorneys for the defendant:—Messrs. *Ardesir, Hormasji and Dinshá.*

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Scott.

HASSANBHOY VISRA'M AND OTHERS, (PLAINTIFFS), *v.* THE BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED, (DEFENDANTS). *

1888. *August* 24.

Presidency Small Cause Courts Act XV of 1882, *Sec.* 38—*Re-hearing—Case in which order for re-hearing granted on ground that decision of Small Cause Court was against weight of evidence—Practice.*

On an application for a re-hearing by the High Court, under section 38 of Act XV of 1882, of a suit already heard and decided by a Judge of the Small Cause Court,

Held by the High Court that the evidence being of a very conflicting character, and not such as to justify a distinct opinion that the Judge of the Small Cause Court was wrong in his decision, the application for a re-hearing should be refused.

Section 38 of Act XV of 1882 does not authorize the High Court to grant an order for a re-hearing where that Court merely feels that the evidence is doubtful without forming any opinion as to whether the conclusion arrived at by the Small Cause Court is a wrong one. The section requires that there should be such an opinion before granting the order, and such opinion should be a distinct opinion, and not merely what is termed the inclination of opinion.

APPLICATION for a re-hearing under section 38 of the Presidency Small Cause Courts Act XV of 1882.

The plaintiffs filed this suit in the Court of Small Causes, Bombay, to recover from the defendants Rs. 2,000 as damages alleged to have been sustained by them to 1,300 bags of Mauritius

* Small Cause Court, No. $\frac{44}{4670}$ of 1888.

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sugar shipped by them on board the defendant's steamer "Byculla" at Rangoon, on carriage to Bombay, by reason of "wet timber being stowed in the same hold as the plaintiffs' said sugar."

The suit came on for hearing before the Chief Judge of the Small Cause Court on the 19th and four following days of July, and on the 13th August His Honour gave judgment for the plaintiffs for Rs. 2,000 and costs, on the ground that the steamer's hold, into which the plaintiffs' sugar was lowered, was wet by the water brought on board by certain timber, and that consequently the defendants had failed to provide a vessel reasonably fit to carry the sugar.

The defendants filed a petition to the High Court, praying for a re-hearing of the case under section 38 of the Presidency Small Cause Courts Act XV of 1882. Their petition concluded as follows:—

"9. That your petitioners feeling themselves aggrieved by the said judgment, and being in a position to produce further evidence in support of their defence, are desirous that this suit should be re-heard by this Honourable Court, under section 38 of Act XV of 1882 of the Legislative Council of India, on the following grounds:—

"(*a*) That the learned Judge erred in holding the sugar was damaged by being lowered on to the floor of the hold of the steamer when the same was wet with the water brought on board by the timber, and that, therefore, your petitioners had failed to provide a ship reasonably fit for the carriage of the said sugar. Your petitioners submit that it was conclusively proved that the S. S. "Byculla," although containing only one hold, was in every respect fit for the carriage of general cargo, consisting *(inter alia)* of timber and sugar, and that the said steamer had often previously carried a mixed cargo of timber and rice without any damage having been caused to the rice, which is a species of cargo specially liable to be damaged by water. That there was no evidence whatever given to show that the sugar had, as a matter of fact, been lowered on to the wet floor of the steamer.

"(*b*) That the learned Judge ought to have held that the said sugar was not in a sound and dry condition when it was shipped,

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and that the damage hereto was caused either by atmospheric influences operating upon it during the year that it remained at Rangoon, or by its having been originally shipped at Mauritius in a green and unsound state, and that such damage was in no way occasioned by any thing which occurred after it had been received on board the defendants' steamer.

"(*c*) That the learned Judge decided against the weight of evidence, and that he either overlooked or did not give due weight to certain parts of the defendants' evidence—notably the evidence which was uncontradicted, and which showed that a shipment of the same sugar which arrived in Bombay from Rangoon by the defendants' steamer 'Nevása' about a month after the arrival of the 'Byculla' was found to be in precisely the same condition as the sugar in question, notwithstanding that no timber was carried by the steamer 'Nevása' and that no part of her cargo was damaged except such sugar. Also the evidence, also uncontradicted, which conclusively proved that although the said S. S. 'Byculla' carried 27,110 bags of rice, and although large quantities of such rice were stowed in immediate proximity to the timber, yet none of it was at all damaged, except a small quantity, which was admittedly damaged by a totally different cause. Also the evidence given by two of the most experienced European surveyors of sugar in Bombay, who subjected the sugar on its arrival in Bombay to a very careful examination, and declared that it could not have been damaged whilst on board the steamer. Also the evidence which showed that a majority of the bags were not Mauritius sugar bags, but were what are called Calcutta rice bags, and were of a precisely similar description to the bags in which rice shipped by the plaintiffs by the same steamer was contained, thus showing, as your petitioners contend, that a majority of the outer bags of the sugar were removed in order to conceal the traces of the damaged condition of the sugar at the time of shipment.

"(*d*) That the learned Judge ought to have held that if the damage was occasioned by improper stowage, your petitioners were protected from liability by the terms of the bill of lading or at any rate he should have held that your petitioners were responsible only for such damage as was proved to have arisen after the

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sugar was received on board and before the steamer commenced her voyage, but not in any case for any damage which arose after the commencement of the voyage.

"(*e*) That the learned Judge erred in holding that no mate's receipt was given to the shippers at the time of shipment of the sugar. Your petitioners submit that it is conclusively proved, by the evidence of the captain and officers of the steamer, that the mate's receipt was handed to the plaintiffs' man at the time of shipment, and that he subsequently brought it back to the steamer on account of some dispute about the number of bags shipped. What became of it afterwards there is nothing to show. That the captain parted with the original mate's receipt, is shown by the fact that at the instance of the plaintiffs he was requested to forward, and that he did forward to Rangoon from Akyab whilst the steamer was proceeding on her voyage, a duplicate of the said receipt bearing the same remark as to the condition of the bags as appears on the bill of lading and as is proved to have been written upon the original mate's receipt.

"(*f*) That his Honour also erred in holding that even if the mate's receipt had been delivered to the shippers on shipment of their sugar, the contents of the bill of lading could not have any retrospective effect, although such receipt showed that the cargo was received subject to the conditions in the company's form of bill of lading.

"(*g*) That his Honour ought to have held that the exceptions and conditions in the bill of lading related back to the point of time when the contract for shipment was made, or at any rate at the time when the goods were received on board.

"(*h*) That his Honour erred in holding that the exceptions in the bill of lading about re-exported goods and the written clause at the foot thereof amount to not being more than a qualification of the words 'shipped in good order' so as to throw on the plaintiffs the burden of proving that the sugar in question was in good order; your petitioners submit that these words amount to a contract that they shall in no case be held responsible for the condition of the sugar.

"(*i*) That his Honour ought to have held that the *onus* of proving that the sugar was in a sound and dry condition at the time of shipment lay upon the plaintiffs and that they had failed to prove that their sugar when shipped was in good condition."

Inverarity appeared for the petitioners.

SARGENT, C. J.:—This was an application for a re-hearing under section 38 of the Small Cause Courts Act of 1882. The grounds set out in the affidavit, by which it was supported, were that the decision of the Small Cause Court was opposed to the weight of evidence and also contrary to law. The Legislature has not given an appeal to the High Court in all cases in which the value of the subject-matter exceeds one thousand rupees, but by section 38 it has provided for an application being made *ex parte* on affidavit for a trial of the cause by the High Court, and which the Court is directed to grant (on such terms as it thinks fit) if it "is of opinion that there has been a miscarriage or failure of justice." It must be at once conceded that the term "opinion" does not necessarily imply "conviction." It can scarcely be better defined than in the words of Hale, to be found in Webster's Dictionary, as "that assent of the understanding which is so far gained by evidence of probability that it rather inclines to one persuasion than to another, yet not without a mixture of uncertainty or doubting." This leaves the question open as to the strength of the opinion to be entertained by the Court as a condition of granting the application; but it obviously excludes that state of mind in which a Judge merely feels that the evidence is doubtful without forming any opinion as to whether the conclusion arrived at by the Small Cause Court is a wrong one. That is what the section expressly requires the Court to do. And, further, we cannot doubt that it was intended it should be a distinct opinion, and not what is termed the inclination of opinion. Having granted the Presidency Small Cause Court jurisdiction to try civil suits up to Rs. 2,000, and not having given an appeal to the High Court, the Legislature must be presumed to have intended that the decision of the Small Cause Court should stand, unless the High Court should upon affidavit form a distinct opinion that there had been a miscarriage of justice. This view

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of the section becomes very important in considering an application for re-hearing, on the ground of the decision being against the weight of evidence. In the present case the Judge of the Small Cause Court, as appears from the judgment, has given greater weight to the direct evidence as to the sugar when it was shipped, and the condition of the floor of the ship and the proximity of the wet timber already shipped to the sugar, than to the inference sought to be drawn by the defendants from the fact of the sugar having been lying in a godown in Rangoon for several months and from the arrival of other sugar in the same state shipped in another vessel under similar circumstances except as to the condition of the floor, and, lastly, to the opinions of experts that the state of the sugar was not due to the causes relied on by the Court. The evidence, so far as it appears from the judgment and the statements in the affidavit, was of a very conflicting character, and certainly not such as to justify a distinct opinion that the Judge of the Small Cause Court was wrong so as to enable this Court to order a re-hearing on the ground of the decision being contrary to the weight of evidence. As to the objection that there was a clause in the bill of lading which relieved the defendants from any responsibility on account of the condition of the sugar, it was scarcely contended that it could apply when the injury to the sugar was caused, as found by the Judge, by the defendants not providing a ship in a reasonably fit state to carry the cargo. We must, therefore, refuse the application.

Application refused.

Attorneys for the petitioners (defendants):—Messrs. *Craigie, Lynch, and Owen.*