APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Parsons.

1891. October 1.

MARY GOLD, (ORIGINAL PLAINTIFF), APPLICANT, *v.* BERL GOLDENBERG, (ORIGINAL DEFENDANT), OPPONENT.*

Practice—Execution—Execution of High Court's order for costs—Procedure applicable to High Court's order in revisional jurisdiction.

The same procedure that applies to High Court decrees in appellate jurisdiction must also be applied, under section 647 of the Code of Civil Procedure (Act XIV of 1882), to the High Court's orders in revisional jurisdiction. Application to execute the latter must be made to the Court which passed the decree against which the revisional application was preferred; and that Court must proceed to execute the decree, or order, passed on revision, according to the rules prescribed for the execution of its own decrees.

THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

The facts of this case were briefly as follows:—

Mary Gold obtained a decree against Berl Goldenberg in the Presidency Court of Small Causes.

To have this decree set aside, Berl Goldenberg applied to the High Court under section 622 of the Code of Civil Procedure.

The High Court issued a notice to Mary Gold to show cause why the decree should not be reversed.

After hearing both parties the High Court rejected the application with costs.

Thereupon Mary Gold applied to the Court of Small Causes to execute the High Court's order for costs.

The Chief Judge of the Small Cause Court rejected this application, holding that that Court had no power to execute the order in question, unless it was expressly directed by the High Court to execute the order.

Mary Gold thereupon moved the High Court to direct the Judge of the Small Cause Court to execute the order for costs.

Sitáráth Gopináth Ajinkya for applicant.

The opponent appeared in person.

* Civil Application, No. 377 of 1891.

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PARSONS, J. :—The facts of this case are as follow :—

Berl Goldenberg, having failed in obtaining an order to set aside a decree passed against him by the Presidency Small Cause Court, applied to this Court to exercise its extraordinary jurisdiction under the provisions of section 622 of the Code of Civil Procedure.

After notice to the plaintiff, Mary Gold, and hearing both parties, this Court dismissed the application with costs, and sent to the Small Cause Court a copy of its order, with the bill of costs attached thereto. Mary Gold then applied to the Small Cause Court for the recovery of these costs by execution. The Judge of the Small Cause Court, however, refused to order the levy of the costs from Berl Goldenberg, on the ground that his Court could not execute what he treated as a decree of this Court, unless the decree were sent to it for execution, or unless a direction were given by this Court to it to execute the decree.

We consider that, if any direction was required, the fact that the bill of costs was sent by this Court to the Court of Small Causes would imply such a direction, but we do not think that any direction was required.

No doubt, in the absence of any express provision, either in the Code of Civil Procedure, or in the Presidency Small Cause Courts Act, 1882, regarding the manner in which decrees or orders passed by a High Court in the exercise of its revisional jurisdiction are to be executed, and costs awarded therein to be recovered, (and the omission is remarkable, since the execution of decrees or orders passed by a High Court on re-hearing cases, and costs of references to a High Court, are provided for,) the Chief Judge of the Presidency Small Cause Court had, as his report shows, good cause for refraining to execute the order in question. We have, however, after due consideration come to the conclusion that the procedure that applies to our decrees in appellate jurisdiction, must also be applied to our decrees or orders in revisional jurisdiction (see section 647). Application to execute the latter must, therefore, be made to the Court which passed the decree against which the revisional application was preferred, and that Court must proceed to execute the decree, or order, passed

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on revision, according to the rules which are prescribed for the execution of its own decrees: (see section 583). This Court has recently ruled that this principle is to be applied in cases of revision of Mámlatdárs' orders, under Bombay Act III of 1876, where the same difficulty had arisen, (see *Nemava* v. *Devendrappa*[1]); and cases of revision of decrees of Small Cause Courts are analogous. We, therefore, reverse the order of the Small Cause Court refusing execution, and remand the case for it to proceed to execute the order of this Court regarding costs in the same manner as if the order were one passed by itself in the suit.

We make no order as to the costs of this application.

Order reversed.

(1) P. J., 1891, p. 105.

ORIGINAL CIVIL.

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

1891. *August* 28.

ESUBÁI, WIDOW, AND OTHERS, (ORIGINAL DEFENDANTS), APPELLANTS, *v.* DÁMODAR ISHVARDÁS, (ORIGINAL PLAINTIFF), RESPONDENT.*

Lessor and lessee—Fazendári tenure—Encroachment of tenant added to the tenure—Implied grant of right to erect a privy—Right of way—Way of necessity—Grantee entitled to one way of necessity or more—Caste prejudices—Possible modification of English law.

An encroachment made by a tenant on the property of his landlord—*e. g.* by a person holding under *Fazendári* tenure—should not be presumed to have been made absolutely, for his own benefit, and against his landlord, but should be deemed to be added to the tenure, and to form part thereof.

Coovoo Doss Roy v. *Issur Chunder Bose* (1) followed.

A plot of land in the centre of the defendants' oart was granted to plaintiff's predecessor in title on *Fazendári* tenure, to build a dwelling upon. A hut was accordingly built thereon. No privy was built with or attached to the hut, the occupants of the hut using the oart, or neighbouring oarts, for natural purposes. The plaintiff bought the hut, knocked it down, and proceeded to build a substantial dwelling with a privy on the site of the old hut. Defendant denied his right to build a privy, or to have any right of way for sweepers to the said privy when built.

Held, that the suitable enjoyment of the hut, when it was originally built, implied the use of a privy, whenever the occupants of the hut should think fit to

* Suit No. 209 of 1890.

(1) 22 W. R., 246.