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delivered up and cancelled. That was his prayer upon which the parties went to trial.

To such a case, we think, article 91 of the Limitation Act, schedule II, applies. This is not a document which is said on the face of it to be void; it can only be adjudged void if the facts which the plaintiff asserts can be proved.

For these reasons we think that the Subordinate Judge should have dismissed the claim with costs, and we accordingly now do so.

In giving our decision on this point we, of course, must not be taken as expressing any opinion on the other points which were decided by the Subordinate Judge, nor as to the question how far the plaintiff can raise the pleas which he did in this case in a suit brought on the bond.

Decree reversed.

APPELLATE CIVIL.

Before the Hon'ble Mr. E. T. Candy, C.S.I., Acting Chief Justice, and Mr. Justice Chandavarkar.

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July 7.

BEHRAM KAIKHUSHRU IRANI (ORIGINAL DEFENDANT), APPLICANT, *v.* ARDESHIR KAVASJI (ORIGINAL PLAINTIFF), OPPONENT.*

Small Cause Court—Presidency Small Cause Courts Act (XV of 1882), sections 9 and 38—Decision by a single Judge on evidence—Reversal of decree by Full Court—Jurisdiction—Practice.

One of the Judges of the Presidency Small Cause Court at Bombay having dismissed the plaintiff's suit on the evidence, the decree of the Judge was reversed by the Full Court (composed of two Judges) as being manifestly against the weight of the evidence, on an application by the plaintiff under section 38 of the Presidency Small Cause Courts Act (XV of 1882).

A question arose as to whether the decision of the Full Court was *ultra vires* and void, there being nothing in the rules framed under section 9 of the Act providing for the exercise by the Full Court composed of two or more Judges of any powers conferred on the Small Cause Court.

Held, that though the Rules of procedure and practice of the Presidency Small Cause Court at Bombay were silent as to the exercise by the Full Court consisting of more than one Judge of any powers under the Act, it did not

* Application No. 77 of 1903 under Extraordinary jurisdiction.

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follow that the sittings of the Full Court were therefore *ultra vires*. Though no rules were framed as to the procedure to be followed, still by long practice the procedure had become well-defined and fully known, the practice being that the Full Court should consist of two Judges—the Chief Judge, and in his absence the senior Judge, presiding. The Judge against whose decree any application is made is generally the second member, if he is present in Court. If he is absent, the Chief Judge and the second, or the Chief and any other Judge hear and dispose of the application. Such being the unwritten rules of practice, they must be deemed to be "Rules treated as in force in the Court on 31st December, 1894," under clause (2), section 9 of the Act, and to be validly in force. They fall within the principle that an inveterate practice amounts to a rule of law.

Held, further, that the power to alter, set aside or to reverse the decree under section 38 of the Act includes the power of the Full Court to pass a decree in favour of the party in whose favour the application is granted.

The practice of the Court of Small Causes at Bombay of reviewing the decree in cases in which the notes of evidence are sufficient to enable the Full Court to undertake that review and of setting aside a wrongful dismissal of the suit where the decision is manifestly against the weight of evidence is not contrary to law.

APPLICATION under the Extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882), to set aside the proceedings and decision of the Full Court, consisting of Mr. R. M. Patell, Acting Chief Judge, and Mr. Young, Acting Second Judge, of the Presidency Small Cause Court, Bombay, reversing the decree of Mr. G. D. Deshmukh, Acting Fifth Judge.

The plaintiff sued the defendant in the Presidency Small Cause Court at Bombay to recover Rs. 250 on account of brokerage at 5 per cent., alleged to be due by the defendant for the sale of his hotel at Thána.

The defendant denied liability to the plaintiff's claim contending that the sale of his hotel was not effected through plaintiff.

The suit was tried by Mr. G. D. Deshmukh, Acting Fifth Judge, who, after recording evidence in full, dismissed the claim on the 22nd December, 1902.

The plaintiff thereupon applied to the Full Court under section 38 of the Presidency Small Cause Courts Act (XV of 1882) for an extension of time to move against the decree of Mr. Deshmukh. The application was granted by the Full Court composed of Mr. Chitty, Chief Judge, and Mr. Deshmukh. Before the date of

the further hearing Mr. Deshmukh ceased to be a Judge of the Presidency Small Cause Court, he having in the meanwhile reverted to his substantial appointment as a Subordinate Judge in the mofussil, and the plaintiff's application against his decree was heard by the Full Court composed of Mr. Chitty, Chief Judge, and Mr. R. M. Patell, Second Judge. The Full Court issued a *rule nisi* in the following terms:—

On the application of Mr. Dhanjishah Dorabji, counsel for the plaintiff, it is ordered that unless good and sufficient cause to the contrary be shown by the defendant on Tuesday the 17th day of February, 1903, at 11 o'clock in the forenoon, the verdict herein be set aside and the suit re-tried on the ground that the verdict herein was against the weight of evidence.

Mr. Chitty having in the meanwhile left Bombay, the rule was argued before the Full Court composed of Mr. R. M. Patell, Acting Chief Judge, and Mr. Young, Acting Second Judge. At the hearing the defendant contended that the Full Court had no jurisdiction to set aside the decree based on evidence heard and recorded by Mr. Deshmukh, who did not sit in the Full Court. The Court overruled the defendant's contention and without ordering a re-trial made the rule absolute by reversing the decree of Mr. Deshmukh. The plaintiff's claim was allowed to the extent of one hundred rupees with costs.

Being dissatisfied with the decree of the Full Court, the defendant preferred an application to the High Court under the Extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882), urging that:—

(1) The Full Court consisting of Mr. Chitty, Chief Judge, and Mr. Patell, Second Judge, acted without jurisdiction in granting a *rule nisi*.

(2) Mr. Deshmukh, who heard the suit and recorded the evidence, was not sitting with the Chief Judge when the rule was granted.

(3) The Full Court consisting of Mr. Patell, Acting First Judge, and Mr. Young, Acting Second Judge, had no jurisdiction in making the rule absolute.

(4) The said two Judges acted without jurisdiction in passing a decree against the applicant (defendant) for Rs. 100 and costs without ordering a re-trial, if they had at all any jurisdiction to do so.

(5) The said Judges acted without jurisdiction in reversing the decree of Mr. Deshmukh without his consent.

(6) The said Judges acted without jurisdiction in passing a decree on evidence not recorded by them or any one of them.

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(7) The Judges acted without jurisdiction in passing a decree in contravention of the terms of section 37 of the Presidency Small Cause Courts Act (XV of 1882) under which it was provided that "every decree of the Small Cause Court in a suit shall be final and conclusive."

(8) The Judges acted without jurisdiction in reversing the decree of Mr. Deshmukh, who did not sit to review his own judgment, on the ground that the decree of the absent Judge was "against the weight of evidence."

(9) The Judges acted without jurisdiction in sitting as the Full Court not recognized either by the Presidency Small Cause Courts Act, or under any of the rules framed by the High Court of Bombay under section 9 of the Act.

A *rule nisi* was issued requiring the plaintiff to show cause why the decree passed by the Full Court in his favour should not be set aside.

Marzban (with *P. N. Godinho*) appeared for the applicant (defendant) in support of the rule :—Our first contention is that there being no rule constituting a Full Court, the definition of Small Cause Court given in section 4 of the Presidency Small Cause Courts Act would mean one Judge or all the five Judges sitting together, but there is no provision for two Judges constituting a Full Court. The Bombay High Court has not framed any rule for the constitution of a Full Court under section 9 of the Act. The High Courts at Calcutta and Madras have framed rules with respect to a Full Court—Rule 95 of the Calcutta Rules and Rules 180 and 181 of Madras Rules. Even under the old Act (IX of 1850) there was no provision made in connection with a Full Court. Sections 37 and 38 of the present Act relate to reviews, but they say nothing with respect to a Full Court. There being no provision of law constituting a Full Court, we submit that the constitution of the Full Court of the Court of Small Causes, Bombay, is illegal.

(CANDY, C. J. (ACTING) :—Have you got any authority to support your contention ?)

There is no authority because this is the first time that the point is urged. Even supposing that the constitution of the Full Court is legal, still the procedure adopted by that Court was highly irregular. According to the usual practice, the Judge who records evidence and decides the original suit sits with the Chief Judge in the Full Court and then the two Judges decide the application. In the present case Mr. Deshmukh, who

recorded the evidence and decided the suit, was not sitting in the Full Court when the decree was reversed. Another irregularity was that the *rule nisi* issued to us by the Full Court distinctly stated that the case would be re-tried. But instead of complying with the terms of the rule, the Full Court reversed the decree of Mr. Deshmukh and passed a new decree then and there. We submit that the Full Court had no jurisdiction to do so, especially as Mr. Deshmukh's decree was based entirely on evidence: *Srinivasa* v. *Balaji Rau* [1]; *Sadasook* v. *Kannayya* [2]; *Sassoon* v. *Hurry Das.* [3]

Our next point is that the Bombay Small Causes Court not having been invested with appellate jurisdiction, the Full Court had no authority to reverse the decree passed by Mr. Deshmukh. The utmost that the Full Court could do in its revisional jurisdiction was to reverse the decree and send back the case for re-trial. The decree being based entirely on evidence, the Full Court had no authority to pass a fresh decree in its place. Even the High Court has no power under its extraordinary jurisdiction to revise a decree of the Small Cause Court when the decree is based purely on facts. Section 25 of the Provincial Small Cause Courts Act supports our contention: *Poona City Municipality* v. *Ramji* [4]; *Bai Jasoda* v. *Bamansha.* [5]

H. C. Ooyaji appeared for the opponent (plaintiff) to show cause.

CANDY, C. J. (ACTING):—This is an application under section 622, Civil Procedure Code, by the defendant in a suit in the Court of Small Causes, Bombay, to set aside a decree passed against him by two learned Judges of that Court under section 38 of the Presidency Small Cause Courts Act. The suit was originally decided on 22nd December, 1902, by the Acting Fifth Judge, Mr. Deshmukh, who dismissed the claim.

Plaintiff then made an application to the Chief Judge and Mr. Deshmukh under section 38.

Such applications in the Bombay Court of Small Causes are (it is said) made orally.

(1) (1896) 21 Mad. 232.
(2) (1895) 19 Mad. 96.
(3) (1896) 24 Cal. 455.
(4) (1895) 21 Bom. 250.
(5) (1898) 23 Bom. 334.

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On the first day the application was to obtain an extension of time, which was granted. On the next day when the application was renewed Mr. Deshmukh had ceased to be a Judge of the Small Cause Court, and the application was heard by the Chief and Second Judges. Notice was then ordered to issue to defendant.

The case eventually was heard by the Acting Chief and Second Judges (Messrs. R. Patell and Young), who, on the evidence recorded by the late Acting Fifth Judge, set aside his decree dismissing the suit and passed a decree for the plaintiff.

The nine objections recited in the application for revision are all based on the plea of want of jurisdiction and were formulated by the learned counsel for applicant under two main heads:—

(1) As there is nothing in the present Rules under section 9 of the Presidency Small Cause Courts Act, 1882, for the Court of Small Causes of Bombay providing for the exercise by two or more Judges of any powers conferred on the Small Cause Court, all applications under section 38 of the Act decided by a "Full Court" are *ultra vires* and void.

(2) In this case the "Full Court" had no jurisdiction to reverse the decision of the late Acting Fifth Judge on a question of fact.

On point (1) we are of opinion that the fact as stated does not render the proceedings of the Full Court invalid. Section 9 provides that the High Court may from time to time by rules having the force of law prescribe the procedure to be followed and the practice to be observed by the Small Cause Court, &c., and Rules made under this section may provide among other matters for the exercise by one or more of the Judges of the Small Cause Court of any powers conferred on the Small Cause Court by the Act. The Rules of procedure and practice of the Court of Small Causes of Bombay, to be found at page 400 of the Local Rules and orders made under Enactments applying to Bombay, are silent as to the exercise by more than one of the Judges (commonly called "the Full Court") of any powers under the Act. But it does not follow that the sittings of the Full Court are therefore *ultra vires*. In the report in this case made by the Acting Chief Judge it is stated that the Full Court has been

constituted, and has been working as a Court of Revision and Appeal ever since the establishment of the Court under Act IX of 1850.

No rules were framed as to the procedure to be followed, but by long practice the procedure has become well-defined and fully known. That practice is that the Full Court consists of two Judges—the Chief Judge, or in his absence the senior Judge, presiding. The Judge against whose decree any application is made is generally the second member, if he is present in Court. If he is absent the Chief Judge, and the second, or the Chief Judge and any other Judge, hear and dispose of the application.

Such *apparently* are the unwritten Rules of practice, and if they are not inconsistent with the provisions of the Act, they must be deemed to be "Rules treated as in force in the Court on 31st December, 1894," under clause (2) of section 9 of the Act, and to be validly in force. They fall within the principle that "an inveterate practice amounts to a rule of law" (see per Esher M. R. in *Joyner* v. *Weeks*.[1]) All the more so as in numbers of cases, this Court has under its Extraordinary jurisdiction acquiesced in the practice. They are in accordance with Rule 95 of the Calcutta Rules and with Rule 180 of the Madras Rules, copies of which have been shown to us by the learned counsel for the present applicant.

Here the pleader for the applicant for a new trial did first move before the Chief Judge and the Acting Judge who had tried the suit; but the merits of the application were not gone into, a postponement being asked for and granted. The Judges were within their rights in granting the postponement. When the application was admitted and finally heard Mr. Deshmukh was not a Judge of the Court, so it was impossible for him to take part in the case.

(2) Under the second head the questions which arise are more difficult.

The first is that the notice (commonly called a *rule nisi*) which was issued was a notice of a new trial, and therefore if the rule was made absolute, all that could be done was to order a new trial.

(1) (1891) 2 Q. B. 31 at p. 43.

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We think that the foundation of this argument is more in form than in substance. It has not been shown by affidavit or otherwise that the pleader who appeared for defendant before the Full Court when the case was finally disposed of was not prepared to argue the case on the merits or had no opportunity of doing so. It appears that all applications under section 38 of Act XX of 1882 are treated as applications for new trials. The marginal note to section 38 is "new trial of contested cases."

Rules 178 to 181 of the Madras Rules, promulgated in 1899, shown to us by the learned counsel, illustrate this point. They speak of applications under section 38 as "applications for new trial." Rule 181 runs :—

"If the Court . . . considers that there are grounds for the application it shall grant a *rule nisi* for a new trial, and shall give notice to the other side."

The fact is that the language is apparently based on the old Law. Under section 54 of Act IX of 1850 the Court was merely empowered to order a new trial. Under section 37 of Act XV of 1882, unamended by Act I of 1895, the Court may "order a new trial to be held, or *alter, set aside, or reverse* the decree or order." The same language is found in section 38 of the present Act. But the applications are treated generically as applications for new trial. Hence the phraseology of the Madras Rules and of the notice in the present case.

But it is contended that, apart from the words of the notice, the Court had no power to set aside the decree of the Acting Fifth Judge, dismissing the suit, and to pass a decree for the plaintiff, basing that decree solely upon a finding of fact. Apart from the question of the jurisdiction of the Full Court to appreciate the evidence and arrive at a finding of fact opposed to that arrived at by the Judge in the first instance, we think that the power to alter, set aside, or reverse the decree or order must include the power to pass a decree in favour of the party in whose favour the application is granted. It is easy to suppose a case in which after the evidence has been recorded there is no contest regarding the facts, but the single Judge misapplying the law to those facts may have wrongly dismissed the suit. If the Full Court could set aside that decision, it follows that the Full Court

would naturally pass a decree in favour of the plaintiff, in whole or in part as the case may be. It would be unnecessary to order a new trial in order that a fresh finding on the facts might be arrived at, those facts not being contested.

But, it is contended, the Full Court had no jurisdiction to appreciate the evidence, and for this contention there is the clear authority of Collins, C. J., and Shephard, J., in *Sadasook Gambir* v. *Kannayya*.[1]

That was a case under section 37 of Act XV of 1882, before the amendments under Act I of 1895. The Full Court discussed the evidence and dealt with the case precisely in the manner in which an Appellate Court might have treated it; and the result was they reversed the decree of the single Judge awarding the claim, and they dismissed the suit (the converse of the present case). Mr. Justice Shephard held that this was beyond the jurisdiction of the Full Court. He relied on the provisions of section 38 of the Act, as it then stood, which provided for a rehearing by the High Court in cases of miscarriage or failure of justice. He remarked "that the Act of 1850, section 53" (50 is a misprint), "did not provide for any other mode of interference with the original decree than by granting a new trial, and when in 1882 the Legislature altered the law by prescribing several modes of interference, it clearly was not intended to alter the conditions under which the Full Court could act. If under the Act of 1850 a new trial could not have been granted, then under the Act of 1882 the decree ought not to have been reversed." Mr. Justice Shephard then referred to the English cases as showing that an applicant for a new trial must show that the verdict is one to which no reasonable man ought to have come, and remarked:—"It does not appear that in the present case there was any pretence for saying that the judgment of the Second Judge was in this sense an erroneous one.....It is clear that the case was one in which different minds might not unreasonably have come to different conclusions."

In the case before us we understand the report of the Acting Chief Judge, who was a member of the Court which granted the rule and also of the Court which disposed of the case, as

(1) (1895) 19 Mad. 96.

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meaning that in the opinion of the Full Court the verdict of the late Acting Fifth Judge was manifestly against the weight of the evidence.

Mr. Justice Best did not agree with Mr. Justice Shephard. He held that the language of section 37 (now section 38) seems to mean that though the party is not entitled to appeal as of right, the Court may, if it thinks fit, reconsider any decree or order with all the powers of an ordinary Appellate Court.

The Judges having differed, the case came on, but was not reargued, before the Chief Justice, Sir Arthur Collins, who simply recorded his agreement with the reasons and conclusions of Mr. Justice Shephard.

The question was again considered by a Full Bench of the Madras High Court in *Srinivasa Charlu* v. *Balaji Rau* [1] when it was held that the effect of the amending Act I of 1895 was not to extend the powers of revision given by section 38, but to limit them to contested cases.

The Full Bench therefore adhered to the ruling in the former case that the Full Court had no power to revise a decree of a single Judge or order a new trial on questions of fact. It is noticeable that their Lorships did not allude to one important fact, *viz.*, that the provisions of the old section 38, providing for a rehearing by the High Court in cases of miscarriage or failure of justice, were repealed by Act I of 1895, which enacted an entirely new Chapter VI, and changed the title from "New trials and rehearing" to "New trials and appeals." The fact that suits could be removed before hearing into the High Court (sections 39, 40) would not justify the term "appeal." If then "save as otherwise provided by this Chapter or by any other Enactment for the time being in force every decree or order of the Small Cause Court in a suit shall be final and conclusive," the jurisdiction conferred by section 38 was evidently contemplated as at least quasi-appellate, and there is some force in Mr. Justice Best's remark that the Full Court was apparently vested with all the powers of an ordinary Appellate Court. The ruling of the Madras High Court (*Sadasook Gambir* v. *Kannayya* [2]), was

(1) (1896) 21 Mad. 232. (2) (1895) 19 Mad. 96.

quoted with approval by Mr. Justice Sale in *Sassoon* v. *Hurry Das Bhukut*.[1] He held that "where the question is one of evidence the judgment of the original Court could be reversed, and a new trial directed, only when such judgment is manifestly against the weight of the evidence"; and, quoting MacEwen's Small Cause Court Practice, said "it would appear that it has not been the practice of the Small Couse Court to deal with applications for a new trial except under the powers ordinarily exercised by a Revisional Court."

If the above dictum be applied to the present case, it would appear that the Full Court could interfere, as it was held that the decree dismissing the suit was manifestly against the weight of the evidence.

The three cases cited above were quoted by Mr. Justice Strachey in *Soonderlal* v. *Goorprasad*[2] as showing that the jurisdiction under section 38 is revisional. So, no doubt, it is; but, as shown above, that does not directly touch the question here, which is whether in revising a decision on a question of fact, because it was manifestly against the weight of the evidence, the Full Court exceeded its revisional jurisdiction.

The learned counsel asked us to apply the analogy of section 25 of the Provincial Small Cause Court Act, and referred us to the dictum of the late Sir Charles Farran in *Poona City Municipality* v. *Ramji*[3] where the late learned Chief Justice said:—"It is, we think, clear that an error of law or procedure in the Small Cause Court confers jurisdiction upon the High Court to exercise the power committed to it by the section (25)." This was taken by Mr. Justice Fox in *Soobramanian Chetty* v. *Coath*[4] as meaning that "error or misapprehension of the facts of a case, on the part of a Judge of a Small Cause Court, would not give jurisdiction to a High Court to interfere." If that is so under section 25 of the Provincial Small Cause Courts Act (by which the High Court may "pass such order as it thinks fit)", it is argued that it must be more so with regard to the powers of the Full Court under section 38 of the Presidency Small Cause Courts Act. But that does not strictly follow. The words of

(1) (1896) 24 Cal. 455.
(2) (1898) 23 Bom. 414.
(3) (1895) 21 Bom. 250.
(4) (1901) 7 Burma L. R. 15.

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the two sections are very different; and Sir Charles Farran in his judgment just cited goes on to show that it would be improper to define the limits within which the power of the High Court under section 25 should be exercised, pointing out that "the wording of the section is of the widest description," differing from the wording of section 622 of the Civil Procedure Code, which under the ruling of the Privy Council must "be construed in a very restricted and limited sense."

The judgment of Sir Charles Farran, just cited, was quoted by Mr. Justice Fulton in his judgment in *Bai Jasoda* v. *Bamansha* [1] in which the Judge of the Small Cause Court at Broach recorded all the evidence which the plaintiff had produced, and then recorded the following judgment:—"Claim not proved. Claim rejected with costs." The Judges (Sir Charles Farran and Mr. Justice Fulton) held that this was not "according to law," and then on the evidence passed a decree for the plaintiff. Mr. Justice Fulton remarked that it was unnecessary to determine whether the phrase "according to law" could by any ingenuity of reasoning, in an extreme case, be held sufficiently elastic to include a clearly erroneous decision of facts. The point is that the Judges, holding that the judgment was not according to law, reviewed the evidence as to the facts, and then considered it unnecessary to order a new trial, but proceeded to give judgment on the facts.

Here, under section 38 of the Presidency Small Cause Courts Act, the *Full* Court is empowered to "order a new trial *or* alter, set aside, or reverse the decree." There is nothing to show that the Legislature intended that if a decree dismissing the plaintiff's claim on the facts is set aside, then the Full Court must order a new trial, or that the Full Court is debarred from going into facts at all, even before ordering a new trial.

Whether the jurisdiction of the Full Court under section 38 be termed revisional, or, following the heading of the Chapter, appellate, we do not feel justified in holding that the practice in the Court of Small Causes, Bombay, of reviewing the evidence in cases in which the notes of the evidence are sufficient to enable the Full Court to undertake that review, and of setting aside

(1) (1898) 23 Bom. 334.

a wrongful dismissal of the suit, where the decision is manifestly against the weight of the evidence, is contrary to law; and we therefore discharge this rule with costs.

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Rule discharged.

APPELLATE CIVIL.

Before the Hon'ble Mr. E. T. Candy, C.S.I., Acting Chief Justice, and Mr. Justice Chandavarkar.

ABDUL KARIM FATEH MAHOMED (ORIGINAL PLAINTIFF), APPLICANT, v. THE MUNICIPAL OFFICER, ADEN (ORIGINAL DEFENDANT), OPPONENT.*

1903. *July* 7.

Letters Patent, 1865, clause 13—Aden Courts Act (II of 1864)—Suit in Civil Court of Resident at Aden—Transfer of suit to the High Court—Power of High Court—Jurisdiction.

The Civil Court of the Resident at Aden, as constituted by Act II of 1864, is subject to the superintendence of the High Court at Bombay within the meaning of clause 13 of the Letters Patent, dated the 28th December, 1865, and the High Court has power to remove a suit from the Court of the Resident and to try and determine the same.

CIVIL APPLICATION for the transfer of a suit from the Court of the Political Resident at Aden to the High Court.

The plaintiff filed a suit in the Court of the Political Resident at Aden, alleging that the defendant wrongfully took possession of certain immoveable property, and praying that he (defendant) should be directed to deliver possession of the property to the plaintiff.

The defendant answered (*inter alia*) that in taking possession of the property he acted under the orders of the Political Resident and that if the plaintiff had any claim he should prefer it against that officer.

The plaintiff, thereupon, applied to the High Court for the transfer of the case from the Court of the Political Resident to

* Civil Application No. 111 of 1903.