

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Beaman.

RAMKRISHNA SITARAM (ORIGINAL DEFENDANT, TENANT), APPLICANT, v.
HAJI DAWOOD ISMAIL (ORIGINAL PLAINTIFF), OPPONENT.*

1907.

January 18.

*Presidency Small Cause Courts' Act (XV of 1882), section 38, Chapter VII—
Proceedings in ejectment—Order—Decree.*

The plaintiff instituted proceedings in ejectment against the defendant under Chapter VII of the Presidency Small Cause Courts' Act (XV of 1882); the Judge passed an order directing the defendant to vacate. The defendant applied under section 38 of the above Act to the Full Court which declined to entertain the application. The defendant, thereupon, applied to the High Court under its extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) and obtained a *rule nisi* requiring the plaintiff to show cause why the order should not be set aside,

Held, discharging the rule, that an application under Chapter VII of the Presidency Small Cause Courts' Act (XV of 1882) does not come within the operation of section 38 of the Act. A proceeding under Chapter VII results not in a decree but in an order. Therefore the condition under which the Presidency Small Cause Court can interfere under section 38 does not arise in a proceeding under Chapter VII of the Act.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against an order of the Full Court of the Bombay Court of Small Causes refusing to entertain an application under section 38 of the Presidency Small Cause Courts' Act (XV of 1882) against an order passed by K. M. Jhaveri, Fifth Judge, in an ejectment proceeding.

One Haji Dawood Ismail, a house-owner, instituted against his tenant Ramkrishna Sitaram proceedings in ejectment under Chapter VII of the Presidency Small Cause Courts' Act (XV of 1882). The proceedings were heard and decided by K. M. Jhaveri, Fifth Judge of the Court, who passed an order directing the defendant (tenant) to vacate. Against the said order the defendant (tenant) applied to the Full Court (Coram Patell, Chief Judge, and Jhaveri, Fifth Judge), which rejected the application on the following ground:—

* Application No. 316 of 1906 under the extraordinary jurisdiction.

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We follow the practice laid down by the Full Court in not entertaining this application under section 38.

The learned Fifth Judge agrees with me.

No rule.

The defendant (tenant) thereupon applied to the High Court under its extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) on the grounds that the Full Court failed to exercise the jurisdiction vested in it by law under section 38 of the Presidency Small Cause Courts' Act (XV of 1882) in refusing to entertain the application and that the said order was illegal and contrary to law. A *rule nisi* having been issued requiring the plaintiff (house-owner) to show cause why the order of the Full Court should not be set aside on the ground that orders made under Chapter VII of the Presidency Small Cause Courts' Act come within the operation of section 38 of the Act,

Sorab B. Dadyburjor appeared for the applicant (defendant tenant) in support of the rule:—The Full Court erred in not entertaining our application. From 1882 to 1905 the practice of granting such applications was in existence. Even references had been made to the High Court in such matters: *Raghoji v. Narandas*⁽¹⁾. The Calcutta High Court also allows references: *Rajendra Mullick v. Nanda Lall Gupta*⁽²⁾. The Small Cause Court could not, under section 9, clause (2), of the Presidency Small Cause Courts' Act, change the practice without any rule framed by this Court in that behalf. The Act, no doubt, uses the expressions "suit" and "proceedings," see sections 14, 48, 69, 71-76. But we submit that the expressions do not exclude each other. The term "suit" has a wider significance and includes "proceedings." The Civil Procedure Code nowhere defines what is a suit, but we can gather its meaning from the dicta in *Bhoopendro Narain Dutt v. Baroda Prasad Roy*⁽³⁾, *Venkata Chandrappa v. Venkata Rama Reddi*⁽⁴⁾, *Manjunath Badra-bhat v. Venkatesh Govind*⁽⁵⁾.

(1) (1899) 1 Bom. L. R. 860.

(3) (1891) 18 Cal. 500.

(2) (1904) 31 Cal. 1001.

(4) (1898) 22 Mad. 256.

(5) (1881) 6 Bom. 54.

Moreover sections 37 and 38 of the Presidency Small Cause Courts' Act must be read together. The word "suit" in section 37 was intended to include proceedings under Chapter VII. If it were otherwise no finality would attach to orders under Chapter VII and this circumstance would lead to absurd results. Consequently if it is a suit under section 37, it is also a suit under section 38.

As regards the explanation to section 14 of the Act, the term explanation itself connotes an inclusion. It is not a proviso to the section. It only makes the meaning of the section clear. Section 36 of the Act makes a proceeding the subject of a new trial.

Even the Rules framed by the High Court make no distinction between "suits" and "proceedings," *vide* Rules 2, 3, 4 and 11. Rule 16, which is the only authority for estimating professional costs, speaks only of suits and makes no distinction between a "suit" and a "proceeding." This shows that the term "suit" includes "proceeding" under Chapter VII.

A. G. Desai appeared for the opponent (plaintiff house-owner) to show cause:—The principal points for consideration are whether a proceeding under Chapter VII of the Presidency Small Cause Courts' Act is or is not a suit within the meaning of section 38 of the Act, and further, whether any order passed under that Chapter is such a "decree or order in the suit" as would come under section 38.

That a proceeding under Chapter VII is not a suit is made clear by the wording of a number of sections in the Act itself. Sections 14, 71 and 74 style the proceeding under section 41 not as a suit but merely an application under section 41, while sections 69, 72 and 76 call the same a "proceeding under Chapter VII". Section 73 also is to the same effect. In all these sections the expressions "suit" and "application or proceeding" are used side by side and it will be too much to say that these expressions are co-extensive. Explanation to section 14 clearly shows that the Legislature intended to keep these expressions distinct. An application under section 41 is "to be deemed" a suit for the purpose of section 14. So far, therefore,

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as a proceeding in ejection before the Registrar is concerned, it is a suit but not otherwise, and it may be that the Legislature, by adding explanation to section 14 by Act I of 1895, wanted to provide a new trial in cases coming under section 14: see section 36. The very arrangement of the different Chapters shows that the Legislature wanted to exclude proceedings under Chapter VII from the category of suits.

The distinction sought to be made in the Act between a "suit" and a "proceeding" is not merely verbal and without meaning. The Legislature has provided a special procedure and a special remedy to a person aggrieved by a proceeding under Chapter VII. A proceeding under that Chapter commences with an application and not with a plaint, while every suit is to be instituted by filing a plaint both under the Civil Procedure Code and the Presidency Small Cause Courts' Act: section 48 of the Civil Procedure Code and section 19A of the Presidency Small Cause Courts' Act. Therefore, the true criterion to determine whether a particular proceeding is or is not a suit would be to see whether it is commenced with a plaint: *Venkata Chandrappa v. Venkata Rama Reddi*⁽¹⁾. A proceeding under Chapter VII does not commence with a plaint, therefore, it is not a suit. Further the order passed under the Chapter is merely ministerial. It is addressed to the bailiff of the Court and he is required to put the successful applicant in possession of the property. It is neither a decree nor an "order in the suit." Further Chapter VII of the Act provides for a special remedy to the aggrieved party. Independently of the result of the application he can sue for compensation or even for trespass under section 41 of the Act, if he can make out a case under section 45 or 46. No suit lies on an ordinary decree: section 94 of the Act; but an order under section 41 is no bar to the institution of a suit in the High Court for trying a question of title.

As regards the practice of the Small Cause Court, it is not enough to show that the Full Court used to interfere with the order under section 41. What must be shown is any law, rule or declaration with respect to such procedure or practice as is

(1) (1898) 22 Mad. 256.

required by section 9, clause 2. The cases relied on do not touch the point.

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The Legislature has deliberately drawn a distinction between a "suit" and a "proceeding" under Chapter VII and also between an order passed under the Chapter and a decree. Therefore the Full Court had no jurisdiction under section 38 of the Act to interfere with any order passed under Chapter VII.

Dadyburjor in reply:—The circumstance that there is no plaint does not make it any the less a suit, for under the High Court Rules no plaint is required to be presented in the Bombay Court of Small Causes in a suit under Rs. 1,000. Under section 48 the order is not final if the question of title is in dispute. But if the title is not disputed there is no remedy for the aggrieved party.

JENKINS, C. J. :—The question arising on this rule is whether the Small Cause Court can take action under section 38 of the Presidency Small Cause Courts' Act, 1882, in reference to an order passed in a proceeding under Chapter VII of that Act. Section 38 defines the condition on which the Small Cause Court has jurisdiction: it is "where a suit has been contested", and, according to the explanation to the section, "every suit shall be deemed to be contested in which the decree is made otherwise than by consent of, or in default of, appearance by the defendant."

In this case the Full Court has held that the condition has not been satisfied, and this is in accordance with the view that has prevailed in that Court for the last two or three years.

Throughout the Act a distinction is drawn between a suit and a proceeding (see, *e.g.*, sections 14, 69, 71, 72, 73, 74 and 76), and the language of the explanation to section 14, added by Act I of 1895. Section 6 assumes that a proceeding under Chapter VII is not a suit except so far as thereby expressly provided.

In our opinion therefore a proceeding under Chapter VII is not a suit within section 38. Nor does the matter rest there: a proceeding under Chapter VII results, not in a decree, but in an order, whereas under the explanation a suit shall be deemed to

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be contested in which the *decree* is made otherwise than by consent of, or in default of appearance by the defendant.

The condition therefore on which the Small Cause Court can interfere under section 38 does not arise on a proceeding under Chapter VII. It may be that this leads to inconvenience, and the language of section 36 suggests that this consequence was not contemplated; that however does not justify a departure from the plain words of the Act. If the defect calls for a remedy, it must be otherwise than by a decision by the Court. For these reasons we hold that the Full Court rightly decided it had no jurisdiction, and the rule must therefore be discharged with costs.

Rule discharged.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Pratt

1907.
 January 23.

RASHID KARMALLI AND ANOTHER (DEPENDANTS-APPELLANTS),
 APPLICANTS, v. SHERBANOO (PLAINTIFF-RESPONDENT), OPPONENT.*

Mahomedan Law—Divorce—Marz-ul-maut—Death-bed illness, tests for determining.

The tests to determine whether illness is to be regarded as death-bed illness (Marz-ul-maut) under Mahomedan Law are:—

(1) Proximate danger of death so that there is a preponderance of Khauf or apprehension that at the given time death must be more probable than life.

(2) There must be some degree of subjective apprehension of death in the mind of the sick person.

(3) There must be external indicia chief among which would be the inability to attend to ordinary avocations.

Sarabai v. Rabiabai (1) followed.

APPEAL against the decision of S. Turner, Assistant Judge of His Britannic Majesty's Court for Zanzibar, at Zanzibar.

* First Appeal No. 54 of 1904.

(1) (1905) 30 Bom. 537.