

APPELLATE CIVIL.

• FULL BENCH.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Beaman
and Mr. Justice Shah.*

PUTTANGOWDA BIN MALLANGOWDA PATIL (ORIGINAL PLAINTIFF),
APPLICANT, v. NILKANTH KALO DESHPANDE (ORIGINAL DEFENDANT),
OPPONENT.

1913.

June 26.

Provincial Small Causes Courts Act (IX of 1887), sections 15 and 33—Suit to recover a sum of money as the value of trees felled by the defendant—Ownership of the trees in the plaintiff because the land on which they stood belonged to him—Incidental issue as to title to immoveable property—Jurisdiction of the Small Causes Court.

The plaintiff brought a suit in the Court of Small Causes to recover Rs. 12 as the value of certain trees felled by the defendant. The plaintiff's claim to relief proceeded on the basis that the trees belonged to him because the land on which they stood also belonged to him. A question having arisen as to the jurisdiction of the Court of Small Causes to entertain the suit,

Held by the Full Bench, that a Court of Small Causes could entertain a suit, the principal purpose of which was to determine a right to immoveable property, provided the suit in form did not ask for that relief but for payment of a sum of money.

APPLICATION under the extraordinary jurisdiction, (section 115 of the Civil Procedure Code, Act V of 1908), against the decision of A. W. Varley, District Judge of Dharwar, reversing the decree of B. R. Mehendale, Subordinate Judge of Haveri.

This action was instituted by the plaintiff in the Court of the Subordinate Judge of Haveri in its Small Cause jurisdiction to recover from the defendant Rs. 12 as the value of certain trees felled by the defendant which stood on plaintiff's open back-yard and which belonged to the plaintiff.

The defendant contended that the back-yard and the trees did not belong to the plaintiff.

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The Subordinate Judge found that the trees belonged to the plaintiff and he awarded the claim.

On appeal by the defendant the District Judge found that the trees did not belong to the plaintiff. He, therefore, allowed the appeal and set aside the Subordinate Judge's decree.

The plaintiff preferred an application under the extraordinary jurisdiction, (section 115 of the Civil Procedure Code, Act V of 1908), urging *inter alia* that the District Judge erred in entertaining the appeal, the decree of the first Court being final and that he acted with material irregularity in acting upon certain evidence. A *rule nisi* was issued requiring the defendant to show cause why the decree of the District Court should not be set aside.

The application was heard by a Division Bench composed of Batchelor and Heaton, JJ., who in referring the question involved in the case to the decision of a Full Bench delivered the following judgment on the 3rd April 1913.

BATCHELOR, J. :—The question, which arises in this application under the extraordinary jurisdiction, is whether the suit filed by the plaintiff was cognizable by the Small Cause Court or not. It was a suit in form to recover the price of certain trees felled by the defendant, and in that form was cognizable by the Court of Small Causes. The decision in *Pitamber Vajirshet v. Dhondu Navlapa*⁽¹⁾ is authority for the view that in these circumstances it must be held to have been decided in the Small Cause Court jurisdiction.

But the mere form of the suit is by no means the last word on the subject of its character. The plaint sets out that the trees felled stood on an open back-yard which was in the ownership and occupation of the

(1) (1887) 12 Bom. 486.

plaintiff, and the plaintiff's claim to relief proceeded on the basis that the trees belonged to him, because the back-yard also belonged to him.

Mr. Nilkanth, indeed, for the plaintiff has admitted that his client could not succeed unless he could prove his right to the back-yard and to the trees. That being the real character of the suit, the question is whether it falls within or without the jurisdiction of the Court of Small Causes. Numerous decisions have been cited to us, and we have examined them, but it appears to us that they are not wholly satisfactory or easily reconcilable. Many of them turn upon the use of the word "incidental" to which we find some difficulty in attributing any precise meaning. Having regard to section 23 of the Small Cause Courts Act, we should be disposed to follow the decision in *Jamnadas v. Bai Shivkor*⁽¹⁾, where Mr. Justice Melvill pointed to the necessity of having regard to the real object rather than to the apparent form of the suit. There is, however, difficulty in now giving effect to that pronouncement, as we are confronted with the decision of Sir Lawrence Jenkins and Mr. Justice Chandavarkar in *Vinayak v. Krishnarao*⁽²⁾. There the Chief Justice goes so far as to say that the authorities decide that "a Court of Small Causes can entertain a suit, the principal purpose of which is to determine a right to immoveable property, provided the suit in form does not ask for this relief, but for payment of a sum of money". Sir Lawrence Jenkins, if we understand his judgment aright, was by no means satisfied with the current of authorities as they then existed, and indeed in the latter part of the judgment he suggested that in some future case the point might be worthy of consideration by a Full Bench. It appears to us that that time has now arrived,

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(1) (1881) 5 Bom. 572.

(2) (1901) 25 Bom. 625.

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seeing that one of the factors which reconciled Sir Lawrence Jenkins to the then position of affairs is wanting now. For, when Sir Lawrence pronounced his judgment, the finding of a Court of Small Causes was not generally held to constitute *res judicata* upon such a point as this; whereas now the finding would apparently amount to *res judicata* under the present section 11 of the Civil Procedure Code. We are of opinion, therefore, that the point is sufficiently important and sufficiently uncertain to warrant a reference to a Full Bench in order that it may be determined whether, in the circumstances of this particular case, this suit was cognizable by a Court of Small Causes or not.

It must be understood that this reference is made, because in our judgment the essential and substantial object of this suit is to obtain the Court's decision on the question of title, though in form the relief claimed is a mere payment of a small sum of money.

The reference was argued before the Full Bench made up of Scott, C. J., Beaman and Shah, JJ.

N. A. Shiveshwarkar for the applicant (plaintiff) in support of the rule:—The present suit is cognizable by the Court of Small Causes. Clause 4 of Schedule II of the Provincial Small Causes Courts Act only refers to suits “for possession of immoveable property or for the recovery of an interest in such property”. In the present suit we sued to recover the value of the trees cut down by the defendant on our land. The defendant contended that the trees belonged to him because the land also was his property. Thus the question of the ownership of the land was raised incidentally in the suit. The suit was in form to recover money, that is, the value of the trees. The Court has only to look to the form of the suit irrespective of its object or motive. What the Court has to consider is the nature of the suit and not the nature of the defence.

The rulings in *Jamnadas v. Bai Shivkor*⁽¹⁾ and *Kalidas v. Vallabhdas*⁽²⁾ are against our contention. But they are distinguished in *Bapuji Raghunath v. Kuvarji Edulji Umrigar*⁽³⁾ which laid down that where a suit has been brought in a form cognizable by a Court of Small Causes, that Court cannot decline jurisdiction because a question of title to immovable property is incidentally raised. See also *Kunjo Behary Singh v. Madhub Chundra Ghose*⁽⁴⁾, *Pitamber Vajirshet v. Dhondu Navlapa*⁽⁵⁾, *Mohesh Mahto v. Sheikh Piru*⁽⁶⁾, *Viraragava v. Krishnasami*⁽⁷⁾, *Shankarbhai v. Somabhai*⁽⁸⁾, *Kesrisang v. Naran-sang*⁽⁹⁾.

K. H. Kelkar appeared for the opponent (defendant) to show cause:—The jurisdiction of the Provincial Small Causes Court is determined by the provisions of section 15 of the Provincial Small Causes Courts Act. That section appears in the chapter headed as “Jurisdiction of Courts of Small Causes”. Apart from the exceptional cases mentioned in the schedule the Court has to try “all suits of a civil nature of which the value does not exceed five hundred rupees”. To ascertain whether a particular suit falls within the jurisdiction or not, the substance of the plaint should be considered and not its form: *Jamnadas v. Bai Shivkor*⁽¹⁾, *Pitamber Vajirshet v. Dhondu Navlapa*⁽⁵⁾.

Further, under explanation 2 to section 11 of the Civil Procedure Code, 1908, the finding of the Court of Small Causes operates as *res judicata* in a subsequent suit

(1) (1881) 5 Bom. 572.

(5) (1887) 12 Bom. 486.

(2) (1881) 6 Bom. 79.

(6) (1877) 2 Cal. 470.

(3) (1890) 15 Bom. 400.

(7) (1883) 6 Mad. 344.

(4) (1896) 23 Cal. 884.

(8) (1900) 25 Bom. 417.

(9) (1908) 32 Bom. 560.

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brought to test the title : *Ahmed v. Moidin*⁽¹⁾, *Avanasi Gounden v. Nachammai*⁽²⁾.

Shiveshwarkar in reply :—In *Pitamber Vajirshet v. Dhondu Nawlapa*⁽³⁾ it was the form of the suit and not the nature of the suit was looked to.

The judgment of the Full Bench was delivered by

SCOTT, C. J. :—We are of opinion that the authorities rightly decide that a Court of Small Causes can entertain a suit, the principal purpose of which is to determine a right to immovable property, provided the suit in form does not ask for this relief but for payment of a sum of money, and that under the circumstances of this particular case the suit was cognizable by a Court of Small Causes. Section 15 of Act IX of 1887 provides that subject to the exceptions specified in the Second Schedule of the Act, and to the provisions of any other enactment for the time being in force, all suits of a civil nature, of which the value does not exceed Rs. 500, shall be cognizable by a Court of Small Causes. The exceptions contained in the Second Schedule are numerous and specific, and, in our opinion, the Court in *Bapuji Raghnath v. Kavarji Edulji Umrigar*⁽⁴⁾ was right in holding that those exceptions could only refer to suits brought expressly for the purpose of obtaining decrees of the nature mentioned in the exceptions. *Jamradas v. Bai Shivkor*⁽⁵⁾ was decided prior to the passing of Act IX of 1887 and cannot be applied to the law declared by that Statute. It appears to us that it is not possible that the finding of a Court of Small Causes, in a suit properly within its jurisdiction as such a Court, upon an issue incidentally arising as to the title to immovable property, can operate as *res judicata* in any

(1) (1901) 24 Mad. 444.

(3) (1887) 12 Bom. 486.

(2) (1905) 29 Mad. 195.

(4) (1890) 15 Bom. 400 at p. 404.

(5) (1881) 5 Bom. 572.

subsequent suit for the determination or enforcement of any right or interest in immoveable property, the reason being that under section 33 a Court invested with the jurisdiction of a Court of Small Causes with respect to the exercise of that jurisdiction, and the same Court with respect to the exercise of its jurisdiction in suits of a civil nature not cognizable by a Court of Small Causes, are, for the purposes both of the Provincial Small Causes Courts Act and of the Civil Procedure Code, to be deemed to be different Courts. In this connection the observations of Sir Raymond West in *Pitamber Vajirshet v. Dhondu Navlapa*⁽¹⁾ are in point:—"Having the Small Cause Court jurisdiction the Subordinate Judge must have dealt with this case under that jurisdiction, even if he was not quite alive to it at the time." If he were to deal with the case under his ordinary civil jurisdiction, he would be violating the provisions of section 16 of Act IX of 1887, which prohibits the trial of a suit cognizable by a Court of Small Causes by any other Court having jurisdiction within the local limits of the Court of Small Causes by which the suit is triable.

Answer accordingly.

G. B. R.

⁽¹⁾ (1887) 12 Bom. 486 at p. 489.

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