APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

1890. *December* 10.

BAPUJI RAGHUNÁTH AND OTHERS, (ORIGINAL PLAINTIFFS), APPLICANTS, *v.* KUVARJI EDULJI UMRIGA'R, (ORIGINAL DEFENDANT), OPPONENT.*

Small Causes Court—Jurisdiction—Suit for rent—Title—Questions of title incidentally raised—Act XV of 1882, *Sec.* 19, *Cl. (g)—"Suits for determination of any right or interest in immoveable property."*

When a suit is brought in a form cognizable by a Court of Small Causes, that Court cannot decline jurisdiction, because a question of title to immoveable property is incidentally raised.

It is the nature of the suit as brought by the plaintiff, and not the nature of the defence, that determines whether or not the Court of Small Causes has jurisdiction. Clause (*g*) of section 19 of the Presidency Small Cause Courts Act (XV of 1882) refers to suits brought expressly for the purpose of obtaining a decree determining a right or interest in immoveable property, and cannot include a suit brought for moveable property, or money in which a question of title may be raised by the defendant.

The plaintiffs sued in the Presidency Court of Small Causes to recover *fazendári* rent from the holder of *fazendári* land. The defendant pleaded that no rent had been paid for the land since 1846; that the claim was time-barred, and that the plaintiffs had no title to the land in question. The Judges of the Court of Small Causes dismissed the suit, on the ground that the defence raised a *boná fide* question of title to immoveable property, which ousted their jurisdiction.

Held, reversing the lower Court's decision, that the suit was cognizable by the Court of Small Causes.

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

The plaintiffs sued in the Presidency Court of Small Causes to recover three years' arrears of *fazendári* rent from the defendant, who was the holder of *fazendári* lands situate in Shaik Abdul Rehman's Street in Bombay.

The plaintiffs alleged that one Vishvanáth Shámji was the original *fazendár* of the lands in question. Vishvanáth died in 1823, bequeathing by his will the whole of his property to his cousin, Venkoba Rághowji, subject to the payment of an annuity of Rs. 120 to his niece, Devbái, for life. Venkoba died in 1832, devising his property to his (three) grandsons, Sakharám, Pátoba and Raghunáth Dádoba, subject to the payment of the aforesaid annuity to Devbái.

* Application, No. 141 of 1890.

In 1846, Sakhárám, Pátoba and Raghunáth referred to arbitration certain disputes which had arisen between them about the property left by their grandfather. The arbitrators made an award, by which they divided the property among the three brothers, and, in order to ensure the regular and punctual payment of the annuity bequeathed to Devbai, the arbitrators assigned to her the *fazendári* rent of the lands in dispute, to be enjoyed by her during her life-time.

The plaintiff alleged that, in accordance with this award, Devbái collected and received the *fazendári* rent of the lands till her death, which occurred in 1862.

They further alleged that on the death of Devbái they, as heirs of Sakhárám, Pátoba and Raghunáth, became entitled to recover the rents of the lands in dispute. They admitted that they had not recovered the rents since 1862; they now sought to recover the rents for the three years preceding the institution of the suit.

The defendant pleaded that neither he nor his predecessor had paid any rent for the lands in dispute since 1846; that he had been in adverse possession for upwards of twelve years; that the plaintiffs had no title to the lands, and that the suit was barred by limitation.

The case came on for hearing before Mr. Hormusji Dádábhái, Acting Third Judge, who dismissed the suit, on the ground that the defence raised a *boná fide* question of title to immoveable property, which ousted the Court's jurisdiction.

This decision was upheld, on revision, by a Full Court composed of Mr. W. E. Hart, Chief Judge, and Mr. Hormusji Dádábhái, Acting Third Judge.

Against this decision the plaintiffs applied to the High Court under section 622 of the Code of Civil Procedure (Act XIV of 1882).

A rule *nisi* was issued, calling upon the defendant to show cause why the decision of the Full Court should not be set aside.

Mánekshâh Jehángirsháh, for the defendant, showed cause:—The Presidency Court of Small Cause had no jurisdiction to try

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this suit. A *boná fide* question of title arises. We do not admit the plaintiff's title. We have been in adverse possession for more than twelve years. We have not paid rent or acknowledged the *fazendár's* title since 1846. The Small Causes Court cannot decide this suit without determining a question of adverse title to immoveable property; and this it has no jurisdiction to do: see *Nowla Ooma* v. *Bála Dharmáji*(1).

Under section 91 of Act IX of 1850, the Small Causes Court invariably declined jurisdiction where a *boná fide* question of title was raised. Section 19 of Act XV of 1882 (clauses (*d*), (*e*), (*f*) and (*g*)) excludes all suits relating to immoveable property from the jurisdiction of the Court. The present case falls within clause (*g*) of section 19. A *fazendár's* claim to a fixed annual payment arises from and issues out of the *fazendári* land. It attaches to the soil. It is a "right or interest in immoveable property" within the meaning of clause (*g*). The Court had, therefore, no jurisdiction—*Jamnádás* v. *Bái Shivkor*(2).

Ganpat Sadáshiv Ráo, for the plaintiff, *contra*;—This is a suit for rent; as such it is cognizable by the Court of Small Causes. The mere denial by the defendant of the plaintiffs' title will not oust the Court's jurisdiction. The Court can go into questions of title incidentally to the main issue—*Alagirisámi Naiker* v. *Innasi Udayan*(3); *Darma Ayyan* v. *Rajapa Ayyan*(4); *Gulám Nabi Kutbudin* v. *Shábábudin*(5). The case of *Nowla Ooma* v. *Bála Dharmáji*(6) was decided under section 91 of the old Act. It does not apply to the present case. Nor does clause (*g*) of section 19 of Act XV of 1882. A *fazendár's* claim to *fazendári* rent is not an interest in the land. A *fazendár* is an absolute proprietor of *fazendári* land, and he stands to the holder of *fazendári* ground precisely in the same relation as a landlord to his tenant. As to the nature of *fazendári* tenure see *Doe* v. *Bishop of Bombay*(7). Suits, like the present, have been frequently brought in the Presidency Small Causes Court, and that Court has never declined jurisdiction in such cases.

(1) I. L. R., 2 Bom., 91.
(2) I. L. R., 5 Bom., 572.
(3) I. L. R., 3 Mad., 127.
(4) I. L. R., 2 Mad., 181
(5) P. J. for 1885, p. 14
(6) I. L. R., 2 Bom. 91
(7) Perry's Or. Ca., p. 505.

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PARSONS, J.:—We are unable to concur with the Judges of the Presidency Court of Small Causes that they have no jurisdiction to try this suit, which is brought by a *fazendár* to recover *fazendári* rent from the holder of *fazendári* land. The invariable practice hitherto has been for that Court to try suits of this nature. Several decrees of that Court awarding *fazendári* rent have been produced before us, and we are unable to find that any such cases have been tried by the High Court in its original jurisdiction.

In the present case, the Judges of the Court of Small Causes have declined jurisdiction on the ground that the defendant has raised a *boná fide* plea of title, which ousts their jurisdiction, the defence set up being that no rent has been paid for the land since 1846, and that the claim is barred by time. Such a plea is, in effect, a denial that the plaintiff has now any *fazendári* rights over the land, and, hence, the present right of the plaintiff to the land as *fazendár* is brought into question and has to be determined. We are of opinion, however that the importation of this question into the suit has in no way changed the nature of the suit, or converted it from a suit for rent, which is cognizable by the Court of Small Causes, into one for the determination of a right or interest in immoveable property, of which its cognizance is barred by section 19 of Act XV of 1882.

Two cases decided by a Full Bench of the High Court of Madras, when Act XI of 1865 was in force, may be referred to, as section 19 of Act XV of 1882 adopts the language of those cases and not that of the English Statute 9 and 10 Vict., c. 95, sec. 58, therein quoted. In *Alagirisámi Naiker* v. *Innasi Udayan*[1] and *Manappa Mudali* v. *S. T. McCarthy*[2] the principle is laid down that, when a suit is brought in a form in which it is cognizable by a Court of Small Causes, that Court cannot decline jurisdiction because a question of title is raised which it has not jurisdiction to determine for any other purpose than the decision of the suit before it. "Notwithstanding such a question of title may be raised by the answer of the defend-

(1) I. L. R., 3 Mad., 127. (2) I. L. R., 3 Mad., 192, at p. 195.

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ant, the suit was originally and continues to be cognizable by a Court of Small Causes." To the same effect are the decisions of Melvill and Kemball, JJ., in Special Appeal No. 303 of 1871, decided on the 15th September, 1871, and of Sargent and Melvill, JJ., in Special Appeal No. 143 of 1872, decided on the 13th August, 1872.

There are numerous rulings to the effect that the nature of a suit is not changed because a question of title is incidentally raised in it. (See, for instance, *Balwant* v. *Bhikáji* (1); *Bábáji* v. *Dinkar*(2); *Trikam* v. *Náráyanráv*(3); *Náráyan Rámchandra Karmarkar* v. *Parashrám Moreshvar Karmarkar*(4); *Khandu* v. *Tátia*(5); *Mohesh Mahto* v. *Sheik Piru*(6); and *Kiam-ud-Din* v. *Rajjo*(7)). These decisions demand especial notice, as they must have been within the knowledge of the Legislature when both Act XV of 1882 and Act IX of 1887 were passed; and yet, in describing the suits which are excluded from the cognizance of Courts of Small Causes, whether in the Presidency towns or in the Provinces, the Legislature has avoided the use of such words as are found in 9 and 10 Vict., c. 95, sec. 58, namely, "action in which the title shall be in question," and has, instead, in both Acts, used the words "suit for the determination of any right to or interest in immoveable property." Such a description can, in our opinion, refer only to suits brought expressly for the purpose of obtaining a decree determining a right or interest in immoveable property, and cannot include a suit brought for moveable property or money in which a question of title may be raised by the defendant. It is to be noted that Act XV of 1882 contains no such provision as is contained in Act IX of 1887, section 23 of which empowers the Provincial Court of Small Causes to return plaints in suits in which questions of title are involved.

The cases of *Nowlu Ooma* v. *Bála Dharmáji*(8) and *Davidás Harjivandás* v. *Tyabally Abdulally*(9) are not at all in point, for there the suits were brought under a particular section of the Act

(1) P. J. for 1873, No. 86.
(2) P. J. for 1873, No. 91.
(3) P. J. for 1878, p. 43.
(4) P. J. for 1878, p. 44.
(5) 8 Bom. H. C. Rep., A. C. J., p. 23.
(6) I. L. R., 2 Calc., 470.
(7) I. L. R., 11 All., 13.
(8) I. L. R., 2 Bom.,
(9) I. L. R., 10 Bom., 30.

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and not under the Act generally. The cases of *Jamnádás* v. *Bái Shivkor*[1] and *Kálidás* v. *Vallabhdas*[2] may also perhaps be distinguished, as they were decided on the ground that the sole object of the plaintiff was to try a question of title, and not to obtain a remedy which a Court of Small Causes might properly grant, and in which a title to immoveable property only incidentally arose for decision. It may be doubted whether these decisions did not go too far when they allowed a Court to ignore the form of a suit and examine into the motive or object of the plaintiff in bringing it. But, however that may be, since they were decided, the law has been settled by the passing of Act XV of 1882; and we must be guided by its provisions. We must look to the nature of the suit, as brought by the plaintiff, and not to the nature of the defence, to determine whether or not the Court of Small Causes has jurisdiction. It would be obviously wrong to hold that it is in the power of a defendant to oust the Court of a jurisdiction that it would otherwise have by the mere raising of a plea of title. The *bona fides* of the plea cannot affect the question, for such a plea, whether made *bonâ fide* or not, would have to be enquired into. Where such a plea is raised, we think that the Court of Small Causes has the power to enquire into it and determine it for the purpose of the suit which it has jurisdiction to try. We make the rule absolute. Costs in this Court to be costs in the cause.

Rule made absolute.

(1) I. L. R., 5 Bom., 572. (2) I. L. R., 6 Bom., 79.

APPELLATE CIVIL.

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

MA'NEKLA'L JAGJIVAN, (ORIGINAL DECREE-HOLDER), APPLICANT, *v.* NA'SIA RADDHA, (ORIGINAL JUDGMENT-DEBTOR), OPPONENT.*

1890. *December* 11.

Decree—Execution—Verbal application for the sale of attached property—Limitation—Step in aid of execution—Limitation Act (XV of 1877), Art. 179, Cl. 4.

An application to the Court to order the sale of property which has been attached, is an application to take some steps in aid of execution; and as the Civil Pro-

* Civil Reference, No. 22 of 1890.