

1920.

ESMAIL
ALLARAKHIA
v.
DATTATRAYA
RAM-
CHANDRA.

not, I think, be allowed to withdraw it except for some good cause shown. There is all the more reason to object to a withdrawal by a stranger, or at any rate a person who has not the same rights as the plaintiff in regard to the enforcement of the decree in his favour.

The respondents have objected to the appeal being allowed on various technical grounds, such as that the appellant has no right to apply to the Court, because the case does not come under section 47 of the Civil Procedure Code. But it is to be remarked that the mortgagee, who made the deposit on behalf of the plaintiff, is in no better position, and the equitable rights that vest in the appellant under his contract with the plaintiff and subsequent decree for specific performance, are clearly superior to any that can be claimed by the mortgagee. The case is one to which an ordinary principle of equity should be applied, namely, that equity will not by reason merely of a technical defect suffer a wrong to be without a remedy. I think, therefore, that the appeal should be allowed.

Appeal allowed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Farncott.

1920.

October 1.

FRAMROZ DOSABHAI AND ANOTHER (ORIGINAL DEFENDANTS), APPLICANTS
v. DALSUKHBHAI FULCHAND AND ANOTHER (ORIGINAL PLAINTIFFS),
OPONENTS^a.

*Presidency Small Cause Courts Act (XV of 1882), Chapter VII, section 48—
Order made in proceedings under Chapter VII—Review—Power of the
Court to review the order—Civil Procedure Code (Act V of 1908), sec-
tions 8, 114 and Order XLVII.*

^a Civil Application No. 115 of 1920 under Extraordinary Jurisdiction.

1920.

The Presidency Small Cause Court has no jurisdiction to review its decision in a proceeding under Chapter VII of the Presidency Small Cause Courts Act, 1882.

FRAMROZ
DOSABHAI
v.
DALSUKH-
BHAI
F LCHAND.

PER MACLEOD, C. J. :—"Section 48 of the Presidency Small Cause Courts Act, 1882, means that in the proceedings themselves under Chapter VII, the provisions of the Code shall apply as far as possible, that is to say, until an order is made granting or dismissing the application, and while any further proceedings which might become necessary in execution of the order are being taken. To go a step further, by stating that any other provisions of the Code with regard to appeals or reviews apply, would not be warranted by the words of the section."

PER FAWCETT, J. :—"The expression 'proceedings' under Chapter VII should be construed as referring simply to the proceedings for the actual hearing of the case on its merits which are terminated by an order either refusing the application or granting possession. It is a further stage, and in reality a separate proceeding, when the Court after passing such an order is asked to review that order."

CIVIL application under extraordinary jurisdiction praying that the order passed by H. B. Tyabjee, Second Judge in the Court of Small Causes at Bombay, on an application for review of judgment in Suit No. 25140 of 1919 may be set aside.

The facts were as follows :—

The plaintiffs brought a suit in the Court of Small Causes at Bombay to eject the defendants from shop No. 263 in Mangaldas Market alleging that the defendants were in occupation of the shop as sub-tenants of the plaintiffs, and that the plaintiffs required the shop for their own use.

The defendants relied *inter alia* on the provisions of the Rent Act.

The learned Second Judge Mr. H. B. Tyabjee held that the premises were *bona fide* required by the plaintiffs for their own use and directed the defendants to vacate within one month from the date of the order.

The defendants having subsequently come across certain fresh evidence applied for a review of the order made by the Second Judge.

1920.

FRAMROZ
DOSABHAI
v.
DALSUKH-
BHAI
FULCHAND.

The learned Judge after hearing the pleaders of the parties rejected the application. His reasons were as follows :—

“The point here is whether from the ejectment proceedings of this Court there is allowed a review, viz., whether Order XLVII of the Civil Procedure Code is applicable. This has not been extended under section 9 of the Presidency Small Cause Courts Act by the High Court and is therefore not applicable to the suits generally in this Court. But the argument is that by section 48, Presidency Small Cause Courts Act, the whole of the Civil Procedure Code is made applicable to the ejectment proceedings and the argument is based on the words of the section which makes the Civil Procedure Code applicable except as herein otherwise provided. It is argued that there is no limitation in the chapter itself and the word herein means Chapter VII, Small Cause Courts Act.

I think the word herein means the Small Cause Courts Act because it would be strange that a simplified Code of Civil Procedure should be made applicable to all the suits in this Court and a much more complicated and elaborate procedure provided for the proceedings for the recovery of possession which have been held not to be suits and from which therefore there is not even an appeal to the Full Court under Chapter VI, Small Cause Courts Act.

Assuming that section 9 does not limit the application of the entire Civil Procedure Code I still think the order of review would not apply as section 48 provides for the procedure to be adopted in ejectment proceedings and does not affect a substantive right such as a right of review or appeal is. I therefore hold that the order of review is not applicable and therefore there is no right of review in ejectment proceedings and the application must be refused.”

The defendants applied to the High Court under its extraordinary jurisdiction.

V. D. Kamat, for the applicants:—Section 48 of the Presidency Small Cause Courts Act makes the Code of Civil Procedure applicable to all proceedings under Chapter VII of the Act, notwithstanding section 9 of the Act or the Rules framed thereunder by the High Court. Section 48 was enacted in view of the disability attaching to ejectment proceedings which were held to be “proceedings” as distinguished from “suits”; and as a necessary sequence, the Act did not provide for

an appeal to the Full Bench of the Small Cause Court, provided in case of "suits" under section 38 of the Act.

1920.

FRAMROZ
DOSABHAI
v.
DALSUKH-
BHAI
FULCHAND.

The whole of the Civil Procedure Code is made applicable to ejectment proceedings because the proceedings being in respect of immovable property and for the determination of the rights and liabilities between a landlord and tenant are akin in a sense to "suits for recovery of immovable property", which are expressly saved from the operation of the Act by section 19 (D); and the Legislature was naturally anxious that the hearing of such causes in spite of its summary nature and its absence of finality (as enacted in section 49) should be regulated by a more elaborate procedure.

The rules framed by the High Court wherein portions of the Civil Procedure Code applicable to the Small Cause Courts Act are specified do not control the substantive provision of law contained in section 48, purposely included by the Legislature in the body of Chapter VII. Further, the Rules framed by the High Court begin with a proviso to the effect that the procedure prescribed under the Schedule to the rules "shall be the procedure followed in the Court in all 'suits'" (as distinguished from *proceedings*); and again it shall be so followed "except where such procedure is inconsistent with the procedure prescribed by any specific provisions of the Presidency Small Causes Courts Act;" the Legislature having clearly in view, among other specific provisions, the one under section 48, Chapter VII. To put it in other words, section 48 of the Act was to be read cumulatively with the rules, the former governing the latter and not *vice versa*.

The view of the lower Court that a right such as a right of review or appeal is of a substantive nature and could be conferred by express legislative terms

1920.

FRAMROZ
DOSABHAI
v.
DALSUKH-
BHAI
FULCHAND.

alone, is, I submit, erroneous, for section 48 in express terms prescribes the application of the entire Code to Small Cause Court proceedings under Chapter VII as applied to trials in a Court of first instance. A review proceeding, as distinguished from an appeal, is merely the continuation of the trial in a Court of first instance. The rulings which hold that the right of appeal must be expressly conferred would, therefore, not apply in the case of review.

J. G. Rele, for the opponent:—The Presidency Small Cause Court has no jurisdiction to review its decision in a proceeding under Chapter VII of the Presidency Small Cause Courts Act. Under section 8 of the Civil Procedure Code, section 114, which deals with review, is not extended to the Presidency Small Cause Court; so also under Order LI, Order XLVII, which deals with the power of review, is not extended. Moreover, under section 9 of the Presidency Small Cause Courts Act, the High Court is empowered to frame rules to prescribe the procedure and practice to be observed by the Small Cause Court, and in framing these our High Court has not extended the application of section 114 or Order XLVII to the Small Cause Court.

The question then arises whether under section 48 of the Presidency Small Cause Courts Act which states that in ejectment proceedings under Chapter VII, the Court shall “as far as may be” and “except as herein otherwise provided” follow the procedure prescribed for a Court of first instance by the Code of Civil Procedure, the Legislature intended to give the Small Cause Court power to review the decisions under that chapter. My submission is (1) the words “herein otherwise provided” in section 48 should be read subject to section 9 of the Presidency Small Cause Courts Act and by the rules framed under the section the order of review is not extended to any proceedings in the Small Cause

Court, irrespective of the "suits" or "proceedings" under Chapter VII. It is true that in the rules framed the word "suit" is used but the rules are also made applicable to "proceedings" under Chapter VII, e.g., Rule 2 which speaks of the institution of a suit by an application and the same procedure is followed in the case of an institution of proceeding under Chapter VII; Rule 4, summons shall contain a statement of the nature of cause of action; Rule 12 which refers to the refund of half the fees on a notice being given to the clerk of the Judge; Rule 16 regulating the costs. Further, a reference to section 69 of the Presidency Small Cause Courts Act would indicate that this power of review is not deemed to be covered by the provisions of section 48 of the Act; section 69 applies not only to suits but also to proceedings under Chapter VII of the Act, and it empowers the Small Cause Court to make a reference to the High Court under certain circumstances. It would be quite unnecessary to confer that power if section 48 was intended to cover the powers of reference and review contained in Part VIII of the Civil Procedure Code, 1908.

Secondly, the words "as far as may be" in section 48 would mean that the provisions of the Civil Procedure Code shall apply as far as possible, that is, until an order is made granting or dismissing an application and while any further proceedings which might become necessary in execution of the order are being taken. "Procedure" having thus ended by the execution of the order, any further proceedings by way of review would, I submit, not be warranted by section 48 of the Act. Right of review like a right of appeal is a substantive right and unless that is conferred by the provisions of the Act, a party cannot claim it: *Nana v. Sheku*⁽¹⁾; *Meenakshi Naidoo v. Subramaniya Sastri*⁽²⁾.

⁽¹⁾ (1908) 32 Bom. 337.

⁽²⁾ (1887) L. R. 14 I. A. 160.

1920.

FRAMROZ
DOSABHAI
v.
DALSUKH-
BHAI
FULGHAND.

Thirdly, the proceedings under Chapter VII are treated as of a summary nature, as a party aggrieved by an order passed under this chapter is not precluded from instituting a suit on title in the High Court under the provisions of section 49 of the Presidency Small Cause Courts Act. It was intended that the order should be treated as final, so far as Small Cause Court was concerned and that the Court should not be harassed by review applications in such summary proceedings. Even a right of appeal to the Full Court under section 38 of the Act is not allowed in the case of proceedings under Chapter VII : *Ramkrishna v. Haji Dawood*⁽¹⁾ ; much less, therefore, could a right of review have been intended.

MACLEOD, C. J. :—This is an application by the defendants under section 115 of the Civil Procedure Code asking the Court to exercise its discretionary powers with reference to an order made by the learned Second Judge upon an application made to him to review his decision in a proceeding under Chapter VII of the Presidency Small Cause Courts Act. It was held in *Ramkrishna v. Haji Dawood*⁽¹⁾ that an application under Chapter VII of the Presidency Small Cause Courts Act would not come within the operation of section 38 of the Act, which provides, in the case of suits, for applications, which could be made by either party within eight days from the date of the decree or order in the suit, for a new trial. It was held that a proceeding under Chapter VII was not a suit. The result is that Chapter VII stands by itself, prescribing a summary method of procedure to enable owners of immoveable property to recover possession from their tenants. Section 49 prescribes that recovery of the possession of immoveable property under that Chapter should be no bar to the institution of a suit in

⁽¹⁾ (1907) 31 Bom. 259.

the High Court for trying the title thereto. It was, therefore, intended to enable landlords to recover possession from their tenants by means of this procedure, and it must have been intended that orders made in proceedings under Chapter VII should be final. In any event unless the right of appeal against such order was especially given by the Act there would be no appeal from such an order. The question, however, in this application is whether, although there is no appeal against the order of the learned Second Judge, he had jurisdiction to entertain an application for a review of his judgment on any of the grounds which appear in Order XLVII, Rule 1, of the Civil Procedure Code. It has been said, and there seems to be some authority for the dictum, that every Court has an inherent power to review its own decisions, but with regard to suits in the Presidency Small Cause Courts, the procedure for which is prescribed by the High Court, the High Court in making rules laying down what portions of the Civil Procedure Code should apply to such suits, directed that section 114 of the Code which provides for review be omitted. It does not seem, however, that the High Court made rules directing what portions of the Civil Procedure Code should be applied to proceedings under Chapter VII. Nothing is said in Rule 1 about such proceedings. That rule says "the portions of the Code of Civil Procedure, Act V of 1908, specified in the first column of the Schedule hereto annexed shall, subject to the additions, alterations and modifications specified in the second and third columns of such Schedule, extend and shall be applied to the Small Cause Court and the procedure prescribed thereby shall be the procedure followed in the Court in all suits cognizable by it except where such procedure is inconsistent with the procedure prescribed by any specific provisions of the

1920.

FRAMROZ
DOSABHAI
v.
DALSUKH-
BHAI
FULCHAND.

1920.

ERANROZ
DONABHAI
v.
DALSUKH-
BHAI
FULCHAND.

Presidency Small Cause Courts Acts, 1882 and 1895". At that time the decision in *Ramkrishna v. Haji Dawood*⁽¹⁾ had been reported, and it seems certainly strange that the High Court should have omitted to lay down what portions of the Civil Procedure Code should apply to proceedings under Chapter VII which had been held not to be suits. One can only assume that their Lordships considered that section 48 prescribed what procedure should be applied to proceedings under that Chapter and therefore no rule was necessary. That section says: "In all proceedings under this Chapter, the Small Cause Court shall, as far as may be and except as herein otherwise provided, follow the procedure prescribed for a Court of first instance by the Code of Civil Procedure". The words "as far as may be" evidently refer to the summary nature of the proceedings which could be taken under the Chapter, while it seems that the words "except as herein otherwise provided" would include any rules made by the High Court under the provisions of section 9 (1), so that the High Court would have power to determine what portions of the Civil Procedure Code should apply to proceedings under Chapter VII. However, it has not done so, and all that we can do is to give the best interpretation we can to the terms of section 48. I think that that section means that in the proceedings themselves under the Chapter the provisions of the Code shall apply as far as possible, that is to say, until an order is made granting or dismissing the application, and while any further proceedings which might become necessary in execution of the order are being taken. To go a step further, by stating that any other provisions of the Code with regard to appeals or reviews apply, would not, I think, be warranted by the words of the section. For there is no right of appeal under

(1) (1907) 31 Bom. 259.

1920.

FRAMROZ
DOSABHAI
v.
DALSUKH-
BHAI
FULCHAND.

Chapter VII, and it would follow that any provisions in the Code which enable an aggrieved party to apply under certain conditions for review were not intended to be included in this section. I think it was intended that the decrees and orders of the Small Cause Courts should be final, except as laid down in the Act. The powers of the High Court to make rules would be subject to the provisions of the Act itself and I have no doubt that because it was laid down in section 37 of the Act that every decree and order of the Small Cause Court in a suit shall be final and conclusive, except as provided by Chapter VI, the High Court refrained from making section 114 of the Civil Procedure Code applicable to proceedings in suits in the Small Cause Court. I think, therefore, that the rule must be discharged with costs.

We would like, however, to draw the attention of the authorities to the inconsistent provisions of the Presidency Small Cause Courts Act in this respect. Under section 14 "the Local Government may invest the Registrar with the powers of a Judge under this Act for the trial of suits in which the amount or value of the subject-matter does not exceed Rs. 20". The Explanation says: "For the purposes of this section an application for possession under section 41 (that is under Chapter VII), shall be deemed to be a suit". Therefore the Registrar has power to make, if invested with the powers of a Judge, an order in a proceeding under Chapter VII, which shall be deemed to be a suit, and under section 36 "an order made by the Registrar in any suit or proceeding shall be subject to the same provisions in regard to new trial as if made by a Judge of the Court". That would appear to contemplate that an order made by a Judge under Chapter VII would be subject to the provisions for new trials. It is absurd that a proceeding under Chapter VII if held before the

1920.

FRAMROZ
DOSABHAI
v.
DALSUKH-
BHAI
FULGHAND.

Registrar should be deemed to be a suit but if held before a Judge should not be a suit. But in *Ramkrishna v. Haji Dawood*⁽¹⁾ it was held that in spite of the wording of section 36 an order in such a proceeding made by a Judge cannot form the subject-matter of an application for a new trial. It is certainly desirable that this inconsistency should be remedied by legislation, and that it might be made clear whether or not it was intended by the Legislature that orders of the Presidency Small Cause Courts in proceedings under Chapter VII should come within the provisions with regard to new trials and appeals in Chapter VI.

FAWCETT, J. :—I agree. We start first with the fact that under section 8 of the Civil Procedure Code, section 114, which deals with the power of review, is not extended to the Presidency Small Cause Courts. Similarly under Order LI, Order XLVII which deals with this power of review is not extended. In this respect the case differs from a Provincial Small Cause Court to which, under section 7 of the Code and Order L, section 114 and Order XLVII extend. Then I think an indication that this power of review is not deemed to be covered by the provisions of section 48 is supplied by section 69 of the Presidency Small Cause Courts Act. That section applies not only to suits but to any proceeding under Chapter VII of the Act, and it provides that in any proceeding, in which the amount or value of the subject-matter exceeds Rs. 500, when any question arises upon which the Court entertains reasonable doubt, and either party so requires, then the Court can make a reference to the High Court. It would be quite unnecessary to confer that power, if section 48 was intended to cover the powers of reference and review contained in Part VIII of the Civil Procedure Code, for, on the reasoning of the appellant's counsel,

⁽¹⁾ (1907) 31 Bom. 259.

the power of reference contained in section 113 and Order XLVI of the Code is conferred as part of the procedure prescribed for a Court of first instance by the Code of Civil Procedure under section 48. A further consideration is that, although section 37 does not in terms apply to an order under section 43, because that is an order not in a suit but in a proceeding, yet the whole tenor of the Act is in favour of finality, and the Court should, therefore, be slow to hold that section 48 was intended by the Legislature to contravene that principle, unless its plain wording shows that such a construction should be put upon its provisions. I think there is no such necessity in this case, and that the expression 'proceedings' under this Chapter should be construed as referring simply to the proceedings for the actual hearing of the case on its merits which are terminated by an order either refusing the application or granting possession. It is a further stage, and in reality a separate proceeding, when the Court after passing such an order is asked to review that order. I think, therefore, that the rule should be discharged with costs.

Rule discharged.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

VISHNU NARHAR SAPRE AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 5), APPELLANTS *v.* SHRIRAM RAGHUNATH KARKARE AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 4 AND 6 TO 11), RESPONDENTS^a.

Partition suit—Plaintiff a purchaser from minor co-parcener—Fresh sale-deed subsequently obtained after attainment of majority—Whether defect in title cured—Practice and procedure.

^a Second Appeal No. 633 of 1919.

1920.

FRAMROZ
DOSABHAI
v.
DALSUKH-
BHAI
FOLCHAND.

1920.

October 1.
