

## APPELLATE CIVIL.

*Before Sir John Beaumont, Chief Justice, and Mr. Justice Rangnekar.*

1936  
October 6

SHANKAR GOVIND BHOSLE (ORIGINAL DEFENDANT-TENANT), APPLICANT v.  
REVASHANKAR PURSHOTTAM TRIVEDI (ORIGINAL PLAINTIFF-LANDLORD),  
OPPONENT.\*

*Presidency Small Cause Courts Act (XV of 1882), sections 59, 60, 66—Distress warrant—Tenant tendering arrears of rent and costs of affidavit and warrant to distrain—Costs under the head "Commission," tenant liable to pay—Practice.*

Where a distress warrant is issued under Chapter VIII of the Presidency Small Cause Courts Act 1882, and the tenant desires to get rid of the distress by complying with a notice under form C under section 59 of the Act, he must pay the item under the head "Commission" along with costs of the affidavit and warrant to distrain.

The practice prevailing in the Small Causes Court, Bombay, in cases in which a landlord applies for a distress warrant, requiring the landlord to pay into Court in advance the whole of the sums which may become payable in respect of the costs of the warrant, is illegal.

The costs are dealt with by the Act; and the scheme is to get them either under a notice in form C from the tenant or on a sale under section 66 of the Act.

CIVIL REVISION APPLICATION against the order made by M. D. Lalkaka, Judge of the Small Cause Court at Bombay.

Distress Warrant.

On February 14, 1935, Revashankar (plaintiff-landlord) applied for a distress warrant to recover Rs. 10, two months' arrears of rent at Rs. 5 per month. The distress was levied the next day. On the same day, i.e., February 15, the tenant tendered a sum of Rs. 10-8-0 (amount of rent Rs.10, plus as. 8 costs of affidavit and warrant to distrain) and applied for return of the property seized.

The Registrar, however, declined to remove the distress except on payment of Rs. 12. His order was as follows :

"Under the recent order passed by the learned Chief Judge, you have to pay Rs. 12 to have the distress marked settled and property returned to you."

\* Civil Revision Application No. 398 of 1935.

The scale of fees fixed on a distress warrant for Rs. 10 were : (1) affidavit and warrant to distrain, as. 8 ; (2) order to sell, as. 8 ; and (3) commission, Rs. 1-8-0. Fees under head (2) had not arisen at all. The tenant offered fees under head (1) and refused to pay commission under head (3). He applied to the Court and got a notice issued against the landlord under section 60 of the Presidency Small Cause Courts Act, 1882. The Judge upheld the order of the Registrar on June 2, 1935.

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On appeal, the Full Court refused to grant Rule.

The tenant applied in revision to the High Court.

*G. N. Thakor*, with *B. G. Thakor* and *S. R. Mehta*, for the applicant.

No appearance for the opponent.

*K. Mcl. Kemp*, Advocate-General, with *B. G. Rao*, Assistant Government Pleader, allowed to appear to support the order (Civil Revision Application No. 134 of 1936).

BEAUMONT C. J. This is an application for revision of an order made by a Judge of the Small Cause Court, Bombay. The sum involved is only Rs. 1-8-0, but the application raises a question of some importance in relation to the costs of distress warrants issued by the Small Cause Court. That matter is dealt with under Chapter VIII of the Presidency Small Cause Courts Act, XV of 1882, and it will be convenient to deal with the Act before coming to the facts of this particular case, as to which there is no dispute.

Under section 53 any person claiming to be entitled to arrears of rent of any house or premises, to which Chapter VIII extends, may apply to any Judge of the Small Cause Court, or to the Registrar of the Small Cause Court, for a warrant as hereinafter mentioned, and the application is to be accompanied by an affidavit in the form (marked A) in the third schedule. Section 54 provides that the Judge or Registrar may thereupon issue a warrant under his hand and seal and returnable within six days, to the effect of the

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form (marked B) in the third schedule addressed to anyone of the bailiffs of the Court. Section 57 provides that in pursuance of the warrant, the bailiff shall seize the moveable property found in or upon the house or premises mentioned in the warrant and belonging to the person from whom the rent is claimed, or such part thereof as may, in the bailiff's judgment, be sufficient to cover the amount of the rent, together with the costs of the distress. Under section 59 the bailiff has then to make an inventory of the property which he seizes and to give a notice in writing to the effect of the form (marked C) in the third schedule to the tenant. The notice in form C is important for the purposes of the present application, and it is (omitting formal parts) in these terms :

"Take notice that I have this day seized the moveable property contained in the above inventory for the sum of Rs. .... being the amount of .... month's rent due to A. B. at .... last, and that unless you pay the amount thereof, together with the costs of this distress, within five days from the date hereof, or obtain an order from one of the Judges or the Registrar of the Small Cause Court to the contrary, the same will be appraised and sold pursuant to the provisions of Chapter VIII of the Presidency Small Cause Courts Act, 1882."

The real question, which calls for decision, is, what costs a tenant, who desires to comply with the terms of that notice, has to pay. He has got to pay the amount of the distress together with the costs of the distress, and the question is what items can be properly included in the costs of the distress at the stage at which the notice in the form C is given. I will return to that question after noticing the other relevant sections of the Act. Section 60 enables a tenant or any other person alleging himself to be the owner of any property seized under the Chapter, at any time within five days from such seizure, to apply to any Judge of the Small Cause Court to discharge or suspend the warrant, or to release a distrained article, and on such application, the Judge may grant relief on such terms as he thinks just, and may at his discretion deal with the costs of the application and the costs of the issue and execution of the warrant. I think that section

only applies in special cases where there is some particular reason for endeavouring to get the distress stayed. It does not, I think, apply to a normal case in which the tenant gets relief by complying with the notice in form C. Section 64 provides that in default of any order to the contrary by a Judge of the Small Cause Court, or by the High Court, any two of the bailiffs may, at the expiration of five days from a seizure of property under the Chapter, appraise the property so seized, and give the tenant notice in writing to the effect of the form (marked D) in the third schedule. Form D (omitting formal parts) is in these terms:—

“Take notice that we have appraised the moveable property seized on the . . . day of . . . under the provisions of Chapter VIII of the Presidency Small Cause Courts Act, 1882, of which seizure and property a notice and inventory were duly served upon you (or upon . . . on your behalf, *as the case may be*) under date the . . . and that the said property will be sold on the . . . (*two clear days at least after the date of the notice*) at . . . pursuant to the provisions of the said Act.”

Then section 65 provides that in default of an order to the contrary, the distrained property shall be sold on the day mentioned in the notice, and the bailiffs shall, on realising the proceeds, pay over the amount thereof to the Registrar of the Small Cause Court; and such amount shall be applied first in payment of the costs of the said distress and then in satisfaction of the debt; and the surplus, if any, shall be returned to the tenant. Then, section 66 provides that no costs of any distress under the Chapter shall be taken or demanded except those mentioned in the part (marked E) of the third schedule. Form E of the third schedule consists of five columns. The first column is headed “Sums sued for”; the second column is headed “Affidavit and warrant to distrain”; the third column is “Order to sell”; the fourth column is “Commission”; and the fifth column is “Total”. In the present case the amount of distress is Rs. 10; the amount payable under the second column in respect of affidavit and warrant to distrain is therefore Re. 0-8-0; the amount payable under the third column “Order to sell,” (which order was never made) is Re. 0-8-0; and the

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amount payable under the fourth column "Commission" is Rs. 1-8-0. Now, the question is whether, in the circumstances of this case, the tenant was bound to pay the commission of Rs. 1-8-0. It is admitted that he is liable to pay Re. 0-8-0 for the affidavit and warrant to distrain, and that he is not liable to pay Re. 0-8-0 for the order to sell. The only question relates to the commission.

The facts are that the landlord applied on February 14, 1935, for a distress warrant, which was duly issued, and on February 15, 1935, the tenant tendered to the Registrar Rs. 10-8-0, that is the amount of the rent claimed, and Re. 0-8-0 for the affidavit and warrant to distrain, and claimed to have the distress released. The Registrar declined to release the distress, except on payment of Rs. 12, that is the amount tendered by the tenant plus Rs. 1-8-0 for the commission. Thereupon, the tenant made an application, which, he states, was made under section 60 of the Small Cause Courts Act, and the judgment purports to be given under section 60. If the application was really made under section 60, the amount which the tenant had to pay was in the discretion of the Judge, but the Judge does not seem to have dealt with the application as one under section 60. He seems to have been of opinion that he had no discretion to decide whether the tenant was bound to pay Rs. 1-8-0 or not, but treated the matter as one of law, as it would be if the tenant was seeking relief by compliance with a notice in form C, and we will deal with the matter on that basis.

As I have said, the real question is, whether the commission falls within the costs of the distress payable under a notice in form C. It is to be noticed that the column "commission" follows immediately after the column headed "Order to sell", and it is accordingly argued that the commission is really a commission on sale, and the commission is not payable unless a sale takes effect. The commission, however, is not based on the amount obtained

on sale, but is based on the amount claimed, for in the last item, where the amount sued for is Rs. 100 or over the commission is seven per cent., that is seven per cent. on the amount sued for, and not seven per cent. on the amount recovered on sale. If we hold that the commission is only payable on sale, then undoubtedly some services, which are required to be rendered in respect of distress warrants, where no sale takes place, are not paid for. Before a notice in form C is served, the bailiff has to go to the premises, to distrain the goods, to make an inventory of them, and to give notice to the tenant of that inventory and of the tenant's right to pay off the distress, and it seems unlikely that it was intended that nothing should be payable for those services. On the other hand, on the view contended for by the learned Advocate General, namely, that the commission is a lump sum, which is payable at any stage at which the distress is terminated, the tenant has to pay the same amount for commission when he pays off the distress on receiving a notice in form C, as he would have to pay after the bailiffs have appraised the property and served a further notice under form D and sold the property. The legislature not having split up the commission, we have to decide which of the two rival views ought to prevail, and it seems to me that the view of the learned Advocate General is right. The column is not headed "Commission on sale", but is headed simply "Commission", which, I think, would normally mean commission for services rendered by the officers of the Court. Where a tenant has allowed his goods to be distrained upon and desires to get rid of the distress by complying with a notice in form C, I do not see anything unreasonable in holding that he must pay the item under the head "Commission," although if he had allowed the goods to be sold he might have received some further services without making any additional payment. In my view, treating this as a case in which a tenant complies with a notice in form C, the Registrar was right

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in declining to remove the distress except on the terms of receiving payment for the item of affidavit and warrant to distrain and for the item of commission.

I gather from the judgment of the learned Judge that the practice prevails in the Small Cause Court in cases in which a landlord applies for a distress warrant of requiring the landlord to pay into Court in advance the whole of the sums which may become payable in respect of the costs of the warrant, and that until recently it was the practice of the Court, where the distress was released without a sale, to refund half the amount paid by the landlord; and that this practice of refunding has been recently discontinued. As far as I can see, there is no justification for requiring payment of the costs in advance by the landlord. The costs are dealt with by the Act, and the scheme is to get them either under a notice in form C from the tenant, or on a sale under section 66, and the practice of requiring the landlord to pay them in advance seems to me to be illegal. Of course, the landlord necessarily has to pay for the costs of his own affidavit, and no doubt he gets these back from the Court, if and when the Court recovers the costs from the tenant, or on a sale.

RANGNEKAR J. I agree and have nothing to add.

*Order accordingly.*

J. G. R.

## APPELLATE CIVIL.

*Before Mr. Justice Rangnekar.*

GURUSHIDDAPPA GURUBASAPPA BHUSANUR AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* GURUSHIDDAPPA CHENAVIRAPPA CHETNI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

*Civil Procedure Code (Act V of 1908), section 11, explanation VI, Order I, rule 5—Res judicata—Defendants sued in representative capacity in former suit—Permission under Order I, rule 8, not obtained—Second suit for the same relief sought under the provisions of Order I, rule 8—Suit barred—Estoppel.*

In 1930, the plaintiffs sued for redemption of a mortgage. They were claiming through the owner of the property and the principal contesting defendants who

\* Second Appeal No. 422 of 1934.

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