

## APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Crump.*

1921.

April 9.

HARIDAS CHAKUBHAI (ORIGINAL DEFENDANT), APPLICANT *v.* RATANSEY RAGHAVJI AND OTHERS (ORIGINAL PLAINTIFFS), OPPONENTS<sup>o</sup>.

*Civil Procedure Code (Act V of 1908), section 115—Point of law not taken in lower Court—High Court not to interfere in revision.*

It is not the function of the High Court under section 115 of the Civil Procedure Code, 1908, to entertain a point of law which has not been taken in the Court below. A lower Court cannot be said to have acted illegally or with material irregularity in deciding a case without taking into consideration a point of law that was never raised before it.

APPLICATION under Extraordinary Jurisdiction praying for reversal of the decision of the Court of Small Causes at Bombay.

The facts are stated in the judgment.

*Coyajee with G. N. Thakor*, for the applicant.

MACLEOD, C. J. :—This is an application by the defendant in ejectment proceedings in the Small Cause Court, No. 2662 of 1921, asking us to interfere under our revisional jurisdiction as defined by section 115 of the Civil Procedure Code.

The plaintiffs sought to eject the defendant from a shop in the Mulji Jetha Cloth Market on the ground that after the fire last monsoon, the defendant, having been burnt out of his shop, asked the plaintiffs to allow him to use a part of their shop to continue his business. The plaintiffs gave him permission, thinking that the defendant's goods would be sold off in a short time. The plaintiffs having themselves been given notice wished to get possession from the defendant. The defence raised in the Court of Small Causes was that the defendant was a partner of the plaintiffs. It was

<sup>o</sup> Civil Application No. 96 of 1921, under Extraordinary Jurisdiction.

(On admission.)

suggested that the Small Cause Court had no jurisdiction to enter into that question. That must be a question material for the determination of the suit, whether the defendant was in the shop as a partner or only by permission of the plaintiffs. The defendant having raised that defence, there was no reason whatever why the Small Cause Court should not have dealt with the question whether as a matter of fact there was a partnership. The defendant failed to prove that he was a partner, and it had to be admitted that there was no partnership writing, nor was there anything in the account-books to show that a partnership had been entered into. As a matter of fact, the business carried on by the plaintiffs was in English piece-goods while the business carried-on by the defendant was in country piece-goods. Even supposing that the plaintiffs, as consideration for allowing the defendant to use their shop after the defendant's shop had been burnt, arranged that they should be paid one and a half annas of the profits of the defendant's business, that would not constitute a partnership between the two. There is no reason, therefore, on a pure question of fact, for this Court to interfere.

A new question has been raised before us whether, when the plaintiffs gave notice to the defendant, the plaintiffs' title had been determined. The defendant relies on the explanation to section 43 of the Presidency Small Cause Courts Act. He never raised that point in the Small Cause Court and never attempted to prove that plaintiffs' title had been determined prior to the date of the application to the Small Cause Court for possession. No doubt, it appears that the plaintiff had received notice from his landlord, but we are not aware of what nature the notice was, and it is not the function of this Court in revision to entertain a point of law which has not been taken in the Court below. None

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of the provisions of section 115 of the Code of Civil Procedure apply to such a case. If a party does not choose to take a point of law in the Court below, then it cannot be said that the lower Court has acted illegally or with material irregularity in deciding the case without taking into consideration a point of law that was never raised before it. If we entertain this application on that ground we should be exceeding the powers that are granted to the High Court to exercise revisional jurisdiction over the decisions of the lower Courts. The application must be refused.

*Application refused.*

J. G. R.

### CRIMINAL REVISION.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.*

1921.

June 10.

BARTHOL DUMING RODRIKS AND OTHERS (ORIGINAL OPPONENTS),  
APPLICANTS v. PAPA DADA (ORIGINAL APPLICANT), OPPONENT\*.

*Criminal Procedure Code (Act V of 1898), sections 408 and 413—Cattle  
Trespass Act (I of 1871), section 22—Order of compensation—Appeal  
from the order.*

An order awarding compensation and repayment of fines, &c., under section 22 of the Cattle Trespass Act, 1871, is appealable under section 408 of the Criminal Procedure Code. The compensation so awarded is not a fine, and consequently the restrictive provisions of section 413 of the Criminal Procedure Code do not apply.

THIS was an application under the criminal revisional jurisdiction of the High Court against an order passed by P. J. Taleyarkhan, Sessions Judge of Thana, declining to entertain an appeal from the order passed by E. W. Perry, Sub-Divisional Magistrate of Bandra.

Cattle belonging to the opponent were put into the cattle-pound for straying, by the applicants. The

\* Criminal Application for Revision No. 67 of 1921.