

1903
NOV. 10.
DEC. 2.

PRIVY
COUNCIL.

31 C. 332=31
I. A. 57=8
C. W. N.
609=8 Sar.
599.

not insisted upon in either of the Courts below. It was also urged that the effect of the Dewan finding the money to pay off the plaintiff in the suit No. 47 of 1890 was to foreclose all subsequent mortgages and make the [339] Dewan absolute owner of the property. It is hardly necessary to say that their Lordships were unable to accept that view of the transaction.

Their Lordships will humbly advise His Majesty that the decree of the High Court ought to be discharged, and that the Dewan's representatives ought to pay the costs in that Court, and that the order of the Subordinate Judge ought to be restored, subject to correction of the slip in that order pointed out by the High Court, the accounts brought up to date, and six months from the date of His Majesty's Order in Council fixed for redemption of the property.

The Dewan's representatives will pay the costs of the appeal.

Their Lordships observe that the Record in this case was received in December 1900, but that the case was not set down for hearing till September 1903. They have accordingly directed the Registrar to disallow to the appellants any costs which, in his view, may have been occasioned by delay on the part of the appellants in prosecuting the appeal.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitor for the respondents: *G. C. Farr.*

31 C. 340 (=8 C. W. N. 246.)

[340] ORIGINAL CIVIL.

Before Mr. Justice Henderson.

AMRITA LAL KALAY v. NIBARAN CHANDRA NAYEK.*

[8th January, 1904.]

Jurisdiction—Small Cause Court, Presidency Towns—New Trial—Tiled huts—Title to immoveable property—Presidency Small Cause Courts Act (I of 1895) s. 38—Civil Procedure Code (Act XIV of 1882) s. 622.

Ordinarily where property attached as being the property of a judgment-debtor is claimed by a third person, that third person may file a claim; and, where the Court has jurisdiction to try the question, the title to the property is determined in the execution proceedings.

Tiled huts are immoveable property, and under the present law the Small Cause Court has no jurisdiction to try a question of title to such huts, as between an attaching creditor and a third person, who alleges, that the property belongs to him and not to the judgment-debtor.

Peary Mohan Ghosaul v. Harran Chander Gangooly (1) distinguished.
Jamnadas v. Bai Shivkor (2) followed.

[Ref 31 Cal. 1001.]

RULE granted to the defendant, Nibaran Chandra Nayek, under s. 622 of the Code of Civil Procedure.

The defendant on the 2nd March, 1903, obtained a decree against one Dinonath Kundu and another in the Presidency Small Cause Court, and on the 25th April, 1903, attached in execution of such decree certain

* Application in Original Civil Suit No. 4 of 1903.

(1) (1885) I. L. R. 11 Cal. 261.

(2) (1881) I. L. R. 5 Bom. 572.

tiled huts alleging that they belonged to the judgment-debtors. The plaintiff, Amrito Lal, thereupon, alleging that these tiled huts belonged to him and not to the judgment-debtors, paid into Court the decretal amount to the credit of the original suit, and immediately after that brought a suit against the defendant for damages for wrongful attachment of the said tiled huts. The Small Cause Court on the 19th June 1903, decided that it had no jurisdiction to try the suit and dismissed the same. Amrito Lal thereupon applied on the 23rd June, for a new [341] trial, and on the 24th June 1903, the Small Cause Court granted the application for a new trial and fixed the 3rd August, 1903, for the hearing, the officiating Chief Judge expressing a view that though the Small Cause Court had no jurisdiction to try questions of title regarding tiled huts, it could nevertheless enter into a question of title incidentally. The defendant thereupon obtained a rule against the plaintiff Amrito Lal, under s. 622 of the Civil Procedure Code, calling upon him to show cause why the order for a new trial should not be set aside on the ground that the Small Cause Court had no jurisdiction to try the suit.

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Mr. B. C. Mitter in support of the rule. It is admitted that the Small Cause Court has jurisdiction to try an ordinary case for damages, but the real object in instituting this suit was to try the question of title to immoveable property, and the law does not allow a thing to be done indirectly, which cannot be done directly: *Jamnadas v. Bai Shivkor* (1), *Kalidas v. Vallabhdas* (2) referred to.

Mr. A. Ghosh (contra).

HENDERSON, J. This was a Rule granted under section 622 of the Code of Civil Procedure and section 38 of the Presidency Small Cause Courts Act to show cause why an order dated the 24th July 1903, directing a new trial made in the suit should not be set aside. The ground upon which the Rule was granted was the want of jurisdiction.

The circumstances under which the Rule was obtained are these: On the 2nd March 1903, the petitioner obtained a decree in the Small Cause Court for Rs. 177-3 including costs and on the 25th April in execution attached a tiled hut and certain moveable articles as belonging to the judgment-debtor. Thereupon the plaintiff in the present suit alleging that he was the owner of the hut and the moveable articles, paid that amount together with Rs. 2-8, said to have been incurred for peons' wages in connection with the attachment, into Court, to the credit of the original suit and filed a suit in the Small Cause Court against the petitioner [342] claiming the amount so paid by him as damages, caused by the wrongful conduct of the petitioner in making the attachment alleging that he had been humiliated and had suffered in reputation as a trader, and had been obliged to pay the amount of the petitioner's decree to save his honour and reputation. This suit was originally dismissed for want of jurisdiction, but on an application to the officiating Chief Judge and the Judge, who had dismissed the suit, an order was made for a new trial, and this is the order against which the Rule is directed.

Ordinarily where property attached as being the property of a judgment-debtor is claimed by a third person, that third person may file a claim, and where the Court has jurisdiction to try the question, the title to the property is determined in the execution proceedings. Tiled huts

(1) (1881) I. L. R. 5 Bom. 572.

(2) (1881) I. L. R. 6 Bom. 79.

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are immoveable property and as the law stands at present, the Small Cause Court has no jurisdiction to try a question of title to such huts as between an attaching creditor and a third person, who alleges that they belong to him and not to the judgment-debtor. It has been found that the law in this respect has been productive of inconvenience and hardship to suitors, claimants to tiled huts which have been attached being forced to bring suits in this Court to establish their title, the value in most cases being exceedingly small; and I believe the attention of the Legislature has been drawn by this Court to the question of the jurisdiction of the Small Cause Court, to entertain claims in execution proceedings to tiled huts with a view to amendment of the law.

The plaintiff in the present case did not file a claim to the tiled hut in question in the execution proceedings and, as he ought to have done, apply for a stay of the proceedings, until he had an opportunity of instituting a suit in this Court to establish his title. But what he has done was to file a suit for damages for trespass. It has been frequently held that the Small Cause Court has jurisdiction to try a question of trespass to immoveable property and that its jurisdiction is not ousted, because a question of title may incidentally arise. But the present is not a mere suit for trespass, as was the case of *Peary Mohun Ghosaul v. Harran Chunder Gangooly* (1). The so-called trespass was, so far as appears, [343] done under a *bona fide* claim by the petitioner that the tiled hut was the property of the judgment-debtor of the petitioners. The sole object of the plaintiff in filing his suit was manifestly to try the title to the attached hut. To use the words of Melvill, J. in *Jamnadas v. Bai Shivkor* (2), the present was not a case in which the real object of the suit was to obtain a remedy which a Small Cause Court might properly give, and on which a question of title to immoveable property only incidentally cropped up for decision.

Under these circumstances I must hold that the order of the Small Cause Court, based, as it was, on the ground that the Small Cause Court had jurisdiction to determine the suit, was itself without jurisdiction. The rule will accordingly be made absolute with costs.

Attorney for the plaintiff: *K. N. Dey.*

Attorney for the defendant: *J. C. Dutt.*

Rule made absolute.

31 C. 344.

[344] CIVIL RULE.

Before Mr. Justice Banerjee and Mr. Justice Brett.

RAGHUNATH CHARAN SINGH *v.* SHAMO KOERI.*
 [25th November, 1903.]

Appeal—Memorandum of appeal—Civil Procedure Code (Act XIV of 1882), ss. 557, 582, 588, cl. 622—Valuation of suit—Bengal, N.-W. P., and Assam Civil Courts Act (XII of 1887), s. 21, sub-s. 2—Jurisdiction—Suits Valuation Act (VII of 1887) s. 11.

No appeal lies against the order of an Appellate Court returning a memorandum of appeal for presentation to the proper Court.

* Civil Rule No. 2015 of 1903.

(1) (1885) I. L. R. 11 Cal. 261.

(2) (1881) I. L. R. 5. Bom. 572.