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## [458] SMALL CAUSE COURT REFERENCE.

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GARLING *v.* SECRETARY OF STATE FOR INDIA.\* [11th February, 1903.]  
*Reference—Presidency Small Cause Courts Act (XV of 1882) s. 69—Conditions imposed upon Judge of Small Cause Court in stating case for opinion—Civil Procedure Code Act (XIV of 1882) ss. 617 and 621—High Court, power of—Amendment—Remand.*

Before the High Court can give an opinion upon a matter referred to it by the Presidency Small Cause Court under s. 69, three conditions must be complied with :—(1) that the Court referring the matter entertains a reasonable doubt upon some question of law. (2) that it states what the point is upon which the doubt is entertained, and (3) that it gives a statement of the facts containing an expression of opinion on the point which is referred to the decision of the High Court

When such a course has not been adopted, the High Court can, under s. 621 of the Code of Civil Procedure, return the case to the Lower Court for amendment.

## SMALL CAUSE COURT REFERENCE.

THIS was a reference made by Mr. E. W. Ormond, the Second Judge of the Court of Small Causes, Calcutta, under s. 69 of the Presidency Small Cause Courts Act, 1882, and s. 617 of the Code of Civil Procedure.

The plaintiff, Mrs. J. S. Garling, instituted a suit in the Small Cause Court against the Secretary of State for India in Council to recover the sum of Rs. 1,500 (the equivalent of £100), being the value of a bowl and the amount for which it was insured, and which was found to be broken on being opened at the General Post Office, Calcutta. On the 26th November 1902, the learned Judge decreed the suit for Rs. 1,500 in favour of the plaintiff, but, at the request of the defendant's attorney, made his judgment contingent upon the opinion of the High Court.

The case, as stated by the learned Judge for the opinion of the High Court, was as follows :—

"The question that I have to refer for opinion is whether, in the circumstances stated below, the defendant is liable for the breakage of a [459] bowl sent as an insured parcel by post from England to Calcutta. The following is my judgment in the case :—

The plaintiff, who was the owner of a valuable onyx bowl she had left in England, requested a friend to insure it and send it out to Calcutta to her. The bowl was sent out by post as a parcel insured for £100 to destination, and packed in a wooden box. The plaintiff called for the parcel at the Calcutta General Post Office, and at the suggestion of the postal authorities the box was opened by one of their servants. The bowl was found to be broken, and is now practically valueless. The plaintiff now sues to recover from the Secretary of State for India in Council, Rs. 1,500, the equivalent of £100, being the value of the bowl and the amount for which it was insured, and Rs. 78-3 for costs and charges paid by her as customs duty.

The defendant's attorney contends that the contract was made with the Post master-General in England and not with the Indian Post Office, and therefore the defendant is not liable; that the breakage is due to the bad packing; and that the value placed upon the bowl is excessive.

The Indian Post Office, in the Indian Postal Guide, undertakes, except in certain cases, to grant compensation not exceeding the insured value for the loss of, or damage to, an insured parcel sent by post from England to India. Section IV, that is, cls. 216 to 218 of the Guide, contains the rules relating to Foreign Parcel Post, and cl. 216 shows that a parcel received in India by post from the United Kingdom comes under those rules. Cls. 220 to 240 relate to compensation payable

\* Small Cause Court Reference No. 5 of 1902.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Sale and Mr. Justice Stevens.

by the Indian Post Office in respect of insured parcels by Foreign Parcel Post, and cl. 237 governs the present case and is as follows :—

' In the case of complete insurance to destination, compensation not exceeding the insured value will be granted to the sender, or in default, or at the request of the sender, to the addressee of an insured parcel for any actual loss or damage occurring during transit, except in the cases described below. The sender of a lost parcel is also entitled to a return of the postage paid, but in no case is the insurance fee refunded.

The excepted cases are as follows :—

- (a) When the loss or damage has been caused by the fault or negligence of the sender or arises from the nature of the article.
- (b) Fraudulent insurance for a sum above the real value of the contents, or any other fraud on the part of the sender or addressee.
- (c) When the insured article has been delivered to the addressee, and he has signed and returned the receipt for such article.
- (d) When the sender or addressee does not give intimation of loss or damage within twelve months from the date of posting.
- (e) In case of loss or damage due to improper or insecure packing.
- (f) When there is no visible damage to the cover or seals.
- (g) In cases beyond control.'

This clause was not referred to by either side, but the question of packing was gone into. The bowl is 12 inches × 10 inches, and was broken at the end. There was about 3/16th of an inch between the ends of the bowl and the box where the wood is half an inch thick. The evidence for the plaintiff shows that the bowl was not broken when packed, and that it was surrounded with a packing of wadding, etc. The defendant's witness, [ 60 ] Mr. Davies of Messrs. Hamilton and Company, thinks that the packing at the end must have dropped down, and then the bowl would have broken by a sudden concussion, such as a fall. In his opinion the bowl was improperly packed, and he says that it should have been put into a larger box with sufficient padding so as to provide against such a contingency. He also says that he could not, if he tried, break the bowl by shaking the box with no packing round the bowl. The box was not broken and is strong enough to withstand any ordinary pressure. The evidence, I think, shows that the bowl would not have been broken if ordinary and reasonable care had been taken of the parcel during transit. An insured parcel is not improperly packed because the article inside could be broken by the package being subjected to a sudden concussion, such as a fall. No doubt the bowl could have been better packed; but I cannot find from the evidence that the breakage is due to any fault or negligence of the sender, or to improper or insecure packing.

The question whether there was any visible damage to the box or seals was never raised: and the box (an old one, which has in fact a dent at the end near the top) having been opened at the suggestion of the Postal authorities, with a view to the plaintiff claiming compensation in the event of the bowl being found to be broken, any defence that might have been raised under this head must be deemed to have been waived.

The plaintiff did not take delivery of the parcel, and there has been no fraud on the part of the sender or the plaintiff.

As to the contention that the value of the bowl as assessed by the plaintiff is excessive, the bowl appears to be a unique article, and therefore its real value is difficult to determine. A witness for the plaintiff states he has seen much smaller bowls at Tellery's the price of which was Rs. 1,000, and Mr. Davies assesses the value of the bowl at Rs. 600, having sold a bowl 7 × 8 inches long for Rs. 100. The plaintiff, I think, honestly thought the bowl was worth £100, and there was no fraudulent insurance for a sum above the real value of the article. The case is analogous to the case of a total loss under a valued policy; and unless the defendant can show that the plaintiff has greatly overvalued the bowl, and this has not been done, I think it is only reasonable to allow the valuation originally fixed, to stand good. For these reasons, I think, the defendant is liable to pay the amount of the insurance, viz. Rs. 1,500. The customs 5 per cent. duty is levied upon the importation of the bowl into India, and there is nothing to show that the bowl was broken before its arrival at Bombay. There will be a decree therefore for Rs. 1,500 with costs, and pleader's certificate.

At the request of the defendant's attorney, the judgment is made 'contingent' upon the opinion of the High Court. "

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On the 11th February 1903, the reference came on for hearing before the High Court.

Mr. Hill for the plaintiff. I raise a preliminary objection to this reference. This reference does not come under either s. 69 of the Presidency Small Cause Courts Act or s. 617 of the Civil Procedure Code. The judgment of the Small Cause Court Judge is delivered and then an application for a reference is made. The [461] application for a reference should be made before judgment, under s. 69 of the Small Cause Courts Act. The Judge before delivering judgment must make up his mind to give judgment subject to the opinion of the High Court. The reference does not come under s. 617 of the Code inasmuch as the Judge of the Small Cause Court has not entertained a reasonable doubt on any question of law.

If the reference comes under s. 69 of the Small Cause Courts Act, then this Court has no power to send it back for amendment under s. 621 of the Code. I submit, therefore, that the reference, as it stands, is bad.

Advocate-General (Mr. J. T. Woodroffe) for the defendant. The order of reference is within the terms of s. 69 of the Small Cause Courts Act. In s. 617 of the Civil Procedure Code, the words "and the point on which doubt is entertained" do not apply to a reference made under s. 69 of the Small Cause Courts Act. That Court must refer a case where a question of law arises, whether it entertains doubt upon the point or not: *Ralli Brothers v. Goculbhai Mulchand* (1), *Ishwardas Tribhovandas v. Kalidas Bhaidas* (2), *Yule & Co. v. Mahomed Hossain* (3). [MACLEAN, C. J. Section 69 of the Small Cause Courts Act does not confer any power on the High Court.] The only power this Court has, is under s. 617 of the Code.

MACLEAN, C. J. It is not a very easy matter to make section 69 of the Presidency Small Cause Courts Act dovetail into section 617 of the Code of Civil Procedure. As regards section 69 in the class of suits mentioned in that section, and in the event of a question of law arising, and if either party so requires, the Small Cause Court shall draw up a statement of the facts of the case and refer such statement, under section 617 of the Code, for the opinion of the High Court. Pausing there for a moment, there is nothing in that section which necessitates that the Small Cause Court Judge in drawing up the statement should state what the point of law is which has arisen, whether he has any reasonable doubt upon that point of law, or that he should express his opinion upon it. But the section says:—"and refer such statement under s. 617 of the Code of Civil Procedure," from which I am [462] led to infer that this is the section which enables this Court to express its opinion upon the matter referred when it has been referred. It has not been suggested that we derive our authority from any other source. But looking at section 617, it seems to me that the Court can only express its opinion upon the matter referred, when three conditions have been complied with—*first*, that the Court referring the matter entertains a reasonable doubt upon some question of law, *second*, states what the point is upon which the doubt is entertained, and, *third*, draws up a statement of the facts containing an expression of opinion on the point

(1) (1890) I. L. R. 15 Bom. 376, 386. (3) (1896) I. L. R. 24 Cal. 129.  
(2) (1896) I. L. R. 20 Bom. 779.

which is referred to the decision of this Court. This is how I read the two sections in conjunction.

In the Case before us, the Judge in the referring Court has not stated any point of law upon which he entertains a reasonable doubt, or what the point of law is, or what his opinion is upon it, and under section 617 I think he must do this before we can deal with the matter. It may be, we do not know, that he has a reasonable doubt upon some point of law. We have, I think, power under section 621 to return the case to the Lower Court for amendment and this course we will adopt.

We refer it back to the Judge in the Court below to say whether there is any point of law upon which he entertains reasonable doubt, and what it is, and what is his own opinion upon it.

STEVENS J. I concur.

SALE J. I agree with the view which has been taken by the learned Chief Justice, of section 69 of the Presidency Small Cause Courts Act, and section 617 of the Code of Civil Procedure. I can only read section 69 of the Presidency Small Cause Courts Act as meaning and contemplating that the opinion to be expressed by this Court is an opinion governed by section 617 of the Code of Civil Procedure. That being so, it seems to me that before this Court can express an opinion upon a case referred under section 69 of the Presidency Small Cause Courts Act, the conditions contained in section 617 must be complied with.

Attorney for the plaintiff : A. C. Ghose.

Attorney for the defendant : H. C. Eggar.

30. C. 463 (=7. C. W. N. 532.)

[463] APPELLATE CIVIL.

SHIB DAS DASS v. KALI KUMAR ROY.\* [18th March, 1903.]

*Mortgage—Sale of mortgaged property—Money-decree—Transfer of Property Act (IV of 1882) ss. 67, 99—Execution—Purchase by the mortgagee, effect of—Mortgagee, liabilities of—Account.*

A mortgagee, in execution of a decree obtained against the mortgagor on account of another debt, sold the mortgaged properties, purchased the equity of redemption himself, and obtained possession through the Court. And in a subsequent suit upon the mortgage for sale of the mortgaged properties, the defence, *inter alia*, was that the proceedings were contrary to the provisions of s. 99 of the Transfer of Property Act, that the purchase by the plaintiff was null and void, and that the mortgagee was bound to account for the period he was in possession of the mortgaged property.

*Held*, that, having regard to the provisions of s. 99 of the Transfer of Property Act, the purchase by the mortgagee was null and void, and possession obtained by him was not in accordance with law, and he was therefore liable to render account of moneys realized from the mortgaged properties during the term of his possession.

*Durgayya v. Anantha* (1) followed, and *Sri Raju Papamma Rao v. Sri Vira Prutapa Ramachandra Razu* (2) referred to.

[Foll. 4 A. L. J. 787.=A. W. N. 1908, 1.=3 M. L. T. 13=Ref. 33 Cal. 233. Diss. 7 O. C. 314; 8 O. C. 327; 35 Cal. 61=6 C. L. J. 320=11. C. W. N. 1011. F. B.]

\* Appeals from Appellate Decrees Nos. 1591 and 1846 of 1899, against the decree of G. Gordon, Esq., District Judge of Chittagong, dated the 26th April 1899, reversing the decree of Babu Jogendra Nath Ray, Subordinate Judge of Chittagong, dated the 27th of July 1898.

(1) (1890) I. L. R. 14 Mad. 74.

29 I. A. 32.

(2) (1896) I. L. R. 19 Mad. 249; L. R.

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