

**Appellate Jurisdiction. (a)***Referred Case No. 52 of 1869.***SHAUNKARA SUBBIEN against VELLAYAN CHETTY.**

The plaintiff sued to recover money paid in order to prevent his land from being sold at the instance of the defendant for non-payment of arrears of rent under Madras Act VIII of 1865, the plaintiff's allegation being that no rent was due to the defendant.

*Held*, that the Small Cause Court had no jurisdiction because the suit was cognizable before a Revenue officer.

**C**ASE referred for the opinion of the High Court by J. R. Daniel, the Acting Judge of the Court of Small Causes at Madura, in Suits Nos. 1831 and 1978 of 1869.

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of 1869.

The case stated was as follows :—

This suit was brought to recover Rupees 56-10-3 under Section 78, Act VIII of 1865, being money paid by the plaintiff in order to prevent his land from being sold in payment of arrears ; the plaintiff alleges that no rent is due, the defendant gave him no puttah as required by Section 7 of the Act and served on him no written notice as required by Section 39 and the sale therefore was illegal.

The defendant pleaded that he had tendered a puttah in the manner laid down in Sections 7 and 39 and also served the notice in accordance with Section 39.

The case was heard before me and decision given in favor of the plaintiff on the ground that the defendant had failed to tender a puttah or serve the notice in the manner required by law. The defendant applied for review of judgment on a new ground, viz., that the Court had no jurisdiction under Clause 4, Section 6, Act XI of 1865 which excludes such claims as are cognizable by a Revenue Court and under Section 49, Act VIII of 1865, this claim was cognizable by the Collector.

Suit No. 1978 of 1869 is similar to the above, the only difference being that in this the plaintiff appealed under Section 40, Act VIII of 1865 to the Sub-Collector who dismissed the appeal for default and ordered the land to be sold.

On 30th October 1869, decision was passed in favor of defendant because I was of opinion that the sale having been

(a) Present : Scotland, C. J. and Holloway, J.

1870. ordered by the Sub-Collector, such sale could not be wrong-  
 February 7. ful as far as defendant was concerned, and therefore money  
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 of 1869.

On 5th November 1869, the plaintiff applied for a review on the ground that the dismissal of the suit by the Sub-Collector would not bar his right to recover.

At the request of both parties I have therefore made the decision in both cases contingent upon the opinion of the High Court upon the following case:—

The defendant is the lessee of the Ammannaicknur Zemindari and the plaintiff holds the lands paying rent to him; the defendant proceeded under Sections 39 and 40, Act VIII of 1865, to recover arrears alleged to be due by plaintiff for the lands in his holding; he issued a notice, and as no appeal was made by the plaintiff, he proceeded to sell the land: a day or two before the sale the plaintiff paid the arrears claimed and now sues to recover it.

The first question is whether the notice was legally served? the notice was fixed upon the land for which the arrears are claimed; the plaintiff has no house in either of the villages in which the lands are situated; his usual place of abode is Madura, and under Section 39 I think it is clear that the notice must be first served on the defaulter at his usual place of abode, and it is only in the last resort that the notice may be affixed to the land; here the defendant knew that the plaintiff resided in Madura, but made no attempt to serve it on him there, and sent it in the first instance to be affixed on the land. It was urged for defendant that it is unreasonable that he should be required to serve notices on the houses of defaulters who reside beyond the local limits of his Zemindary; that it would be expensive and that tenants having lands within the Zemindary and residing beyond it should have authorized agents to accept such service or the tenants in actual occupation should be considered as his authorized agents; further that this mode of service has been sanctioned by the Revenue Court; as this latter statement appears true I have thought it advisable that there should be an authoritative ruling on the point.

The 2nd question is whether the defendant was justified in proceeding at all under Sections 39 and

40 to sell the land. Section 13 of the Act requires that "all land-holders under Ryotwary settlements, &c., shall be authorized to proceed under this Act for the recovery of rent, if they have taken a lease or agreement in writing from their tenants specifying the rent to be paid to them but not otherwise"—at first I was of opinion that tender of puttah under Section 7 was not sufficient to authorize the defendant to proceed under the Act to recover the arrears: but comparing Section 13 with Section 1, I find that the words of Section 13 are the same as the 2nd half of Section 1, and that therefore Section 13 applies only to the class of land-holders specified in the 2nd half; the defendant does not come under that class—he as a person farming lands from a Zemindar, one of the classes specified in the first portion of Section 1: and therefore tender of puttah would be sufficient to enable him to collect arrears under the Act—under Section 7 tender of puttah may be evidenced by such proof of service as is provided by Section 39 in the case of notices. The puttah was served in the same way as the notice upon the land and is not therefore in my opinion legally tendered; unless therefore the High Court be of opinion that the above service is legal the present question will not arise.

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of 1869.

The third question is jurisdiction. I was of opinion that this Court had jurisdiction.

Under Clause 4, Section 6, Act XI of 1865 no action will lie in any Court of Small Causes "for any claim for the rent of land or other claim for which suit may now be brought before a Revenue officer." Section 49, Act VIII of 1865 provides that any person deeming himself aggrieved by any proceeding taken under color of this Act shall be at liberty to seek redress by filing a summary suit for damages before the Collector. Section 51 provides that "summary suits must be brought within 30 days from the cause of action, and Section 78 provides that nothing in this Act shall be construed to debar any person from proceeding in the ordinary tribunals to recover money paid or to obtain damages in respect of any thing professedly done under the authority of this Act within 6 months from the cause of action." The present suit was instituted after 30 days and within 6 months, and the claim was not, therefore, cognizable by the Collector, and this Court has jurisdiction.

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of 1869.

I was therefore of opinion that as the sale was illegal the plaintiff was entitled to damages, the only question remained whether if the arrears for which the lands were to be sold were *bonâ-fide* due, the defendant can be allowed to retain the money, the plaintiff's plea in addition to that of illegality of procedure is that there were no arrears because the land on which it was claimed was waste and no rent was therefore chargeable—the defendant claims to charge rent for the land whether waste or not. The rent was therefore not due—it was disputed and it could only be determined by a Court of Law upon the agreement between the parties whether waste land could be charged with rent or not; now if the defendant instead of proceeding under Act VIII of 1865 to sell the land had instituted a suit for the arrears, he could not have recovered because he had failed to tender a puttah in the manner prescribed by Section 7 and he cannot be allowed to retain it because he has obtained it under compulsion by illegal process.

The 4th question arises in suit No. 1978 of 1869 whether the dismissal of plaintiff's appeal under Section 40 by the Sub-Collector affects his right to recover the money; this was a summary suit in which decree was given against the plaintiff by default, and the effect of it was to declare the sale of the land justifiable; it seems to make no difference that the case was not decided on the merits; the plaintiff's only remedy would be an appeal, but by Section 58 no appeal is allowed in cases where judgment is given against plaintiff for default.

The questions for the decision of the High Court are

1. Are the suits cognizable by a Court of Small Causes?
2. Is the defendant, being the lessee of the Zemindari, bound under Section 13, Act VIII of 1865 to take an agreement in writing from his tenants, or is tender of puttah under Section 7 sufficient to authorize him to proceed under the Rent Act for recovery of arrears?
3. Is the service by affixing on the land in the present instances a legal service under Section 39, Act VIII of 1865?

4. Is the dismissal of plaintiff's suit under Section 40 by the Collector for default a bar to his recovering damages? 1870.  
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of 1869.

*Johnstone*, for the plaintiff.

*O'Sullivan*, for the defendant.

The Court delivered the following judgment:—

We are of opinion that the Small Cause Court had no jurisdiction because the suit was cognizable before a revenue officer. That at the actual period of bringing the suit it could no longer have been prosecuted with success, because the period of limitation, there a shorter one, had expired, can make no difference.

The right to institute it once existed and barred the jurisdiction of the Small Cause Court by the express provisions of the Act which created it.

This renders the answering of the other questions unnecessary.

### Appellate Jurisdiction. (a)

*Civil Miscellaneous Regular Appeal, No. 195 of 1869.*

STRINARASIMMA CHARIYAR.....*Petitioner.*

V. NARASIMMA CHARIYAR.....*Counter-Petitioner.*

Where an application was made to the Civil Court under Sec. 230 of the Civil Procedure Code by the petitioner disputing the right of a decree-holder to dispossess him of certain immoveable property and the Civil Judge rejected the application,

*Held*, that Sec. 231 of the Civil Procedure Code did not give the petitioner a right of appeal to the High Court.

**T**HIS was an appeal against the order of E. B. Foord, the Civil Judge of Chingleput, dated the 22nd March 1869, passed on Miscellaneous Petition, No. 155 of 1869. 1870.  
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C.M.R.A.No.  
195 of 1869.

The order of the Civil Judge was as follows:—

Petitioner disputes the right of the decree-holder in Original Suit No. 4 of 1866, this Court's file, to dispossess him of 1  $\frac{7}{8}$  cawnies of land on the ground that the said land was put in his possession in execution of the decree in Suit No. 221 of 1864, Tripassore Munsif's file, in which he was the decree-holder.

(a) Present : Bittleston and Innes, JJ.