

within three years from the termination of the last proceedings for execution, and the order appealed from must be affirmed with costs.

1869.  
November 13.  
C.M.R.A.No.  
174 of 1869.

*Appeal dismissed.*

### Appellate Jurisdiction. (a)

*Referred Case No. 42 of 1869.*

ANANTHA NARAYANA against PERIYANA KONE.

The actual presence of the defendant within the jurisdiction of the Court is not necessary if he was there dwelling at the commencement of the suit, and a temporary dwelling is sufficient to give jurisdiction to a small Cause Court.

Service of a copy of the summons on the door of the house in which the defendant is dwelling is one of the modes of service provided in lieu of personal service, but it is necessary that the defendant should be residing in the house in such a manner as to make it probable that knowledge of the service of the summons will reach him. There may be a dwelling sufficient to give jurisdiction and yet not the kind of dwelling necessary to make a good service.

**T**HIS was a case referred for the opinion of the High Court by J. R. Daniel, the Acting Judge of the Court of Small Causes of Madura, in Suit No. 1780 of 1869.

1869.  
November 15.  
R. C. No. 42  
of 1869.

The case stated was as follows :—

This suit was brought to recover Rupees 156-8-6 due under a bond, dated 15th September 1866, executed by defendant.

On the day fixed for hearing of this suit it appeared from the evidence of the serving peon that the defendant had left his house and village about two years ago, but the reason of his going, or the place where he has gone to, was not known; the summons was served by affixing a copy to the house in which the defendant's father and brother resided, and the question arose whether this was the house in which defendant was dwelling and whether the summons was served according to Section 55, Act VIII of 1859. The jurisdiction of this Court to try the case at all depends upon the meaning of the word dwell as under Section 8, Act XI of 1865; it is necessary that the defendant at the commencement of the suit should dwell within the limits of the jurisdiction.

All that is known of the defendant is that he left his village about two years ago; his father and brother can

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

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given no information about him: he may be dead, but sufficient time has not elapsed to raise the legal presumption of his death; he was up to date of his departure living with his father and brother, and has left his property, a share in the lands and house of his family.

I was of opinion that the defendant could not be said to dwell in this house; but if I am right the plaintiff loses all remedy against defendant for the debt. He waited till the last day of the term allowed by the Act of Limitations, and if dismissed now he could never bring the suit again; at the plaintiff's request therefore I have referred the question for the opinion of the High Court.

In Referred Case No. 22 of 1864, 2, *High Court Reports*, page 304, it is ruled that residence for a temporary purpose without the intention of remaining is not dwelling, and conversely a man would be said to dwell at his house though absent for a temporary purpose, and in High Court Proceedings, dated, 26th October 1866, quoted in *Sloan's Mofussil Practise* as note to Section 8, Act XI of 1865, he, who permanently resides at a place and who though absent from it has the intention of returning, who when there is at home, and when absent from there is abroad, does dwell in the place of which these qualities can be predicated.

In all the cases it is laid down that there must be an animus revertendi. In the present case it seems to me that the defendant has abandoned the intention of returning; if he is alive he must be dwelling some where else.

The explanation to Section 8, Act XI of 1865 says that if a person has a permanent dwelling at one place and a temporary dwelling at another, he shall be deemed to dwell at both places. This does not appear to me to apply to the present case.

It might be argued that the defendant must be presumed to have the intention of returning unless the contrary be shown; as there is reasonable doubt, and I have been unable to find any authoritative ruling on the point, I have referred the case for the opinion of the High Court.

The questions submitted for the opinion of the High Court.

- I. Whether in the case stated the defendant can be said to dwell within the jurisdiction of this Court. 1869.  
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of 1868.
- II. If the Court has jurisdiction whether service of summons by affixing a copy to the house is a valid service (the defendant's father and brother refusing to accept it.)

No counsel were instructed.

The Court delivered the following

JUDGMENT:—The decisions of this Court and the exception in Section 8 of Act XI of 1865 establish that the actual presence of the defendant within the jurisdiction of the Court is not necessary if he was there dwelling at the commencement of the suit, and a temporary dwelling is given the same effect as a permanent one. Therefore the jurisdiction of the Small Cause Court in this case depends upon the question whether the defendant had or had not ceased to make his family home a place of residence, and that is a question of fact which the Judge must decide for himself upon the circumstances in evidence before him. We may however point out that a legitimate presumption arises in the case in favor of the defendant's intention to return to his family home, and the point to be considered is whether that presumption is outweighed by the length of absence and other circumstances proved.

As to the 2nd question : Service of a summons by fixing a copy of it on the door of the house in which the defendant is dwelling is one of the modes of service provided in lieu of personal service, and it was clearly we think the intention of the provision that the defendant should be residing in the house in such a manner as to make it probable that a knowledge of the service of the summons will reach him. There might therefore be a dwelling within the meaning of Section 8 of Act XI of 1865 so as to give jurisdiction, and yet not the kind of dwelling necessary to make a good service under Section 55 of the Code of Civil Procedure. And whether the dwelling is sufficient for the purpose is also a question of fact. In the present case we should have no hesitation in deciding that the circumstances as stated negatived that the defendant was dwelling in the family house in the sense intended by the section.