Appellate Jurisdiction.(a)

Special Case No. 71 *of* 1875.

MOHUN SING ... ...*Plaintiff.*

KAREEM OONISSA BEGUM and another ...*Defendants.*

The right to distrain for rent in arrear has always to some extent existed and been recognized in the Presidency towns; and the Acts passed since 1847 are distinct declarations by the Legislature, made while regulating the exercise of the right and providing for its exercise only through the intervention of a Judge of a Court of Small Causes, that the right itself, subject to the restriction, is general, and that "any person claiming to be entitled to arrears of rent of any house or premises" in a Presidency town is authorized to apply for the issue of a Distress Warrant.

By the terms of the Law, the Small Cause Court Judges are authorized to reserve questions for the opinion of the High Court only where they arise in suits depending before them and not when doubts may occur upon applications for the issue of process or warrants.

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THIS was a case stated under Section 55 (*b*) of Act IX of 1850 for the opinion of the High Court by Mr. T. M. Busteed, the First Judge of the Court of Small Causes at Madras.

The facts sufficiently appear from the reference made which was as follows:—

"In this matter the applicant by his Vakeel Mr. Ramanuja Chariar, applied to the First Judge of this Court, to issue a warrant to distrain the moveable property of Kareem Oonissa Begum and Alimbee on the house and premises of the applicant in the occupation of the said Kareem Oonissa Begum and Alimbee as his tenants for Rupees 64-0-0 arrears of rent of the said house and premises justly due by the said tenants to the said applicant for 8 months, viz. from June 1874 to February 1875.

"2. The application was supported by affidavit made in accordance with the provisions of Act I of 1875.

"3. It appears from a statement which accompanied the affidavit that the said applicant was, by an instrument in writing not under seal, mortgagee or pawnee in possession for a term of 4 years from 9th March 1874, still unexpired of the house and premises in question from the said tenants, who were the mortgagors, thereof, and who by an unsealed

(*a*) Present:—Sir W. Morgan, C.J., and Kindersley, J.

(*b*) See note (*a* p. 58.

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instrument in writing, usually called a rent-agreement, became the tenants of the mortgagee for the term, stipulating to pay to the mortgagee, a monthly rent of Rupees 8-0-0 for the same.

"4. The mortgagors are stated to be absolute owners of the house and premises in question, and the position of the parties by virtue of the mortgage and rent-agreement is that of ordinary landlord and tenant at a monthly money rent. The rent is not a rent service nor has a right to distrain been created or specially reserved by the mortgage instrument or the rent-agreement or by any other instrument or agreement between the parties.

"5. The First Judge made an order declining to issue the distress warrant applied for on the ground, that the rent in arrear was not a rent to which the right of distress was incident, reserving leave to the applicant to move the full Court to set aside such order.

"6. The applicant pursuant to leave reserved moved accordingly, and the full Court confirmed the order of the First Judge.

"7. But as the Court entertains doubts whether a higher Court may not be able to put a different construction on the Act, and as a matter of much importance is involved, this Court made its order contingent upon the opinion of the Judges of the High Court on a case to be stated to the said Court under Section 55(*a*) of Act IX of 1850.

"8. Act VII of 1847 (*b*) was, it is apprehended, incorporated with Act IX of 1850 by Section 89(*c*) of the latter Act, and

(*a*) Act IX of 1850, s. 55 is as follows:—

"The Judges of the Court of Small Causes may, in their discretion, reserve any question of law or equity on which they entertain doubts, or which they shall be requested by either party to the suit to reserve, for the Judges of the Supreme Court, and shall give judgment contingent upon the opinion of the said Supreme Court on a case which they shall thereupon be entitled to state to the Court. If only two Judges sit together, and shall differ in opinion, the question on which they differ shall be so referred."

(*b*) "An Act to regulate distresses for Small Rents in Calcutta."

(*c*) Act IX of 1850, s. 49 extends the powers of Act VII of 1847 "to the recovery of all arrears of rent not exceeding five hundred Rupees," and declares that "the Judges of every Court of Small Causes under this Act shall be empowered to exercise within their several jurisdictions the extended powers of the said Act."

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Act I of 1875(*a*) is merely substituted for Act VII of 1847, so that this Court has, it is presumed, a right to state this case to the High Court, and your Lordships will no doubt put the most liberal construction possible on the above enactments in aid of the appellate jurisdiction of the High Court in the matter.

" 9. Act VII of 1847, has been practically a dead letter in Madras. The records of this Court do, it is believed, show four or five instances of distress before 1855, but do not show a single instance of the provisions of the Act having been put in force since 1855. This is a very remarkable fact considering that since 1864 (see Act XXVI of 1864, Section 4) arrears of rent up to Rupees 1,000 were recoverable by distress through this Court, and could not otherwise be distrained for.

" 10. In practice therefore it may be safely asserted from an experience of nearly 20 years, that the remedy by distress as between individuals is unknown in the town of Madras.

" 11. In fact however the right of distress existed. Being in the nature of a remedy upon the contract to pay rent, it would in the Presidency towns most probably form part of the *lex fori*, brought with them by the English. But if any doubt could have existed on the matter, Act VII of 1847, and Act I of 1875, have removed it.

12. These Acts profess to regulate distresses for rent in the Presidency towns. They are a legislative recognition of the existence of a right of distress which they proceed to modify and control. That right never was derived from the Hindus or the Mahomedans, for, even supposing them to have possessed it, the legal remedies and procedure of the English and not their's would prevail. There is no Act of any Indian Legislature dealing with the subject of distress in the Presidency towns before Act VII of 1847. That Act is called " An Act to regulate distress, &c." and its 6th Section provides that " no distress

(*a*) " An Act to regulate Distresses for Rents in the Presidency Towns."

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shall be levied for arrears of rent amounting to Rs. 100 or less except under the provisions of this Act." It is therefore abundantly clear that Acts VII of 1847 and I of 1875, *do not create any new right of distress* for rent, but *only modify and control an existing right*, and that the existing right is not derived from the Hindus or Mohamedans, and is not created by any Act of any legislature in India. How then did it come into being? Clearly it must have come in with the English. The right of distress with which Acts VII of 1847 and I of 1875 deal, therefore, must be the right as it existed at Common Law and by Statute in the year 1726, the date of the Charter creating the Mayors' Courts in the Presidency towns.

"13. If any corroboration of this view were needed it is amply supplied by the second schedule of Act I of 1875, which repeals the Statutes of Henry III., Edward I., Edward II., &c., which deal with distress, replevin, &c. The vast extent of the remedy given by Section 3 (*a*) Act VII of 1847 which embraced the goods of any one on the premises, would also tend to corroborate it. That the remedy did go to this extent is clear for the restricted wording of Section 10 (*b*) of Act I of 1875, and the proceedings of the legislature when the bill was under discussion, the authority of the case in 1 Ind. Jurist, (N. S.) 361 (1) (quoted at page 842 of Mr. Cowell's Digest) notwithstanding.

(*a*) Act VII of 1847, s. 3 provides "that by virtue of the warrant of distress it shall be lawful for the Bailiffs to seize the whole or such part of the goods and chattels upon the said premises as shall be sufficient to cover the amount of the said rent, together with the costs of the said distress."

(*b*) Act I of 1875, s. 10 is as follows:—"In pursuance of the warrant aforesaid the bailiff shall seize the moveable property found in or upon the house or premises mentioned in the warrant and belonging to the person from whom the rent is claimed (hereinafter called the debtor), or such part thereof as may in the bailiff's judgment be sufficient to cover the amount of the said rent, together with the costs of the said distress.

Provided that the bailiff shall not seize—

(*a*) things in actual use; or

(*b*) tools and implements not in use; where there is other moveable property in or upon the house or premises sufficient to cover such amount and costs; or

(*c*) the debtor's necessary wearing apparel; or

(*d*) goods in the custody of the law."

(1) *Dwarka Nauth Biswas* v. *Uddit Churn Auddy.*

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" 14. If this view of the question be correct the word 'rent' used in both Acts in connexion with distress, cannot by any possibility mean any rent usually so-called, but only such rent as in 1847, would have had incident to it the right of distress. From this position, there is, it seems to this Court, no escape.

" 15. This necessitates the inquiry what rents in the Presidency towns in 1874, had incident to them the right of distress.

" 16. In 1731, Statute 4, Geo. 2, Chap. 28, Section 5, which has no application to India, greatly extended the remedy by distress in England. Prior to that Statute only rent-services, that is, such rents as had some corporeal service incident to them, and rent-charges, that is rents in respect of which the right of distress was specially reserved by the deed or will creating them, were liable to distress. The Statute of Geo. 2 gave a similar remedy in case of rents-seck, rents of assize, and chief-rents or quit-rents, and generally may be said to have created the enlarged remedy by which in modern times the vast majority of rents are reached.

" 17. From this point of view the operation of Act I of 1875 will necessarily be very limited. We should mistake our duty if we did not strive to give its full effect to the Act, and to that which we believe to be the intention of the Legislature if it were possible to do so, having due regard to the rules and principles applicable to the interpretation of Statutes, but we do not feel ourselves at liberty to give this Act any other interpretation than the one we have put upon it.

" 18. The questions which this Court begs to submit for the opinion of the High Court are:—

" 1. What are the rents for which distress warrants may be issued by this Court under the provisions of Act I of 1875 ?

" 2. Whether this Court was right in declining to issue the distress-warrant applied for in this instance."

Ramanuja Charri, for the Plaintiff.

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Ananda Charlu and *Kamesam*, for the Defendants.

The Court delivered the following

JUDGMENT:—The language of the enactments, passed to regulate Distresses for Rents in Calcutta first, and afterwards in the other Presidency towns, is clear; and it is needless to consider either the state of the Law of Distress in England at the time when the Mayors' Courts were established or the precise extent of the introduction and recognition here of this part of the English Law. That the right to distrain for rent in arrear has always to some extent existed and been recognized in the Presidency towns is certain; and the Acts passed since 1847 are distinct declarations by the Legislature made while regulating the exercise of the right and providing for its exercise only through the intervention of a Judge of a Court of Small Causes, that the right itself subject to the restriction, above referred to, is general and that "*any person claiming to be entitled to arrears of rent of any house or premises*" in a Presidency town is authorized to apply for the issue of a Distress Warrant.

In the first Act not only are the general words above quoted used, but they are followed by others plainly indicating that the law was applicable generally in the case of Natives as well as of Europeans. The assumption that the rents contemplated by these Acts are the "rents service" of the English Law, or rents of that nature (if any such rents can be found in Calcutta and Madras) and that the Acts only modify and control the right to distrain for such rents is unfounded and inconsistent with the language of the Acts.

We are of opinion that the Court erred in declining on the grounds alleged to issue the warrant applied for. We have in this instance answered the case stated for our opinion in order to avoid expense and delay to the parties concerned. But it must in future be borne in mind that by the terms of the Law, the Small Cause Court Judges are authorized to reserve questions for our opinion only where they arise in suits depending before them and not when doubts may occur, as here, upon applications for the issue of process or warrants.