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IN THE  
MATTER OF  
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SURAN NA-  
RAIN SINGH.

the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall pass an order for releasing the property, wholly or to such extent as it thinks fit, from attachment."

It seems clear, therefore, that when a claim is put forward under section 278, and a claimant or objector satisfies the Court that he has some interest in, or is possessed of, the property attached, and it does not appear that the possession of the objector was in reality the judgment-debtor's, the claim must be allowed. In this particular case the question for determination is not whether the petitioner is liable to pay the mesne profits or not, under the covenants contained in the deed of gift. The real question is whether the property is really in the possession or enjoyment of the judgment-debtor, though nominally conveyed to the petitioner. There is no doubt as to the fact that the petitioner is in possession in his own right, subject to the payment of the annuity and the costs.

In disallowing his claim the Subordinate Judge has allowed execution for the debt of one person against the property of another. I therefore concur with the learned Chief Justice in making the rule absolute.

A. A. C.

*Rule made absolute.*

## ORIGINAL CIVIL.

*Before Mr. Justice Wilson.*

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February 10.

ISMAIL SOLOMON BHAMJI (PLAINTIFF) v. MAHOMED KHAN  
AND ANOTHER (DEFENDANTS).\*

*Attachment—Claim to attached property in Calcutta Court of Small Causes—Suit in High Court by unsuccessful claimant—Res judicata—Code of Civil Procedure (X of 1882), ss. 278, 283—Presidency Small Cause Courts' Act (XV of 1882), ss. 9, 23 and 37—Act X of 1888, s. 2.*

An order made upon a claim to attached property filed in the Small Cause Court of Calcutta under section 278 of the Civil Procedure Code, 1882, is an order in the suit within the meaning of the Presidency Small Cause Courts' Act, 1882, section 37, and is final, subject only to the right to apply for a new trial. Where such a claim has been disallowed, a suit brought under

\* Original Civil Suit No. 365 of 1890.

section 283 of the Civil Procedure Code by the person against whom that order has been passed to establish the right which he claims to the property in dispute is not maintainable in any Court.

The exclusion by the Small Cause Court under the powers conferred on it by section 23 of the Presidency Small Cause Courts' Act, 1882, of section 283 of the Civil Procedure Code has not been affected by Act X of 1888.

THIS was a suit to recover damages for wrongful attachment of property.

The circumstances of the case were as follows:—

One Mahomed Khan, a defendant in this suit, seized two horses, as being the property of Hoshein Dooply, the other defendant, in execution of a decree which he had obtained against him in the Calcutta Small Cause Court. The present plaintiff alleged that the horses in question were his property and applied to the Small Cause Court for their release from attachment. The Court refused the application. The plaintiff then paid the amount of Mahomed Khan's decree and costs into Court, and applied to have the former order set aside. This application also was refused with costs. He then brought a suit in the High Court to obtain a declaration that the horses were his property at the date of attachment, and to recover the sum of Rs. 2,686, being the amount paid by him into Court, together with the costs of his applications to the Small Cause Court.

Mr. *T. A. Apcar* and Mr. *Chowdhry* for the plaintiff.

Mr. *Hill* and Mr. *Sale* for the defendant Mahomed Khan.

The defendant Hoshein Dooply was unrepresented.

At the settlement of issues it was contended that the suit was not maintainable.

Mr. *Hill*.—This suit is brought under section 283 of the Civil Procedure Code, a section which does not apply to suits in the Calcutta Court of Small Causes. The procedure in that Court is regulated entirely by Act XV of 1882 as amended by Act X of 1888. Under section 37 of the former Act, every decree or order of the Small Cause Court in a suit shall be final, save as by the Act provided. Section 23 extends to the Small Cause Court the portions of the Civil Procedure Code mentioned in the second schedule of the Act, subject, however, to the powers reserved to the Court by that section. By a notification under the section published

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in the *Calcutta Gazette* of the 14th June 1882, the Court has declared section 283 of the Code to be inapplicable to it. This notification has not been affected, so far as section 283 is concerned, by any subsequent notification. Act X of 1888, section 2, substituted for this schedule a new schedule, which also extends to the Small Cause Court, but section 3 of the Act expressly declares that any notifications regarding the old schedule shall be construed as referring to the new schedule. Moreover, section 23 of the Act of 1882 provides that the portions of the Code specified in the second schedule shall be applied only so far as the Court may deem them applicable, and section 9 empowers the Court to make rules for all matters not specially provided for by the Act. Under rule 46 a claim under section 273 of the Code is not tried summarily, but has to be preferred in a regular suit, and section 26 of the Act enables the Court in such suit to award compensation by way of damages for a wrongful attachment or claim. The question of wrongful seizure is therefore *res judicata* under section 13 of the Civil Procedure Code.

Mr. *Apear* for the plaintiff.—The subject-matter of this suit is not *res judicata*. This is a suit for damages, and, as we lay our damages at Rs. 2,600, this is the proper Court in which to bring it. The notification in the *Gazette* as to section 283 has been cancelled by implication by the Act of 1888. Even if it has not been cancelled, it does not affect this suit. Section 283 does not require the suit to be brought in the Court which has adjudicated upon the claim. The notification, if still in force, has merely taken away the right of bringing such a suit in the Small Cause Court. If the amount of the damages is such as to bring the matter within the jurisdiction of the High Court, a suit will lie in this Court. Suits of this kind are not appeals from the orders of the lower Courts, but are substantive suits to all intents and purposes—*Kishori Mohan Dass v. Humsook Dass* (1). We have followed the right course in adding our costs to the amount of our claim, and making them part of the subject-matter of our suit for trespass—*Raghu Nath Dass v. Badri Prasad* (2). This is the only Court in which suits of this nature for damages can be

(1) I. L. R., 12 Calc., 696.

(2) I. L. R., 6 All., 21.

maintained. The plaintiff is not barred by this section from bringing a suit, as he has not claimed compensation in the Small Cause Court. He has not availed himself of the remedy afforded by section 26, and it is therefore still open to him to sue under section 283. *Durga Prasad v. Kachla Kuar* (1); *Annaji Raw v. Rama Kurup* (2) were referred to.

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Mr. Hill, in reply.—The plaintiff contends that he has a right to bring a suit for damages for trespass, but the Court has already decided that there has been no trespass.

The following judgment was delivered by—

WILSON, J.—The plaintiff sues on allegations in his plaint which are in substance to this effect:—The now defendant, in execution of a decree of the Calcutta Court of Small Causes against a third person, caused to be attached a pair of horses which, the plaintiff says, are his property. The plaintiff filed a claim in the Small Cause Court, and his claim was disallowed with costs. He applied for a new trial, and his application was refused. He now sues to establish his title to the horses, and for damages.

The case came on for settlement of issues, and the question for decision is whether, on the above statement of facts, this suit will lie. Had the previous proceedings taken place in a Court other than the Small Cause Court, there is no doubt that such a suit could be maintained, for it is expressly given by section 283 of the Civil Procedure Code; and if it can be maintained, there is no doubt that this is the proper Court. But the case stands on a different footing by reason of the proceedings having been in the Small Cause Court.

The sections of the Presidency Small Cause Court Act, XV of 1882, which it is necessary to consider are the following:—

Section 9: “Except as otherwise provided by this or any other law for the time being in force, the Small Cause Court may, with the previous sanction of the High Court, make rules to provide in such manner as it thinks fit for all matters not specially provided for by this Act, and for the exercise, by one or more of its Judges,

(1) I. L. R., 9 All., 140.

(2) I. L. R., 10 Mad., 152.

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of any powers conferred on the Small Cause Court by this Act or by any other law for the time being in force."

Section 23: "The portions of the Code of Civil Procedure specified in the second schedule hereto annexed shall extend, and shall, so far as the same may, in the judgment of the Court, be applicable, be applied to the Small Cause Court, and the procedure prescribed thereby shall be the procedure followed in the Court in all suits cognizable by it except where such procedure is inconsistent with the procedure prescribed by any specific provisions of this Act. Provided that the Court may, subject to the control of the Local Government, from time to time by notification in the official Gazette, declare that any of the said portions of the said Code shall not extend and be applied to the Small Cause Court, or that any of such portions shall so extend and be applied with such modifications as the Court, subject to the control aforesaid, may think fit."

Section 26, paragraphs 2, 3, and 4: "When any claim preferred or objection made, under section 278 of the Code of Civil Procedure, is disallowed, the Small Cause Court may in its discretion order the person preferring or making such claim or objection to pay to the decree-holder, or to the judgment-debtor, or to both, by way of satisfaction as aforesaid, such sum or sums as it thinks fit.

"And when any claim or objection is allowed the Court may award such compensation by way of damages to the claimant or objector as it thinks fit; and the order of the Court awarding or refusing such compensation shall bar any suit in respect of injury caused by the attachment.

"Any order under this section may, in default of payment of the amount payable thereunder, be enforced by the person in whose favour it is made against the person against whom it is made as if it were a decree of the Court."

Section 37: "Save as is herein specially provided, every decree and order of the Small Cause Court in a suit shall be final and conclusive; but the Court may, on application of either party, made within eight days from the date of the decree or order in any suit (not being a decree passed under section 522 of the Code of Civil Procedure), order a new trial to be held, or alter, set aside, or reverse

the decree or order, upon such terms as it thinks reasonable, and may, in the meantime, stay the proceedings."

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Among the sections of the Procedure Code specified in the second schedule to the Act were the sections relating to claims by third parties to property attached in execution, including section 283, which gives a right of suit to get rid of the effect of the decision upon a claim in the following terms: "The party against whom an order under section 280, 281, or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive." But in exercise of the power given by the proviso to section 23, the Small Cause Court, with the sanction of the Local Government, while retaining the other claim sections, excluded section 283, and the effect of the amending Act X. of 1888 is, I think, to maintain the exclusion. Under section 9, the Small Cause Court, with the sanction of this Court, has made rules for dealing with claims, the effect of which is that the claimant files a plaint, and the matter is then treated as a suit.

In my opinion an order made upon a claim filed under section 278 of the Civil Procedure Code is an order in the suit, within the meaning of section 37 of the Presidency Small Cause Courts Act. The words in section 278 to the effect that the Court is to investigate the claim with the like power, as regards the examination of the claimant or objector, and in other respects, as if he were a party to the suit, are strong to show this. It follows that by the terms of section 57 of the Presidency Small Cause Courts Act the order is final, subject only to the right to apply for a new trial. And there can be no doubt that the omission of section 283 from the sections of the Procedure Code applied to the Small Cause Court was intended to give effect to this view.

The balance of convenience is, I think, altogether in favour of the same view. Under the rules of the Small Court claims are not tried summarily; they are dealt with just as suits are, with the same remedy in case of mistake by application for a new trial, and the Court has full power to award damages to either party. A person who thinks himself aggrieved by the seizure of goods, in execution of a Small Cause Court decree,

1891 has his choice of remedies. He may bring an ordinary suit in the proper Court, or he may make a claim in the Small Cause Court. In either case his rights are fully tried out, and it would, I think, be inconvenient and contrary to sound principle to allow him to try first one remedy and then the other. The suit is dismissed with costs.

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Attorney for the plaintiff: Baboo *Kedarnath Mitter*.

Attorney for the defendant: Mr. C. Pittar.

H. L. B.

### PRIVY COUNCIL.

P. C.\*  
1890  
July 18 & 23.

BUDHA MAL (PLAINTIFF) v. BHAGWAN DAS AND ANOTHER  
(DEFENDANTS).

[On appeal from the Chief Court of the Punjab.]

*Hindu law—Partition—Evidence of Partition—Distribution of family estate, followed by separate possession, equivalent to informal partition—Appeal to Chief Court, Punjab—Civil Procedure Code, 1882, s. 584—Questions of fact.*

The Courts below found that a distribution of ancestral estate among the members of a family had taken place in former years, and had been followed by continuous possession, without their having any intention to re-adjust or to hold on behalf of the family. The right of an individual member to claim another partition was therefore negatived.

The parties, who had long discontinued joint residence, were of a family consisting at the time of the distribution of four sons. One son, a Sikh Dewan deceased. The son of one brother now claimed as son of another, joining a third who still survived, partition of the estate which had descended from the grandfather with the increment since that time.

That an actual partition had been effected, although probably no formal document of partition had been executed, appeared to their Lordships to be a just inference from the evidence.

An appeal from an Appellate Court to the Chief Court is not limited to such appeals as are under the Civil Procedure Code, 1882, section 584; evidence may be dealt with, and questions of fact are open for decision.

\* *Present*: LORD WATSON, LORD MACNAGHTEN, SIR B. PEACOCK, and R. COUCH.

(1) Act XVII of 1877, section 38, providing for such appeals, was replaced by section 40 of the Punjab Courts' Act, XVII of 1884.