

## ORIGINAL CIVIL.

Before Mr. Justice Ameer Ali.

A. YULE & Co. (PLAINTIFFS) v. MAHOMED HOSSAIN &  
OTHERS (DEFENDANTS.)

1896  
July 24.

*Small Cause Court, Presidency Towns—Practice and Procedure—Judgment contingent upon opinion of the High Court—Presidency Small Cause Court Act (XV of 1882), section 69—Civil Procedure Code (Act XIV of 1882), sections 373, 617, 618, 622.*

The Small Cause Court passed a decree for the plaintiffs, but contingent upon the opinion of the High Court. On the reference the High Court decided that upon the plaint before the Court the plaintiffs could not recover.

*Held*, that the Small Cause Court on the receipt of the copy of the judgment of the High Court was bound to enter judgment for the defendants.

IN this case the Small Cause Court passed a decree in favour of the plaintiffs, but contingent upon the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act (XV of 1882). Upon the reference it was held by the High Court that the plaintiffs could not recover on the plaint before the Court. The judgment of the High Court was transmitted to the Small Cause Court, and subsequently the Officiating Second Judge of that Court allowed the suit to be withdrawn with liberty to the plaintiffs to bring a fresh suit. Thereupon the defendants obtained this rule under section 622 of the Civil Procedure Code, calling on the plaintiffs to show cause why the order of the Small Cause Court allowing the suit to be withdrawn should not be set aside.

Mr. Allen for the plaintiffs.

Mr. W. C. Bonnerjee for the defendants.

AMEER ALI, J.—The question involved in this rule is of some importance. The parties showing cause brought a suit in the Small Cause Court for damages alleged to have accrued to them in consequence of the refusal of the defendants in that suit, the now applicants, to take delivery of certain goods they had agreed to purchase from the plaintiffs. On such refusal the plaintiffs re-sold the goods, and then sued for the difference between the

1896 contract price and the price obtained at the re-sale. It appears  
 YULE & Co. that at the re-sale the plaintiffs themselves bought in the goods.  
 v. The objections raised by the defendants at the hearing of the suit  
 MAHOMED were overruled by the learned Judge of the Small Cause Court,  
 HOSSAIN. who held that there was no objection to the plaintiffs having  
 themselves purchased the goods on the re-sale, and that they were  
 entitled to recover the amount claimed.

The judgment, however, was made contingent on the opinion of the High Court. When the reference to the High Court came on for hearing, it was found that none of the questions submitted for consideration really arose in the suit. And the High Court's answer to the first question was "the plaintiffs cannot on the *plaint before the Court* recover the loss alleged by them to have been sustained at the sale held on the 25th July."

The learned Judges then proceeded to say: "In an action properly framed the amount of damages would not be limited to the expenses incurred at the sale. \* \* \* In an action properly framed the plaintiffs would not be prevented from recovering damages because they only professed to sell 13 out of the 15 bales. \* \* \* The case has been entirely misunderstood, and neither of the questions proposed really arises in it at all. \* \* \* \* The proper course in this case would have been to amend the *plaint* by adding an averment that the market price at the time of the breach was less than the contract price, and by adding a claim for damages on that basis. Then at the trial evidence might have been given of what the market price was at the time when the goods were refused, and the judgment should have been for the difference if any was shown to have existed."

The judgment of the High Court was transmitted to the Small Cause Court, and the Officiating Second Judge read it out, and on the 29th of January 1896 after certain adjournments allowed the suit to be withdrawn with liberty to the plaintiffs to bring a fresh suit. Thereupon on the 21st of May last the defendants obtained a rule from this Court calling on the other side to show cause why the order of the Small Cause Court made in the suit should not be set aside, and why this Court should not pass such other order thereon as it should think fit.

The rule was granted under section 622 of the Civil Procedure

Code on the ground that the Judge had acted without jurisdiction, or if with jurisdiction then "illegally or with material irregularity."

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Mr. Allen shewed cause for the plaintiffs, and his contention is that the Small Cause Court Judge acted rightly in making the order under section 373 of the Civil Procedure Code. It must be borne in mind that the reference to this Court was made under section 617 of the Civil Procedure Code coupled with section 69 of the Small Cause Court Act. It is unnecessary to refer particularly to section 617, but the provisions of section 618 should be considered. That section runs thus :—

"The Court may either stay the proceedings or proceed in the case, notwithstanding such reference, and may pass a decree or order contingent upon the opinion of the High Court on the point referred ; but no execution shall be issued, property sold, or person imprisoned, in any case in which such reference is made, until the receipt of a copy of the judgment of the High Court upon such reference."

Section 619 is as follows : "The High Court shall hear the parties to the case in which the reference is made in person or by their respective pleaders, and shall decide the point so referred, and shall transmit a copy of its judgment under the signature of the Registrar to the Court by which the reference was made ; and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court."

It should be observed that the words "the case" in the last part of the section refer to "the case" in the first part, showing clearly that what is intended is the suit and not the subject of the reference. In this case the evidence had been taken, and the Judge had come to the conclusion that the plaintiffs were entitled to a decree and had accordingly passed a decree in their favour.

The High Court came to the conclusion that the plaintiffs were not entitled to recover the loss alleged on the plaint before the Court. In other words they held that the plaintiffs' suit as it then stood must fail. They proceeded to give reasons and to state what might have been done if the plaintiffs had taken another course, but the conclusion was that the plaintiff having taken the course he had, the suit must fail, and this they expressed most clearly in their judgment which was transmitted to the Small Cause Court.

1896 Section 619 provides that on transmission of a copy of the judgment of the High Court, "under the signature of the Registrar to the Court by which the reference was made, such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court."

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It has been contended that under that section, on receipt of the judgment of the High Court, the Small Cause Court was bound to declare its own judgment rescinded, but having done that it was then at liberty to proceed with the case as it liked. This contention carried to its legitimate extent must land us in serious difficulties. A case may, as in the present instance, proceed to decree contingent upon the opinion of the High Court. That Court may hold that the action as framed was not maintainable. If the contention be well founded, the Small Cause Court may, after a suit has been decided, give the plaintiff leave to amend his plaint and proceed with the suit *de novo*. This may happen any number of times, for there would be nothing to restrict the discretion of the Small Cause Court. Such an eventuality would not be likely to occur in practice except rarely, but it may be referred to as a fair test to apply in the construction of the section: I cannot accept the argument put forward by learned Counsel, as it seems to me the meaning of the section is perfectly plain, and I must deal with the question from a common sense view.

The Small Cause Court had passed a decree for the plaintiffs contingent on the opinion of the High Court. The High Court held that upon the case presented by the plaintiffs they could not recover. As the result, judgment could only be entered for the defendants, and the Small Cause Court was bound on receipt of the decision of the High Court to dispose of the case in accordance therewith. The method suggested by Mr. Allen would render it possible to help parties who have made mistakes and who have had their cases heard and obtained the decision of the Court on the basis of those mistakes; but that certainly is not contemplated by the section, which requires the Court to "proceed to dispose of the case in conformity with the decision of the High Court." Had the case been referred in an interlocutory or intermediate stage the final judgment being withheld until the decision on the point referred to the High Court, the Small Cause Court would then have been in possession

of the case, but having pronounced judgment contingent upon the opinion of the High Court, which opinion was against that judgment, there was only one course to take.

It seems to me that the Small Cause Court did not possess the jurisdiction it exercised, and that it did not act in conformity with section 619 in disposing of the matter as it did. The order which it purported to make was therefore bad for want of jurisdiction, and must be set aside. The matter must go back with this expression of opinion.

*Rule made absolute with costs.*

Attorneys for the plaintiffs : Messrs. *Dignam & Co.*

Attorneys for the defendants : Messrs. *Sowton & Sen.*

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## APPELLATE CIVIL.

*Before Mr. Justice Macpherson and Mr. Justice Hill.*

IN THE MATTER OF BASHARAT ALI CHOWDHRY (A LUNATIC).\*

1896

May 4.

*Lunatic—Residence—Lunatic resident in mofussil—Guardian of Lunatic's Person—Position of Guardian towards local Court appointing him—Temporary Suspension of Guardian—Jurisdiction of District Judge—Irregularity—Act XXXV of 1858, sections 10, 18 and 22—Superintendence of High Court—Civil Procedure Code (Act XIV of 1882), section 622.*

Although Act XXXV of 1858 contains no express provisions as to the place of residence of a lunatic governed by the Act, it contemplates that he shall reside within the jurisdiction of the Court that has found him to be a lunatic.

The guardian of such a lunatic's person is, in matters connected with the guardianship, subordinate to the District Court which appointed him.

A guardian, having obtained leave from the District Judge to take the lunatic out of the jurisdiction for a specified time, was, at the expiration of that time, ordered to return with the lunatic to his residence within the local jurisdiction. He failed to comply with the order. Without further notice, the District Judge, by certain orders which he gave by letter and telegram through the manager of the lunatic's estate, suspended the guardian from his office, and directed him to make over the custody of the lunatic to the manager. The guardian made over the custody accordingly;

\* Civil Rule No. 814 of 1895.