

## [ORIGINAL CIVIL JURISDICTION.]

1782.  
Oct. 3.*Referred Case.*

BA'I JADA'V ..... *Plaintiff.*  
 TRIBHUVANDA'S JAGJIVANDA'S and another. *Defendants.*

*Trustee—Breach of trust—Liability of passive trustee for breach of trust by his co-trustee—Small Cause Court—Equitable jurisdiction, extent of—Act IX. of 1850, Secs. 25 and 32—Act XXVI. of 1864, Sec. 2.*

A trustee, who, having accepted a trust, remains passive and takes no steps to see the trust carried into execution, is liable for losses arising from the breach of trust of his co-trustee.

The Court of Small Causes has an equitable jurisdiction only in the cases specified in Sec. 32 of Act IX. of 1850, as the provisions of Sec. 2 of Act XXVI. of 1864 do not extend the class of cases over which the Court has jurisdiction, but only enlarge the amount for which it may make a decree.

THIS was a case stated for the opinion of the High Court by N. Spencer, Third Judge of the Bombay Court of Small Causes, under Sec. 55 of Act IX. of 1850, and Sec. 7 of Act XXVI. of 1864.

“A question raised in this suit was, on the 30th of January last, submitted by me for the opinion of the Judges of the High Court. A copy of the case—then stated is annexed for ready reference.

“The suit was instituted to recover the value of a pair of gold wristlets entrusted to the defendants by the plaintiff's late husband for the purpose of being by them converted into money and the proceeds invested at interest with a banker for the use of the plaintiff. I held that the claim was barred by the law of limitation. The Judges of the High Court, however, were of opinion that the defendants were trustees within the second Section of Act XIV. of 1859, and therefore that the plaintiff's claim was not barred. The non-suit was set aside, and the cause remitted to this Court for trial on the merits.

“I have now tried the cause, and the evidence given before me has established the following facts:—The two defendants were relatives of Tápidás Makundás, the plaintiff's deceased

1872. husband ; during his last illness the deceased was removed  
 BA'I JADA'V to the house of the first defendant, Tribhuvan Jagjivan ;  
 v. a few days before his death, the two defendants, Tribhuvan  
 TRIBHUVAN- Purshotam, the brother of Govardhan, the second defendant,  
 DA'S JAG- and several others, met in the room in which the deceased  
 JIVANDA'S. was lying ; and, at the dictation of the deceased, Tribhuvan  
 Purshotam wrote the will or testamentary paper, copy trans-  
 lation of which is annexed, marked No. 2. A short time  
 before this paper was written, the wristlets, the subject  
 matter of this suit, were, in the presence of the parties as-  
 sembled, handed by the deceased to the defendant, Tribhu-  
 van Jagjivan, for the purpose of being disposed of in  
 accordance with the writing, and the paper itself was made  
 over to the other defendant, Govardhan Purshotam. It has  
 been in his possession ever since and was produced by him  
 at the trial.

“ It will be observed that in the first part of paper No. 2,  
 the name of the defendant Tribhuvan Jagjivan alone appears ;  
 with reference to this, I may mention that it was at the  
 suggestion of the plaintiff's father and with the consent of  
 the other defendant, Govardhan Purshotam, that the name  
 of the latter was added as a co-trustee in the subsequent part  
 of the document. No evidence was given as to what was  
 done with the wristlets after they were delivered to Tribhu-  
 van Jagjivan.

“ The defence set up by the defendants was :—By the  
 first defendant, a denial that the wristlets were given to him.  
 By the second defendant, a denial that he was present when  
 paper No. 2 was written, or that he was aware that the  
 wristlets had been given to his co-defendant, but he failed to  
 give any satisfactory explanation as to how the paper came  
 into his possession. I disbelieved the statements of the de-  
 fendants, and the facts set out in the preceding para. are to  
 be taken as having been proved.

“ On the evidence I gave a verdict against both the de-  
 fendants for the value of the wristlets, Rs. 650, subject to  
 the opinion of the High Court on the following questions :—

“ 1st Question—Has the defendant, Govardhan Purshotam, by his conduct, rendered himself liable, with the other defendant, as a trustee, to make good to the plaintiff the value of the trust property ?

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“ 2nd Question—As the defendants have been held to be trustees, can they be sued in the Court of Small Causes by the *cestui que trust* for the recovery of the specific trust property or the value thereof ?

“ By the 25th Section of Act IX. of 1850, constituting this Court, ‘ every defence which would be deemed good in the Supreme Court sitting as a Court of Equity shall be a good bar to any legal demand in the Court of Small Causes ’ ; but it appears to me to be doubtful whether this Court possesses an equitable jurisdiction for plaintiffs, except in the two instances (partnership account and a legacy) in which such jurisdiction is expressly given to it by the 32nd section of the Act.

“ 3rd Question—If the defendants are liable to make good the value of the trust property, are they not also liable for the interest which, but for their breach of trust, the plaintiff would have received since 1859, and has not the plaintiff, by suing for the value of the property only, divided her cause of action the whole of which would exceed the money jurisdiction of the Court ?

“ I may add that this last defence was not taken by the defendants, but when the objection was pointed out by me at the close of the case, the plaintiff's pleader applied to me to amend the summons, by adding (on payment of the Court fees) Rs. 350 to the particulars of demand for interest, thus making the claim Rs. 1,000, and abandoning the excess of interest, but I did not think it was then competent for me to do so.

“ I now solicit the opinion of their Lordships on the three questions above stated.”

The case was argued, on the 30th of August 1872, before SARGENT, Acting C.J., and GREEN, J.

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The defendant, Tribhuvan, did not appear.

*Tyabji* (*Mayhew* with him) for the defendant, Govardhandás :—As to the first point, the defendant, Govardhandás, is not, under the will, a trustee in respect of the subject matter of this suit, and even if he is, there is nothing to show that he has been guilty of a breach of trust or of any misconduct.

As to the second point, this being a suit between *cestui que trust* and trustee, the Small Cause Court has no jurisdiction to try the suit. The only jurisdiction the Small Cause Courts have is conferred by Secs. 25 and 32 of Act IX. of 1850. The words in Sec. 25 “and every defence which would be deemed good in the Supreme Court sitting as a Court of Equity shall be a good bar to any legal demand” show that their jurisdiction is confined to legal demands, for these words would have been unnecessary, if they had equitable jurisdiction. Sec. 32 confers a limited equitable jurisdiction on the Small Cause Courts: *Expressio unius est exclusio alterius*. The Small Cause Courts, for more than twenty years, have refused to try equity cases and they have no legal machinery for carrying out complicated equity decrees.

*Inverarity*, for the plaintiff :—On a true construction of the will Govardhandás is a trustee, and he has been found to be so by the Judge of the Small Cause Court. The question is whether he has, by his conduct, made himself liable for not carrying out the trusts of the will. The most favourable view the Court can take of his conduct is that he stood by and did nothing to see that the trusts were carried out. If so, he is liable. The law knows not a passive trustee: *Lewin on Trusts*, p. 170. Trustees may not delegate their office to any one, not even to a co-trustee: *Lewin on Trusts*, p. 205, and cases there cited.

As to the second question, the terms of Sec. 25, which should be read with Sec. 37 of Act IX. of 1850, are wide enough to give equitable jurisdiction to the Small Cause Courts. The words are “all suits where the debt or damage, claimed or value of the property in dispute, &c.” This is a suit where the value of the property in dispute is not more than the

amount up to which the Small Cause Courts have jurisdiction. The words "every defence which would be deemed good in the Supreme Court sitting as a Court of Equity shall be a good bar to any legal demand," only mean that points of equity may be determined by the Court, if they arise in a legal action, and this is quite consistent with the Court having the power to try pure equity cases. By the provisions of Sec. 2 of Act XXVI. of 1864 the jurisdiction of the Court extends "to the recovery of any debt, damage, or demand," &c. ; it is not restricted to a legal demand, but expressly provides for any demand. The word "demand" is one of the widest signification in our law.

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SARGENT, J. :—What are the words in the English County Court Act, 9 & 10 Vict., c. 95 ?

The words there are "all pleas of personal actions where the debt or damage claimed," &c. (Sec. 58.) The English County Courts have a limited equitable jurisdiction under 28 & 29 Vict., c. 99 ; but it must not be forgotten that they sit in a country where there are distinct courts for law and equity. When Act XXVI. of 1864 was passed, that distinction no longer existed here, law and equity being administered in the same court.

*Tyabji* in reply.

*Cur. adv. Sult.*

On the 3rd October 1872, the judgment of the court was delivered by GREEN, J. :—In the present case three questions have been reserved for the opinion of this Court by the Third Judge of the Bombay Court of Small Causes. From the statement submitted by that Judge, it appears to have been held by him that the defendant, Govardhan Purshotam, had been constituted a trustee, jointly with the defendant Tribuvandás Jagjivandás, of certain ornaments, namely, the two gold wristlets mentioned in the amended particulars of demand. Though it is not one of the questions referred to us, we may state that, in our opinion, the Judge was right in so holding. No doubt, in the earlier part of the document, bearing date the 14th August 1859, the name of

1872. the defendant Tribuvandás Jugjivandás alone is mentioned  
 BAI JADÁV as a trustee, but, in the latter part of it, that of the defen-  
 v. dant Govardhandás Purshotamdás is added, and the Judge  
 TRIBHUVAN- finds, as a matter of fact, that this was done by consent of  
 DA'S JAG- Govardhandás himself. He also finds that the document  
 JIVANDA'S. was, on its execution, made over to the defendant Govar-  
 dhandás Purshotamdás (as indeed appears from the docu-  
 ment itself), and has been in his custody ever since and was  
 produced by him on the trial. The first question, which the  
 Judge has reserved for our opinion, is as to the liability of  
 the defendant Govardhandás, with the defendant Tribuvan-  
 dás, to make good to the plaintiff, Bái Jadáv, the value of  
 the trust property. The trusts, on which, according to the  
 document of the 14th August 1859, the gold wristlets in  
 question were held by the defendants (so far as concerns the  
 plaintiff and so far as it is necessary to mention them for  
 the present purpose), were, after the death of Tápidás  
 Makundás (the deceased husband of the plaintiff and  
 the party executing the document and which death  
 occurred shortly afterwards), to sell the same and de-  
 posit the proceeds at interest and pay such interest to  
 Bái Jadáv during her life. The defendants do not allege  
 that the wristlets or the proceeds of their sale have been lost  
 under circumstances that would exonerate them from  
 liability; on the contrary, the defendant Tribhuvandás, at  
 the trial, denied that the ornaments were ever delivered to  
 him, and the defendant Govardhandás denied that he was  
 present when the document of the 14th August 1859 was  
 written or that he was aware that the ornaments had been  
 given to his co-defendant. These denials, however, have  
 been disbelieved by the Judge who heard the suit, and the  
 case stands thus that the defendant Tribhuvandás, having  
 received into his hands the ornaments in question, does not  
 appear since 1859 ever to have done anything towards carry-  
 ing into execution the trusts reposed in him in respect of  
 them, and his co-trustee, Govardhandás, so far as appears,  
 has stood by, and in no way interfered to see that such  
 trusts were carried into execution. This being so, we are of  
 opinion, whatever the ultimate liability of the defendant

Tribhuvandás to his co-defendant may be, that the proximate liability of the latter, so far as regards the plaintiff, is the same as that of the former. Whether, however, the liability of the defendants or either of them is to make good to the plaintiff the value of the trust property, is another matter as to which we shall have more to say hereafter.

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The second question, namely, whether the defendants, as trustees, can be sued in the Court of Small Causes by the *cestui que trust* for the recovery of the specific trust property or the value thereof, raises an important question as to the extent of the jurisdiction of the Courts constituted under Act IX. of 1850 amended by Act XXVI. of 1864—the question, namely, whether those Courts have general jurisdiction over trusts. By Sec. 25 of Act IX. of 1850, the jurisdiction given to the Small Causes Courts is over “all suits where the debt or damage claimed or value of the property in dispute is not more than Rs. 500 whether on balance of account or otherwise.” The same section provides “that every defence which would be deemed good in the Supreme Court, sitting as a Court of Equity, shall be a good bar to any legal demand in the Court of Small Causes,” and excludes certain specified classes of suits from the cognisance of the Court. A subsequent section (Sec. 32) extends the jurisdiction of the Court “to the recovery of any demand not exceeding the sum of Rs. 500 which is the whole or part of the unliquidated balance of a partnership account or the amount or part of the amount of a distributive share under an intestacy or of any legacy under a will.” At the time that Act IX. of 1850 was passed, the distinction between Law and Equity, as being two systems of rules having each peculiar and appropriate forms and procedure for the enforcement of the rights given by those rules respectively, existed in the Supreme Courts of the Presidency Towns. The words “debt and damage” in Sec. 25, and in fact the language of Act IX. of 1850 generally, seem to us to indicate that the legislature intended to give general jurisdiction to the Small Cause Courts only over matters which would have been the subject of a plea *side action* in the Supreme

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Court. Had it been intended to limit the jurisdiction merely by pecuniary amount and not also by class and nature of rights and violations or withholding of rights, there would seem to be no reason for Sec. 32 expressly giving the Court jurisdiction over partnership accounts, shares under an intestacy, or legacies under a will. The provision in Sec. 25, authorizing equitable defences to legal demands, was, in our opinion, introduced with the object of rendering unnecessary an application on the Equity Side of the Supreme Court for an injunction against a proceeding in the Small Causes Court to enforce a legal demand to which, in a Court of Equity, there would have been a defence. This provision and Sec. 32 are, in our opinion, a strong argument against the supposition that the Small Causes Courts under Act IX. of 1850 were intended to have any general equitable jurisdiction, and we believe that it has been always considered that under that Act those Courts had no such jurisdiction except so far as it is expressly given by Sec. 32. Then came Act XXVI. of 1864 of which the preamble is as follows :—“Whereas it is expedient to increase the limit of the jurisdiction of the Courts of Small Causes held under Act IX. of 1850 and to increase the number of Judges of the said Courts ;” and by Sec. 2 it is provided that “the jurisdiction of Courts held under Act IX. of 1850 shall extend to the recovery of *any debt, damage or demand* exceeding the sum of Rs. 500 but not exceeding the sum of Rs. 1,000 and to *all actions in respect thereof* (except the several actions specified in the proviso in Section 25 of the same Act).” The language of this Section is no doubt more comprehensive than that of Sec. 25 of Act IX. of 1850, and might, taken by itself, be held to give jurisdiction in all classes of suits where the appropriate remedy would be a money decree and where the amount sought to be recovered did not exceed Rs. 1,000, without regard to the consideration whether the right, sought to be enforced, would have been the subject of an action on the plea side or of a bill in equity on the Equity Side of the Supreme Court. It may, further, be mentioned that at the time Act XXVI. of 1864 was passed, the distinction between Law and Equity, as involving

different systems of judicial procedure, had ceased to exist in Bombay on the abolition of the Supreme Court and the establishment of the High Court. But we think that the greater generality of the language of the Section quoted, as compared with that of Sec. 25 of Act IX. of 1850, may be accounted for by this that the Legislature was increasing the limit of the jurisdiction of the Court in such classes of suits as it had jurisdiction in before, and had to employ words which would effect this in respect, not only of the suits of a legal nature which the Court had been empowered to entertain under Sec. 25 of the Act of 1850, but also of the suits of an equitable nature which the Court had been empowered to entertain under Sec. 32 of the same Act. The object of the Legislature, in passing Act XXVI. of 1864, was, we consider, to increase the money limit of the jurisdiction of the Court, not to enlarge the class of suit over which it had jurisdiction; and the language of that Act, taken in conjunction with its preamble, does not necessarily import more than this. Besides, to hold that the later Act (subject, of course, to limit in respect of amount) gives a general equitable jurisdiction to the Court (which perhaps, at first sight, Sec. 2 might, as we have said, seem to import), would involve the unreasonable supposition that the Legislature intended to give such jurisdiction between the money limits of Rs. 500 and Rs. 1,000, but to refrain from doing so, where amounts less than Rs. 500 were involved; and we cannot find in either Act or in the Acts, taken together, any provision or provisions the effect of which would be to give such jurisdiction in the case of such last named amounts. The present case, however, is an example, we consider, of a class of cases where it would be very desirable that the Courts of Small Causes should have jurisdiction, namely, whenever an appropriate remedy can be afforded by a decree for a definite sum of money. But under the present Acts, we are of opinion that the Small Causes Courts cannot enforce trusts, unless the trust, sought to be enforced, is one for the payment of a distributive share under an intestacy or a legacy under a will, the value of the claim being not greater than Rs. 1,000; and we must, therefore, answer the second ques-

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tion in the negative. We may, however, observe that the same answer would have been given to this question, had it been put with regard to a suit in the High Court. The proper decree to be made, in the circumstances stated in the case, would be to appoint a new trustee or trustees of the document of the 14th August 1859 in the place of the defendants, that the defendants do deliver to such new trustee or trustees the ornaments, or their value, and that the defendants do pay to the plaintiff the loss of interest sustained by her by reason of the defendant's breach of trust. Under the declaration of trust of the 14th August 1859, the plaintiff is not entitled to have the ornaments or their value delivered or paid to her individually; but only to the interest of the proceeds of the sale of them for her life. She has, however, a right to require that the capital fund, out of which such interest is to come, be placed in a proper state of security and properly invested.

We do not consider it necessary, having regard to the opinion we have expressed on the two first questions, to express any on the third question reserved, except that, in our opinion, the defendants are liable to make good the value of the trust property in the sense above mentioned, but *not to the plaintiff*; but that they are liable, in a Court having jurisdiction over trusts, to make good *to the plaintiff* the loss of interest she has sustained.

Though the verdict, passed against the defendants, cannot stand, having regard to the opinion expressed above on the questions reserved, yet we should strongly recommend the defendants to satisfy the plaintiff's demands without further litigation. So far as we can at present judge, upon a suit being instituted against them in the High Court, there would be a decree to restore the ornaments or their value and to pay to the plaintiff the amount of interest which, had the defendants fulfilled their trust, she ought to have received, and, on such a decree, they would certainly have to pay the costs of the suit.

As to the costs of the parties of reserving and stating the said questions for the opinion of this Court and of the argu-

ment thereof, we order that the parties do respectively bear their own costs.

Attorneys for the plaintiff:—*Dallas and Lynch.*

Attorney for the defendant Govardhandás:—*C. Tyabji.*

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[APPELLATE CRIMINAL JURISDICTION.]

REG. v. NA'RA'YAN GANGA'RA'M and other.

July 11.

*Offences against opium laws—Regulation XXI. of 1827—Jurisdiction—  
Power of arrest.*

The District Magistrate (whose Court is the proper tribunal for the trial of an offence relating to the smuggling of opium \*) has, under Section 21 of the Code of Criminal Procedure, power to inflict any fine provided by Regulation XXI. of 1827 for such offence, even though the fine may exceed Rs. 1,000.

The arrest of a person accused of the above offence without a warrant is generally illegal, except under the circumstances specified in Sec. 108 of the Code of Criminal Procedure.

THIS was a reference made by R. H. Pinhey, Session Judge of Púna, for the orders of the High Court.

Each of the two accused was found in illegal possession of a bundle of opium, weighing over a quarter of a Súrat *seer*. The quantity in each of the bundles was such that the penalty recoverable exceeded the sum of one thousand rupees. The Police apprehended the accused without a warrant and sent them on to Mr. Bell, Acting Magistrate of the District of Púna, who committed the case for trial by the Court of Session. That Court, under Sec. 22 of the Code of Criminal Procedure, Cl. 3, delegated the trial to the Assistant Judge, Mr. Satyendra Náth Tagore, who, finding the accused guilty, sentenced each to pay a fine of Rs. 1,292-6-4 or in default to suffer six months' simple imprisonment. Mr. Pinhey, the Sessions Judge, being of opinion that the offence was not triable by the Assistant Judge, and feeling doubtful whether the Magistrate of the District, whose pecuniary jurisdiction was limited, by Sec. 22 of the Code of Criminal Procedure,

\* See *Reg. v. Lakhu Sakru* 8 Bom. H. C. Rep. Cr. Ca. 118.