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BÁBÁ
v.
VISHVANÁTH
JOSHI.

WEST, J.—The defendant in this case being sued in ejectment set up a right as a permanent tenant. That defence raised the question of whether he had or had not a permanent tenancy, but it did not raise the question of whether he was a tenant from year to year. If this latter question had been raised, the further one would have been necessary, of whether the yearly tenancy had been legally terminated: but when the defendant did not admit a yearly tenancy, he could not claim the notice due only to a yearly tenant—*Shahábakhán v. Bálya*⁽¹⁾. Setting up a right to hold at a customary rent in answer to a claim for increased rent is a repudiation of the landlord's title, which dispenses him from giving notice to quit—*Vivian v. Moat*⁽²⁾, citing *Doe d. v. Stanion*⁽³⁾ and *Doe d. Calvert v. Frowd*⁽⁴⁾. The land being as between a landlord and tenant, originally the landlord's property, he has a right to possession, except so far as the tenant makes out a right in derogation of that. Here the right sought to be made out was one of permanent occupancy independently of the landlord's will. When the proof of this failed, there was nothing left to stand between the landlord and the recovery of his possession. It was properly awarded to him, and we confirm the decree of the District Court, with costs.

Decree confirmed.

(1) See Printed Judgments for 1873, p. 66. (3) 1 M. & W. at p. 702.

(2) 16 L. R. Ch. Div., 730.

(4) 4 Bing. at p. 560.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánabhái Haridds.

December 7.

BHAGVAN DAYA'LJI, PLAINTIFF, v. BALU, DEFENDANT.*

Jurisdiction—Difference between a Court of Small Causes constituted under Act XI of 1865 and a Court of a Subordinate Judge invested with the jurisdiction of a Judge of a Small Cause Court under section 28 of Act XIV of 1869—Decree—Execution—Transfer of decree for execution—Subordinate Judge with Small Cause Court powers—Act XI of 1865, Sec. 20—The Code of Civil Procedure, XIV of 1882, Sec. 223—Act XIV of 1869, Sec. 28.

The Courts of Subordinate Judges invested with the jurisdiction of a Judge of a Small Cause Court under section 28 of Act XIV of 1869 do not thereby

* Civil Reference, No. 51 of 1883.

become "Courts of Small Causes constituted under Act XI of 1865." They merely exercise a similar jurisdiction. This makes their decisions final in the cases to which the jurisdiction extends, but it does not imply that the variations of procedure prescribed expressly for the Courts constituted under Act XI of 1865 are applicable to Courts constituted under a different Act and subject to different conditions. The Court of a Subordinate Judge exercising Small Cause Court powers is, under section 5 of the Code of Civil Procedure (Act XIV of 1882) one of the "other Courts exercising jurisdiction of a Court of Small Causes," and, as such, its procedure is governed by the Civil Procedure Code without the variations provided by Act XI of 1865. Under section 223 (d) of the Civil Procedure Code the Court which has passed a decree in its Small Cause Court jurisdiction may, for any good reason to be recorded in writing, transfer its decree to the other branch of the same Court, as it might to a different Court, for execution, without requiring a certificate under section 20(1) of Act XI of 1865. For this purpose the two branches or sides of the Subordinate Judge's Court may be regarded as different Courts.

THIS was a reference, under section 617 of the Code of Civil Procedure, by Ráj Sáheb S. M. Chitale, Subordinate Judge of Máhád.

He stated the case thus :—

"The plaintiff Bhagván sued the defendant to recover from him a certain debt. The plaintiff obtained a decree in that suit (No. 401 of 1882). The suit was tried on the Small Cause side of this Court, as the Subordinate Judge was invested with powers under section 28 of Act XIV of 1869. The applicant by his present *dar khást* seeks to execute the decree against certain immoveable property of the defendant. The plaintiff has not, however produced any certificate under section 20 of Act XI of 1865.

"The question, therefore, arises as to whether the plaintiff can execute the said decree against immoveable property without having produced a certificate under section 20 of Act XI of 1865.

(1) Section 20 runs as follows :—"In the execution of a decree under this Act, if, after the sale of the moveable property of a judgment-debtor, any portion of a judgment-debt shall remain due, and the holder of the judgment desire to issue execution upon any immoveable property belonging to the judgment-debtor, the Court, on the application of the holder of such judgment, shall grant him a copy of the judgment and a certificate of any sum remaining due under it, and on the presentation of such copy and certificate to any Court of civil judicature having general jurisdiction in the place in which the immoveable property of the judgment-debtor is situate, such Court shall proceed to enforce such judgment according to its own rules and mode of procedure in like cases."

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“The plaintiff’s pleader contends that no certificate is necessary. He has argued that the fact that a Subordinate Judge has been invested with powers under section 28 of Act XIV of 1869, does not make him a Judge of a Court of Small Causes, nor does it make his Court a Court constituted under Act XI of 1865. In support of his argument the plaintiff’s pleader has relied upon the decision of the Honourable High Court in the case of *Bálkrishna v. Lakshman*⁽¹⁾. That case does not, however, apply, in my opinion, to this case. The question was there considered with reference to the provisions of section 5 of the Civil Procedure Code (Act X) of 1877. I am of opinion that when a Subordinate Judge is entrusted with powers under section 28 of Act XIV of 1869, he becomes the Judge of two Courts, viz., a Judge of a Court of a Subordinate Judge as such, as well as a Judge of a Court of Small Causes when he is trying suits cognizable by a Court of Small Causes and the value of which suits is not more than Rs. 50 or 500, as the case may be. If this were not so, any plaintiff could successfully ask a Subordinate Judge entrusted with such powers, to try a suit as one filed as a regular suit, though it may be one triable by him on the Small Cause side of his Court. If the Subordinate Judge so invested does not become a Judge of a Court of Small Causes constituted under Act XI of 1865, section 12 of that Act cannot apply. The plaintiff in such a case will make such a request if he be desirous of not allowing a decree to be final. Besides, a decree passed by a Subordinate Judge on his Small Cause side becomes final by the operation of Act XI of 1865. If such a Subordinate Judge does not become a Judge of a Court constituted under that Act, I do not see any reason for making the provisions of that Act, as to the finality of judgments, applicable to his judgments. I am, therefore, humbly of opinion that a Subordinate Judge invested with powers under section 28 of Act XIV of 1869, becomes the Judge of two Courts as stated above, and that section 20 of Act XI of 1865 applies to decrees passed by a Subordinate Judge on the Small Cause side of his Court.

“But this is a question of importance, and the question often arises in the execution of such decrees against immoveable pro-

(1) I. L. R., 3 Bom., 219.

party. I entertain a reasonable doubt about the correctness of my opinion. I, therefore, beg to refer the said question for the opinion of the Honourable High Court under section 617 of the Civil Procedure Code, 1882.

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“I have stayed the proceeding in this *darikhást* pending the Honourable Court's order in the matter.”

No one appeared in the High Court on behalf of either party.

The judgment was delivered by

WEST, J.—We think that the Court of a Subordinate Judge invested with the jurisdiction of a Judge of a small Cause Court under section 28 of Act XIV of 1869 does not thereby become a “Court of Small Causes constituted under Act XI of 1865.” A Court constituted under the latter Act has a jurisdiction provided by the Act itself which cannot be varied by the local Government. Its procedure is in some particulars specially provided for, and the appointments of the Judges can be made only in the way pointed out by the Act. Under Act XIV of 1869, on the other hand, the local Government may invest any “Subordinate Judge” with the jurisdiction of a Court of Small Causes,—not for the trial of suits of the amount of Rs. 500 in ordinary cases and of Rs. 1,000 under a special extension (Act XI, secs. 6, 7 of 1865), but of Rs. 500 in the case of Subordinate Judges (First Class), and Rs. 50 in the case of Subordinate Judges (Second Class). Nor are these powers granted under the Act in such wise that the Courts can be deemed Courts under section 3 of Act XI of 1865, since that section requires the previous sanction of the Governor General in Council to the constitution of any such Court, while no such sanction is necessary under section 28 of Act XIV of 1869. Nor is a fixing of the territorial limits prescribed, as in section 3 of Act XI of 1865.

It is plain, therefore, that the Courts of Subordinate Judges invested with special jurisdiction under section 28 of Act XIV of 1869 are not thus constituted Small Cause Courts under Act XI of 1865. They merely exercise a similar jurisdiction. This makes their decisions final in the cases to which the jurisdiction extends, but it does not imply as a necessary consequence, or imply at all, that the variations of procedure prescribed expressly

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for the Courts constituted under Act XI of 1865 are applicable to Courts constituted under a different Act, and subject in their establishment to quite different conditions. The Court of a Subordinate Judge then exercising Small Cause Court powers under section 28 of Act XIV of 1869 is, under section 5 of the Code of Civil Procedure, one of the "other Courts exercising the jurisdiction of a Court of Small Causes," and as such Court its procedure is governed by the Civil Procedure Code without the variations provided by Act XI of 1865.

The second schedule to the Code taken with section 5, determines which of its sections are applicable to Courts exercising Small Cause Court jurisdiction, and amongst the sections enumerated there is not one corresponding to section 20 of Act XI of 1865. Instead of this we have section 223 of the Code, and under article (d) of that enactment the Court which has passed a decree in its Small Cause Court jurisdiction may, for any good reason to be recorded in writing, transfer its decree to the other branch of the same Court, as it might to a different Court, for execution according to the powers of such Court. For the purpose in question the two branches or sides of the Subordinate Judge's Court may be regarded as different Courts, seeing that they exercise different powers, and the transfer is not to be made of course, but only if under the circumstances it appears just and expedient.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nandabhai Haridds.

December 1

MORBHAT PUROHIT (ORIGINAL PLAINTIFF), APPELLANT, v. GANGA'DHAR KARKARE (ORIGINAL DEFENDANT), RESPONDENT.*

Indmdār—Khot—Landlord and tenant—Suit for money value of fixed quantities of grain payable by tenant to landlord—Nature of such claim for purposes of limitation—Suit to enforce payment of money charged on land—Immoveable property—Nibandha—Money value of goods, what is—Act XV of 1877, Sch. II, Arts. 62, 115, 132, 144.

An *indmdār*, in a suit against his tenant, established his right to the money value of a fixed quantity of grain to be paid to him yearly by his tenant, and

* Second Appeal, No. 431 of 1882.