

12 B. 30.

[30] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and
Mr. Justice Nanabhai Haridas.

MAHANT ISHWARGAR (Original Defendant), Applicant v. CHU-
DASAMA MANABHAI AND OTHERS (Original Plaintiffs),
Opponents.* [23rd June, 1887.]

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Civil Procedure Code (Act XIV) of 1882, ss. 2, 244 and 617—Decree—Stay of execution—Amount of security required on granting stay of execution a question in execution and order thereon appealable.

The defendant in a redemption suit, against whom a decree had been passed, appealed to the High Court, which on his application granted the usual stay of execution pending the appeal, upon security being given by him. The Subordinate Judge, feeling doubt as to whether the actual value of the property or the value stated in the plaint should be regarded in fixing the security, referred the case to the High Court under s. 617 of the Civil Procedure Code (Act XIV) of 1882.

Held, that no reference would lie under s. 617 of the Civil Procedure Code. The question as to the amount of the security was a question relating to execution as contemplated by s. 244 of the Code, and, therefore, an order determining that question would be appealable under s. 2 of the Code.

[R., 14 C L.J. 489=12 Ind. Cas. 745.]

THIS was a reference by Khan Bahadur Burjorji Edalji Modi, First Class Subordinate Judge of Ahmedabad, under s. 617 of the Civil Procedure Code (Act XIV) of 1882.

In a redemption suit by the plaintiffs, a decree was passed holding the property redeemable on payment of a certain amount. The decree was appealed against by the defendant to the High Court, which granted a stay of execution on security being given by the defendant. The Subordinate Judge, feeling doubt as to which of the two amounts—viz., (1) that stated in the plaint or the (2) actual value of the property—was to form the basis for the security, referred the question to the High Court, under s. 617 of the Civil Procedure Code (Act XIV) of 1882.

Rav Sahab Vasudev Jagannath Kirtikar, for the defendant.—This is a question in an execution proceeding, and cannot be referred under s. 617 of the Civil Procedure Code. Any order passed by the lower Court in this matter would be appealable—[31] *Ghazidin v. Fakir Bakhsh* (1); *Udeyadeta Deb v. Gregson* (2); *Luchmeeput v. Sita Nath* (3); *Rangji v. Bhaiji* (4).

Ganpat Sadashiv Rao, contra.—This is not a reference under s. 617 of the Civil Procedure Code. The lower Court wants a mere direction of the High Court as to the taking of security ordered by this Court. Even assuming that it is a reference under s. 617, still the lower Court should be considered as proceeding under s. 545, and any order that may be passed under that section is not appealable under s. 588 of the Code. A reference, therefore, will lie, such an order being final.

JUDGMENT.

SARGENT, C.J.—The question as to the amount of security to be given by the defendant as the condition of the stay of execution of the decree against him was a question now "relating to execution" within the

* Civil Reference, No. 15 of 1887.

(1) 7 A. 73. (2) 12 C. 624. (3) 8 C. 477. (4) 11 B. 57.

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contemplation of s. 244 of the Civil Procedure Code, and, therefore, an order determining that question would be appealable under s. 2 of the Civil Procedure Code—*Ghazidin v. Fakir Bakhsh* (1); *Udeyadeta Deb v. Gregson* (2). No reference, therefore, lies to this Court under s. 617, even assuming that section to apply to a proceeding of this nature under s. 647. Plaintiffs to pay defendant his costs.

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APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and
Mr. Justice Nanabhai Haridas.*

RAMPRATAP (*Plaintiff*) v. GANESH RANGANATH (*Defendant*).*
[27th June, 1887.]

Jurisdiction—Subordinate Judge invested with Small Cause Judge's powers—Civil Procedure Code (Act XIV) of 1882, s. 111—Set-off exceeding pecuniary jurisdiction of the Small Cause powers of the Subordinate Judge—Practice.

In a suit brought by the plaintiff to recover Rs. 33-7-9 from the defendant, under the Small Cause jurisdiction of a Subordinate Judge, the defendant claimed to set-off Rs. 72, which exceeded the pecuniary jurisdiction of the Judge as a Small Cause Judge. On reference to the High Court,

Held, that the set-off might be pleaded by the defendant. The Judge would exercise his Small Cause Court jurisdiction in trying the claim of the plaintiff and his ordinary jurisdiction in trying the set-off.

[D., 31 B 314=9 Bom. L. R. 327.]

[32] THIS was a reference by Rav Sahab Karpurram Manmathram, Subordinate Judge of Panvel, under s. 617 of the Civil Procedure Code (Act XIV) of 1882.

The plaintiff sued to recover from the defendant Rs. 33-7-9, being the price of two cases of clarified butter bought by the defendant on the 6th April, 1886; Rs. 1-12 as interest thereon at the rate of 12 annas *per cent. per mensem*; and Rs. 1-3-6, the cost of a notice given to the defendant. The defendant entered his appearance, and put in a written statement admitting the claim, but claiming a set-off of Rs. 75

The Subordinate Judge referred the following question to the High Court for its opinion:—

Whether a defendant has a right to set-off a sum exceeding Rs. 50 in a suit which is within the Small Cause Court jurisdiction of his Court?

The Subordinate Judge's opinion on the point was in the negative.

Ghanasham Nilkanth Nalkarni, for the plaintiff.—The set-off claimed by the defendant exceeds the pecuniary jurisdiction of the Subordinate Judge as a Small Cause Judge, and he cannot try the question of set-off. If the defendant proved his set-off, the effect would be the same as if he obtained a decree: see cl. 3 of s. 111 of the Code. But the Small Cause Court jurisdiction of the Subordinate Judge is limited to Rs. 50; therefore, the set-off can only be proved to that amount.

Vasudev Gopal Bhandarkar, for the defendant.—The Subordinate Judge, who has been invested with Small Cause Court powers, exercises

* Civil Reference, No. 4 of 1887.