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to relieve the plaintiff from his liablity was mainly based on the same consideration.

It was said, indeed, that art. 6 of the agreement threw the risk of obtaining leave to quarry on the defendant; but, we think, that, on the reasonable construction of the language of that clause, all that was intended was to throw on the defendant the expenses [642] to be incurred in carrying out the police arrangement and obtaining the license, and to prevent his having any cause of complaint on that account against the plaintiff; but that is quite a different thing from making the obligation to pay the rents absolute, whether the quarrying was stopped altogether or not. It was said indeed, that it was only the blasting which was forbidden, and that the defendant might have quarried by other means; but there is no finding in the case that any other means were practically feasible, or that blasting by means of some description of explosive is not, practically speaking, an essential part of quarrying stone on the plaintiff's hill.

We must, therefore, answer the first question in the negative; the second question in the negative; and the third in the affirmative.

Costs to be costs in the cause.

Attorneys for the plaintiff.—Messrs. *Pestonji and Rustom.*

Attorneys for the defendant.—Messrs. *Payne, Gilbert and Sayani.*

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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

S. A. RALLI AND OTHERS (*Plaintiffs*) *v.* PARMANAND JEWRAJ (*Defendant*).* [13th September, 1889.]

Practice—Civil Procedure Code, s. 622—Material irregularity—Small Cause Court—Motion for new trial.

The defendant contracted to sell to the plaintiffs a quantity of rape-seed, April—May delivery. On the 23rd of April the defendant endorsed over to the plaintiffs a delivery order for the seed given him by Messrs. L. M. & Co., which plaintiffs presented to Messrs. L. M. & Co. on the 26th April and on three or four subsequent occasions. Messrs. L. M. & Co. refused to deliver, on the ground that they had till the 31st May for delivery. On the 15th May, Messrs. L. M. & Co. failed, and then, but not before, plaintiffs informed the defendant that they had not had delivery from Messrs. L. M. & Co., and demanded it of him. The defendant failing to deliver, the plaintiffs sued for damages as of the 31st May. The learned Judge of the Small Cause Court, on this statement of facts, and before evidence was gone into, ruled that the damages were assessable as of the 25th April, on which day it was admitted the market rate was as high or higher than the contract rates. The plaintiffs on this ruling, without going into their case further accepted judgment for [643] nominal damages, and took out a rule for a new trial, on the ground that the Judge was in error in assigning the 25th April, and not the 31st May, as the date which ruled the question of damages. On the argument of the rule the Full Court decided against the plaintiffs, not on this point, which they did not decide one way or the other, but on another point altogether, *viz.*, that plaintiffs ought to have given defendant notice of Messrs. L. M. & Co.'s refusal to give delivery on the 25th April, and not having done so, could not call on the defendant to deliver.

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* Small Cause Court Suit, No. 13896 of 1889.

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The plaintiffs now moved the High Court, under s. 622 of the Civil Procedure Code (Act XIV of 1882), to set aside the order of the Full Court of the Small Cause Court as one which at that stage of the proceedings that Court had no right to make.

Held, that in making the order in question under the circumstances of the case, and the state of the record, the Full Court had acted with material irregularity within the meaning of s. 622 of the Civil Procedure Code, and that the case must be remanded to be dealt with according to law.

THIS was an application, under s. 622 of the Civil Procedure Code (Act XIV of 1882), by the plaintiffs in the Small Cause Court suit No. 13896 of 1889, praying for the reversal of the order of the Full Court of the Court of Small Causes of the 23rd day of July, 1889, discharging a rule previously taken out by the plaintiffs for a new trial. The plaintiffs alleged that, in passing the order in question, the Full Court acted illegally and with material irregularity.

The facts of the case, as stated by the plaintiffs in their petition to the High Court (and not contradicted), were as follows :—

" 1. By a contract in writing bearing date the 11th September, 1888, the defendant contracted and agreed with the plaintiffs for the sale to them of 50 tons of new brown Delhi rape-seed, at the rate of Rs. 6-3-0 *per* cwt. to be delivered at the plaintiffs' godown, or railway station, Bombay, and that such delivery was to be made by the defendant on or before April—May, 1889.

" 2. On the 25th April, 1889, the defendant forwarded to the plaintiffs a delivery order dated the 23rd instant, and given by Messrs. Lang, Moir & Co. to the defendant on their godown-keeper for 50 tons of Delhi brown rape-seed, and endorsed by the defendant in favour of the plaintiffs.

" 3. The plaintiffs on the 25th day of April, 1889, and on three or four subsequent occasions, applied to Messrs. Lang, Moir & Co. **[644]** for delivery of the produce in question under the said delivery order, but were informed by Messrs. Lang, Moir & Co., that, under their contract with the defendant, they (Messrs. Lang, Moir & Co.) were not bound to deliver the produce to him before the 31st May, 1889; that they had not the produce ready for delivery on the occasions on which the plaintiffs applied to them for delivery; and that as soon as the same was ready they would deliver, under their delivery order, to the plaintiffs.

"4. On or about the 15th May, Messrs. Lang, Moir & Co. stopped payment; whereupon the plaintiffs, seeing that there was no further chance of obtaining delivery of the said produce from Messrs. Lang, Moir & Co., returned the delivery order to the defendant; and then, but not before, informed him that they had not obtained the delivery of the produce from Messrs. Lang, Moir & Co., and that, if the defendant failed to give delivery under his aforesaid contract with them, they would hold him responsible for the consequences. The defendant repudiated his liability, alleging that he had fully performed his part of the contract, and that he was not responsible for the plaintiffs' negligence. The plaintiffs denied that there was any negligence on their part, and asked the defendant to complete delivery by the 31st May; but the defendant failed to do so, and the plaintiffs claimed from the defendant the amount of Rs. 562-8-0, as damages for the breach by the defendant of the said contract, being the difference between the contract price of the 50 tons of the said produce and the market price thereof ruling on the 31st May, 1889, which was the last

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day for the performance of the said contract; but the defendant did not pay the same, or any part thereof.

"5. The plaintiffs thereupon, on the 12th day of June, 1889, instituted a suit in the Bombay Court of Small Causes, (being suit No. 13896 of 1889), to recover from the defendant the said sum of Rs. 562-8-0.

"6. The suit came on for hearing before the Chief Judge of the said Court on the 10th July, 1889, when the pleader for the defendant in stating his defence denied the breach of contract, disputed the damages, and contended that the plaintiffs, not having given to the defendant notice of the refusal of Messrs. Lang, [645] Moir & Co., to deliver on the 25th April until after the failure of Messrs. Lang, Moir & Co., had thereby prejudiced the defendant, and were not now entitled to recover damages. The learned Judge held that the defendant had, by tendering the delivery order in question on the 25th April, thereby fixed that day as the day for the performance of the contract; that by non-delivery of the seed on the 25th of April a breach of the contract had been committed by the defendant; that the breach of the contract by the defendant was complete on that day; and that any damages which the plaintiffs were entitled to must be ascertained by calculating the difference between the contract price of the said produce and the market price thereof as ruling on the 25th April, 1889. The plaintiffs informed the Court, through their solicitors, that they could not prove any damages on the 25th April, and that it would be a waste of the time of the Court to continue the case, and a decree was accordingly passed in their favour for Re. 1, as nominal damages, and costs. The contract between the defendant and Messrs. Lang, Moir & Co., was not put in, nor was any evidence given of the terms of it, nor was the question of the obligation of the plaintiffs to give the defendant immediate notice of the refusal of Messrs. Lang, Moir & Co., to deliver argued or tried in any way.

"7. On the 16th July, 1889, the plaintiffs' attorney applied to a Full Court, consisting of the Chief Judge and the Second Judge of the said Court, for a rule *nisi* for retrial of the said suit, and a rule *nisi* was accordingly granted by the said Court.

"8. The grounds upon which the said rule *nisi* was granted were—

"(*a*) That the learned Judge, who tried the case, ought to have held that the time appointed for the performance of the contract expired on the 31st May, 1889, and not on the 25th April, 1889.

"(*b*) That the learned Judge ought not to have held that a breach of the contract had been committed on the 25th April, 1889, and that he ought to have held that a breach had been committed on the 31st May, 1889.

[646] "(*c*) That the learned Judge ought to have held that the damages must be calculated as on the 31st May, 1889, and not as on the 25th April, 1889.

"9. The rule *nisi* came on for argument before a Full Court consisting of the Chief Judge and the Second Judge, and after hearing the argument, the Court discharged the rule with costs.

"10. The Court discharged the rule, stating that it was not necessary for them to enter into the construction of the contract, or decide whether the due date of the performance was the 25th of April or the 31st of May; that the plaintiffs on equitable grounds were estopped by their conduct from claiming from the defendant any more than the

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nominal damages which they had been awarded; that, according to the admitted facts, in performance of his contract for April—May delivery, the defendant had obtained from Messrs. Lang, Moir & Co. a delivery order on the 23rd April; this delivery order he endorsed over to the plaintiffs; that by giving the delivery order to the defendant, Messrs. Lang, Moir & Co. had represented themselves as ready to deliver on the 23rd April and by endorsing that delivery order to the plaintiffs on the 25th of April the defendant had represented himself to the plaintiffs as ready to deliver to them, through Messrs. Lang, Moir & Co. on the 25th April; and that it lay on the plaintiffs to accept that delivery order, or not, as they pleased. They chose to accept it, thereby intimating to the defendant that they would apply, in the first instance, to Messrs. Lang, Moir & Co. for the goods. They applied on the 25th April, and were refused, and then they lay by until Messrs. Lang, Moir & Co.'s insolvency. The defendant contended that by leading him to suppose that they had accepted delivery from Messrs. Lang, Moir & Co. on the 25th April they had put it out of his power to give them that delivery which he wished to give on the 25th April; that, if they had given him notice when they failed to receive delivery on the 25th April, he could have made other arrangements. The Court thought that the defendant was entitled to rely on that defence, and it discharged the rule on those grounds."

Inverarity, for the plaintiffs, the applicants.

Jardine, for the defendant.

[647] *Inverarity*:—At the trial the case was decided solely on the ruling of the First Judge, that the date which governed the question of damages was the 25th April. That ruling stopped the case almost as soon as it had commenced, for the market rate on that date was, if anything, rather better than the contract rate. In so holding it is clear that the learned Judge was wrong; the defendant had up to the 31st May to deliver—see *Borrowman* v. *Free* (1) and many other cases—and was not estopped from making a valid tender within the time by reason of a previous invalid tender. This, therefore, was the only point before the Full Court. It is the only point on which the rule was granted, and the only one for the decision of which there were the necessary materials. By the time the matter came to be argued before the Full Court, the First Judge had, no doubt, seen he was in error in his original view of the case, and he then justified his decision on another ground altogether, *viz.*, want of notice to the defendant of non-delivery by Messrs. Lang, Moir & Co. The Court had not the facts before them necessary for the decision of this point, *e.g.*, the contract between Messrs. Lang, Moir & Co. and the defendant, which would, or at least might, be most material, and evidence of practice which we might desire to give, &c. Their going into that point was objected to on behalf of the plaintiffs, and in going into it they acted irregularly. In another respect their procedure was most detrimental to us, for it deprived us of the right which, if the case were properly tried and the decision were adverse to us, we should have had, *viz.*, that of having a case stated for the opinion of the High Court under s. 69 of the Small Cause Court Act. I ask, therefore, that this case be sent down for a new trial.

[SARGENT, C. J.—That would not be exactly the right order to make under s. 622. If the Court has acted irregularly, we should send the

(1) L. R. 4 Q. B. Div. 500.

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case back to the Court—*i.e.*, in this case the Full Court—with an order to dispose of the case according to law.]

Jardine, contra ;—At the hearing the case was not stopped **[648]** by the Judge, but by plaintiffs' solicitor, Mr. Craigie. He could have gone on had he chosen, and produced all his evidence. The plaintiff may take out a rule on one point alone if he chooses, but the defendant is not debarred from supporting the decision in his favour any way he can. We were entitled to urge any ground that would help us—*inter alia* this of want of notice.

[SARGENT, C. J.—No doubt at the right time; but were you entitled to do so in the then state of the record ? That is the question. Ought not the Court to have said : "We cannot go into this ground now : the case must go back for trial before that ground can be gone into" ?]

It does not seem to have been so put to the Court ; moreover, there was sufficient material before the Court for the decision of that point.

[SARGENT, C. J.—You cannot say the materials were sufficient, until it is known what all the relevant material was or would have been.]

The Court had some evidence before it on the point, we believe, and the Court thought that it had all the possible relevant evidence on the point. The point may have been decided wrongly, though we think not, but that gives no power of interference to this Court. I submit this Court should not interfere.

JUDGMENT.

The judgment of the Court was delivered by

SARGENT, C. J.—I think this is a case which properly falls under s. 622 of the Civil Procedure Code ; for, I think, it has been shown that a material irregularity was committed by the Full Court on the hearing of the rule taken out in this case.

It is plain that the ground the Full Court went on in disposing of the rule was that the equitable plea raised by the defendant, as to want of notice of the refusal to deliver on the part of Messrs. Lang, Moir & Co. was a good one. The only question, therefore, before us is, in so dealing with the matter, under the circumstances of the case, did the Court, or did it not, commit a material irregularity ?

Now the circumstances of the case were shortly these. It is clear that, at the trial, Mr. Hart was of opinion that the defendant **[649]** had committed a breach of his contract on the 25th April, and that that was the date which must be looked to to settle the question of damages. That being that learned Judge's view, Mr. Craigie for the plaintiff, naturally enough, intimated that it was of no use his proceeding any further, as he was prepared to admit that, if that was the date to be taken as the material one in assessing damages, he could not show that the plaintiffs had suffered any damage. Mr. Hart, accordingly, having found breach of the agreement on the part of the defendant, passed judgment for the plaintiffs and awarded nominal damages. Now, under these circumstances, it appears to us that it was not competent to the Full Court, when the matter came before it on the rule for a new trial, to deal with the rule on the ground on which they did, unless it was then clearly admitted that there were no other facts that could bear on the point remaining to be proved. As regards this, it does not even appear that Mr. Craigie was ever asked by the Court whether he was prepared to admit that that was

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so; and on the contrary Mr. Craige states that he distinctly objected to any such question being gone into by the Court, on the ground that the materials necessary for its decision were not before the Court The action of the Court was, therefore, distinctly irregular, and, moreover, irregular to a material degree.

We must, therefore, reverse the decision come to by the Full Court on the rule, and remit the case to the Small Cause Court for the Full Court to dispose of the rule according to law. Costs to be costs in the cause.

Inverarity said the Small Cause Court had frequently intimated that there was no machinery by which it could assess costs incurred in the High Court, and asked for some order as to the scale on which these costs were to be allowed.

SARGENT, C. J. :—The costs will be taxed by the Registrar of the High Court on the appellate Side according to the usual scale of allowance observed on that side of this Court.

Attorneys for plaintiffs :—Messrs. *Craigie, Lynch and Owen.*

Attorneys for defendant :—Messrs. *Ardesir, Hormasji and Dinsha.*

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13 B. 650.

[650] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

BIBI LADLI BEGAM (*Original Defendant*), *Applicant v.* BIBI RAJE RABIA (*Original Plaintiff*), *Opponent.** [18th December, 1888.]

Jurisdiction—Plea of—Waiver - Consent cannot give jurisdiction where none is given by law.

Where a Court has no inherent jurisdiction over the subject-matter of a suit the parties cannot by their mutual consent give it jurisdiction.

A suit of a nature cognizable by a Court of Small Causes alone was brought in the Court of a Joint Subordinate Judge. The defendant objected to the jurisdiction of the Court, but his objection was overruled. The suit was, however, dismissed on the merits. In appeal before the District Judge, the defendant did not renew the plea of want of jurisdiction. The District Judge reversed the decree of the Subordinate Judge and awarded the plaintiff's claim. The defendant thereupon applied to the High Court under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

Held, that both the lower Courts had no jurisdiction to deal with the suit. The mere circumstance that the defendant did not raise the plea of want of jurisdiction in the appellate Court did not clothe that Court with a jurisdiction not given to it by law.

[R., 14 A. 413 (416); 20 B. 86 (92); 35 C. 525=7 C.L.J. 445=12 C.W.N. 569; 28 A.W.N. 211 (214); 37 P.R. 1903; 122 P.L.R. 1902=36 P.R. 1902.]

THIS was an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

The plaintiff and defendant were co-sharers in the *talukdari* village of Dharoda. The *talukdari* estate, being heavily incumbered with debt, was entrusted to the management of the Talukdari Settlement Officer under the provisions of Bombay Act VI of 1862. During the period of his management the Talukdari Settlement Officer used to pay, out of the

* Application, No. 92 of 1888, under Extraordinary Jurisdiction.