

Gangarām B. Rele appeared for the applicant in support of the rule:—He relied on *Vishvanáth v. A'ba*⁽¹⁾, *Badarichárya v. Rám-chandra*⁽²⁾ and *Rámsing v. Bábu Kisansing*⁽³⁾.

Dáji A'báji Khare appeared for the opponent to show cause.

SARGENT, C. J.:—The Special Judge considers that a Special Judge has no power to set aside an *ex-parte* order made by him, because no such power is given him by the Act, and it is not, he considers, a power inherent in every Court. We have already held in *Vishvanáth v. A'ba*⁽¹⁾ followed in *Badarichárya v. Rám-chandra*⁽²⁾ and *Rámsing v. Bábu Kisansing*⁽³⁾ that “the conduct of the proceedings before the Special Judge must be deemed to be in his own discretion;” and in the last two cases it was held that the granting a review of judgment may be a most reasonable exercise of such discretion. Similarly the setting aside an *ex-parte* decree or order may well be a most reasonable exercise of discretion on the part of the Court.

For these reasons we think that the Special Judge was wrong in holding he had no power to entertain the application, and must, therefore, make the rule absolute, discharge the order of the Special Judge, and send back the application for his consideration on the merits. Costs to follow the result.

Rule made absolute.

(1) P. J., 1886, p. 11.

(2) P. J., 1893, p. 35; I. L. R., 19 Bom., 113.

(3) *Ibid.* p. 575; I. L. R., 19 Bom., 116.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

IN RE HAUSAMBHAI ABDULABHAI.*

1895.

January 31.

Provincial Small Cause Court Act (IX of 1887), Sec. 27, and Art. 35, Cl. (i), Schedule

II—*Suit for damages—Cognizable by Small Cause Court—Jurisdiction—Registration of plaint which has been ordered to be returned.*

A suit to recover damages for injury to a wall caused by the diversion of a water-course is cognizable by a Provincial Small Cause Court. Such a suit does not fall within the exception of article 35 (i) of Schedule II to Act IX of 1887.

THIS was a reference under section 617 of the Code of Civil Procedure (Act XIV of 1882) by Ráo Bahádur Krishnamukh

* Civil Reference, No. 16 of 1894.

1895.

RA'M-
CHANDRA
NA'RA'YAN
KULKARNI
DRA'UPADI.

1895.

IN RE
HAUSAMBHAI
ABDULABHAI.

A'tmâram, Judge of the Provincial Court of Small Causes at Ahmedabad.

The reference was in the following terms:—

“The plaintiff sues to recover from the defendants Rs. 150 as damages owing to certain tortuous acts of the defendants in preventing the water of the plaintiff's house from going in a certain cesspit and thereby causing damage to his (plaintiff's) wall and house.”

“Ráo Bahádur Lálshanker Umyáshanker, who acted for me during my absence as Fourth Judge of the Bombay Court of Small Causes, returned the plaint to the plaintiff for presentation to proper Court. He does not give in his order any reasons for returning the plaint. The plaintiff presented the plaint to the First Class Subordinate Judge's Court. Then it was filed and registered and sent to the Joint Subordinate Judge for trial. The Joint Subordinate Judge returned it to the plaintiff, holding that the suit was one cognizable by a Small Cause Court. Thereupon it was presented to me. I am myself of opinion that a suit like this is cognizable by a Small Cause Court, as it cannot be said to be a suit relating to immoveable property. Incidentally questions relating to immoveable property will arise in the case but the suit is really one for damages, and does not come under any of the clauses given in Schedule II of Act IX of 1887. But as this same Court presided over by my predecessor once returned this plaint to the plaintiff, I doubt if I can admit it. I, therefore, submit the following questions for the determination of the Honourable the Chief Justice and Judges of Her Majesty's High Court:—

“1. Whether a suit like this is cognizable by a Small Cause Court?

“2. Whether I can register the plaint unless the High Court sets aside the order of my predecessor?”

“My opinion on No. 1 is that the suit is cognizable by this Court, and on No. 2 is that I cannot register it until the previous order of this Court is set aside by the High Court.”

The reference was heard by a Division Bench (Jardine and Ránade, JJ.).

Siténdh Gopindh Ajinkya (amicus curiæ) for plaintiff:—The present is a suit for damages for injury caused to immoveable property. There is no question of title directly involved in the suit. If a question of title be incidentally raised, that does not oust the jurisdiction of a Small Cause Court—*Mánappa Mudáti v. McCarthy*⁽¹⁾; *Alagirisami v. Innasi*⁽²⁾; *Shumbhoo Chunder Mowlick v. Prán Kristo Mowlick*⁽³⁾; *Rádha Churn v. Gudádhur*⁽⁴⁾. The present case does not fall within any of the excepted cases given in Schedule II to Act IX of 1887. The suit is, therefore, cognizable by a Small Cause Court.

Vishnu-K. Bhatávidekar (amicus curiæ) for the defendant:—A Small Cause Court has no jurisdiction to entertain a suit like the present. A question of title is directly involved in the suit. The plaintiff is not entitled to the relief he claims without proving his title to immoveable property, which the Court cannot finally determine. The plaint was, therefore, rightly returned under section 23 of Act IX of 1887 for presentation to the proper Court. The suit falls under article 35 (I), Schedule II to the Act.

PER CURIAM:—The Court answers the questions as follows:—
(1) The suit is cognizable by the Court of Small Causes as one for damages caused by injury to a wall. The fact that the injury was caused by diversion of a water-course or obstruction of an easement is an accidental circumstance which does not bring the plaint within the exception of article 35 (i) of Second Schedule to Act IX of 1887.

(2) The order returning the plaint being final under section 27 of the Act, the Judge cannot register the plaint while that order is in existence.

(1) I. L. R., 3 Mad., 192.

(2) *Ibid.*, 127.

(3) 13 Cal. W. R., 105.

(4) 15 Cal. W. R., 166.