APPELLATE CIVIL.

Before Mr. Justice Russell, Acting Chief Justice, and Mr. Justice Beaman.

1906. *October 4.*

ISMALJI IBRAHIMJI NAGREE (ORIGINAL PLAINTIFF), APPLICANT, *v.* N. C. MACLEOD, RECEIVER (ORIGINAL DEFENDANT), OPPONENT.*

Presidency Small Cause Court Act (XV of 1882), section 9—Civil Procedure Code (Act XIV of 1882), section 622—Regulation XXVII of 1827, section 5—Decree of Presidency Small Cause Court—High Court's power of superintendence and revision—Grave and irreparable injustice—Receiver—Rent—Use and occupation.

The plaintiff owned a certain house at Bombay. He let it out to a tenant on a monthly tenure. The tenant used the premises for his press, machinery and stock which he had mortgaged to his creditor, before he entered into a contract by way of lease with the plaintiff. Subsequently the mortgagee brought a suit in the High Court upon his mortgage and under the Court's order, the official Receiver took possession of the machinery and stock on the plaintiff's premises. Before the suit in the High Court the plaintiff had given to the tenant a notice to quit. Later on he gave another notice to the Receiver that he was going to charge him rent from a particular date. On failure of the Receiver to pay rent, the plaintiff, with the permission of the High Court, brought a suit against him in the Court of Small Causes, Bombay, for the recovery of the rent, or in the alternative for compensation for use and occupation. The suit was dismissed by the Court on the ground that there was no relationship of landlord and tenant between the plaintiff and defendant, who, as Receiver, was merely a custodian appointed by the Court and that his appointment did not affect the rights of the contracting parties.

Against the said decision the plaintiff applied to the High Court under the extraordinary jurisdiction and obtained a *rule nisi* requiring the defendant to show cause why the decision should not be reversed,

Held, discharging the rule, that the plaintiff could not succeed in the suit.

Per BEAMAN, J.:—Courts in the exercise of superintending powers will not ordinarily interfere except in cases of grave and otherwise irreparable injustice.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of R. M. Patell, Acting Chief Judge of the Court of Small Causes, Bombay, in Suit No. 64—2979 of 1906.

The plaintiff owned a certain house at Bombay. He let it out to one C. A. Ellis under a lease for two years, but as the lease

* Application No. 192 of 1906 under extraordinary jurisdiction.

was unregistered, Ellis continued in possession of the premises as a monthly tenant. He used the premises for his printing press, machinery and stock which he had, before he entered into the contract with the plaintiff, mortgaged to his creditor. As Ellis did not pay rent regularly, the plaintiff gave him notice to quit. Subsequently the mortgagee brought a suit, No. 345 of 1905, against Ellis in the High Court, on the mortgage and got an order for the appointment of receiver in the usual way. Under the Court's order Mr. N. C. Macleod, the official Receiver, was empowered to take possession of the machinery and stock on the plaintiff's premises and he accordingly did so. After this the plaintiff gave another notice to the receiver stating that he would be held liable to the plaintiff as landlord, for the payment of rent from the date he took possession of the machinery and stock. This led to some correspondence between the plaintiff and the receiver and the latter having ultimately declined to pay rent, the plaintiff, with the permission of the High Court, brought a suit against him in the Court of Small Causes, Bombay, for the recovery of Rs. 1,720 for rent or in the alternative for compensation for use and occupation. The Court dismissed the suit on the ground that the plaintiff had not made out a case either for rent, or for compensation for use and occupation, that the defendant being merely a custodian of the press and machinery appointed by the High Court no relation of landlord and tenant was created between the parties to the suit, and that the rights of the contracting parties remained intact and were not affected by the appointment of defendant as receiver.

Against the said decree the plaintiff applied under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) urging (*a*) that the Judge erred in holding that the claim for rent as between landlord and tenant had not been made out on the facts admitted and proved; (*b*) that in any event the Judge acted with material illegality in holding that the claim for compensation for use and occupation had not been legally made out; (*c*) that the Judge did not give due effect (1) to the fact that the applicant had given notice to the defendant with respect to his liability to pay rent, (2) to the fact that the defendant was informed that there was no existing lease between the

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applicant and Ellis, (3) to the fact that the defendant did not give replies to the bills for rent submitted to him every month, (4) to the fact that the defendant had actually kept the premises under his own lock and key and had informed the applicant in whose favour he had been appointed receiver that the rent of premises was running against him and (5) to the fact that the defendant had actually recovered rent, and (*d*) that the decision of the Judge was unjust and inequitable. On the said application a *rule nisi* was issued requiring the opponent (defendant) to show cause why the decision of the Judge should not be reversed.

M. B. Chaubal appeared for the applicant (plaintiff) in support of the rule.

Desai (with *Maganlal, Jehangir and Company*) appeared for the opponent (defendant) to show cause.

RUSSELL, Ag. C. J.:—In this case there is no doubt several interesting questions have been raised.

The first is whether the inclusion of section 622 of the Code of Civil Procedure in the Presidency Small Cause Courts Act under the rules framed under section 9 of that Act is not *ultra vires*? That is a question which has not been raised before. Another question is whether this Court under section 5, clause (2) of Regulation XXVII has got the power to interfere in all cases tried in the Presidency Small Cause Courts, if this Court is of opinion that the decision of that Court is wrong.

Those questions are of great importance, because the practice of this Court for many years has always been to interfere under section 622.

But, in our opinion, it is not necessary for us to be compelled to come to a formal decision upon the above points because we think that upon the merits the defendant is entitled to succeed. There is a good deal of point in Mr. Desai's argument that the plaintiff should not be permitted to come up to the High Court until all other remedies have been exhausted; and I should certainly say that it appears to me, at all events, that under section 69 the plaintiff had the remedy, in this case, as the

amount is over Rs. 500, of requesting the Small Cause Court to frame a case for the decision of the High Court.

It appears further that an application was made to the Full Court for a rule but that was refused.

Coming then to deal with merits it appears that one Ellis had a printing press in the premises of the plaintiff and he had mortgaged the press machinery and stock to the mortgagee who filed a suit against him in the High Court. That mortgagee got Mr. Macleod appointed receiver in the usual way.

Now under the order appointing Mr. Macleod as a receiver he was only empowered to take possession of the machinery and the stock on the premises. He was not appointed a manager and had nothing whatever to do with the building or premises themselves.

Afterwards apparently the plaintiff, the landlord, gave notice to quit to Mr. Ellis, the tenant, on the 12th of May 1905, but he never informed Mr. Macleod of that notice. Subsequently no doubt he did give Mr. Macleod notice that he was going to charge him rent from the particular date that he mentioned.

It seems to us that Mr. Macleod was not in use and occupation of the premises and so when the notice was given by the plaintiff to Mr. Macleod that he was going to charge rent, his obvious answer to that would be "I am not in use and occupation of the premises. I am merely the receiver of the machinery and the stock kept in the place."

The plaintiff thereupon might have said "If you prevent my getting into my premises I shall file an action for trespass against you," and he might have had a fair chance of success.

But instead of doing that he has brought the present suit, for rent (which obviously is wrong) and use and occupation and it seems to me that that is a suit which under the circumstances cannot succeed and therefore I am of opinion that the rule must be discharged with costs.

BEAMAN, J.:—I concur in thinking that this rule should be discharged with costs.

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I must say for myself that I entertain much doubt whether this Court has any power under section 622 of the Code of Civil Procedure to go into cases of this kind. That section has been applied, we are told, to Presidency Small Cause Courts by rules purporting to be framed under section 9, but when the language of that section is considered, I think that any rules framed under it which have the effect of extending the provisions of section 622 to the Presidency Small Cause Courts are clearly *ultra vires*.

I understand that it has always been the practice hitherto, or, at any rate, it has been commonly the practice to entertain applications of this kind against decrees of the Presidency Small Cause Courts under section 622, and a *cursus curiæ* so firmly established must of course command respect.

I therefore express the doubt which I feel with considerable diffidence being thoroughly alive to the possibility of some considerations having escaped my notice which have hitherto amply justified it.

What then this Court's powers of superintendence and revision over the decrees of Presidency Small Cause Courts may be, whence they are derived and what is their extent, are all questions of the greatest importance which will have on a proper occasion to be determined definitely and with precision.

I do not, however, feel called upon to express now any final opinion upon that point because whether we have powers of control under the Charter Act, or whether we take them under section 622 [assuming that that should eventually prove to be the section under which we are empowered to deal with this case] I think that however ample our powers as a Court of extraordinary jurisdiction may be, they will always be conditioned by the same general principles. One of the most important is that Courts in the exercise of superintending powers will not ordinarily interfere except in cases of grave and otherwise irreparable injustice. Now after hearing the very able argument which has been addressed to us, I entirely agree with my learned brother that the question at issue between the parties, a question which was thoroughly gone into and ably adjudicated upon in the Court of Small Causes, was one of so difficult and technical

a kind that it is impossible to say that the Court below in disposing of it as it did was plainly and certainly wrong. I therefore concur in the order proposed by my learned colleague.

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Rule discharged.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Russell, Acting Chief Justice, and Mr. Justice Beaman.

MAHAMAD AMIN VALAD MAHAMAD IBRAHIM (ORIGINAL PLAINTIFF), APPELLANT, *v.* HASAN VALAD MAHAMAD IBRAHIM AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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Indian Evidence Act (I of 1872), sections 13, 40-43—Principles applicable to purchase—Hindus—Mahomedans—Judgment not inter partes*—Admissibility in subsequent suit—Transaction—"Particular instances in which the right is claimed"*—Res-judicata.

The principles applicable to a purchase by one member of a joint Hindu family from another are not applicable to Mahomedans.

Plaintiff, a Mahomedan, brought a suit against his brother, brother's wife and the widow of a deceased brother to recover possession of a house on the strength of a registered sale-deed passed to the plaintiff by his deceased father.

Subsequent to the sale to the plaintiff, certain mortgagees of the father brought a suit on the mortgage against the plaintiff, his father and mother. In the said suit the sale to plaintiff was held to be a sham transaction and the plaintiff had to pay off the mortgage.

In the suit brought by the plaintiff for the recovery of the house on the strength of the sale-deed, the defendants relied on the judgment in the suit on the mortgage to show that the sale was a colourable transaction. The first Court allowed the claim, but the Judge in appeal dismissed it on the ground that the purchase by the plaintiff from his father was not proved to be *bonâ fide*.

On second appeal by the plaintiff a question having arisen as to the admissibility in evidence of the judgment in the suit on the mortgage, *held*,

Per RUSSELL, *Ag. C. J.*—The proceedings in the suit on the mortgage were admissible as relevant evidence because the plaintiff and defendants, either by themselves or their predecessors, were parties to that suit. The said proceedings came within the words "particular instances in which the right was claimed" in section 13 of the Indian Evidence Act (I of 1872).

* Second appeal No. 505 of 1905.