became liable to an action. It has been urged that Lord Holt, who with great honour to himself once filled this seat, intimated his opinion that the mere refusal of the vote of a person entitled to vote, would give the party a right to sue the returning officer. Whether he ever did say so or not, we do not certainly know, for the reports of that case are very imperfect. No one entertains a greater veneration for that learned Judge than I do, but if he did so express himself, I am bound to deliver my opinion that he was mistaken."

In our opinion it would be unreasonable to hold that an officer, who had to perform the functions allotted to the defendant, was liable to a suit because he made a mistake in good faith in determining questions that arose for his decision. We do not say that the defendant did make a mistake, for in the view we take that question does not arise for our decision. But assuming that he made a mistake, still we think that in the absence of malice no suit can lie against him.

For these reasons the decree of the lower appellate Court must be confirmed with costs.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

TYEB BEG MAHOMED (ORIGINAL DEFENDANT), APPLICANT, *v.* ALLIBHAI MANGALJI (ORIGINAL PLAINTIFF), OPPONENT.*

1906. *September* 18.

Presidency Small Cause Courts' Act (XV of 1882), chap. VII—Civil Procedure Code (Act XIV of 1882), sec. 108—Presidency Small Cause Court—Proceedings in ejectment—Ex parte order—Power to set aside.

The Small Cause Court has an inherent power to deal with an application to set aside an order made *ex parte* and to set it aside upon a proper cause being substantiated.

Per JENKINS, *C. J.*:—It is erroneous to suppose that section 108 of the Code of Civil Procedure has no application to proceedings under chapter VII of the Presidency Small Cause Courts' Act.

* Application No. 201 of 1906 under the extraordinary jurisdiction.

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It is quite true that it has not a direct application, because proceedings under chapter VII are not a suit, nor is an adjudication in the proceedings a decree.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) to set aside an order passed by J. E. Modi, Fourth Judge of the Court of Small Causes, Bombay, in suit No. 6217 of 1906.

The plaintiff instituted proceedings in ejectment against the defendant under chapter VII of the Presidency Small Cause Courts' Act (XV of 1882). The proceedings were instituted on the 17th March 1906 and on the 4th April, during the defendant's absence, an *ex parte* order was passed against him to vacate the premises, namely, a shop. The defendant came to know of the *ex parte* order on the 24th April 1906, when the plaintiff levied execution and took possession of the shop. The defendant, thereupon, presented an application to the Judge on the 27th April 1906 and obtained a *rule nisi* requiring the plaintiff to show cause why the *ex parte* order should not be set aside. The said rule came on for hearing on the 7th May 1906 and the Judge, though satisfied on the evidence that the summons was not served on the defendant and that the plaintiff had practised some fraud, discharged the rule on the ground that he had no jurisdiction to grant a new trial under section 108 of the Civil Procedure Code (Act XIV of 1882), as the proceedings in ejectment were not a "suit".

The defendant, therefore, presented an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882), on the ground that in refusing to set aside the *ex parte* order or to grant a new trial, the Judge failed to exercise jurisdiction vested in him by law. A *rule nisi* was issued calling on the plaintiff to show cause why the said order of the Judge should not be set aside. In forwarding the record and proceedings of the case the Judge submitted the following memo. for consideration :—

This was an application under chapter VII of the Small Cause Court Act, section 41, to recover possession of a shop in Khoja Street from the defendant, the tenancy having been terminated. The application came for hearing on the 4th April 1906, when the defendant not appearing, an *ex parte* order was passed under section 43 requiring the defendant to give up possession of the premises to the applicant in ten days.

Subsequently the defendant applied on the 27th April for a rule on an affidavit that he was not served with the summons before the order was passed. The rule was argued on the 7th of May 1906 before me, when I was informed that the shop had been taken possession of by the landlord (the applicant) and a new tenant had been put in, before the rule was issued.

I discharged the rule for the following reasons:

(1) I was of opinion that, as the Full Court (consisting of Mr. Chitty and Mr. Hakim in suit No. 20906 of 1904, and Mr. Chitty and myself in suit No. 2977 of 1905) had decided on 10th January 1905 that applications or proceedings under chapter VII were not "suits" so far as section 38 of the Small Cause Court Act was concerned, that they were also not "suits" under section 108 of the Code and section 108 did not apply.

(2) I was of opinion that even if section 108 applied, the granting of rehearing under it would not have availed the defendant, as neither the Small Cause Court Act nor the rules under it contained any provisions to enable the Court to reinstate the tenant and restore possession to him after he was once evicted in execution of an *ex parte* order, although it might be that he was wrongfully dispossessed. Moreover, in the present instance a new tenant had been already in occupation of the same shop.

(3) I was also of opinion that the Presidency Small Cause Court not being a Court of Record, apart from jurisdiction specially conferred on it by the Act under chapter VII, it had no inherent jurisdiction such as is vested in Courts of Record to set aside such an order even though it was obtained wrongfully.

S. B. Dadyburjor appeared for the applicant (defendant) in support of the rule:—Whether section 108 of the Civil Procedure Code is applicable or not, proceedings in ejectment are none the less a suit: *Bhoopendro Narain Dutt* v. *Baroda Prosad Roy Chowdhry*[1], *Venkata Chandrappa Nayanivaru* v *Venkata Rama Reddi*[2], *Manjunath Badrabhat* v. *Venkatesh*[3]. Even if they are not a suit, still the Court having jurisdiction to pass an order, it has jurisdiction to set it aside. Section 48 of the Presidency Small Cause Courts' Act makes the provisions of the Civil Procedure Code applicable. Further the language of section 647 of the Code is wide enough to cover any proceeding. We, therefore, submit that section 108 of the Code applies. The term used in that section is "case" and not "suit".

The Judge is of opinion that he cannot set aside an *ex parte* order because his Court is not a Court of Record, but every Court

(1) (1891) 18 Cal. 500. (2) (1898) 22 Mad 256.
(3) (1881) 6 Bom. 54 at p. 61.

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has inherent jurisdiction to set aside its *ex parte* decree: *Bibee Tulsiman* v. *Harihar Mahato*(1), *S. M. Sudevi Devi* v. *Sovaram Agarwallah*(2).

Whether a new tenant has been put in possession or not, if the Court is satisfied that the summons was not served, it must set aside the *ex parte* order. The language of section 108 of the Code is imperative.

S. S. Rangnekar appeared for the opponent (plaintiff) to show cause:—We contend that a proceeding in ejectment under chapter VII of the Presidency Small Cause Courts' Act is not a suit, see section 41 of the Act. It begins with an application and not with a plaint, and all that the applicant is entitled to is an order to the bailiff and not a decree: *Manjunath Badrabhat* v. *Venkatesh*(3). In order that a proceeding should be a suit, it must begin with a plaint: section 48 of the Civil Procedure Code, *Venkata Chandrappa Nayanivaru* v. *Venkatarama Reddi*(4). The Presidency Small Cause Courts' Act itself makes a distinction between a proceeding under chapter VII and a suit, see section 14, *explanation*. If, therefore, such proceeding is not a suit and the final order therein is not a decree, then section 108 of the Code cannot apply because it relates to setting aside of an *ex parte* decree only. Moreover, chapter VII of the Act specifically restricts the right of a person aggrieved by an order passed under it to a suit for compensation, see section 45. Section 46 gives the aggrieved party a remedy by a separate suit, therefore the order complained against cannot be interfered with in revision under the extraordinary jurisdiction: *J. J. Guise* v. *Jaisraj*(5), *Bhundal Panda* v. *Pandol Pos Patil*(6), *Shiva Nathaji* v. *Joma Kashinath*(7).

The Judge says that as a new tenant has already been put in possession, a new trial would be futile. The Judge has exercised his discretion in refusing relief on a solid ground.

JENKINS, C. J.:—This application arises out of proceedings under chapter VII of the Presidency Small Cause Courts' Act.

(1) (1904) 9 Cal. W. N. 81 at p. 83.
(2) (1906) 10 Cal. W. N. 306.
(3) (1881) 6 Bom. 54.
(4) (1893) 22 Mad. 256.
(5) (1893) 15 All. 405.
(6) (1887) 12 Bom. 221.
(7) (1883) 7 Bom. 341.

An order was made under that chapter in favour of the opponent before us.

The applicant before us on the 27th of April applied for a rule to show cause why that order should not be set aside on the ground that he was not served with a summons before the order was passed.

A rule was granted but it was subsequently discharged by the Fourth Judge of the Small Cause Court.

From the memo. now furnished to us, the learned Judge represents that he was influenced, first, by the opinion held by him in deference to previous decisions in the Small Cause Court that section 108 of the Civil Procedure Code did not apply; secondly, that even if section 108 applied, any order by him would be infructuous; and thirdly, that the Court, not being a Court of Record, had not power to set aside an *ex parte* order, even though it was wrongfully obtained.

This last opinion is in direct opposition to the ruling of the Full Bench of the Calcutta High Court in *Bibee Tulsiman* v. *Harihar Mahato*[1], where it was held in reference to a Subordinate Judge that the Court has an inherent power to deal with an application to set aside an order made *ex parte* and to set it aside upon a proper cause being substantiated.

In our opinion that view is correct and the learned Judge was in error so far as his third reason goes.

We think, too, that it is erroneous to suppose that section 108 of the Code of Civil Procedure has no application to proceedings under chapter VII of the Presidency Small Cause Courts' Act.

It is quite true that it has not a direct application, because proceedings under chapter VII are not a suit, nor is an adjudication in the proceedings a decree.

But having regard not only to section 647 of the Code of Civil Procedure but also to section 48 of the Presidency Small Cause Courts' Act and also to the decision of the Full Bench of the Calcutta High Court, we feel no doubt that the Judge had power to set aside the *ex parte* order.

(1) (1904) 9 Cal. W. N. p. 81.

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The second reason given by the learned Judge at first sight creates a difficulty in the way of our interfering, because it would seem that he exercised a discretion, but that discretion was exercised on the basis that a new tenant had been already in occupation of the same shop.

It is asserted by the advocate for the applicant and is conceded by the advocate for the opponent that there is nothing on the record that substantiates that statement; and therefore, so far as the discretion of the learned Judge is based upon that statement, it has no legal foundation. It may be that it is true. If so, it must be proved in the usual way, and if it is proved, then it must be considered, having regard to the decisions, what the effect is of this tenancy.

But the result is that we must make the present rule absolute and send back the case to the Fourth Judge in order that he may deal with the application according to law.

Costs will be costs in the application before the Fourth Judge.

Rule made absolute.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Aston and Mr. Justice Heaton.

1906. *September 19.*

NARAYAN GANPATBHAT AGSAL (ORIGINAL DECREE-HOLDER), APPELLANT, *v.* TIMMAYA BIN SUBBAYA (ORIGINAL DEFENDANT) AND ANOTHER (ORIGINAL SURETY), RESPONDENTS.*

Limitation Act (XV of 1877), Schedule II, Article 179, Explanation 1, para. 2—Decree—Jointly passed—Application for execution against surety—Civil Procedure Code (Act XIV of 1882), sec. 253—A decree cannot be treated as "jointly passed" as against the judgment-debtor and his surety.

Before the passing of the decree in an original suit, N became liable as surety for the due performance of part of the decree. The decree in the original suit was passed in January 1893. The decree-holder filed several applications to execute the decree against the judgment-debtor. All these applications were within the periods prescribed by the Limitation Act (XV of 1877). But it was only in 1902, that he filed an application to execute the decree under section 253 of the Civil Procedure Code (Act XIV of 1882) as against the surety.

* Second Appeal No. 753 of 1905.