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property." That being the case and the suit being a suit for possession of land, most of the difficulties which would otherwise have beset our decision disappear. And I have no reason to doubt, notwithstanding some apparent conflict in what was described as *obiter dicta* in at least one previous case, that once this point has been raised and all that has been implied in it definitely stated, the decision which we have come to is the right decision and correctly interpretes the statute.

Decree set aside.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909. *July* 12.

NARAYAN RAVJI RANADE (ORIGINAL PLAINTIFF), APPLICANT, *v.* GANGARAM RATANCHAND MARWADI AND ANOTHER (ORIGINAL DEFENDANTS), OPPONENTS.*

Small cause suit—Suit brought in the Court of First Class Subordinate Judge having small cause powers—The Subordinate Judge on privilege leave—Charge of the Court in Joint Second Class Subordinate Judge who had no small cause powers—Registering the suit as a regular suit—Trial of the suit by the First Class Subordinate Judge as a regular suit—Suit remains a small cause—Appeal—Jurisdiction.

A suit of the nature of a small cause was instituted in the Court of the First Class Subordinate Judge who had small cause powers. At the date of its institution, he was on privilege leave and his Court was in the charge of the Joint Second Class Subordinate Judge who had no small cause powers. The suit was therefore registered as a regular suit. On his return from leave the First Class Subordinate Judge tried it as a regular suit. The question having arisen whether the suit was a small cause

Held, that the First Class Subordinate Judge continued to be a Judge with small cause Court powers during his absence on leave, and the entering of the suit in the file of regular suits could not take it away from the category of small causes nor could the fact that the Subordinate Judge tried the suit under his ordinary jurisdiction deprive it of its character as a small cause.

APPLICATION under extraordinary jurisdiction under section 115 of the Civil Procedure Code (Act V of 1908).

The plaintiff filed a suit to recover Rs. 287 on a promissory note from the defendants. The suit was instituted in the Court

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of the First Class Subordinate Judge of Nasik (Mr. G. L. Nanavati) who had small cause Court powers. He was on privilege leave when the suit was lodged, and the charge of the Court was with the Joint Second Class Subordinate Judge who had no small cause Court powers. The suit was therefore registered as a regular suit. On his return from leave, the First Class Subordinate Judge tried it as a regular suit; and decreed the plaintiff's claim with costs.

The defendants appealed to the District Judge of Nasik (Mr. B. C. Kennedy) who reversed the decree and dismissed the suit.

The plaintiff applied to the High Court.

D. R. Patwardhan for the applicant:—We submit that the nature of a suit is not changed by the manner in which it is tried. Here the suit was filed in the Court of the Judge who had small cause Court powers; but as he was away on leave on the day it was filed, the Second Class Subordinate Judge who held charge of his Court had it registered as a regular suit, for he had no small cause Court powers. The suit was, as a matter of fact, tried by the Judge who had the powers, but as a regular suit. Still, the nature of the suit cannot be changed by the procedure adopted. See *Pitamber Vajirshet* v. *Dhondu Navlapa*[1].

P. D. Bhide for the opponent:—The case referred to does not apply: first, because though the suit was there filed properly it was tried as a regular suit; and secondly, it was decided under the old Act which differed in this respect from the present Act. The small cause powers must exist at the very inception in the Judge who takes cognizance of a case. See *Venkatrao* v. *Mahableshwar*[2]; *Hari Kamayya* v. *Hari Venkayya*[3]; *Soundaram Ayyar* v. *Sennia Naickan*[4]; *Kannan Nambiar* v. *Anantan Nambiar*[5]; *Akshay Kumar Shaha* v. *Hira Ram Dosad*[6].

(1) (1887) 12 Bom. 486.
(2) (1901) 26 Bom. 241.
(3) (1903) 26 Mad. 212.
(4) (1900) 23 Mad. 547, at p. 563.
(5) (1905) 29 Mad. 124.
(6) (1908) 35 Cal. 677.

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Further, the point of jurisdiction, not having been raised in the District Judge's Court, cannot be raised here. See *Kulada Kinkar Roy* v. *Danesh Mir*(1); *Sri Raja Simhadri Appa Rao* v. *Chelasane Bhadrayya*(2); *Parameshwaran Nambudiri* v. *Vishnu Embrandri*(3); *Suresh Chunder Maitra* v. *Kristo Rangini Dasi*(4); *Ram Lal* v. *Kabul Singh*(5) and *Muthusami Mudaliar* v. *Nallakulantha Mudaliar*(6).

CHANDAVARKAR, J. :—It is admitted, and indeed the record shows, that the suit was instituted in the Court of the First Class Subordinate Judge and that at the time of institution the Subordinate Judge had conferred on him the powers of a Small Cause Judge. The present suit was of the nature of a small cause and fell within that jurisdiction. But it is argued that the suit is not a small cause because it was not tried as such. It is true it was tried by the Subordinate Judge, First Class, not under his small cause but under his ordinary jurisdiction. The reason is that at the time of its institution, the Subordinate Judge, First Class, having gone on privilege leave for twenty-one days, the Joint Subordinate Judge, Second Class, who was in charge of the Court, had the suit registered in the file of regular suits and not in the file of small causes. But, on that account, the Subordinate Judge, First Class, had not ceased to be a Judge of the Court with small cause powers; his absence was merely temporary; he had gone on privilege leave and no *locum tenens* had been appointed. Hence no re-investment of his powers as a Small Cause Judge became necessary when he resumed charge of his office. He continued to be a Judge with those powers during his absence and the entering of the suit in the file of regular suits could not take it away from the category of small causes. Nor could the fact that subsequently the Subordinate Judge, First Class, tried the suit under his ordinary jurisdiction deprive it of its character as a small cause : *Pitamber Vajirshet* v. *Dhondu Navlapa* (7). Against his decree no appeal lay to the District Court and that Court's appellate decree was passed

(1) (1905) 33 Cal. 33.
(2) (1906) 30 Mad. 41.
(3) (1904) 27 Mad. 478.
(4) (1893) 21 Cal. 249.
(5) (1902) 25 All. 135.
(6) (1894) 18 Mad. 418.
(7) (1887) 12 Bom. 486.

without jurisdiction. It is true no objection on the ground of want of jurisdiction was raised before the District Court but the petitioner before us is not precluded from urging that ground. Consent cannot give jurisdiction where the law does not confer it on a Court. The result is that the rule must be made absolute and the Subordinate Judge's decree restored but without costs here and in the District Court, as the petitioner allowed the appeal to be heard without objection.

Rule made absolute.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Russell.

In re MADHAVJI, KAMDAR AND CHHOTUBHAI AND DADA MAHOMED AND OTHERS.

1903. *December* 11.

Petition—Taxing Master—High Court Rules, Rule 544—Solicitors' retainer denied—Taxation of costs.*

An attorney can obtain an order in taxation of his costs although he knows that his client disputes the retainer as to the whole bill.

In re Jones(1) followed.

The facts of this case appear sufficiently in the Judgment.

Raikes, for the applicants.

Our application is made under the amended rule 544 of the High Court Rules, the latter part of which is in point. Our application is merely for an order to tax our bills and the order asked for, when made, will not affect the question of liability of the clients. When the bills are taxed and the amount of costs ascertained we shall have to proceed under Rule 866 of the High Court Rules and take out a summons against the clients and at the hearing of such summons the clients will have an opportunity to be heard on the question of their liability. They have no

* High Court Rules (2nd Edition), Rule 544 runs as follows:—

"544. The Taxing Officer shall tax the bills of costs on every side of the Court (except the appellate side) and in the Insolvent Court. All other bills of costs of attorneys shall also be taxed by him when he is directed to do so by a Judge's order."

(1) (1887) 36 Ch. D. 105.