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emption. In such circumstances any suit which they brought strictly under Mahomedan Law would be clearly predestined to failure. They seek to evade this by a blending of the Hindu with the Mahomedan Law and the Courts below have acceded to their contentions in this respect. I am however very clearly of opinion that the learned Judge of Appeal was entirely wrong in thus giving effect in a pre-emption suit to the doctrine of representation by a manager peculiar to the Hindu Law. In my opinion, therefore, no useful purpose can be served by remanding the issues suggested by Mr. Weldon for trial upon evidence by the Courts below. I entertain no doubt whatever in my own mind as to what the decision in this case ought to be, and I would, therefore, now dismiss the plaintiffs' suit with all costs upon them.

MACLEOD, J. :—I entirely concur. A custom must be proved by evidence in the first instance and once it is proved the Courts are entitled to recognise its existence. A custom cannot be proved by the admission of the parties or their counsel before the Court. I concur that the appeal should be allowed with costs throughout.

Suit dismissed. Appeal allowed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

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September 26.

HARI BALU GAEKAWAD AND OTHERS (ORIGINAL DEFENDANTS), APPLICANTS, v. GANPATRAO LAKHURJIRAO GAEKAWAD AND OTHERS (ORIGINAL PLAINTIFFS), OPPONENTS.*

Provincial Small Cause Courts Act (IX of 1887), sections 23 and 27—Small Cause suit—Question of title—Suit transferred to the ordinary jurisdiction of the Court—No substantial irregularity—Decision on title—Decree not final—Appeal.

* Application No. 142 of 1913 under the extraordinary jurisdiction.

In a suit which was originally filed as a Small Cause Court suit in the Court of the Subordinate Judge having both Small Cause and regular jurisdiction, the Judge transferred the suit, at a very early stage, to his file as ordinary Judge as the relief claimed by the plaintiffs depended upon proof or disproof of a title to immoveable property. The Judge then passed a decree deciding the question of title.

Held, that there was no substantial irregularity in thus effecting the transfer and that it must be taken that the powers conferred by section 23 of the Provincial Small Cause Courts Act (IX of 1887) were put in force in a regular manner.

Held, also, that as it was a decree which could not be passed by a Court of Small Causes, it was not a decree falling within the terms of section 27 of the Provincial Small Cause Courts Act (IX of 1887) and was, therefore, not final but appealable.

APPLICATION under the extraordinary jurisdiction, (section 115 of the Civil Procedure Code, Act V of 1908) against the decree of V. G. Kaduskar, First Class Subordinate Judge of Ratnagiri, with appellate powers, reversing the decree of S. A. Naik, Subordinate Judge of Dapoli.

The plaintiffs sued the defendants for the recovery of Rs. 5-8-0 as damages caused by their removal of bamboos, mangoes and jack fruits from trees standing on the land in suit which belonged to plaintiffs and which had been in their possession for many years.

The defendants answered that the land in suit did not belong to the plaintiffs and was never in their possession. It belonged to the defendants and was in their possession for a long time.

The suit was originally filed in the Small Cause jurisdiction of the Court but as the Court was also invested with regular jurisdiction, the Judge transferred the suit from his Small Cause jurisdiction to his regular jurisdiction as the right of the plaintiffs and the relief claimed by them depended upon proof or disproof of the title to the land in suit. Having thus transferred the suit from the Small Cause to the ordinary jurisdic-

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tion, the Subordinate Judge found that the plaintiffs' ownership of the land was not proved and he dismissed the suit.

On appeal by the plaintiffs the Appellate Judge found that the decree of the first Court was appealable and that the plaintiffs had proved their title to the plot in suit. He, therefore, reversed the decree of the first Court and awarded to the plaintiffs Rs. 2 as damages.

The defendants preferred an application under the extraordinary jurisdiction, (section 115 of the Civil Procedure Code, Act V of 1908), urging *inter alia* that the Appellate Court had no jurisdiction to entertain the appeal. A *rule nisi* having been issued requiring the plaintiffs to show cause why the decree of the lower Court should not be set aside,

B. V. Vidwans appeared for the applicants (defendants) in support of the rule.

P. V. Kane appeared for the opponents (plaintiffs) to show cause.

SCOTT, C. J. :—The only question in this case is whether the lower appellate Court rightly entertained the appeal. The suit was originally filed as a Small Cause Court suit in the Court of a Judge having both Small Cause Court and regular jurisdiction. Finding that the right of the plaintiff and the relief claimed by him depended upon proof or disproof of a title to immoveable property which the Small Cause Court could not finally determine, the Judge acting under the power contained in section 23 of the Provincial Small Cause Courts Act caused the suit to be transferred to his file as an ordinary Judge at a very early stage after the plaintiff had been examined. There was no substantial irregularity in this. He could hardly return the plaint to be presented to another Judge, because he himself was the Judge having jurisdiction

to determine the question of title ; and no point is made of the fact that the evidence of the plaintiff recorded before him as a Small Cause Court Judge was used in the regular suit. We think that it must be taken that the powers conferred by section 23 were put in force in a regular manner. He then passed a decree deciding the question of title. It was a decree which could not be passed by a Court of Small Causes ; it was not a decree falling within the terms of section 27 of the Small Cause Courts Act, and was therefore, not final. It was, therefore, appealable and the lower appellate Court rightly entertained the appeal. In support of the argument that the decree was not appealable reference has been made to *Kali Krishna Tagore v. Izzatannissa Khatun*⁽¹⁾. In that case the question was whether a suit was cognizable by a Court of Small Causes within the meaning of section 586 of the old Code of Civil Procedure so as to bar a second appeal, and the learned Judges came to the conclusion that the suit, although it might fall within the class of suits contemplated by section 23, would nevertheless be a suit cognizable by a Court of Small Causes. That, however, is not the point before us. The question is whether the decree, which was actually passed by a Court to which the suit originally so cognizable was transferred, was a final decree under the Small Cause Courts Act. For the reasons above stated we are of opinion that it was not. Therefore, we cannot interfere under our extraordinary jurisdiction. We discharge the Rule with costs.

Rule discharged.

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⁽¹⁾ (1897) 24. Cal. 557.

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