

1873.
December 19.

[ORIGINAL CIVIL JURISDICTION.]

Referred Case.

DA'DA'BHA'I HUSSANJI *Plaintiff.*

KUVARBA'I *Defendant.*

Small Cause Court—Jurisdiction—Possession—Landlord and Tenant—Act IX. of 1850, Sec. 91—“Without leave of the owner.”

Upon a summons issued under Sec. 91 of Act IX. of 1850 by the Judge of the Small Cause Court to the occupier of a house to show by what title he claims to hold or occupy the same or part thereof:—*Held*, that the jurisdiction of the Small Cause Court is not ousted by the occupier appearing and showing as cause that which does not amount to an allegation of title on the occupier. *Held also*, that the words in that section, “without leave of the owner,” comprise a case where the original possession was with leave of the owner, but was afterwards withdrawn by his vendee, the subsequent owner.

THIS was a case stated for the opinion of the High Court by N. Spencer, Second Judge of the Bombay Court of Small Causes, under Sec. 55 of Act IX. of 1850.

“This is a summons issued under Sec. 91 of Act IX. of 1850, requiring the defendant to show cause, why she should not quit and deliver up to the plaintiff possession of the first floor of a certain house.

“In 1865, Navroji Hussanji, the brother of the plaintiff, who is a merchant trading in China, while on a temporary visit to Bombay, entered into a contract to purchase the house in question. At that time Navroji and his family occupied a part of the house as tenants. The defendant Kuvarbái is the wife of Navroji Hussanji.

“The conveyance of the house to Navroji Hussanji was not executed until the 17th of June 1865, after he had left for China.

“On his departure Navroji Hussanji appointed his brother, the plaintiff, his agent for the management of his property

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“ After the conveyance to Navroji Hussanji was executed, all the occupants of the house, including his family, vacated it; and his brother, as his agent, spent a considerable sum in repairing the house. The repairs were completed in 1866.

“ During this time the plaintiff, by direction of Navroji, paid his wife, the defendant, an allowance of Rs. 100 a month for the maintenance of herself and family, and Rs. 30 per month as house-rent.

“ When the repairs to the house were completed, the plaintiff, as the agent of his brother, put the defendant, Kubarbái, and her children, in possession of the portion of the house from which it is now sought to eject them; and from that time ceased to pay her the allowance for house-rent.

“ In April 1866 the plaintiff himself left for China, and Navroji Hussanji appointed another agent to pay the allowance of Rs. 100 to his wife, who continued to act as his agent for four years. During this time he paid Kubarbái the allowance, and arranged for the letting of the portion of the house that was not occupied by Navroji's family; he received the rents from the tenants, and accounted for them to Navroji.

“ In 1869 Navroji Hussanji's agent had a disagreement with the defendant Kubarbái, and refused to continue to act as his agent.

“ As Navroji Hussanji was unable to induce any other person to undertake the management of his property, he authorized his wife, the defendant Kubarbái, and his sons, to receive the rents and appropriate them towards the maintenance allowance of Rs. 100 per month; and directed Nánábhái Nasarvánji to make up the deficiency in the event of the rents falling short of that sum.

“ On the 5th March 1873, Navroji Hussanji, for good and valid consideration, sold and conveyed the house to his brother Dádábhái Hussanji, the plaintiff in this case. Navroji Hussanji has returned to Bombay.

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“The tenants who occupy the house now pay rent to the plaintiff; the plaintiff has called upon the defendant to quit and deliver up possession to him of the portion of their occupation.

“The annual value of the premises does not exceed the pecuniary jurisdiction of this court.

“Navroji Hussanji, the vendor, is willing that the plaintiff should be put in possession of the premises; but his wife, the defendant Kubarbai, refuses to quit on the ground that when her husband purchased the house he intended to make a settlement of it for the benefit of herself and her children.

“I held that the defendant was an occupier of the premises within the meaning of Sec. 91 of Act IX. of 1850; that she came into possession under the party from whom the plaintiff claims his title, as a permitted user: *Hurry Money Dossee v. Gopal Chunder Mookerjee* (a), and that permission having been withdrawn, she should deliver up possession.

“I, therefore, gave a verdict for the plaintiff, subject to the opinion of the High Court on the following question: Has the Small Cause Court, under the circumstances above set forth, jurisdiction to put the plaintiff in possession of the premises under Sec. 91 and following sections of Act IX. of 1850?”

The case was argued before WESTROPP, C.J., and BAYLEY, J.

Latham for plaintiff:—The question here is whether the Small Cause Court can, under Sec. 91 and following sections of Act IX. of 1850, put the plaintiff in possession of the upper rooms of the house: 9 and 10 Vic., ch. 95; §. 122; *Fearon v. Nowall* (b). “Show cause” means show good cause. A mere claim of title is not sufficient: *Lilley v. Harvey* (c), *Lloyd v. Jones* (d), *Emery v. Barnett* (e).

(a) 2 Taylor and Bell 57.

(b) 17 L. J. N. S. 1619 B. S. C. 5 Dow. & L. 439.

(c) 17 L. J. N. S. 3579 B.

(d) Ibid. 206 C. P.

(e) 4 C. B. N. S. 423.

Jackson, contra, for defendant:—The Judge of the Small Cause Court has not decided whether or not there was a *bonâ-fide* contest as to title. There is the finding that the husband of the defendant had an intention of settling the house upon her. By the mere fact of the defendant showing cause to the contrary of the summons, under Sec. 92, the Small Cause Court had no further jurisdiction. All the English cases cited are cases wherein the relation of landlord and tenant existed between the parties. Sec. 91 applies only to persons without any title whatever.

WESTROPP, C.J.:—In this case, submitted to us by the Second Judge of the Court of Small Causes, he asks whether, under the circumstances set forth in his statement, the Court of Small Causes had jurisdiction, under Sec. 91 of Act IX. of 1850 and the immediately following sections, to put the plaintiff into possession of premises within the pecuniary jurisdiction of that Court. To that question we must reply in the affirmative. We are not to be understood, therefore, as holding that if there had been a *bonâ-fide* question of title raised by the defendant, the Small Cause Court would have had jurisdiction under Sec. 91 of Act IX. of 1850 *et seq.* But the defendant's allegation, as stated to this Court by the learned Judge, was that "when her husband purchased the house he *intended* to make a settlement of it for the benefit of herself and her children." That does not, in our opinion, amount even to an allegation of title. It is no assertion of an agreement or contract or trust or other legal or equitable liability to convey to, or hold the premises for the benefit of the defendant, Kuvarbái, and her children. But it may be said, she and her children having originally entered upon the occupation of the rooms, the subject of this case, with the permission of her husband, who was then the owner, cannot be said to hold or occupy "without leave of the owner," and that it is not pretended that they hold or occupy under any lease or agreement which has been ended or duly determined by a legal notice to quit, and, therefore, they do not come within the jurisdiction given to the Small Cause Court by Sec. 91 of Act IX. of 1850.

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However, we are of opinion that the words "without leave of the owner" are not confined to the case of an original entry without leave, but also comprise a case, such as this, in which the leave once granted by the original owner has been withdrawn by the present owner, who derives title under him—a view of the section which was expressed by PEEL, C.J., in *Hurry Money Dossee v. Gopal Chunder Mookerjee* (f). No doubt his dictum to that effect was extra-judicial but it is nevertheless of great weight and commends itself to our minds; and we think we should mischievously, and without sufficient reason, narrow the construction of Sec. 91 were we to limit it in the manner in which the argument for the defendants would necessitate, viz., to an absence of original leave.

Attorneys for the plaintiff: *Shapoorjee and Thakurdass.*

Attorneys for the defendant: *Jefferson and Payne.*

(f) 2 Taylor & Bell 57.