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5 B. 563=6 Ind. Jur. 38.

would otherwise not justify it. It was so held by the Privy Council as far back as the case of *Cossinath Bysak* v. *Hurroosondree Dossee*(1); but the question, who are the heirs whose consent will thus render the alienation indefeasible, has led to much conflict of decision. The principle, however, upon which that question is to be answered has, we apprehend, been laid down by the Privy Council in the case of *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*(2). Their Lordships say: "They do not mean to impugn the authorities, &c., which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such cases must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu law." In the present case the plaintiffs, although distant heirs, were the heirs presumptive of Narotam at the time of the sale, entitled to succeed in the event of Vakhat dying before her mother without issue, and, as such, clearly interested in disputing the sale. Nor can the mere concurrence of Bai Vakhat, albeit the nearest in succession (having regard to the state of dependence in which all women are supposed by Hindu law to have their being), be regarded as affording the slightest presumption that the alienation was a justifiable one. On both these grounds, we think, the plaintiffs are entitled to succeed. With respect to the house, the plaintiffs are clearly entitled to it on **[572]** recouping the second defendant what has been actually expended by him in rebuilding it. The decree must, therefore, be varied by directing that the plaintiffs be put into possession of all the fields, except No. 331, and also of the house on payment, by plaintiffs to second defendant, of the moneys actually expended by him in rebuilding it, the same to be determined in execution of the decree, and by directing that the first and other defendants (excepting the tenth defendant, Abheram Nathuram) do pay plaintiffs their costs throughout. Plaintiffs to pay to defendant No. 10 the costs of the second appeal.

Decree accordingly.

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5 B. 572=6 Ind. Jur. 96.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

JAMNADAS (*Defendant*), *Applicant v.* BAI SHIVKOR (*Plaintiff*), *Opponent.** [10th March, 1881.]

Damages on account of rent—Suit for use and occupation—Trespass—Ejectment—Mesne profits—Court of Small Causes—Jurisdiction.

The plaintiff, alleging that the defendant, without her permission, removed a lock placed by her on her house and took possession of it, sued in a Court of Small Causes for "damages on account of rent" of which she was thus deprived. The Court, regarding the suit as one for use and occupation, made a decree in favour of the plaintiff.

Held—thas the suit was not rightly regarded as one for use and occupation, for the claim was not based on any contract, express or implied: it should have been regarded as an action of trespass, brought to try a question of title,—an action in which the Court of Small Causes had no jurisdiction. The plaintiff's

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* Extraordinary Civil Application, No. 136 of 1880.

(1) 2 Mor. Dig. 198 Ed. 1849. (2) 13 M.I.A. 209 (228).

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proper remedy was by an action of ejectment in the ordinary Civil Courts, to which, if he chose, he could add a claim for mesne profits for the period during which the defendant had been in occupation.

The decree of the Court of Small Causes was, accordingly, annulled.

[F. 31 C. 340=8 C.W.N. 246; R., 6 B. 79; 25 B. 85 (88, 89); 31 C. 1001; D., 15 B. 400 (405); 23 C. 884.]

THIS was an application for the exercise of the High Court's extraordinary jurisdiction against a decree passed by Khan Bahadur Cursetji Manekji Cursetji, Judge of the Court of Small Causes at Ahmedabad.

[573] The facts of the case are as follows:—

The plaintiff alleged that a house, situate in the city of Ahmedabad, belonged to her husband, a member of a divided family and that on his death she became the sole owner thereof; that, four years and seven months before the date of her plaint, the defendant removed the lock which she had placed on the door, and possessed himself of it; that she had thus lost rent which she otherwise would have got; and she, therefore claimed Rs. 99 as "damages on account of rent." She confined her claim to loss sustained during the three years previous to the suit on account of the operation of the Law of Limitation. The plaint was filed in the Court of Small Causes at Ahmedabad, which treated it as an action for use and occupation.

The defendant denied the plaintiff's ownership, and asserted his own.

The Judge went into the merits of claim; and, finding the title of the plaintiff proved, and that of the defendant not proved, made a decree in favour of the former.

The defendant moved the High Court for the exercise of its extraordinary jurisdiction on the ground that the suit did not lie, and that the Small Cause Court had no jurisdiction, whereupon a *rule nisi* was issued to the plaintiff to show cause why the decree should not be annulled for want of jurisdiction.

Pandurang Balibadra showed cause.—A course of decisions has established that it is permitted to a Court of Small Causes to try a question of title which incidentally arises as a side-issue. The plaintiff alleged that the defendant was a mere trespasser, and the Court has found that he was so. The plaintiff could undoubtedly have ejected the defendant, but did not do so; it must therefore, be assumed that he was in possession of the house by the permission of the plaintiff, who was entitled, therefore, to treat him as her tenant, and sue him in an action for use and occupation.

Shantaram Narayan, contra.—There is no contract, express or implied, between the plaintiff and the defendant; and no suit would lie for use and occupation. Each party asserted his or her [574] title, and the Judge of the Court of Small Causes disposed of the case on that point, which he had no jurisdiction to do.

Turner v. *Cameron's Coalbrook Steam Coal Co.* (1) and *Tew* v. *Jones* (2) were referred to.

JUDGMENT.

MELVILL, J.—This suit was brought by the plaintiff, in the Court of Small Causes at Ahmedabad, to recover "damages on account of rent," in consideration of the occupation of a house by the defendant for three years. The plaintiff alleged that the defendant had had occupation for

(1) 5 Exch. 932. (2) 13 M. & W. 12.

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four years and seven months; but that, as a portion of the claim was barred by limitation, the suit was confined to the amount due for three years. In her deposition the plaintiff alleged that the defendant had removed her lock from the door of the house, and occupied it without her permission.

On the face of the plaint the suit would appear to be what in England would be called an action for use and occupation; but, as such, it should arise out of contract, and could not be maintained in the absence of an express or implied contract to pay a reasonable sum for the occupation of the house. It was on this ground, and also because we were inclined to think that a Court of Small Causes had not jurisdiction to determine the question at issue between the parties, that we granted a rule to show cause why the decree of the Judge of the Small Cause Court should not be set aside.

At the hearing of the rule it has been argued that the action is an action of trespass, and that, the claim being one for damages, the Small Cause Court had jurisdiction, notwithstanding that a question of title may incidentally have arisen. It is true that this Court has held that a Small Cause Court is not ousted of its jurisdiction merely because a question of title may incidentally arise, and that it may determine such question, so far as may be necessary, for the purpose of the suit. But the present is not a case in which the real object of the suit is to obtain a remedy which a Small Cause Court may properly give, and in which a question of title to immoveable property only incidentally crops up for decision. It is an action of trespass (if that be its nature), of [575] which the sole object manifestly is to try the title to the house. It would be very objectionable if persons out of possession were thus allowed to harass persons in possession, by obtaining from a Small Cause Court periodical decrees for damages or mesne profits, founded upon a decision as to title which the defendant would, from the constitution of the Small Cause Court, be debarred from bringing under the cognizance of the superior Courts. The plaintiff's proper remedy, if she has been dispossessed of her house by the defendant, is to bring an action of ejectment in the ordinary Civil Courts,—coupling with her demand, if she see fit, a claim for mesne profits for the period during which the defendant may have been in occupation. We make this rule absolute, and annul the decree of the Small Cause Court; but as no objection to the jurisdiction was there taken by the defendant, we direct that the parties bear their own costs throughout.

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5 B. 575=6 Ind. Jur. 98.

APPELLATE CIVIL.

Before Mr. Justice Pinhey and Mr. Justice Nanabhai Haridas.

JAVHERBAI, (*Applicant*) *v.* HARIBHAI, (*Opponent*).* [4th April, 1881.]

The Code of Civil Procedure, Act X of 1877, *ss.* 293, 294, 306, 307 *and* 308—*Court sale—Defaulting purchaser—Failure to pay deposit—Resale—Redress against defaulter—Bidding without permission of Court—Benami purchase.*

A purchaser of property at a Court sale who fails to pay the deposit (25 per cent, on the purchase-money) directed to be paid by s. 306 of the Civ. Pro. Code is a defaulting purchaser within the meaning of s. 293 of that Code, and liable,

* Extraordinary Civil Application, No. 144 of 1880.