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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 ejection 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.

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.

as such, to make good any deficiency of price which may happen on a resale, and all expenses attending the same.

A sale at which the decree-holder himself, or some other person for him, without the permission of the Court first obtained becomes the purchaser, is not *ipso facto* void: it is a good sale, unless and until set aside by the Court under the provisions of s. 294 of the Civ. Pro. Code.

[R., 11 B. 588 (590); 22 B. 624 (628); 10 C. 757; 21 C. 554 (558); 12 M. 454; 32 M. 212=1 Ind. Cas. 221=5 M.L.T. 248; 3 L.B.R. 225.]

THIS was an application for the exercise of the High Court's extraordinary jurisdiction for the reversal of an order of Bhaskar Shridhar Joshi, Subordinate Judge of Bassein.

[576] The applicant, Jayherbai, had made an application to the Subordinate Judge of Bassein for redress against a defaulting purchaser of property sold at a Court sale under s. 293 of the Code of Civil Procedure. She alleged that a house belonging to her judgment-debtors was attached and put up for sale at a court sale, and that one Haribhai bid for it, and was declared to be the purchaser; that the said Haribhai having failed to pay the deposit of 25 per cent. as provided by s. 306, the house was subsequently resold to one Parshotam, a grandson of the applicant, for Rs. 125 less than Haribhai had bid for it. The applicant accordingly prayed that Haribhai might be directed to make up this deficiency, and pay the expenses incurred in putting up the house to a resale as provided by s. 293 of the Civil Procedure Code. Haribhai contended that s. 293 of the Code did not apply to a resale had in consequence of the failure of the first purchaser to pay the necessary deposit. He also contended that the resale was invalid in consequence of the relationship between the appellant (the decree-holder) and the purchaser, the latter having bid without having first obtained the express permission of the Court. The purchase was, in fact, *benami*.

The Subordinate Judge allowed this contention, and rejected the application of Jayherbai, who consequently now applied to the High Court.

*Nagindas Tulsidas*, for the applicant.

*Vinayak Mahadev Pandit*, for the opponent.

#### JUDGMENT.

The judgment of the Court was delivered by

PINHEY, J.—Haribhai was the first purchaser of the house, but he failed to pay the deposit required by s. 306 of the Code of Civil Procedure. Consequently, the house was "put up again and sold." At the resale the house was purchased by Parshotam, the step-grandson of the decree-holder, Jayherbai, for Rs. 125 less than Haribhai had bid for it.

Jayherbai then applied to recover this sum of Rs. 125 from Haribhai under s. 293 of the Code of Civil Procedure; but the Subordinate Court at Bassein rejected the application on the grounds:—(1) that the second part of s. 293 does not apply to a case in which property is resold by reason of the first [577] purchaser making default in payment of the deposit required to be paid at the time of sale by s. 306 of the Code; and (2) that the purchase of the house by Parshotam invalidated the sale under the provisions of s. 294.

We are of opinion that the Subordinate Court was wrong. It is clear to us that the provisions of s. 293 of the Code apply to resales under the Code, whether made in consequence of default of payment of deposit

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under s. 306, or in consequence of default of payment of the purchase-money under ss. 307 and 308. The fact that Parshotam, the step-grandson of the decree-holder, purchased the house when it was put up a second time for sale did not necessarily invalidate the sale; although, under cl. 3 of s. 294 of the Code, the Subordinate Court might, on the application of the judgment-debtor or any other person interested in the sale have set aside the sale on this ground, if it were proved to the satisfaction of the Subordinate Court that Parshotam had purchased the house for or on behalf of the decree-holder, Javherbai. In his application to the Subordinate Court, Haribhai did, in fact, state that Parshotam, who had purchased the house when it was "put up again and sold," was Javherbai's grandson; but he rested content with making this statement. He did not say a word which can be construed into an application for an order to set aside the sale. In the absence of such an application the Code does not, in s. 294, contemplate a sale being set aside. No fraud or collusion is charged against Parshotam or Javherbai. As Haribhai was at one time willing to bid more for the property than the sum at which Parshotam purchased it, it is not apparent what possible objection can be taken to Parshotam's act.

As neither of the grounds, on which the Subordinate Court proceeded, are good, the order of the Subordinate Court rejecting the application of Javherbai must be reversed, and the application be remanded to the Subordinate Court for disposal on its merits.

Costs in this Court must be borne by the respondent, Haribhai Madhavji.

5 B. 578.

[578] APPELLATE CIVIL.

*Before Mr. Justice M. Melvill and Mr. Justice F. D. Melvill.*

MOHEYODIN VALAD MASLODIN, (*Applicant*) v. CHHOTIBIBI,  
WIFE OF GHASITA MIYA, (*Opponent*)\*  
[6th January, 1880.]

*Bombay Act III of 1874—Act X of 1876—Jurisdiction of Civil Courts.*

Neither Bombay Act III of 1874 nor Act X of 1876 contains any provision excluding the jurisdiction of Civil Courts in a suit brought to establish a share in the emoluments of a *vatan* which has ceased to be a service *vatan*.<sup>s</sup>

THIS was an application, under the extraordinary jurisdiction of the High Court, against the decision of E. Cordeaux, Judge of the District Court of Khandesh, in appeal No. 74 of 1878, reversing the decree of the Second Class Subordinate Judge of Nandurbar in suit No. 895 of 1877.

The plaintiff Moheyodin brought this suit for Rs. 75, being the amount of eight years' arrears of his share in a certain allowance received by the defendant from Government in lieu of a service *vatan*. The plaint was filed on the 10th November, 1876. The plaintiff produced a certificate from the Collector of the district, as required by s. 6 of Bombay Act XXIII of 1871, sanctioning the suit.

The defendant among other objections, answered that the allowance was payable at the pleasure of Government, and that the suit was not maintainable.

\* Application under Extraordinary Jurisdiction, No. 108 of 1879.