

The following is the judgment of the Court:—

WESTROPP, C.J.—The Court is of opinion that the agreement was one finally disposing of the matter within the meaning of section 44, Act XVII of 1879, and, therefore, that the Subordinate Judge of Talegaon was bound to receive it, and to proceed as directed in the above-named section.

Whether the Special Judge is right in supposing that the agreement is one for the benefit of the judgment-debtor, would depend to some extent on the question whether the decree, the subject of it, was or was not barred by limitation at the time of the agreement. See clause 3, sec. 25, of the Indian Contract Act IX of 1872.

1881

LAKHMI-
CHAND
MANSARAM
v.
ARJUNA

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

KALIDAS (ORIGINAL DEFENDANT), APPLICANT, v. VALLABHDA'S *September 27.*
(ORIGINAL PLAINTIFF), OPPONENT.*

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

The plaintiff obtained a decree declaring him entitled to a certain house. He thereupon gave to the defendant, who was in occupation, notice to pay him rent, and on default of such payment he sued the defendant in the Court of Small Causes to recover “damages on account of rent.”

Held that the suit was not maintainable in a Court of Small Causes, which could not be used as a medium for ejecting, by indirect means, a person in possession of immovable property.

•*Held*, also, that the plaintiff's suit was only maintainable as a suit for damages on account of trespass, and in such a suit it would be necessary for the plaintiff to prove possession prior to the trespass, or to have obtained a decree in ejectment which would relate back to the date of the trespass. The plaintiff had obtained nothing more than a decree declaring him to be the owner of the house; but this did not necessarily import a right to immediate possession, nor could the plaintiff be allowed to derive from it all the benefit which he might derive from a decree in ejectment.

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.

* Extraordinary Application, No. 99 of 1881.

1881

The facts of the case were as follows :—

KALIDAS
v.
VALLABHADAS

A house situated in the city of Ahmedabad belonged to one Khusal, brother of the plaintiff. On the death of Khusal the plaintiff obtained a certificate of heirship to his brother, and laid claim to the house. Khusal's widow, Ganga, disputed the claim, and by a suit had it established that her husband and the plaintiff had been divided, and that, therefore, she was entitled to the house for her lifetime.

Some time afterwards Ganga executed a mortgage of the house to one Hargovandas, who sued her upon it, and obtained a decree. After the passing of this decree, Ganga died, and Hargovandas proceeded to sale, and the house was bought by the defendant's father.

The plaintiff thereupon brought a suit against Hargovandas, as well as the defendant's father, and obtained a decree declaring the Ganga had only a life-interest in the house, and that what passed to the purchaser at the sale under the decree against her was nothing more than her life-interest, which alone she could convey. The decree declared the plaintiff entitled to the house.

The plaintiff now sued in the Court of Small Causes at Ahmedabad. He alleged that he was the owner of the house; that Ganga fraudulently executed the mortgage to Hargovandas, who collusively with her obtained a decree, and sold the house to the defendant's father; that he having obtained a decree in the Court of the Subordinate Judge declaring him to be the owner of the house, the defendant's father should have given up possession to him, but did not; that since the death of the defendant's father in September, 1880, the defendant himself had been in possession; that the plaintiff gave a notice to the defendant, but the defendant would neither vacate the house nor pay him rent; and the plaintiff prayed for Rs. 8, being damages for the loss of rent for four months.

The defendant (*inter alia*) contended that the plaintiff must first sue in the Court of the Subordinate Judge for ejectment, and that his present action could not be maintained.

The Judge of the Court of Small Causes held that "the effect of the decisions in the plaintiff's favour is that the defendant's father, buying after Ganga's death, absolutely took nothing by his

purchase. Gangá had, at least, only a life-interest, and that, of course, ceased on her death. The defendant's father paid money only for such right, title, and interest as Gangá had in the house,
 * * * The defendant's vakil has contended that the plaintiff is bound to bring a suit for ejectment before he can sue for use and occupation. * * * *

But, after the decisions in his favour, the plaintiff's title I consider to be fully established, and he is not bound to sue for ejectment. He can certainly bring a suit of this nature in this Court for wrongfully holding over premises which it has been decided by a competent Court do not belong to them but to the plaintiff. It would, under the circumstances, be plainly unjust and inequitable to assist the defendant in his wrongful occupation by making the plaintiff (who has already suffered much by costs of litigation) bring a suit for ejectment, which would cost him a deal of money and delay the remedy."

The Judge of the Court of Small Causes made a decree in favour of the plaintiff for the rent asked for.

Nánábhái Haridás, Government Pleader, on behalf of the defendant moved the High Court for a *rule nisi*, calling on the plaintiff to show cause why the decree of the Small Cause Court should not be annulled. The rule was granted on the 14th of July, 1881, by *Kemball and Pinhey, JJ.*

Pándurang Balíbhadra showed cause.—The plaintiff has done all he could. He has got a declaratory decree as regards his title, and the defendant's possession is clearly wrongful. And a suit to eject him properly lies in a Court of Small Causes, and the circumstance that an incidental inquiry into title is necessary, does not deprive that Court of its jurisdiction. In *Mugun Chunder Chutteraj v. Surbessur Chuckerbutty*⁽¹⁾ a person was an innocent purchaser for value, and held *bonâ-fide* possession in ignorance of the plaintiff's rights, and the plaintiff obtaining a decree sued him for mesne profits for the time during which he had been kept out of possession by the defendant. The Court held that mesne profits could always be recovered from a person who had enjoyed them, even though he had been in *bonâ-fide* possession without know-

(1) 8 Calc. W. R. 479.

1881
 KALIDAS
 v.
 VALLABHDAS.

ledge of the defect in his title. In *Ram Chunder Surmah v. Ram Chunder Pal*⁽¹⁾ it was held that where intermediate holders combined wrongfully to keep an auction-purchaser out of possession, they must all be held liable for mesne profits. [MELVILL, J.—But can you cite any authority for holding that a suit for rent or mesne profits could be brought before suing for possession, and merely on the strength of a declaratory decree in which no consequential relief is given?] No; I cannot.

Nanabhai Haridas in reply.—This case must be decided on the same principle as that in which *Jamnadas v. Bai Shivkor*⁽²⁾ was decided. That suit was before the same Judge, and was for damages on account of rent, and this Court held that the suit could not be regarded as one for use and occupation, the claim not being based on an express or implied contract, and that the plaintiff's proper remedy was by a suit in ejectment accompanied by a claim for mesne profits. The plaintiff's present suit is premature, and not cognizable by a Court of Small Causes.

The judgment of the Court was delivered by

MELVILL, J.—This claim purports to be one for “damages on account of rent,” and, therefore, resembles that in *Jamnadas v. Bai Shivkor*⁽²⁾. The case differs, however, from *Jamnadas v. Bai Shivkor* in two particulars, viz., that the plaintiff has obtained a decree declaratory of his title, and has given to the defendant a notice to pay him rent. The notice cannot make the defendant the plaintiff's tenant, nor create a contract between the parties; and, therefore, if regarded as a suit for rent, or for use or occupation, this action will not lie. It can only be maintainable as a suit for damages on account of trespass; and, before such a suit can be maintained, the plaintiff must, we are inclined to think, prove possession prior to the trespass, or have obtained a decree in ejectment, which would relate back to the date of the trespass (*Turner v. Cameron's Coalbrook Steam Company*⁽³⁾). The plaintiff has obtained nothing more than a decree declaring him to be the owner of the house; but this does not necessarily import a right to immediate possession, nor can the plaintiff be allowed

(1) 23 Calc. W. R. 226.

(2) I. L. R., 5 Bom. 572.

(3) 5 Exch. 932.

1881

 KALIDAS
 v.
 VALLABHDAS.

to derive from it all the benefit which he might obtain from a decree in ejectment. If this were permitted, a plaintiff would never bring a suit for possession; but, having obtained a cheap declaratory decree, he would proceed to worry the defendant by constant suits for mesne profits in the Small Cause Court, until the defendant would throw up the property, and the plaintiff would obtain, to the detriment of the public revenue, all the advantages which he could derive from a suit in ejectment. Assuming, (though it is very doubtful), that the present action is maintainable in any Court without a previous decree, or simultaneous claim for possession of the property, for trespass on which mesne profits are asked, we feel no doubt that it is not maintainable in a Court of small Causes, which cannot be used as a medium for ejecting, by indirect means, a person in possession of immovable property.

Rule made absolute with costs.

APPELLATE CIVIL.

Before Sir M. R. Westroop, Kt., Chief Justice, and Mr. Justice Birdwood.

RUNGO BUJA'JI, PLAINTIFF, v. BA'BA'JI AND OTHERS, DEFENDANTS.*

 March 23.

Limitation Act No. XV of 1877, Section 25—Native date—Month.

The plaintiff sued on a note, bearing a native date, Ashad Vadya 13th, Shaké 1799 (7th August, 1877), and containing a stipulation for payment of the money to this effect:—"In the month of Kártik, Shaké 1799,—that is to say, in four months,—we shall pay in full the principal and interest." The plaint was filed on the 6th December, 1880, in the Court of small Causes at Poona. The Judge was of opinion that the claim was barred. On his referring the case to the High Court for its decision,

Held, that the period of four months was, for the purpose of ascertaining whether the suit was barred by lapse of time, to be calculated according to the Gregorian Calendar, under section 25 of the Limitation Act XV. of 1877, and that the claim was not barred.

Ráq Bahádúr Madan Shrikrishnáji, Judge of the Small Cause Court at Poona, referred the following case, with his opinion thereon, for the decision of the High Court under section 617 of Act X of 1877:—

"This is a suit to recover Rs. 60 on a note dated Ashad Vadya

*Small Cause Court Reference, No. 2 of 1881.