[4 Mad. 385]

APPELLATE CIVIL—FULL BENCH.

The 12th December, 1881, and 20th February, 1882.

PRESENT:

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, MR. JUSTICE INNES, MR. JUSTICE KINDERSLEY, AND MR. JUSTICE MUTTUSAMI AYYAR.

Muhammed Esuf Sahib.....Plaintiff

and

George and Jane.....Defendants.*

Act IX of 1850, Sections 91-98—Jurisdiction—Showing cause to the contrary—Mere assertion of title insufficient.

Proof of the existence of a difficult or doubtful question as to the right to possession *bonâ fide* raised by the person in possession is sufficient cause shown to justify a Presidency Small Cause Court in refusing a warrant of ejectment under Section 93 of Act IX of 1850.

THIS was a case stated under Section 7 of Act XXVI of 1864 by *J. W. Handley*, First Judge of the Madras Court of Small Causes, as follows:—

"This was a suit to compel the defendants to quit and deliver up possession of a house alleged to be the property of the plaintiff and in the occupation of defendants as his tenants. The summons, though not in the form indicated by Section 91 of Act IX of 1850, was intended to be and was treated as being taken out under that section. The defendants (Native Christians, husband and wife) appeared and denied the title of the plaintiff. The plaintiff produced a registered deed dated 8th December [386] 1877, the execution of which was admitted, purporting to be an absolute conveyance of the property in question to him for Rs. 100, and also a rent agreement in his favour of the same date, but executed by the first defendant only, and a third party the defendants' son-in-law, the rent reserved being Rs. 5 a month. Execution of this by the first defendant was also admitted. The plaintiff was represented by Mr. H. G. Wright, Attorney, and the defendants were unrepresented. The defendants' case was that they had never sold the house to plaintiff but mortgaged it for Rs. 100, which amount and all arrears of rent they had long ago paid off, and that the tenancy had therefore ceased and the house became again their own absolute property. This of course was denied by the plaintiff. The first defendant was examined on oath and stated that the house had been built by them many years ago out of the money belonging to the wife, who had been in the habit of going voyages to Europe as an attendant upon ladies by which she used to earn considerable sums of money; that they borrowed Rs. 100 of plaintiff and intended to execute a deed of mortgage to him, but he had the deed drawn up in the form of a sale-deed, saying it did not matter. He further stated that the mortgage had been paid off, and the rent discharged by payments made at different times. In support of this he produced a receipt dated 9th October 1878 for Rs. 50 written in Hindustani and signed by the plaintiff (signature admitted) of which the following is a translation:—

"'I am Muhammed Esuf. Out of the sum of Rs. 100 on account of George and Jane's house, the sum of Rs. 50 has been received by me in the matter of the house, therefore these few words are written and given in the way of receipt so that they may for the future serve as a voucher.'

* Special Case No. 77 of 1881 stated by J. W. Handley, First Judge of the Madras Court of Small Causes, in Suit No. 16998 of 1881.

"Plaintiff's explanation of this document was that defendants got it written, that it was intended as a receipt for rent, and that he was not aware of its contents when he signed it. On the rent agreement is endorsed in the writing of, and signed by defendants' son-in-law, John Carlier: 'Interest for thirteen months, Rs. 65, paid 8th December 1878.' First defendant also produced a promissory note for Rs. 20 in plaintiff's favour by the said John Carlier, dated 7th August 1878, which he stated had been given, together [387] with Rs. 10 cash, in payment of rent due and demanded by plaintiff, and had been subsequently paid off and returned to defendants. First deefndant could produce no other vouchers for the payment of the rent and mortgage debt. The balance, he said, had been paid in small sums, and plaintiff had not given him receipts. Upon the above state of facts I declined to take further evidence, holding that a doubtful and difficult question of title was involved which it was not my duty, in the exercise of the summary jurisdiction conferred by Sections 91-98 of Act IX of 1850, to determine. I accordingly gave judgment for the defendants; but, at the request of plaintiff's Attorney, made my judgment contingent upon the opinion of the High Court upon a case to be stated under Section 55 of the same Act. My reason for doing so was that, in my opinion, the practice of the Small Cause Court in suits of this nature is in an unsettled and unsatisfactory state. In 1866 my predecessor, Mr. Busteed, referred a case upon the subject for the opinion of the High Court. A copy of the case and of the judgment of the High Court is enclosed (see *post*). It will be seen that the High Court held that the sections of the Small Cause Court Act giving the jurisdiction 'necessitate an inquiry into the title when such inquiry is necessary to determine the right to possession.' These words appear to me to apply to all suits for ejectment, and to render necessary an investigation and determination of the title in all cases when it is disputed. But that such was not the intention of the High Court is apparent from the words of the Judgment following shortly after those above quoted, *viz.*: 'The main object of the Legislature no doubt was to provide a cheap and summary mode of ejecting tenants or occupiers wilfully refusing to give up possession to landlords and owners, and the Court would properly refrain from granting such remedy when the right to possession appears to depend upon a difficult and really doubtful question of title to the ownership in the property *bonâ fide* raised by the person in possession.' Since this decision the practice of the Small Cause Court has been to entertain all suits for ejectment within the pecuniary limits fixed by the Act, and, I believe, to decide the question of title in every case. This practice appears [388] to me to be at variance with the intention of the Legislature in conferring a summary jurisdiction in ejectment on the Small Cause Courts. That intention I understand to have been to give owners of immoveable property a summary means for recovering possession when the ownership of the property is not disputed upon any substantial grounds. It seems to me clear that it cannot have been the intention to empower Courts of Small Causes in cases of really doubtful title to deprive the person in possession of the advantage which the fact of possession gives him, and that after a summary investigation and by a judgment which is not binding upon the parties. In a recent case decided by the High Court of Bombay, reported in *Indian Law Reports*, 5 Bom., 295, where the defence to an action of ejectment in the Small Cause Court was that the sale and rent agreement under which the plaintiff claimed were merely colorable transactions entered into by the defendant in collusion with the plaintiff to defeat the former's creditors, it was held that this equitable defence ousted the jurisdiction of the Small Cause Court. That decision appears to me

correctly to lay down the principles upon which the jurisdiction in ejectment should be exercised by Courts of Small Causes under Act IX of 1850, though the application of these principles to that particular case seems open to question. The present case is a much stronger one in favour of the defendant than that before the Bombay Court, inasmuch as the fraud alleged as the ground of the equitable title is entirely on the side of the plaintiff.

"The new Small Cause Court Bill limits the jurisdiction in ejectment to suits against tenants and permissive occupants, but as it seems doubtful when that Bill may become law, I think it is highly desirable in the meantime to obtain a more definite and decisive opinion of the High Court upon the subject for the guidance of this Court than that given upon the reference by my predecessor.

"The questions, therefore, which I refer to the High Court under Section 55 of Act IX of 1850 are—

"(1) Whether this Court has jurisdiction under Sections 91-98 of Act IX of 1850 to try questions of doubtful title *bonâ fide* raised by the persons in possession.

[389] "(2) Whether, assuming this Court to have such jurisdiction, it is bound to exercise it in every case, or has discretion to abstain from exercising it."

Dunhill for the Plaintiff.

The defendants were not represented.

The Court (TURNER, C.J., INNES, KINDERSLEY, and MUTTUSAMI AYYAR, JJ.) delivered the following

Judgment:—The former judgment of this Court * on the point again referred, when properly understood, appears to adopt a reasonable construction of the provisions of the Act.

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*PRESENT:

SIR C. H. SCOTLAND, C.J., AND BITTLESTON, J.

Judgment:—Not without considerable doubt we have come to the conclusion that the Madras Court of Small Causes cannot refuse to entertain the consideration of a question of title arising in proceedings under Section 91 of Act IX of 1850.

By that section any person holding or occupying a house (not above a certain value) without leave of the owner and neglecting or refusing to deliver up possession may be summoned by the owner to show "by what title he claims to hold or occupy the premises."

The next section is curiously framed. It provides only for the case of the party summoned *not appearing and showing cause to the contrary*. It does not say what cause he is to show if he does appear, but as he is summoned to show "by what title" he claims to occupy, it is reasonable to infer that he may set up and give evidence of his title to the premises, there being no provision in the Act prohibiting the Court from entering upon a question of title. Further, if he does not "appear and show cause to the contrary," there is then to be an investigation, and the owner is expressly authorized to give proof of the holding and of the determination of the tenancy, if *there was any tenancy*, and of the right by which he claims possession; so that thus far on the one hand the occupier is summoned to show "by what title" he claims to hold, and on the other the owner is to give proof of the right by which he claims the possession.

These sections provide a summary jurisdiction for the recovery of the possession of immoveable property in cases in which the Court is satisfied that the person proceeded against is wrongfully withholding possession from the person legally entitled to the property, and necessitate, it seems to us, an inquiry into the title when such inquiry is necessary to determine the right to possession. And the provisions in the subsequent sections are not, we think, opposed to this construction, but rather the contrary.

The main object of the Legislature no doubt was to provide a cheap summary mode of ejecting tenants or occupiers wilfully refusing to give up possession to landlords and owners: and the Court would properly refrain from granting such remedy when the right to possession appeared to depend upon a difficult or really doubtful question of title to the ownership in the property *bona fide* raised by the person in possession. The judgment of the Court is not

[390] The Court under the 91st section is empowered to issue a summons to the person in possession to show by what title he claims to hold and occupy the premises. If he does not appear and show cause to the contrary, that is to say, if he does not appear, or if, having appeared, he does not show cause to the contrary, then, on proof of the holding and of the determination of the tenancy, if any, and of the right of the claimant to possession, the Court may issue a warrant to place the claimant in possession.

What is the meaning of the term "showing cause to the contrary?"

We may refer to the English decision *Fearon* v. *Norvall* (17 L. J. Q. B., 161) that the cause shown must be cause which is in the opinion of the Court sufficient.

The decision of this Court to which we have been referred indicates as sufficient cause proof that the right to possession depends on a difficult or really doubtful question of title to the ownership in the property *bonâ fide* raised by the person in possession; and expressing the illustration more generally, we agree that proof of the existence of a difficult or doubtful question as to the right to possession *bonâ fide* raised by the person in possession is sufficient cause.

It is not the mere assertion of a right or title to possession that will justify the Small Cause Court in refusing relief: it must first be satisfied that the right or title is asserted in good faith and on reasonable grounds.

NOTES.

[*See*, also, (1890) 15 Bom., 400.]

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[391] APPELLATE CIVIL.

The 14th December, 1881.

PRESENT:

MR. JUSTICE KERNAN AND MR. JUSTICE KINDERSLEY.

Narasimma Thatha Acharya.....(Plaintiff), Appellant

and

Anantha Bhatta and others.....(Defendants), Respondents.*

Paricharaka office and emoluments—Sale of, by Archaka, invalid.

An Archaka† cannot sell the office and emoluments of Paricharaka‡ inasmuch as they are *extra commercium*.

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binding on a question of title, and the sections clearly secure to the person in possession the right to have the title to the property tried by another Court competent to decide finally.

Upon a consideration of all the sections we are (although not insensible to the inconvenience pointed out by the learned First Judge) unable to come to the conclusion that the First Judge was right in refusing to enter upon the case merely because the defendants set up independent title in themselves. We think they had a right to put the plaintiff upon proof of his right to the possession, although that involved the consideration of a question of conflicting title between the plaintiff and the defendant.

* Second Appeal No. 317 of 1881 against the decree of J. Hope, District Judge of Chingleput, confirming the decree of V. Sundaramier, District Munsif of Tiruvallur, dated 6th December 1880.

† A priest who alone is allowed personally to attend upon the idol. From Archa=idol.

‡ Assistant to the Archaka—not allowed to touch the idol.