1877.

WA'LJI KARIMJI v. JAGANA'TH PREMJI.

Court of Small Causes had not jurisdiction, under Section 91 of Act IX. of 1850, to try a case of pure adverse title between two claimants of the fee in immoveable property exceeding Rs. 500 in value. The defendant in possession there insisted that he was entitled to hold absolutely as heir, while the claimant (the plaintiff and alleged owner) claimed under the defendants' ancestor in virtue of a bill of sale executed by him in his life-time.

Decree affirmed.

[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, Knight, Chief Justice, and Sir Charles Sargent, Knight, Justice.

NOWLA' OOMA' (PLAINTIFF *v.* BA'LA' DHURMA'JI (DEFENDANT).* June 22.

Jurisdiction—Bombay Court of Small Causes—Title to immoveable property—Form of Suit—Practice—Leave to amend Summons—Act IX. of 1850—*Act XXVI. of* 1864.

In a suit brought under Section 91 of Act IX. of 1850, the Bombay Court of Small Causes has no jurisdiction to try a question of adverse title to the immoveable property, the subject of the suit. *Aliter* if the suit be brought under Section 25 of Act IX. of 1850, as extended by Section 2 of Act XXVI. of 1864, and the value of the property in dispute do not exceed Rs. 1,000.

In a case involving a question of adverse title the plaintiff should be allowed to amend the summons issued under Section 91 of Act IX. of 1850, so as to render it conformable with a claim under Section 25 of Act XXVI. of 1864, if the summons were issued in the mistaken form by the faul of the Clerk of the Court, and not of the plaintiff.

THE following case was stated for the opinion of the High Court by J. O'Leary, First Judge of the Court of Small Causes at Bombay, under Section 55 of Act IX. of 1850 :—

This suit was brought by the plaintiff, under Section 91 of Act IX. of 1850, to recover possession of a room in a house. See copy summons annexed.(1)

* Small Cause Court Reference, Suit No. 22943 of 1874.

(1) The summons called on the defendant "personally to appear, &c., to answer to the complaint of Nowla-Ooma, the plaintiff above named, of your neglect, or refusal to quit and deliver up to him possession of a room in house, &c., and occupied by you as plaintiff's monthly tenant."

1877.

NOWLA' OOMA' v. BA'LA' DHURMA'JI.

No evidence was taken by me, but certain facts hereinafter stated were admitted, and on the defendant's statement of his defence I struck out the case for want of jurisdiction, and on the request of the plaintiff I made that order subject to the opinion of the High Court.

Defendant, it was admitted, had been the owner of the house. It was, on 4th November 1873, purchased by plaintiff from a Márvádi firm, called Huckma Lálá & Co., who sold it under a power of sale contained in a mortgage deed, dated 8th November 1869, executed by defendant in favour of Huckma Lálá & Co.

Defendant admitted his signature to the mortgage deed of 8th November 1869, and also to a deed of further charge, dated 10th January 1872.

He stated that he was drunk when he executed the mortgage of 8th November 1869, and that it was obtained from him by fraud, and was not binding on him.

As to the deed of further charge, he also alleged fraud with regard to it, and that he had received no consideration for it.

Plaintiff alleged that the value of the house was about Rs. 2,000, and that the portion of it not occupied by defendant, was occupied by tenants, who paid plaintiff rent.

The question which I was requested to submit for the opinion of the High Court, and which I do accordingly respectfully submit, is whether, by the statement of such a defence as is set forth above by the defendant, in a suit brought under Section 91 of Act IX. of 1850, the jurisdiction of the Court is ousted.

I was of opinion that it was, and struck out the case accordingly, subject to the opinion of the High Court, which I now respectfully solicit.

At the hearing of the reference there was no appearance of the parties, either in person or by counsel.

The opinion of the High Court on the question referred was delivered by

WESTROPP, C.J.:—It is admitted that the defendant, by deed of the 8th November 1869, mortgaged a house at Mazagon to

1877.

NOWLA' OOMA' v. BA'LA' DHURMA'JI.

certain Márvádis. That mortgage contained a power of sale in the event of the mortgage money not being duly repaid at the time fixed. The defendant alleges that he was drunk when he executed that mortgage, and that it was obtained from him by fraud, but he does not appear to have added that it was without consideration. He admits that, on the 10th of January 1872, he executed, in favour of the same Márvádis, a deed of further charge on the same house. This deed the defendant alleges to have been obtained from him by fraud and without consideration.

The Márvádis sold the house, on the 4th November 1873, to the plaintiff under the power of sale contained in the first mortgage, that of the 8th November 1869. The learned Chief Judge of the Court of Small Causes does not state whether the vendors executed to the plaintiff a deed of sale; but, in the absence of any statement to the contrary, we presume that such a deed was executed. It is also not mentioned whether the plaintiff, when he purchased the house, had notice of the assertions of the defendant, that the first mortgage was obtained from him when he was drunk and by fraud, and that the second mortgage was without consideration and procured by fraud.

The plaintiff alleged that the value of the house was about Rs. 2,000; but he brought this action to recover only one room in it, occupied by the defendant, and the value of which is not stated, but most probably was under Rs. 1,000, if not, as is not unlikely, under Rs. 500. The plaintiff asserted that the residue of the house was occupied by tenants who paid rent to him for their lodgings. This assertion is not stated to have been denied.

The Chief Judge observes that this suit was brought under Section 91 of Act IX. of 1850, and we perceive that, although that section is not mentioned in the summons, his observation is manifestly correct, as is apparent from the form of that document, which treats the defendant as a monthly tenant of the plaintiff, and requires him in that capacity to quit and deliver up possession of the room in question to the plaintiff. The suit is clearly not brought upon Section 25 of the same Act, the form of the summons under that section or Section 2 of Act XXVI. of 1864 being, as is exemplified by the summons in *Walji Karinji* v.

1877.

NOWLA' OOM'A' v. BA'LA' DHURMA'JI.

Jagannáth Premji and *Gulbái, his wife*,[1] to which case we shall presently advert, quite different from that under Section 91. If this suit had been brought under Section 25 of Act IX. of 1850, and if the room be under Rs. 500 in value, the Court of Small Causes would certainly have jurisdiction to try this case, notwithstanding that the title to the room is in dispute. The case of *Radhamoney Boystomey* v. *Anundomaye Dabey*,[2] decided in the Supreme Court at Calcutta by Peel, C.J., and Buller and Colvile, JJ., in 1852, shows conclusively that to be so. Our recent decision in *Walji Karimji* v. *Jagannáth Premji* and *Gulbái, his wife*,[3] in which we differed from the judgment of the Calcutta Court of Small Causes given in 1866 in *Sreemutty Shibosoondery Dossee* v. *Táracknáth Pandit*,[4] shows that, in our opinion, the Bombay Court of Small Causes would have jurisdiction to try this suit, if it had been brought under Section 25 of Act IX. of 1850 taken in conjunction with Section 2 of Act XXVI. of 1864, provided that the room did not exceed in value Rs. 1,000. But the learned Chief Judge of the Court of Small Causes has held that, having regard to the fact that this suit is brought under Section 91 of Act IX. of 1850, and to the nature of the defence set up, whereby the defendant disputes the plaintiff's title on the grounds already stated, the Court of Small Causes had not jurisdiction to try the suit, and, subject to the question submitted to us as to whether it had such jurisdiction, has struck the cause out of his list.

His view is completely supported by a decision, in 1851, of the Supreme Court of Calcutta in the case of *Hurrymoney Dossee* v. *Gopaulchander Mookerji*,[5] when it ordered a writ of prohibition to issue to the Court of Small Causes in Calcutta, where the plaintiff had sued to recover land (exceeding Rs. 500 in value), whereof he had been in possession for many years under a conveyance from the father of the defendant, and of which land he had been forcibly dispossessed by the defendant, who claimed as heir. The judgment of the Supreme Court was given by Peel, C.J., who, while admitting that the Court of Small Causes had jurisdic-

(1) *Supra* p. 84.
(2) 2 Ind. Jur. 144.
(3) *Supra* p. 84.
(4) 2 Ind. Jur., note to p. 145, *et seq.*
(5) 2 Taylor and Bell, 57.

tion to try the title to immoveable property, under Section 25 of Act IX. of 1850, where the value did not exceed Rs. 500, said of Section 91: "But the section on which this question turns, is entirely different, and framed with a different view; it is framed to empower the Court to give possession in certain cases, leaving the title untried, and subject to litigation in the same or another Court. It is important to bear in mind, in considering the meaning of this clause, that the Court for trial of Small Causes is directed to act on the same substantive law on which this Court proceeds: the procedure is different, but both Courts are subject to the same law. Therefore, whether in that Court or this, one suing to recover lands on title must recover on the strength of his own title. To turn the occupier out of possession, that he might try *his* title by suit, would in some cases expose him to immediate injury. The value of possession where there is no title is so well known that it would be quite unreasonable to suppose that it had escaped the notice of the Legislature, or that, when they reserved to another tribunal, or trial, this decision of title, they meant to invert the position of the several claimants, to displace one from the possession, and to put in another, whose claim, had he been in the position of a plaintiff, might not have been capable of proof, or might have been subjected also to some defect. The title of purchasers would, indeed, be exposed to new risks if the Legislature had sanctioned any such procedure; but nothing of the kind is inferrible from the Act: it is true that this Act differs in these sections from the language of the English Act from which it is mainly taken, and goes beyond it. The corresponding section of that Act extends to landlords and tenants only: to persons who have stood to each other in that peculiar relation. This Act goes further: it uses the word 'occupier' as distinct from 'tenant,' and 'occupy' as distinct from 'hold.' But the context shows plainly that 'occupier' is used in a sense in which it is frequently employed to denote mere actual possessions of land which are permissive, or have been so, and yet where there is no holding or tenure by any hand, and no relation of a tenant to a landlord, or ever was; it includes adverse holdings on a once permitted occupation, as where a house has been lent, or a servant or clerk has in part occupied; but only as incidental to his

1877.

NOWLA' OOMA' v. BA'LA' DHURMA'JI.

service, and not with any view to tenantry. The sense of the word is derivable from its association with the word 'tenant,' and it would be a strange rule of construction to force it into the sense of an adverse holding by one claiming to hold as absolute holder, whether on a good or bad title. There are some cases of adverse holding within the Act, as where the holder has once stood in a position to 'the owner' inconsistent with any claim of title in himself; as where he has come in under the owner, or those from whom the owner derives title, whether as tenant or as permitted user or occupier of the property without legal interest. But this case is merely that of possession by one claiming to hold absolutely as heir, whilst the claimant, 'the owner', claims under the ancestor by some act in his life-time. This is a pure adverse title between two claimants of the fee, and to such a case these sections (91 to 98) of the Act have no application. It was contended on the affidavits that jurisdiction existed in this case, because the actual occupier had ousted the claimant. The Act, however, does not extend to such a case, to restore possession on a forcible ouster, though a jurisdiction of the same kind exists in the mofussil. "The whole language of the Act points to a continuation of occupation consequent on a once lawful possession. Prohibition appears to be a proper remedy: this remedy exists even where the Court has jurisdiction, but is about to do something injurious to a legal right in a way unauthorized by law: it does not apply to mere errors of decision, which can only be remedied by appeal." What follows is peculiarly applicable here. Sir L. Peel continues thus: "In this case the value appears to be above that of the limit fixed for the jurisdiction of the Court below: but, independently of that, if that Court was proceeding to eject, under these clauses, a person as to whom the claimant was not in the position of owner within the meaning of those sections (*i. e.*, sections 91 to 98,) the remedy would still attach even in a case where the title might be tried in that Court; because the inversion of the position of the rivals might work an irremediable wrong."

We understand Sir Lawrence Peel in that passage to mean that if the plaintiff has sued out his summons under the 91st and following sections of Act IX. of 1850, he ought not, in the event of

1877.

NOWLA' COMA' v. BA'LA' DHURMA'JI.

its appearing, that the property does not exceed Rs. 500 in value, to be permitted to treat the case as if the summons had been sued out under Section 25 of that Act, and to proceed with the case, although the defendant may claim against him the fee adversely. We are not prepared to differ from that view. If, however, it appears to the Court of Small Causes that the Clerk of the Court, and not the plaintiff, is, as very probably may be, the person responsible for the mistaken form in which the summons has been issued, it would, we think, be fair to permit the plaintiff to amend his summons so as to render it conformable with a claim under Section 25 of Act XXVI. of 1864, provided the Court be satisfied that the room sued for does not exceed Rs. 1,000 in value, and that the plaintiff is, as he avers, in possession of the residue of the house, and that this suit, though ostensibly for a room, is not really brought to try the title to the house. In cases under Rs. 1,000 in value the Court of Small Causes may, under the 25th Section of Act IX. of 1850, combined with Section 2 of Act XXVI. of 1864, hear such legal or equitable defence as the defendant may have.

If the Court of Small Causes be of opinion that there are not in this case such circumstances, as above indicated, which would justify an amendment, we think that the Judge would be right in dismissing the cause for want of jurisdiction, on the ground that a defence resting upon an adverse title to the fee takes the case out of Section 91 of Act IX. of 1850.

The Court of Small Causes will dispose of the costs of this reference as may be just. There was not any appearance here by or for either party.

Case remanded.

[APPELLATE CIVIL.]

Before Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice Nándbhái Haridás.

SATRA KUMA'JI (PLAINTIFF AND APPELLANT) *v.* VISRA'M HASGA'VDA' (DEFENDANT AND RESPONDENT).* January 17.

Deed of assignment of mortgage—Consideration—Registration.

A deed of assignment for a consideration of less than Rs. 100, of a mortgage for a consideration of Rs. 100, or upwards, does not need registration.

* Special Appeal No. 328 of 1876.