1885.

RÁMCHANDRA JIVÁJI TILVE v. KHATAL MAHOMED GORI.

SARGENT, C. J.—We think that section 103 of the Civil Procedure Code should receive a somewhat strict construction. In the first suit against the second defendant alone, plaintiff alleged that he was the owner of the equity of redemption by purchase from the first defendant, and, as such, was entitled to redeem the second defendant's mortgage. In this suit his case is that he contracted for the purchase of the property from the first defendant, the latter undertaking to clear it of the second defendant's mortgage; that the second defendant has since purchased the equity of redemption from the first defendant, with the full knowledge of the said contract, and he substantially, although not in strict form, seeks that both the defendants may be compelled to specifically perform the contract. Under these circumstances we think that section 103 does not preclude plaintiff from bringing his present suit, and that the District Judge was right in remanding the case for trial on the other issues. Order confirmed. Costs of this appeal to follow the result.

Order accordingly.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1885. *April 8.*

DAVIDA'S HARJIVANDA'S, (ORIGINAL PLAINTIFF), APPLICANT, *v.* TYABALLY ABDULALLY, (ORIGINAL DEFENDANT), OPPONENT.*

Small Cause Court—Jurisdiction—Question of title—Landlord and tenant—Admission of tenancy—Small Cause Court Act XV of 1882, *Sec.* 41—*Suit in ejectment—Practice.*

The plaintiff, alleging that the defendant was his tenant at a monthly rental of Rs. 52, and had refused to deliver up possession to the plaintiff, took out a summons against the defendant under section 41 of the Small Cause Court Act XV of 1882.

The defendant admitted the tenancy, but contended that he held under an unexpired lease for four years. The Judge of the Court of Small Causes was of opinion that a question of title was involved, and he dismissed the case on the ground that he had no jurisdiction to hear it. The plaintiff thereupon applied to the High Court under its extraordinary jurisdiction

Held, that the case was within the jurisdiction of the Small Cause Court.

* Extra Application, No. 10 of 1885.

1885.

DAVIDÁS HARJIVANDÁS v. TYABALLY ABDULALLY.

THIS was an application under the High Court's extraordinary jurisdiction against an order of W. E. Hart, First Judge of the Court of Small Causes at Bombay.

The plaintiff took out a summons against the defendant in the Court of Small Causes at Bombay under section 41 of the Small Cause Court Act XV of 1882, alleging that the defendant was his tenant at a monthly rental of Rs. 52. When the summons came on for argument, the defendant admitted the tenancy, but contended *(inter alia)* that he held the plaintiff's premises under a lease for four years, which had not then expired. The Judge was of opinion that the case raised a question of title, and that the suit did not fall within the cognizance of the Court of Small Causes. He, therefore, dismissed the plaintiff's suit for want of jurisdiction. His decision, on reference, was upheld on 6th May, 1884, by the Full Bench of the Court of Small Causes, and the plaintiff's prayer, that a case should be stated for the opinion of the High Court, was refused as having then been made too late.

The plaintiff applied to the High Court under its extraordinary jurisdiction.

Inverarity (*Jamsetji Cursetji Cámá* with him) for the applicant.—The summons having been taken out against the defendant under section 41 of the Small Court Act XV of 1882, the defendant was bound to show cause to the satisfaction of the Court. To "show cause" is not merely to allege cause, but to allege and prove it to the satisfaction of the Court: see *Dandekar* v. *Dandekars*[1], which the defendant has not done. The defendant did not deny the fact of tenancy, and the Court of Small Causes had jurisdiction to try the suit: see *Muhammed Esuf* v. *George and Jane*.[2]

Macpherson (*Máneksha Jehángirsha* with him) for the opponent.—The powers of the Court of Small Causes under section 41 of the Small Cause Court Act XV of 1882 are discretionary, and that Court having exercised its discretion this High Court cannot interfere with its order under the extraordinary jurisdiction. Under section 37 of the Act the plaintiff ought to have

(1) I. L. R., 6 Bom., 663. (2) I. L. R., 4 Mad., 385.

1885.

DAVIDÁS HARJIVANDÁS v. TYABALLY ABDULALLY.

applied to the Small Cause Court within eight days from the dismissal of his suit, which he failed to do.

SARGENT, C. J.—The First Judge of the Small Cause Court was wrong, we think, in dismissing the case for want of jurisdiction, on the ground, as we have been told, that the case raised a question of title. It is true that it has been held by this Court on the corresponding section 91 of Act IX. of 1850 that "a defence resting upon an adverse title to the fee" takes the case out of that section—*Nowla Ooma* v. *Bálá Dharmáji*[1]; and the same ruling would equally apply, if not with greater force, to section 41 of Act XV of 1882, under which the present summons was taken out; but in the present case the defendant does not dispute the plaintiff's right to the ownership, but admits that he is his tenant; and the only question to be determined is, whether the defendant was holding, as he alleges, under an unexpired term of four years, or as a monthly tenant, as the plaintiff avers. We must, therefore, in exercise of the power vested in the High Court by section 622 of the Code of Civil Procedure, direct the Judge of the Small Cause Court to proceed to try the case. Costs of this application to follow the result.

(1) I. L. R., 2 Bom., 91.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1885. *May* 4.

BÁLKRISHNA MORESHWAR KUNTE, (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE MUNICIPALITY OF MAHA'D (ORIGINAL DEFENDANT), RESPONDENT.*

Parties—Practice—Procedure—Joinder of parties—Right of co-sharer to sue alone. Unless there is a special provision of the law, co-owners are not permitted to sue through some or one of their members, but all co-owners must join in a suit to recover their property. The defendant cannot be deprived of his right to insist on the other co-owners being joined on the record by the fact that they approve of the suit being brought by the plaintiff alone.

THIS was a second appeal from the decision of W. H. Crowe, Judge of Sátára, confirming the decree of the Subordinate Judge of Mahád.

* Second Appeal, No. 541 of 1883.