SHAH, J.:—I agree.

Solicitors for appellants: Messrs. *Khandvalla & Chhotalal.*

Solicitors for respondents: Messrs. *Little & Co.*

Appeal allowed.

V. G. R.

APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice Fawcett.

1924. *February* 29.

RUKMINI KOM VITHU MOTHER'S NAME SAGUNA MALWANKARIN (ORIGINAL DEFENDANT) APPELLANT *v.* RAYAJI DATTATRAYA PAI (ORIGINAL PLAINTIFF), RESPONDENT*.

Landlord and Tenant—Suit in ejectment—Alleged disclaimer—Elements of—Waiver of forfeiture—Finding in previous suit in Court of Small Causes—Question of res judicata*—Civil Procedure Code (Act V of 1908), section 11—Provincial Small Cause Courts Act (IX of 1887), section 33.*

In 1913, the plaintiff Pai filed a suit against the defendant for arrears of rent before the Subordinate Judge exercising the powers of the Small Cause Court, alleging that the defendant was an annual tenant. The defendant then pleaded as follows. "I have never paid rent to plaintiff Pai. Pai now claims that he is entitled to the rent and Ghurye claims likewise. I do not know who is rightfully entitled. I am ready to pay rent at annas five per year to either of them as the Court directs". A decree was passed against the defendant for payment of rent on the footing that the defendant was a tenant of plaintiff. On July 28, 1916, the plaintiff served the defendant with a notice to vacate. The defendant having failed to deliver possession as demanded, the plaintiff sued to eject the defendant, basing his claim on the grounds, viz., first, that there had been forfeiture of the tenancy by virtue of the defendant's denial of plaintiff's title as landlord in the suit of 1913 and secondly, that if the denial was not established, his notice of July 28, 1916, should be treated as a notice terminating annual tenancy as from July 1, 1917. The lower Court decreed the suit holding that the question of tenancy was *res judicata* because the Small Cause Court in suit of 1913 had passed a decree against the defendant on the footing that she was a tenant of plaintiff; that on evidence the defendant was not a permanent tenant of plaintiff; that the written statement filed by her in the suit of 1913 was a disclaimer of the landlord's title and that the plaintiff was justified in forfeiting the tenancy. On appeal by the defendant,

* Letters Patent Appeal No. 19 of 1923.

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Held, (1) that, having regard to the provisions of section 33 of the Provincial Small Cause Courts Act, the finding of the Court of the Subordinate Judge in the rent suit of 1913 in the exercise of the jurisdiction of a Court of Small Causes was not *res judicata* in the subsequent suit for possession, the Court of Small Causes not being competent to try such suit;

(2) that the plea of the defendant in her written statement in the suit of 1913, relied on by the plaintiff as a disclaimer, afforded no ground for forfeiture, the defendant not having renounced her character of a tenant, but in fact acknowledging herself to be a tenant and ready to pay rent to the right person.

Doe dem. Williams v. *Cooper*[1] and *Jones* v. *Mills*[2], followed;

(3) that in any event the plaintiff was estopped from pleading that the tenancy was terminated by forfeiture, his claim that his notice should be treated as a notice terminating the annual tenancy as from July 1, 1917, amounting to an assertion that the tenancy was still subsisting and being, therefore, a waiver of the forfeiture.

Evans v. *Davis* [3], referred to;

(4) that, on the facts, the tenancy must be presumed to be a permanent tenancy.

APPEAL under the Letters Patent against the decision of the Honourable the Chief Justice in Second Appeal No. 48 of 1923 preferred against the decision of V. V. Pataskar, First Class Subordinate Judge, A. P., at Ratnagiri, reversing the decree passed by D. S. Gupte, Joint Subordinate Judge at Malvan. Action in ejectment.

The property in suit formed part of a Thikan called Mirachi Bag" in Malwan Taluka. It was held in inam by plaintiff, Pai. The plaintiff sued to recover possession of the property alleging that it was leased to the defendant by the plaintiff's father on an annual tenancy.

In 1913, the plaintiff filed Suit No. 227 of 1913 against the defendant before the Subordinate Judge exercising the powers of the Small Cause Court, to recover arrears

(1) (1840) 1 M. & Gr. 135. (2) (1861) 10 C. B. N. S. 788.
(3) (1878) 10 Ch. D. 747.

of rent for the years 1909-10 to 1911-12. In that suit the defendant filed a written statement in terms (*inter alia*) as follows:—

"It is true that the land held by me belongs to Pai; but it is understood it forms part of the land held by Banavalkar from Pai; Banavalkar's rights have gone to Ghurye, and Ghurye used to take 5 annas per year from me on account of rent; but I have never paid rent to the plaintiff, Pai; Pai now claims that he is entitled to the rent and Ghurye claims likewise; I do not know who is rightfully entitled; I am ready to pay rent at annas 5 per year to either of them as the Court directs ...... I am a permanent tenant of the land."

The Court held that the defendant was a tenant of the plaintiff, and decreed the payment of rent.

On July 28, 1916, the plaintiff gave a notice to the defendant demanding possession of the property on the ground that the latter had disclaimed plaintiff's title by her written statement in Suit No. 227 of 1923. The defendant having failed to reply to the notice, the present suit was filed by the plaintiff (Suit No. 216 of 1918), basing his claim on two grounds, viz., (1) that there has been forfeiture of the tenancy by virtue of the defendant's denial of plaintiff's title as landlord in Suit No. 227 of 1913 and (2) that if the denial was not established, his notice of July 28, 1916, should be treated as a notice terminating the annual tenancy as from July 1, 1917.

The defendant contended that the land in suit had been in her possession and that of her predecessors-in-title from time immemorial, not as annual but as permanent tenants; that she never paid any rent to the plaintiff prior to the suit of 1913; that she was still willing to pay rent to the plaintiff; that her house had been standing on the land for over twelve years and that the suit was barred by limitation.

The Subordinate Judge found that the defendant was a permanent tenant on the ground that there was no evidence to show any payment of rent until after the

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suit of 1913 and that the defendant's house was standing on the land for at least sixty years. He further held that there was no denial of plaintiff's title arising on the written statement of the defendant in Suit No. 227 of 1913; nor was the tenancy determined by the plaintiff's notice to quit. He, therefore, dismissed the plaintiff's suit.

On appeal, the First Class Subordinate Judge, A. P., held that the defendant was not a permanent tenant; that the question of tenancy was *res judicata*, because a decree had been made against the defendant in Suit No. 227 of 1913 for payment of rent on the footing that she was a tenant of the plaintiff; that notice given by the plaintiff was sufficient to terminate the tenancy of the defendant. He, therefore, reversed the decree and ordered that the plaintiff should recover possession of the land in suit and the house thereon occupied by defendant on paying to defendant or into Court Rs. 125 as compensation and Rs. 2 for rent for the three years rent before date of suit.

The defendant filed a Second Appeal (No. 48 of 1923) which was dismissed under Order XLI, Rule 11.

The defendant preferred an appeal under the Letters Patent.

S. R. Parulekar, for the appellant:—Though the Judge trying the Small Cause Court suit was the same who tried the regular suit, in legal terms they are two separate Courts under section 33 of the Provincial Small Cause Courts Act. The Judge trying the Small Cause Court suit was not competent to try the present suit and the finding of the Small Cause Court, therefore, is not *res judicata* under section 11 of the Civil Procedure Code, as the present suit is for possession.

On the question whether the defendant is a permanent tenant or not it is submitted that the tenancy is

old and continuous and its origin cannot be traced. This, together with the fact that a permanent building has been erected on the land, the recital in the deed of gift of 1859 and the fact that the tenure has been transferred from time to time, coupled with the fact that the so-called rent notes are not genuine, raises a very strong presumption of permanent tenancy under section 83 of the Bombay Land Revenue Code: *Afzal-un-Nissa* v. *Abdul Karim*[1].

What the defendant contended in her written statement in the earlier suit does not amount to disclaimer, since it is not a renunciation by her of her character of tenant either by setting up a title in another or by claiming a title in herself. The case is more analogous to *Doe dem. Williams* v. *Cooper*[2] and *Jones* v. *Mills*[3]. See *H. Mathewson* v. *Jadu Mahto*[4]. There is no disclaimer and, therefore, no forfeiture. The plaintiff amends the plaint by saying that his notice of 1916 should be treated as one terminating the annual tenancy from July 1, 1917. Thus there was the tenancy existing after so-called forfeiture.

A. A. Adarkar, for the respondent:—The decision in the small cause suit is *res judicata*: see *Musaddi Lal* v. *Jwala Prasad*[5].

It is submitted that the finding of the appellate Court that the defendant is the annual tenant is right and cannot be disturbed in Second Appeal. It is not shown that the tenancy is co-extensive with the duration of the plaintiff's tenure and it is further clear that the tenancy began before 1859, the date of the gift deed, but sometime within the memory of Exhibit 40, a witness eighty-three years old. So that, though the tenancy cannot be traced to a particular year, it can be

[1] (1919) 47 Cal. 1.
[2] (1840) 1 M. & Gr. 135.
[3] (1861) 10 C. B. N. S. 788.
[4] (1908) 12 C. W. N. 525.
[5] (1912) 10 A. L. J. 106.

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traced back to a definite period, e. g., from about 1835 to 1859 and the presumption under section 83 of the Land Revenue Code does not arise: see *Narayan Ramchandra* v. *Pandurang Balkrishna*[1].

The contention in the written statement relied on by the other side does amount to disclaimer; see *Doe dem. Calvert* v. *Frowd*[2].

The judgment of the Court was delivered by

PRATT, J.:—The plaintiff sued to evict the defendant from the house in suit on the ground that the defendant was his tenant and that she had forfeited the tenancy by disclaimer of her landlord's title in her written statement in Suit No. 227 of 1913.

The defendant's main plea was that she was a permanent tenant and held under one Ghurye who was a permanent tenant of the plaintiff.

The lower appellate Court found that the written statement of the defendant was a disclaimer of the landlord's title and that the plaintiff was justified in forfeiting the tenancy; that the question of tenancy was *res judicata* because in Suit No. 227 of 1913 which the plaintiff had filed against the defendant before the Subordinate Judge exercising the powers of the Small Cause Court, a decree had been made against the defendant for payment of rent on the footing that she was a tenant of the plaintiff. The Judge also found on the evidence that the tenancy was not permanent.

Now we do not concur with the finding of the lower appellate Court on the point of *res judicata*. No doubt the Small Cause Court had found that the defendant was a tenant of the plaintiff and passed a decree for the plaintiff against the defendant for rent. But that finding of the Small Cause Court could not be *res judicata* under section 11, Civil Procedure Code, unless

[1] (1922) 47 Bom. 4. [2] (1828) 4 Bing. 557.

the Small Cause Court has jurisdiction to decide this suit. This suit is for possession and therefore the finding of the Small Cause Court is not *res judicata*. It matters not that the Judge who made the decree in Suit No. 227 of 1913 was also a Judge competent to try a regular suit. For it is clear under section 33 of the Provincial Small Cause Courts Act that the Judge when trying a suit in his ordinary jurisdiction is a Court different from that of the same Judge trying a suit in the Small Cause Court jurisdiction. But as the defendant has expressed her willingness to pay rent to the plaintiff, the question whether the defendant was a tenant or a sub-tenant under the plaintiff is of little importance. We, therefore, accept the finding that the defendant was a tenant.

With regard to the finding of the lower appellate Court that the defendant was not a permanent tenant, the main issue for decision is whether that tenancy is as the plaintiff alleges an annual tenancy or as the defendant contends a permanent tenancy. The lower appellate Court has found on the evidence against the defendant. But we are unable to accept that finding as the lower appellate Court has misconceived the evidence. The evidence of the witness, Exhibit 40, is that the first tenant he can remember in possession of the house was a Sonar. The lower appellate Court misstates this evidence when it says that this witness has deposed that the Sonar was the first tenant of the plaintiff of the house in suit. The whole finding of the lower appellate Court as to permanent tenancy is based upon this initial mistake. For the Judge comes to the conclusion that in view of the origin of the tenancy being determined either by this witness or at a date subsequent to that which this witness speaks of, section 83 of the Land Revenue Code is not applicable. But what the witness had said is that the house was

tenanted as far back as he could remember. This witness is of the age of eighty-three and the first tenant that he can remember is the Sonar. Then he says that the Sonar transferred his tenancy to one Banavalkar. That statement seems to be true because it is corroborated by a recital in the deed of gift of 1859 executed by the defendant's mother. That deed of gift recites the fact that the defendant's mother Ladu was paying rent to Banavalkar. There seems, therefore, no doubt that Banavalkar succeeded the Sonar in the tenancy. Subsequently the defendant was paying rent to Ghurye and Ghurye says that he purchased the house at a Court sale from Banavalkar. The payment of rent by the defendant to Ghurye corroborates Ghurye's statement, and there can be no doubt that the tenancy which is thus traced to Ghurye and to the defendant is the same tenancy as was traced back by Exhibit 40 to at least eighty years ago. The fact that the commencement of the tenancy cannot be determined, coupled with the presumption of continuance of the tenancy, and coupled also with the fact that a permanent building has been erected on the land at least as far back as the witness, Exhibit 40, can remember, raises a strong presumption that the tenancy is permanent. We, therefore, find that the tenancy was a permanent tenancy.

The next question that remains is whether the tenancy has been terminated by forfeiture which the plaintiff professed to exercise by his notice of July 28, 1916, on the ground that the defendant had disclaimed the plaintiff's title by her written statement in Suit No. 227 of 1913. But all that the defendant then said was: "I have never paid rent to the plaintiff Pai. Pai now claims that he is entitled to the rent and Ghurye claims likewise. I do not know who is rightfully entitled. I am ready to pay rent at annas five

per year to either of them as the Court directs". It seems to us clear that there was here no denial of the landlord's title. The case of *Doe dem. Calvert* v. *Frowd*[1], cited by the respondent's pleader, is not in point; because in that case there was a distinct refusal to recognise the remainderman as landlord. The case is more analogous to those of *Doe dem. Williams* v. *Cooper*[2], and *Jones* v. *Mills*[3].

The remarks of Erle C. J. in *Jones* v. *Mills*[3], quoting Tindal C. J. in *Doe dem. Williams* v. *Cooper*[2], are cited with approval in *H. Mathewson* v. *Jadu Mahto*[4] and are particularly in point. The learned Judge said (p. 796) :—

" 'A disclaimer, as the word imports, must be a renunciation by the party of his character of tenant, either by setting up a title in another, or by claiming title in himself'. Here [the tenant] did not set up the title of another, neither did he affect to claim title in himself : but he required further information before he would pay the rent to anybody. He acknowledged himself to be tenant, and was ready to pay rent to the right person."

That is exactly the case here. For the defendant did not dispute that the plaintiff was the owner. She only wanted to be protected against the possible claim by Ghurye and said that she was willing to pay rent to the right person. That written statement, therefore, afforded no ground for forfeiture of the tenancy.

Again the plaintiff by his conduct in this suit is estopped from relying upon the forfeiture. Because he made an alternative claim in his plaint that his notice of July 28, 1916, should be treated as a notice terminating the annual tenancy as from July 1, 1917. This was clearly inconsistent with the claim that the tenancy had been terminated by forfeiture as from the date of notice. It amounted to an assertion that

(1) (1828) 4 Bing. 557.
(2) (1840) 1 M. & Gr. 135.
(3) (1861) 10 C. B. N. S. 788.
(4) (1908) 12 C. W. N. 525.

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the tenancy was still subsisting and was, therefore, waiver of the forfeiture : see on this point the case of *Evans* v. *Davis*[1].

For these reasons we reverse the decree of the lower appellate Court and restore that of the first Court dismissing the suit.

The appeal is allowed with costs throughout.

Appeal allowed.

J. G. R.

[1] (1878) 10 Ch. D. 747.

FULL BENCH.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, Mr. Justice Shah, and Mr. Justice Crump.

1924.
March 24.

HARGOVIND FULCHAND AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* BHUDAR RAOJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

Civil Procedure Code (Act V of 1908), section 47—Decree-holder auction-purchaser—Suit to recover possession.

Where a decree-holder, who is himself the auction-purchaser at a Court sale held in execution of his decree, seeks to get possession of the property so purchased, he does not do so in execution of his decree but by virtue of the title acquired as purchaser. His claim based on such title does not relate to the execution, discharge or satisfaction of the decree, and the provisions of section 47 of the Civil Procedure Code, therefore, do not prevent his filing a separate suit for possession.

Sadashiv bin Mahadu v. *Narayan Vithal*[1], overruled.

Bhagwati v. *Banwari Lal*[2], followed

SECOND Appeal against the decision of Karsandas J. Desai, First Class Subordinate Judge, A. P., at

* Second Appeal No. 144 of 1923.

[1] (1911) 35 Bom. 452. [2] (1908) 31 All. 82.