

claim damages for the value of crops taken away which had been raised by him on the land, whereof he was at the time in lawful possession.

Mitter, J.—We are of opinion that the plaintiffs' claim, so far as it relates to the possession of the lands in dispute in this case, ought to be dismissed. The defendant, special appellant, is the undisputed owner of those lands; and it was for the plaintiffs to prove that they are entitled to obtain possession of the same, either by virtue of a lease granted to them by the zemindar, or by virtue of a right of occupancy acquired under the provisions of Section 6 Act X of 1859. The plaintiffs have not produced their alleged lease, and there is nothing on the record to show that they were entitled to the possession of the lands in question at the time when this suit was brought. The Lower Appellate Court has distinctly found that there was no proof on the record to establish the fact that the plaintiff Howreah had acquired a right of occupancy. Under these circumstances, it seems to us quite clear that the plaintiffs have no right to treat this suit merely as a possessory suit. The action was not brought under the provisions of Clause 6 Section 23 Act X of 1859, nor was it brought under the provisions of Section 15 Act XIV of 1859. It was brought in the Civil Court as an ordinary civil suit, and the plaintiffs cannot recover possession of the lands in dispute as against the undisputed owner of those lands, merely by proving their previous possession and dispossession.

The claim for damages stands on quite a different footing. The Lower Appellate Court has found that the plaintiffs Jhupproo Doss and Bhujoo Doss were in lawful possession at the time when they were dispossessed by the defendants Nos. 1 to 9, and that those defendants had no right whatever to take away the crops raised by the plaintiffs Jhupproo Doss and Bhujoo Doss upon those lands of which they were at that time in lawful possession. This finding is quite sufficient to justify the verdict for the value of those crops.

With this modification, the decrees of both the lower Courts will be reversed, and the plaintiffs Jhupproo Doss and Bhujoo Doss will be entitled merely to recover the value of the crops taken away by the defendants Nos. 1 to 9 in the mode prescribed by the order of the Lower Appellate Court. Each party will bear his own costs in all the Courts.

The 8th June 1870.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

**Notice under Section 21 Act XI. 1865
—Deposit—Construction.**

Reference to the High Court by the Officiating Judge of the Small Cause Court at Kishnaghur, dated the 5th May 1870.

Koylash Chunder Sannel and others (Defendants) *Petitioners,*

versus

Asalut Shaikh Gharamee and others (Plaintiffs) *Opposite Party,*

Where notice of application for a new trial under the latter provision of Section 21 Act XI of 1865 is given without a deposit of the amount of the decree which has been passed against the applicant, a subsequent deposit made within seven days will not entitle him to ask for a new trial.

The words "the next sitting of the Court" in the same proviso mean the next sitting after the decision complained of, and apply where the sittings of the Small Cause Court are not held consecutively, but the same Judge sits in more than one Court.

Reference.—In these cases, which were contested ones, plaintiffs obtained decrees. Defendants filed "notices" under Section 21 Act XI of 1865 on the following day, but unaccompanied with the amounts decreed and costs, as required by that Section. Within seven days of the original decision, *i. e.*, seven open days (*vide* reference from this Court, Grijabhusan Halder, decided 26th January last,* applications for new trials were filed, and along with these applications the amounts decreed and costs were deposited in each case. I have refused the applications on the ground that the amounts decreed and costs were not deposited along with the notices as required by Section 21. Defendants urge that as they are allowed seven days from the decision within which to file the notice along with which deposit is to be made, and as the latter was made within the seven days, though not along with the notices, the latter are notwithstanding valid. The question on which I have to solicit the opinion of the High Court, is whether a notice by a defendant under Section 21 Act XI of 1865 to apply for a new trial in a case which has not been decided *ex-parte*, is valid, though unaccompanied by the deposit of the amount decreed and costs, if that amount has been deposited within seven days from

the date of the decision. My own opinion is that such notice is not sufficient.

I think the deposit is intended to be a test of the *bona fides* of the notice, without which the Court should not act on it; in fact, that the presentation of the notice without the deposit would be equivalent to no notice at all, in which case the application for new trial could not be entertained (vide Pitambur Sadhukhan *versus* Doya Moyee Dasse, 12 Weekly Reporter, 16.)

Judgment of the High Court:—

Jackson, J.—I am of opinion that a party applying under the latter provision of Section 21 of the Mofussil Small Cause Court Act for a new trial must deposit in Court, with his notice of application, the amount for which a decree shall have been passed against him; and that where the notice has been given without such deposit, a subsequent deposit, if made within seven days, will not entitle the party to ask for a new trial. It appears to me that the Judge of the Small Cause Court at Kishnaghur, in making this reference, has possibly not considered the full effect of the words with which the proviso commences: they are—"provided also that it shall be competent to the Court, if it shall think fit, in any case not falling within the proviso last aforesaid, to grant a new trial, if notice of the intention to apply for the same at the next sitting of the Court be given to the Court within the period of seven days from the date of the decision, and if the same be applied for at the next sitting of the Court."

I understand the words "the next sitting of the Court" not to mean the next sitting after the notice, but the next sitting after the decision complained of; and that the words "within the period of seven days from the date of the decision," apply to cases in which the sittings of the Small Cause Court are not held consecutively by reason of the same Judge being the Judge of more than one such Court; so that in case of the absence of the Judge himself after giving the decision, the notice, together with the deposit of the amount of the decree, must be given to the Court within seven days, and the application must in all cases be made at the next sitting of the Court.

Glover, J.—I concur.

The 10th June 1870.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, *Judge*.

Lessor and lessee—Ejectment.

Case No. 188 of 1870.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 13th November 1869, reversing a decision of the Moonsiff of Mozufferpore, dated the 25th July 1868.

Gobind Chand Juttee (one of the Defendants) *Appellant*,

versus

Mun Mohun Jha (Plaintiff) and another (Defendant) *Respondents*.

Mr. C. Gregory for Appellant.

Baboo Mohesh Chunder Chowdhry and *Bhowanee Churn Dutt* for Respondents.

In a suit by an ejected lessee to recover a year's balance of rent from his lessor, who had given a lease to another party and dispossessed plaintiff:

Held, that by granting the later lease, defendant had made himself responsible for any loss which might thereby be occasioned to plaintiff, even though he (the lessor) had not collected the rent himself.

Couch, C. J.—In this suit, the plaintiff's case was that the present appellant, one of the defendants, having given a lease to the plaintiff and afterwards given a lease to Kanto Jha, the plaintiff had been dispossessed and had only collected rents for the year 1271 to the amount of 31 rupees 9 annas, and he claimed the balance of the rents for that year. The Judge says that he finds as a fact upon the evidence "that the respondents" (that is to say, the lessors, the present appellants Gobind Chand Juttee and others) "ejected the plaintiff, and that they, as well as Kanto Jha, collected the rents for 1271." Now, if the present appellant did, as is found by the Judge, eject the plaintiff by granting this lease to Kanto Jha who took possession under it, he would be liable to make good to the plaintiff the rents for that part of the year