1884

JAFFAN KHAN v. JABBAR MEAH.

and there would be no necessity for the other." Now the facts of the present case do not fall within the meaning of the passage last quoted. The plaintiff did not, on hearing of the sale, immediately call witnesses to attest the immediate demand. He made a delay, went into the house, got the money, and then called the witnesses, and this being so, it is clear that the case is not one to which the second quotation from Mr. Baillie's work would apply. We may refer to the cases of *Mona Singh* v. *Mosrad Singh* (1) and *Ram Charan* v. *Narbir Mahton* (2), which have been cited by the vakeel for the appellant, as instances of what is required by the law in conformity with the first of the above extracts from Mr. Baillie's work. We think that in the present case the requirements of the law have not been complied with.

The decision of the District Judge must therefore be set aside and that of the Munsiff restored with costs of both Courts.

Appeal allowed.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

1884 *January* 31.

RAM COOMAR SEN AND ANOTHER (PLAINTIFFS) *v.* RAM COMUL SEN (DEFENDANT.)*

Small Cause Court—Proceeds of Immoveable Property—Jurisdiction—Act XI of 1865, *s.* 6—*Money had and received—Sale of tenure—Co-sharers—Arrears of Rent.*

The plaintiff and the defendant were co-owners of a certain taluq. The zemindar brought a suit for arrears of rent of the taluq against the defendant, obtained a decree, and in execution of that decree sold the tenure. The proceeds of the sale, after satisfying the zemindar's decree, were taken by the defendant; and the plaintiff instituted the present suit to recover an 8-annas share thereof.

Held, that the plaintiff was entitled to recover; and, *held*, further, that such a suit was not cognizable by a Small Cause Court.

ON the 5th of May 1871, the plaintiff Ram Coomar Sen brought a suit in the Court of the Munsiff of Kooshtea against the defendant Ram Comul Sen for possession and mesne profits of

* Appeal from Appellate Decree No. 963 of 1882, against the decree of Baboo Uma Churn Kastogiri, First Subordinate Judge of Tipperah, dated the 13th March 1882, affirming the decree of Baboo Ram Judub Talapatra, Second Munsiff of Kooshtea, dated the 31st January 1881.

(1) 5 W. R., 203. (2) 4 B. L. R. A. C., 216; 13 W. R. 259.

1884

RAM COOMAR SEN v. RAM COMUL SEN.

an 8-annas share of a certain taluq held under the Maharajah of Tipperah on the allegation that the defendant had dispossessed the plaintiff from the said 8-annas share on the 12th of March 1871. The final decree in this case was passed in the plaintiffs' favour in the High Court, and, in execution of that decree the plaintiffs obtained possession on the 3rd of August 1878.

In the meantime, the Maharajah of Tipperah brought a suit for arrears of rent of the same taluq against the defendant Ram Comul Sen, who was the only person recorded in his *sherista* as proprietor, and obtained a decree on the 25th of June 1878. In execution of that decree the taluq was sold for Rs. 800. Out of this sum Rs. 6,153 were paid to the Maharajah in satisfaction of his decree, the balance being paid over to the defendant Ram Comul Sen. The plaintiffs presented a petition in the execution case claiming half the proceeds of the taluq, but their claim was rejected. They thereupon brought the present suit.

The plaintiffs' suit was dismissed with costs, chiefly on the ground that, as they were not parties to the rent suit of 1878, their interest in the taluq was unaffected by the sale, the lower Appellate Court finding it not proved that Ram Comul Sen was the only recorded proprietor. The plaintiffs appealed to the High Court.

Baboo *Aukhil Chunder Sen* for the appellants.

Baboo *Doorga Mohun Dass* and Munshi *Serajul Islam* for the respondent.

The judgment of the Court (FIELD and O'KINEALY, JJ.) was delivered by

FIELD, J.—In this case the plaintiffs sued to recover the value of a moiety of a taluq under the following circumstances: The landlord, who is the Maharajah of Tipperah, brought a suit for the rent of the taluq against Ram Comul Sen. He obtained a decree for Rs. 44-8, being the amount of rent in arrears; and, in execution of that decree, he brought the taluq to sale. It was purchased by one Nobo Coomar Roy for the sum of Rs. 800. The plaintiffs' contention is that, although they were not made parties to the rent suit, nevertheless they had a half share in the taluq, and that they are therefore entitled to Rs. 400, the value of the half share.

1884

RAM COOMAR SEN v. RAM COMUL SEN.

A preliminary objection was taken to the hearing of the appeal, it being contended that this is a suit of the Small Cause Court class, and therefore the amount in dispute being less than Rs. 500, no second appeal lies to the High Court.

We have considered this preliminary objection, and the conclusion at which we arrive is, that this is not a suit of the Small Cause Court class, in other words, that it is not a suit coming within the purview of s. 6 of Act XI of 1865. According to that section, the following suits are cognizable by a Court of Small Causes, *viz.*, "claims for money due on a bond or other contract, or for rent for personal property, or for the value of such property, or for damages, when the debt, damage or demand does not exceed in amount or value the sum of Rs. 500." We think it impossible to say that the present suit is a suit for money due on a "contract," having regard to the meaning of the term as expounded in a number of decisions of this Court. We may further observe that the words "bond or other contract" seem to indicate that the "contract" here spoken of must be *ejusdem generis* with a bond, in other words, a true contract as opposed to a *quasi-contract* or an obligation in the nature of a contract. Then that the words "personal property" are not applicable would appear from the words which immediately follow "for the value of such property," for if money was intended to be included in personal property, it would have been unnecessary to insert the words "for the value of such property" immediately after the words "personal property." Then we think it impossible to say that this suit is a suit for *damages* within the meaning of the section, and there is a further consideration. The suit is clearly for the value of immoveable property, and while the section distinctly enumerates "the value of personal property" as a subject-matter of a suit which may be brought under the section, there is nothing about the value of immoveable property. The reasonable construction, therefore, is that the value of immoveable property was not intended to be within the purview of the section. The conclusion at which we arrive then is that this suit is not a suit of the Small Cause Court class, and that a second appeal does lie. We have been referred

to the case of *Mata Prasad* v. *Gauri* (1), but we are unable to concur with the conclusion arrived at by the learned Judges who decided that case.

Turning now to the facts, it appears that, on a previous occasion, the Maharajah brought this very taluq to sale in execution of a decree for rent obtained in a suit to which the present plaintiffs were not parties; and that they successfully asserted their right to a moiety of the taluq in a suit which came up in appeal to the High Court. In that suit the defendant in the present case was a party, and therefore he is estopped from saying that the plaintiffs have not a moiety of the taluq. The decision in that case is, we think, of no value to show what was sold in the present case, a purpose for which it has been, to some extent, used in the Court below. But upon referring to the sale certificate it appears to us clear that what was sold on the present occasion was the whole of the taluq, and as the defendant has adopted that sale by taking away the whole of the surplus purchase-money, notwithstanding that the plaintiffs gave him notice to abandon his right to one moiety, and allow them (plaintiffs) to take out this moiety from the Civil Court, we think it inequitable that the defendant should be allowed to retain the whole value of the taluq, when it has been already decided between the parties that the plaintiffs have title to a moiety of the taluq itself. Under these circumstances, we think that the decree of the Court below must be set aside, and this appeal decreed. The plaintiffs will have a decree for one moiety, not of the Rs. 800 for which the taluq was sold in the execution sale, but of the surplus sale proceeds, Rs. 738-10-9. As the plaintiffs have elected to adopt the sale, they cannot equitably claim more than a moiety of the sale proceeds which remain after satisfying the rent decree.

The plaintiffs will have their costs in all the Courts.

Appeal allowed.

(1) I. L. R. 3 All., 59.