

1927

JHAN
BAHADUR
SINGH
v.
THE BAILIFF
OF THE
DISTRICT
COURT OF
TOONGOO.
HEALD, J.

Since in the present case no creditor proved in respect of any debt during the period of nearly six years which has elapsed since the adjudication, it was in my opinion unnecessary and inequitable for the Court to order the seizure of the cattle on the application of Ram Nath Singh, and the cattle ought to be returned to the person from whose possession they were seized.

I would therefore set aside the lower Court's order directing the Receiver to take possession of the cattle and would direct their return to the person from whose possession they were seized.

As I would decide the appeal otherwise than on a finding that appellant's claim to the cattle was established, I would make no order for costs in either Court.

CUNLIFFE, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Pratt.

MAUNG HLA DIN

v.

MAUNG KYAW GALE.*

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Mar. 21.

Provincial Small Cause Courts Act (IX of 1887), Second Schedule, Article 31—Suit for accounts, what is—Suit for produce of land taken by defendant or its value is not an accounts suit—Such suit does not come within Article 31.

Held, that Article 31, Second Schedule, of the Provincial Small Cause Courts Act contemplate suits in the nature of suits for an account.

Held, that a suit for produce of land taken by defendant or its value specified in the plaint is not a suit in the nature of an accounts suit and is of a small cause nature.

Antone v. Mahadev Anant, 25 Bom. 85; *Maung Tun E v. Maung Shwe Tha*, 4 U.B.R. 83; *Ramasami Reddi v. Anthi Lakshmi Ammal*, 24 Mad. 502, *Savarimithu v. Aithurusu Rowllar*, 25 Mad. 103—*dissented from*.

Kunjo Behary Singh v. Madhub Chandra Ghose, 23 Cal. 884—*followed*.

* Special Civil Second Appeal No. 152 of 1926 (at Mandalay).

Aung Thin—for the Appellant.

Ko Ko Gyi—for the Respondent.

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MAUNG HIA
DIN
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PRATT, J.—Plaintiff purchased certain paddy land at a Court auction. Subsequently defendant worked a portion of the land, claiming to be a tenant of the original owner.

Plaintiff accordingly sued *for the produce, which defendant had taken from the land which he had entered and forcibly worked or its value Rs. 210.*

The suit was decreed in the Township Court but that decree was reversed on appeal to the District Court.

Plaintiff now comes up on second appeal.

A preliminary objection has been taken that no second appeal lies, the suit being of a small cause nature.

On behalf of plaintiff it is contended that the suit is one "for the profits of immoveable property belonging to the plaintiff, which have been wrongfully received by defendant" falling within Article 31 of the Second Schedule to the Provincial Small Cause Courts Act and as such excepted from the cognisance of a Court of Small Causes.

The suit is in effect for damages for use and occupation and is similar to a suit for mesne profits, though the actual claim is for the whole produce removed and not for the mesne profits only.

In *Kunjo Behary Singh v. Madhub Chundra Ghose* (1), it was held by a majority of a full bench of the Calcutta High Court that no second appeal lies from a suit for mesne profits where the value of the subject-matter in dispute is less than Rs. 500.

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In order to ascertain whether a suit for mesne profits falls within the definition of Article 31 above quoted Petheram, C.J., considered it necessary to examine carefully what a suit for mesne profits was.

He laid down that if any person, by force or fraud takes possession of immoveable property which belongs to another and deprives the true owner of the possession of his property, he commits a trespass for which trespass the owner of the property may compel him by civil suit to pay him damages in the nature of mesne profits. In such a suit the profits of the property actually received by the wrong-doer may not even be the measure of the damages.

The article on which reliance is placed runs "any other suit for an account, including a suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee, and a suit for the profits of immoveable property belonging to the plaintiff, which have been wrongfully received by the defendant."

Reading the article as a whole it seems quite clear that the forms of suit described are included as being of the nature of suits for an account.

As Petheram, C.J., puts it, "The article, I think, clearly contemplates cases in which the plaintiff claims an account of monies, which the defendant has received, and to an account of which the plaintiff is entitled because the monies received belonged to him. This is not the case in a simple action for damages, and what is called an action for mesne profits is nothing more."

A suit for profits of immoveable property wrongfully received is included from the point of view of a suit for an account.

A contrary view was taken by Saunders, J.C., in *Maung Tun E v. Maung Shwe Tha* (2), after discussing the conflicting views of the Indian High Courts.

He was of opinion that the proposition that the last two sentences of Article 31 are governed by the first part of the first sentence and that the fact that Article 31 follows Article 30, which deals with a suit for an account of property, indicates that it was the intention of Article 31 to exclude only suits for an account is extremely doubtful.

I have studied the Bombay and Madras cases cited by Saunders, J.C., in his judgment and am still of opinion that the view taken by the majority in the Calcutta case already referred to is correct.

It seems to me clear that the first part of the first sentence governs the last two clauses of Article 31.

In *Antone v. Mahadev Anant* (3), a bench of the Bombay High Court held, following the current of decisions in the Court, that a claim for mesne profits by a purchaser at an execution sale, based on the allegation that he had been dispossessed by the defendant, cannot be regarded as a claim in which the defendant rightfully received and wrongfully retained those profits, and falls within clause 31 of the Provincial Small Cause Courts Act Schedule.

The judgment is unsatisfactory inasmuch as it does not discuss the question of whether clause 31 refers to suits of the nature of suits for an account only.

The Madras Full Bench in *Savarimuthu v. Aithurusu Rowthar* (4), laid down categorically that

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(2) (1921) 4 U.B.R. 83.

(3) (1901) 25 Bom. 85.

(4) (1902) 25 Mad. 103.

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a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant, who dispossessed the plaintiff in execution of a decree afterwards set aside on appeal, is not cognisable by a Court of Small Causes, but did not discuss the point referred and gave no reasons.

This decision cannot therefore be considered as illuminating.

In the later case of *Ramasami Reddi v. Authi Lakshmi Ammal* (5), it was held that a suit framed as one for mesne profits was exempted from the cognisance of the Small Cause Court under clause 31 of the Second Schedule to the Small Cause Court Act. Here again no reason was given, there was no discussion, and no authority was cited. The finding was taken apparently as a matter of course, and is not helpful.

The plaint in the present suit is not couched in the terms of a suit for an account.

Plaintiff does not claim an account of monies, which the defendant has received, and to an account of which plaintiff is entitled because the monies received belong to him.

Although he may be said in effect to claim damages for use and occupation, he does not ask for mesne profits.

He does not merely sue for the profits of the of the land, but for the whole of the produce. He asks for no account, but specifies what the produce is.

I am of opinion that the suit as framed does not fall within Article 31, but was of a Small Cause nature, and that therefore no second appeal lies.

The appeal is dismissed with costs.