APPELLATE CIVIL.

Before Beckett J.

1938

June 7.

BACHITTAR SINGH AND OTHERS (PLAINTIFFS) Appellants,

versus

RAHIM BAKHSH AND OTHERS (DEFENDANTS) Respondents.

Regular Second Appeal No. 271 of 1938

Provincial Small Cause Courts Act (IX of 1887), Sch. 2, Arts. 4 and 35 (ii) — Suit for recovery of price of fruits removed from trees claimed to be growing upon their respective lands by both the parties — Whether cognisable by a Court of Small Causes.

Held, that where the defendant, as in the present case, removed fruits from trees which both the parties claimed to be growing on their respective lands and therefore the act of the defendant did not constitute an offence under Chapter XVII of the Indian Penal Code, the plaintiff's suit for the recovery of price valued at less than Rs. 500, was cognisable by a Court of Small Causes and did not fall under Art. 35 (*ii*) of Sch. 2 to the Provincial Small Cause Courts Act.

Mula Singh v. *Sri Ram* (1) and *Attar Singh* v. *Nuru* (2), not followed.

Held also, that such a suit was not covered by Art. 4 of Sch. 2 to the Act as the fruits removed from trees are not immovable property or an interest in immovable property within the meaning of the article.

Nasir Khan v. *Karamat Khan* (3), relied upon.

Second appeal from the decree of Dewan *Siri Ram Puri, Senior Subordinate Judge, Hoshiarpur, dated 17th November, 1937, affirming that of* Sardar *Harnam Singh, Subordinate Judge, 3rd Class, Hoshiarpur, dated 2nd July, 1937, dismissing the plaintiff's suit.*

(1) 1921 A. I. R. (Lah.) 72. (2) 1933 A. I. R. (Lah.) 172.
(3) I. L. R. (1880) 3 All. 168.

GULLU RAM, for Appellants.

BARKAT ALI, for Respondent No. 1.

BECKETT J.—A preliminary objection has been raised that no second appeal lies, on the ground that the suit is of a nature cognizable by a Court of Small Causes and that the value is less than Rs.500. The plaintiffs are suing for the price of fruit removed by the defendants from certain trees which both parties claim to be growing on their own land.

In support of his right to appeal, counsel for the plaintiffs relies on *Mula Singh* v. *Sri Ram* (1), in which a suit for the price of fruit removed was held to be excluded from the cognisance of a Small Cause Court by Article 35 (*ii*) of the Provincial Small Cause Courts Act. The judgment is brief and it is not clear what were the particular facts of the case which would have constituted an offence punishable under Chapter 17 of the Indian Penal Code. In the present instance it is clear that the property was removed in the assertion of a contested claim or right so that the removal would not constitute theft as defined in section 378 of the Code. It is not taken out of the scope of Chapter 17 by any of the provisions of Chapter 4, but does not constitute an offence under Chapter 17, simply because it does not fall within the wording of section 378. In these circumstances, Article 35 (*ii*) does not apply. Reference has also been made to *Attar Singh* v. *Nuru* (2) where Article 35 was held to apply to the wrongful removal of grass. If this decision is to be taken as implying that the wrongful removal of property must be taken as falling under Chapter 17 of the Code even though there is no dishonest intention, I find myself

(1) 1921 A. I. R. (Lah.) 72. (2) 1933 A. I. R. (Lah.) 172.

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with all respect unable to accept a proposition so widely worded.

An attempt has also been made to justify the appeal as one falling under Article 4, which excludes a suit for the possession of immovable property, or for the recovery of an interest in immovable property. Since the Provincial Small Cause Courts Act appeared before any definition of immovable property was included in the General Clauses Act, there have been conflicting decisions with regard to trees. But there never appears to have been any doubt that a suit for the value of fruit removed from trees is not covered by Article 4. In this connection reference may be made to *Nasir Khan* v. *Karamat Khan* (1), a case decided under the earlier Act, XI of 1865.

For these reasons, I hold that no appeal lies, and no sufficient grounds have been made out for treating the appeal as a petition for revision. The memorandum of appeal is accordingly rejected with costs.

A. N. K.

Appeal dismissed.

(1) I. L. R. (1880) 3 All. 168.