

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Chaudal.

1908.
 June 29.

KESRISANG BANESANG (ORIGINAL PLAINTIFF), APPELLANT, v. NARAN-SANG MANABHAI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1883), section 586—Provincial Small Cause Courts' Act (IX of 1887), Schedule I, Article 31—Suit to recover profits—Suit of Small Cause Court nature—Second Appeal—High Court.

The plaintiff sued to recover from the defendant a specific sum of money (Rs. 120) described in the plaint as his income due to him in respect of his share in certain lands. This right was denied by the defendants in their written statement. The lower Courts dismissed the claim. A second appeal was preferred, but it was objected to on the preliminary ground that no second appeal lay, as the suit was of a nature cognizable by Courts of Small Causes.

Held, that no second appeal lay. The question of title did arise incidentally ; but that did not remove the suit from the cognizance of the Court of Small Causes.

Damodar Gopal Dikshit v. Chintaman Balakrishna Karve(1), and *Narayan v. Balaji*(2), followed.

SECOND appeal from the decision of Vadilal T. Parekh, First Class Subordinate Judge at Ahmedabad, confirming the decree passed by G. M. Pandit, Subordinate Judge of Dhandhuka.

Suit to recover a specific sum of money as profits of immoveable property.

The plaintiff sued to recover Rs. 120 from the defendants as the value of his share in the produce of certain lands held jointly by him and defendants.

The defendants in their written statement denied the plaintiff's right.

Both lower Courts dismissed the suit.

The plaintiff appealed to the High Court.

At the hearing, a preliminary objection was taken that the suit having been of a Small Cause Court nature, no second appeal lay.

* Second Appeal No. 801 of 1907.

(1) (1892) 17 Bom. 42.

(2) (1895) 21 Bom. 248.

G. S. Rao, for the respondent, in support of the preliminary objection:—This is a suit to recover an ascertained sum of money as the value of the plaintiff's share of the produce of the land described in the plaint; it is a suit of a Small Cause Court nature, and the amount of the claim being less than Rs. 500 the present second appeal cannot lie. See *Girjabai v. Raghunath*⁽¹⁾.

L. A. Shah for the appellant:—The suit falls under Articles 4 and 11 of the schedule to the Provincial Small Cause Courts' Act (IX of 1887), and is, therefore not of a Small Cause Court nature. The definition of immoveable property in the General Clauses Act (see section 3, clause 25 of Act X of 1897) includes the benefits to arise out of the land and the produce of the land would be benefits to arise out of the land. Further, having regard to the terms of the plaint and the main point at issue, it is clear that the question of title to the fields is directly and not incidentally involved. See *Jamnadas v. Bai Shivkor*⁽²⁾; *Amrita Lal Kalay v. Nibaran Chandra Nayek*⁽³⁾.

The cases of *Damodar Gopal Dikshit v. Chintaman Balkrishna Karce*⁽⁴⁾ and *Narayan v. Balaji*⁽⁵⁾, are no doubt against me, but they do not in any way override the principle laid down in the above rulings.

BACHELOR, J.:—In this appeal a preliminary objection has been taken on behalf of the respondents that the suit was a Small Cause suit and therefore no appeal to us lies. In resisting this objection Mr. Shah for the appellant has relied on Articles 4 and 11 of the Provincial Small Cause Courts' Act. But in our opinion this suit cannot be brought under either of these two articles.

On reference to the plaint we find that what the plaintiff prays for is a specific sum of money described as his income due to him in respect of his two-thirds share in the land in question. It is true this right was denied in the written statement, but it does not follow that the case is thereby removed from the jurisdiction of the Small Cause Court. It appears indeed

(1) (1905) 30 Bom. 147; 7 Bom. L. R. 741.

(2) (1881) 5 Bom. 572.

(3) (1904) 31 Cal. 340 at p. 343.

(4) (1892) 17 Bom. 42.

(5) (1895) 21 Bom. 245.

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impossible to make any substantial distinction between the present case and *Dumodar Gopal Dikshit v. Chintaman Balkrishna Karve*⁽¹⁾, or *Narayan v. Balaji*⁽²⁾. The question of title arises incidentally and does not therefore remove the suit from the cognizance of the Court of Small Causes.

Then Mr. Shah contended that the plaint purports to represent that the money now claimed by the plaintiff had been wrongfully received by the defendants and that in this view of the pleadings the suit should be brought within clause 31 of the second schedule of the Small Cause Court Act. But even if we read into the plaint the allegation of wrongful receipt by the defendants—and there is no such plain allegation in the plaint as drawn,—still this addition would not suffice to bring the suit under the operation of clause 31, for this reason that that clause requires as a condition precedent to its applicability that the suit be a suit for an account, and this is not a suit for an account.

We think, therefore, that the objection must prevail and that the appeal must be dismissed with costs, on the ground that no second appeal lies.

Appeal dismissed.

R. R.

(1) (1852) 17 Bom. 42.

(2) (1895) 21 Bom. 243.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Chaudh.

1908.

July 2.

BHIKYA AND TUKYA VALAD SAKHARAM (ORIGINAL PLAINTIFFS), APPELLANTS, v. BABU MARD VEDU TELI (ORIGINAL DEFENDANT, RESPONDENT.*

Hindu Law—Succession—Shudras—Illegitimate daughters.

Under Hindu law among Shudras an illegitimate daughter cannot succeed to her father's property in preference to the son of a divided brother.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Násik, confirming the decree passed by R. B. Gogte, Subordinate Judge at Sátára.

* Second Appeal No. 795 of 1907.