

1869  
June 8.

*Before Mr. Justice Bayley and Mr. Justice Hobhouse.*

LASMANI DEBIA AND OTHERS (DEFENDANTS) v. MAHOYMED HAF.  
EZULLA, (PLAINTIFF)\*

*Suit to recover Share of Malikana—Jurisdiction of Small Cause Court—  
Act XXIII. of 1861, s. 27—Special Appeal.*

A suit to recover share of malikana, which the defendant had realized from the Collector, is a suit for recovery of a sum of money which has been taken away by the defendants to the damage of the plaintiff, and is therefore cognizable by the Small Cause Court; and under section 27, Act XXIII. of 1861, no special appeal lies from a judgment passed in appeal in such a suit.

Baboo Nalit Chandra Sen<sup>r</sup> for appellants.

Baboo Mahini Mohan Roy for respondent.

HOBHOUSE, J.—The nature of this suit is accurately described in the first paragraph of the first Court's judgment. It is there said that "the plaintiff has brought this action for the recovery of his share of malikana of Chur Deskandi formed by the reformation of his mohals amounting to rupees 2-3 annas out of the entire rupees 311-2 annas which the principal defendants, Nos. 2 to 8, have realized from the Collector of Mymensingh (defendant No. 1), on the allegation that the said principal defendants have taken the whole amount without giving his share."

From this statement of the plaint it appears that the claim was to recover a sum of money to the extent of rupees 62, on the allegation that the defendants had deprived the plaintiff of that money by keeping it themselves.

Both the Courts below have given the plaintiff a decree, and the defendants now appear as the special appellants before us. But a preliminary objection is taken by the pleader for the plaintiff to the effect that under the provisions of section 27, Act XXIII. of 1861, no special appeal will lie in this case. He urges that the suit was of a nature cognizable by a Court of Small Causes; that it was a suit for damages, and that, as is admitted, the amount of the money in suit was below rupees 500. It is contended by the pleader for the special appellant that the matter in suit was not properly for damages; that it was a question of malikana, or money derived from a proprietary interest in land. But it seems to us on the face of the suit that it was a suit for damages. Whatever was the original source from which the money was derived, still it was a sum of money which was taken by the defendants to the injury of the plaintiff, and it therefore represented that which the plaintiff had been endamaged by the defendants. Clearly therefore the matter in dispute was a matter of damages. It is next, however, contended by the pleader for the appellant that the suit was not cognizable by a Court of Small Causes; that

\*Special Appeal, No. 2327 of 1868 from a decree of the Additional Subordinate Judge of Mymensingh, dated the 3rd June 1868, affirming a decree of the Moonsiff of that district, dated the 15th December 1866.

a question of right was raised and determined in that suit, and that such a question is not one cognizable by a Court of Small Causes. We think however, on a perusal of the plaint itself and on the understanding between the parties as represented by the statements on record as to the point at issue, that no question of right was determined, and that though such a question was raised, yet it was simply raised incidentally in order to the determination of the question of damages. The plaintiff did not sue to have his right established to a particular share in the land from which malikana was derived. He simply asserted that share, and then claimed to recover the money due in reference to that share. And the case seems to us to be clearly of the nature contemplated by the decision of the Full Bench, on which the pleader for the special respondent relied (1). The suit was in fact a suit to recover a certain sum of money, and a question of right was simply raised as a question incidental to the question of the recovery of the money. We think therefore that the provisions of section 27, Act XXXIII of 1861, bar a special appeal in this case, and we therefore dismiss this appeal with costs.

1869.

LASMANI  
DEBIA  
MAHOMMED  
HAFIZULLA

*Before Mr. Justice Bayley and Mr. Justice Hobhouse.*

ISWAR CHANDRA CHUCKERBUTTY (ONE OF THE DEFENDANTS)  
v. BISTU CHANDRA CHUCKERBUTTY (PLAINTIFF.)\*

1869  
June 8

*Sale—Suit for Possession—Grounds of Decree—Act VIII. of 1865, B. C.  
s. 16—Incumbrance.*

At a sale held under Act VIII. of 1865, B. C., the defendant purchased a shikmi tenure, and obtained possession thereof. Subsequently he ousted the plaintiff from certain lands, and hence the suit by the plaintiff for recovery of possession thereof, on the ground that property in dispute was a lakhiraj tenure created by the Raja of Tippera, and that the plaintiff was owner thereof, partly by purchase and partly by inheritance. The lower Appellate Court found as a fact that the late shikmidar and not the Raja had granted the lands in dispute as bramatar, but not in favor of the person through whom the plaintiff claimed. It however passed a decree in favor of the plaintiff, as he had been unlawfully dispossessed.

*Held*, that the plaintiff having failed to prove the case as set up by him and upon which he claimed, cannot be entitled to a decree upon grounds other than those stated in the plaint.

*Held*, that under section 16, Act VIII of 1865, the incumbrances created by the former holder was voidable by the auction purchaser, and that the plaintiff should show that the former holder could create such right.

*Baboo Nalit Chandra Sen for appellants.*

*Baboo Kalikrishna Sen for respondent.*

\* Special Appeal, No. 330 of 1869, from a decree of the Subordinate Judge of Tippera, dated the 13th November 1868, reversing a decree of the Moonsiff of that district, dated the 6th June 1868.

(1) Case referred to High Court from Small Cause Court of Kishanaghur; Aug. 26th, 1863.