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ground of necessity. Was there a necessity to borrow at the rate of 18 per cent.? That is a question to which he ought to have applied his mind; and if it were unreasonable to suppose that the widow could not borrow the money at a less amount than 18 per cent., he ought not to have charged her that rate.

Their Lordships think therefore that the High Court were right in not allowing interest as against the estate at a higher rate than 12 per cent.

For these reasons their Lordships think that the decree of the High Court ought to be affirmed; and they will humbly advise Her Majesty to that effect. The appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Wentmore & Swinhoe.*

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

1891 *March 2.*

SRIRAM SAMANTA (PLAINTIFF) *v.* KALIDAS DEY AND OTHERS (DEFENDANTS).*

Second Appeal—Small Cause Court cases—Suit for mesne profits—Provincial Small Cause Court Act (IX of 1887), Sch. II, Act 31.

Where the plaintiff, after obtaining a decree in a suit for possession of certain land of which he had been dispossessed by the defendants, brought a suit in the Munsiff's Court for mesne profits for the period during which he had been kept out of possession, and the suit, though partly decreed by the Munsiff, was dismissed by the District Judge, *held*, that such a suit was not cognizable by a Small Cause Court, and therefore a second appeal in the suit would lie to the High Court.

The facts of this case were as follows:—

The defendant No. 3 was the owner of certain lands. The defendant No. 2 had obtained a decree against the defendant

* Appeal from Appellate Decree No. 666 of 1890, against the decree of R. F. Rampini, Esq., Judge of Burdwan, dated the 5th of March 1890, reversing the decree of Baboo Raj Narain Chuckerbutty, Munsiff of Kutwa, dated the 15th of August 1889.

No. 3. The defendant No. 3 in order to pay off the decree sold the lands to the plaintiff, who deposited in Court the amount due to defendant No. 2 under his decree. The defendant No. 2 did not take the money out of Court, but caused the lands to be put up for sale, and they were purchased by him and his brother, defendant No. 1, and they obtained the sale certificate and entered into possession.

The plaintiff thereupon sued to recover possession of the lands and obtained a decree.

He now sued to recover mesne profits for the years 1292 and 1294. The amount he claimed was Rs. 389-7. The Munsiff gave the plaintiff a decree, but not for the whole amount sued for.

On appeal the District Judge reversed the Munsiff's decision and dismissed the suit with costs.

From this decision the plaintiff appealed.

Baboo *Saroda Churn Mitter* for the appellant.

Baboo *Promoth Nath Sen* for the respondents.

The arguments and cases cited are fully stated in the judgment of the Court (NORRIS and BEVERLEY, JJ.) which, after stating the facts as above, continued:—

In second appeal the only point urged is that the Judge was wrong in holding that a certain petition, upon which the Munsiff had relied, was inadmissible in evidence by reason of its not having been formally proved.

The learned pleader for the respondents raised a preliminary objection that as the suit was of the nature cognizable by a Court of Small Causes, and the subject-matter did not exceed Rs. 500, no second appeal lay.

For the appellant it was contended that the suit was one "for the profits of immoveable property belonging to the plaintiff which had been wrongfully received by the defendants," which by virtue of Art. 31 of schedule II of Act IX of 1887 is exempted from the cognizance of a Court of Small Causes.

The learned pleader for the respondents relied upon the following cases, viz., *Ram Peari Debia* v. *Dinonath Mookerjee* (1), *Bheenuck Lall Mahton* v. *Rung Lall Mahton* (2), and *Makhan Lall Datta*

(1) 10 W. R., 375. (2) 11 W. R., 369.

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v. *Goribullah Sardar* (1). For the respondents the case of *Krishna Prosad Nag* v. *Maizuddin Biswas* (2) was relied on.

The cases in the *Weekly Reporter* were cases under the repealed Act of 1865, section 6 of which enacted that the following suits should be cognizable by Courts of Small Causes, viz., "claims for money due on bond or other contract, or for rents, or 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 five hundred rupees, whether on balance of account or otherwise." In *Ram Peari Debia* v. *Dinonath Mookerjee* (3) Macpherson and Bayley, JJ., held that a suit for mesne profits only, no question of title or right arising in it, was within the meaning of this section, and that if the amount claimed did not exceed Rs. 500, by virtue of section 27 of Act XXIII of 1861 no special appeal lay. The facts of the case are not given. In *Sungram Singh* v. *Juggun Singh* (4) it was held that a suit for assessed mesne profits, within the pecuniary limits of section 6 of the repealed Act, was a suit for damages and therefore cognizable by a Court of Small Causes.

In *Krishna Prosad Nag* v. *Maizuddin Biswas* (2) the learned Judges say that the case of *Sungram Singh* v. *Juggun Singh* (4) "has never been followed." In one sense this is no doubt correct, for it was decided after the case of *Ram Peari Debia* v. *Dinonath Mookerjee* (3); but with all due respect, the dictum is somewhat misleading, for the case of *Ram Peari Debia* v. *Dinonath Mookerjee* distinctly decided that a suit for mesne profits within the pecuniary limits of section 6 of the repealed Act was a suit for damages, and therefore cognizable by a Court of Small Causes. The case of *Bheenuck Lall Mahton* v. *Rang Lall Mahton* (5) is not in point. That was a suit for damages for carrying away standing crops. It was contended that section 6 of the repealed Act was limited to damages in respect of moveable property alone, and that standing crops were immoveable property. The Court held that the section made no distinction between suits for damages to moveable property and suits for damages to immoveable property.

(1) I. L. R., 17 Calc., 541.
(2) I. L. R., 17 Calc., 707.
(3) 10 W. R., 375.
(4) 2 N.-W. P., 18.
(5) 11 W. R., 369.

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The case of *Makhan Lall Datta* v. *Goribullah Sardar* (1) came before this Court upon a reference from the Judge of the Small Cause Court of Sealdah, and no one appeared on the reference. In that case the plaintiff sued for Rs. 20 as damages for use and occupation of his land by the defendant for three months, alleging that the defendant had occupied the land for that period without his consent, and had used some of the earth for making wall sidings. The learned Judges (TOTTENHAM and AMEER Ali, JJ.) held that the suit was cognizable by a Court of Small Causes.

The case of *Krishna Prosad Nag* v. *Maizuddin Biswas* (2) came before the same learned Judges. It was a suit for damages for cutting and carrying away grass growing on plaintiff's land. The defendant contended that such a suit was one " for the profits of immoveable property.........wrongly received by the defendant." This contention was overruled. It was held that " Article 31, schedule II of Act IX of 1887 does not except from the jurisdiction of a Court of Small Causes suits for damages for trespass and for the forcible appropriation of crops or the produce of land." This was sufficient for the decision of the case; but the learned Judges go on to discuss the question whether a suit for mesne profits is now, whatever may have been the case under the Act of 1865, cognizable by a Small Cause Court, and they express a strong opinion that it is not so cognizable.

From that opinion, as at present advised, we are not prepared to differ, and we must therefore hold that the preliminary objection fails. As intimated in the course of the argument, we think that, having regard to the circumstances under which it was filed and used in the first Court, the plaintiff should have an opportunity of proving the petition relied on. We therefore direct the District Judge to take such evidence as the plaintiff may produce to prove the petition, and to return his finding upon such evidence to this Court at his earliest convenience.

The appellant must pay the costs of this appeal.

The costs of the suit in the Lower Courts and of the taking of the further evidence will be dealt with after the Judge's finding has been returned to this Court.

J. V. W.

(1) I. L. R., 17 Calc., 541. (2) I. L. R., 17 Calc., 707.