indicated in his order ; but having regard to her rank and position in Hindu society, and to the fact that she (as stated) never appeared in any Court or other public place, we think that the offer made by the Magistrate is not, in the circumstances of the case, quite adequate. We think that we might give the same directions which were given by this Court in the case of *Din Tarini Debi* (1). If the lady would take a house or a suite of rooms not far from the Magistrate's Court, and if she will pay all the costs which the Magistrate shall deem reasonable and proper, he will not enforce her attendance in Court, but examine her in the place so appointed in the presence of the parties concerned, and in the manner in which *purdanashin* ladies are ordinarily examined. This will not entail any inconvenience or loss of time upon the Court, but will at the same time remove the hardship which the lady may be subjected to, if the order of the Magistrate as it stands is enforced. If, however, she does not comply with the conditions imposed, the order of the Magistrate will stand.

In these terms the rule will be made absolute.

C. E. G. *Rule made absolute.*

APPELLATE CIVIL.

Before Sir Francis William Maclean, Knight, Chief Justice, and Mr. Justice Banerjee.

KALI KRISHNA TAGORE (PLAINTIFF) *v.* IZZATANNISSA KHATUN AND ANOTHER (DEFENDANTS.)* 1897 *February* 10.

Second Appeal—Code of Civil Procedure (Act XIV of 1882), section 586—Suit for compensation for use and occupation of land valued at less than Rs. 500—Provincial Small Cause Courts Act (IX of 1887), sections 15 and 23, Schedule II, Article 8.

A suit for compensation for money realized by the defendants from the actual occupants of land, who were stated to be the plaintiff's tenants, is a suit of a nature cognizable by the Small Cause Court ; therefore, no second appeal lies to the High Court in such a suit valued at less than Rs. 500, notwithstanding that the plaint was returned by the Small

* Appeal from Appellate Decree No. 33 of 1895, against the decree of A. E. Staley, Esq., District Judge of Backergunge, dated the 26th of September 1894, reversing the decree of Babu Siti Kantha Mullick, Munsif of Barisal, dated the 26th of April 1894.

(1) I. L. R., 15 Calc., 775.

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Cause Court to be filed in the Civil Court under section 23 of the Provincial Small Cause Courts Act, on the ground that the suit involved a question of title.

Mohesh Malio v. *Piru* (1), and *Muttukaruppan* v. *Sellan* (2), referred to.

THIS appeal arose out of an action for compensation for use and occupation of land. The plaintiff, who was the proprietor of sixteen annas of pergunnah Edilpore, brought twelve suits for rent for the years 1292 to 1295, B. S., against Kamal Khan and others, in whose names different quantities of land were recorded in the measurement paper prepared at the time of the *deara* settlement. His allegation was that, within the said pergunnah, there was a *howla* in the *chur* contiguous to *mouzah* Apupur standing in the names of Azgar Khan and others, which was held by the defendants by virtue of auction purchase; that there was a *deara* settlement with him by the Government in respect of the said *chur*, but at the time of the said settlement the defendants did not cause their *howladari* rights to be recorded; that out of these aforesaid twelve rent suits, four were decreed *ex parte*, but the remaining eight were dismissed, the tenants denying the title of the plaintiff, and alleging that the land in question was held by the defendants in *howla* right; that since the dismissal of these suits the defendants had realized and received the profits of the said land to a considerable amount, and as at the time of the settlement the defendants did not cause their *howladari* right to be recorded, they were not legally entitled to enjoy the profits thereof. Hence the present action for compensation was brought. The plaintiff also claimed road cess and public works cess. The suit was first instituted in the Small Cause Court, but as in the written statement the defendants raised various questions of title the plaint was returned to be filed in the Civil Court. The Munsif decreed the suit, but on appeal the learned District Judge reversed the decision of the Munsif, holding that the defendants were in possession of the disputed land as *howladars*, and that the plaintiff was not entitled to any damages.

From this decision the plaintiff appealed to the High Court.

Babu *Saroda Churn Mitter* and Babu *Amar Nath Bose* for the appellant.

Babu *Bussunt Kumar Bose* for the respondents.

(1) I. L. R., 2 Calc., 470. (2) I. L. R., 15 Mad., 98.

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Babu *Bussunt Kumar Bose* for the respondents took a preliminary objection to the hearing of the appeal on the ground that as the suit was one of a nature cognizable by the Small Cause Court, and as it was valued at less than Rs. 500, no second appeal would lie to the High Court under section 586 of the Code of Civil Procedure. See *Kunjo Behary Singh* v. *Madhub Chundra Ghose* (1).

Babu *Saroda Churn Mitter* for the appellant contended that section 586 of the Code of Civil Procedure did not apply, as the plaint was returned by the Small Cause Court for presentation to the Civil Court under section 23 of the Provincial Small Cause Courts Act. The object and effect of the provision in section 23 is to give jurisdiction to ordinary Civil Court. See *Mahamaya Dasya* v. *Nitya Hari Das Bairagi* (2). Under section 13, explanation 2, of the Code of Civil Procedure, the decision on the question of title is final. It is really a suit under article 11, schedule II of the Provincial Small Cause Courts Act, a suit "for the determination or enforcement of any other right to, or interest in, immoveable property." The effect of section 23 of the Provincial Small Cause Courts Act was to convert this suit, after the plaint was returned, to one for determination or enforcement of any other right to, or interest in, immoveable property. It can also be said that the suit is one for rent, as is contemplated in article 8, schedule II of Act IX of 1887. The plaintiff does not say that the defendant is a trespasser, but he asks for what he realized from the plaintiff's tenants. In this case the plaintiff has asked for cesses also ; that being so the case is one not cognizable by the Small Cause Court.

Babu *Bussunt Kumar Bose* in reply.—The mere fact that in a suit cognizable by the Small Cause Court, a question of title to immoveable property has been raised, does not take the case out of the provisions of section 586 of the Code of Civil Procedure. See *Mohesh Mahto* v. *Piru* (3). It has been held in the case of *Muttukaruppan* v. *Sellan* (4) that a suit of a nature cognizable by a Small Cause Court does not cease to be so within the meaning of the Civil Procedure Code, section 586, because the Court in which it was instituted as a small cause suit returned the plaint

(1) I. L. R., 23 Calc., 884.
(2) I. L. R., 23 Calc., 425.
(3) I. L. R., 2 Calc., 470.
(4) I. L. R., 15 Mad., 98.

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to be filed on the regular side under the Provincial Small Cause Courts Act, section 23.

The following judgments were delivered by the High Court (MACLEAN, C.J., and BANERJEE, J.) :—

MACLEAN, C.J.—I think that this preliminary objection must prevail. In section 586 of the Code of Civil Procedure it is provided that no second appeal shall lie in any suit of the nature cognizable in a Court of Small Causes when the amount or value of the subject-matter of the original suit does not exceed Rs. 500. If we turn to the Small Cause Courts Act (IX of 1887) we find this provision in sub-section 2 of section 15 of the Act, "Subject to the exceptions specified in that schedule," that is, the second schedule of the Act, "and to the provisions of any enactment for the time being in force, all suits of a civil nature, of which the value does not exceed Rs. 500, shall be cognizable by a Court of Small Causes." If the matter stood there, there could be no reasonable doubt that this was an action cognizable by the Small Cause Court, and therefore within the meaning of section 586 of the Code of Civil Procedure, and consequently no second appeal would lie.

But it has been ingeniously argued on behalf of the appellant that section 23 of the Act of 1887 makes a difference in the case. That section provides as follows: "Nowithstanding anything in the foregoing portion of this Act, when the right of a plaintiff and the relief claimed by him in a Court of Small Causes depend upon the proof or disproof of a title to immoveable property, or rather title which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title." That section is an enabling section only; and enables the Court, at any stage of the proceedings, to return the plaint in order that it may be presented to any Court which could determine the title. But, as was pointed out in the course of the argument, the section does not say that such suits shall not be cognizable by the Small Cause Court. It could easily have said so; it could easily have said, if that were the intention of the Legislature, that a suit, where the issue depended upon the proof or disproof of the title, would cease

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to be cognizable by the Small Cause Court. It appears to me, therefore, that that section only does not make a case such as this, less a case cognizable by the Small Cause Court, as to which, under section 586 of the Code of Civil Procedure, no second appeal lies.

But that does not quite dispose of the matter. One other point was urged before us. It was urged that this particular case came within the exception of article 8 in the second schedule of Act IX of 1887: an exception that takes the case out of the operation of section 15 of the Act. It was stated that this was a suit for the recovery of rent. I think that when one looks at the plaint, and when one applies one's knowledge of what the term "rent" ordinarily means, it is not easy to arrive at the conclusion that this is a suit for the recovery of rent. It is an action for the recovery of damages. The conclusion at which I arrive appears to me to be consistent with the principle laid down by a Full Bench of this Court in the case of *Mohesh Mahto* v. *Piru* (1), and with the view held by the High Court at Madras in the case of *Muttukaruppan* v. *Sellan* (2).

For these reasons I think the preliminary objection must prevail, and this appeal must be dismissed with costs.

BANERJEE, J.—I am of the same opinion. The preliminary objection being that a second appeal is barred by section 586 of the Code of Civil Procedure, the question for consideration is whether the suit was of the nature cognizable in the Court of Small Causes, the amount being admittedly below Rs. 500. The learned Vakil for the appellant contended that the suit was not of that nature for two reasons—first, because, though the plaint was originally filed in the Court of Small Causes, it was returned by the Judge of the Small Cause Court under section 23 of Act IX of 1887 for presentation to the Court having jurisdiction to determine the question of title that was involved in the case; and, secondly, because, having regard to the nature of the claim, the suit ought to be treated as one for rent, and therefore excepted from the jurisdiction of the Court of Small Causes under article 8 of the second schedule of Act IX of 1887.

As to the first branch of this argument, I do not think that

(1) I. L. R., 2 Calc., 470. (2) I. L. R., 15 Mad., 98.

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the effect of the transfer of a suit cognizable by a Court of Smal Causes is to make it any the less cognizable by such Court. Section 23 of Act IX of 1887 simply enacts that, "notwithstanding anything in the foregoing portion of the Act, when the right of a plaintiff and the relief claimed by him in a Court of Small Causes, depend upon the proof or disproof of a title to immoveable property, or other title which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title." That does not alter the nature of the suit. The section is evidently intended to enable Courts of Small Causes to save their time by returning plaints in suits which involve indirectly enquiry into questions of title which may take time; and a comparison of sub-section 2 of section 15 of the Small Cause Court Act of 1887, with section 16, will clearly show that a suit which under any of the provisions of that enactment may be tried by an ordinary Civil Court, notwithstanding that it is cognizable by a Court of Small Causes, does not cease to be a suit of that description by the mere fact of its being tried by such Court. The effect of the trial of such a suit by the ordinary Civil Court was considered by a Full Bench of this Court in a case tried under the old law, that is, the case of *Mohesh Mahto* v. *Piru* (1); and it was held that a second appeal would not lie in such a case.

Then, as to the second branch of the argument, I do not think that this suit can be treated as one for rent in any sense of the term. It is clear from the plaint that what is claimed is not any sum payable by the defendant as holding lands under the plaintiff as his te ant. What is claimed is a sum of money which, the plaintiff says, ought to have come to his hands in the first instance, but which the defendant wrongfully realised from the actual occupants of the land who are stated to be the tenants of the plaintiff. It was argued that as part of the claim consisted of road cess and public works cess, and as road cess and public works cess are realisable under the Cess Act as rent, the suit should, so far as the claim for road and public works cesses was concerned, be treated as one for rent. But on looking at the 6th paragraph of the plaint, I find that cesses are introduced, not as

(1) I. L. R., 2 Calc., 470.

independent items of the claim, but as merely furnishing data for the assessment of the damages claimed in the suit. Both branches of the argument, therefore, upon which it is sought to take the case out of the description mentioned in section 586 of the Code of Civil Procedure, fail; and the preliminary objection must be allowed, and the appeal dismissed with costs.

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S. C. G. *Appeal dismissed.*

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

RAJARAM PANDEY (PLAINTIFF) *v.* RAGHUBANSMAN TEWARY AND OTHERS (DEFENDANTS.)*

1897 *April* 9.

Claim to attached Property—Civil Procedure Code (1882), section 280—Claim by a Mokurariдar—Limitation—Limitation Act (XV of 1877), Schedule II, Article 11.

Upon attachment of immoveable property in execution of decree a claim was made on the ground that the judgment-debtor had granted a *mokurari* in respect of the property in favour of the claimant. The claim was allowed, and the property was ordered to be sold with a declaration of the *mokurari*. More than a year after this order, the decree-holder who purchased at an execution sale, brought a suit for a declaration that the *mokurari* was fraudulent and *benami* and for possession and mesne profits.

Held, that the order was a judicial determination under section 280 of the Civil Procedure Code (1882), and that, therefore, the suit was barred under article 11 of the second Schedule of the Limitation Act (XV of 1877.)

A DECREE was passed in favour of the plaintiff upon a petition of compromise and confession of judgment by Bagisdut Misser (defendant No. 2 in this case), whereby he was made liable for Rs. 3,100, and certain properties, including 18 bighas 5 biswas of *zerait* land, were declared securities for the amount. In execution of that decree claims and objections were made on behalf of different members of the family of the judgment-debtor as well as by defendant No. 1, Raghubansman Tewary. The claims of the members of the judgment-debtor's family were disallowed, and regular suits were brought by them to establish their rights, and

* Appeal from Appellate Decree No. 1657 of 1895, against the decree of F. S. Hamilton, Esq., Officiating District Judge of Sarun, dated the 29th of July 1895, affirming the decree of Babu Krishna Nath Roy, Officiating Additional Subordinate Judge of that district, dated the 16th of September 1893