APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1880
July 14.

ASMAN SINGH (PLAINTIFF) *v.* DOORGA ROY AND OTHERS (DEFENDANTS).*

Appeal in cases cognizable by a Small Cause Court—Civil Procedure Code (Act X of 1877), *s.* 586.

A was the proprietor of nine annas of a mouza, *B* and his family of one anna, and *C* and others of the remaining six annas. *B* and his family having occupied and enjoyed, to the exclusion of their co-shareholders, fifty-four bighas of the mouza, failed to pay any rent in respect of such occupation. *A* instituted a suit against them (making *C* and the other holders of the six-anna share defendants to the suit) to recover the sum of Rs. 412-8 as the sum justly due to him after making all proper deductions, including as well the share of the rent of the fifty-four bighas to which the six-anna shareholders were entitled, as also the share which *B* and his family were entitled to retain as proprietors of a one-anna share. *Held*, that the facts shewed an implied contract on the part of *B* and his family to pay to their co-shareholders whatever, upon taking an account, should appear to be due to them; and that, inasmuch as the total amount sought to be recovered in the suit by *A* did not exceed 500 rupees, the suit was one which might have been brought in a Small Cause Court, and therefore the plaintiff had no right of second appeal to the High Court under s. 586 of the Code of Civil Procedure.

THE plaintiff in this suit was the owner of an undivided nine annas share of mouza Ishakpore, in Pergana Mulk, in the district of Bhagalpore. The nine first defendants, who in the pleadings were styled first party defendants, were members of a joint Hindu family, and the joint owners of an undivided one-anna share in the same property. The remaining defendants, styled the second party defendants, were the joint owners of the remaining six annas share. Mouza Ishakpore comprised upwards of three hundred bighas of land, out of which the proprietors kept by mutual arrangement thirty-two bighas as

* Appeal from Appellate Decree, No. 867 of 1879, against the decree of Moulvie Hafiz Abdul Kurim Khan Bahadur, First Subordinate Judge of Bhagalpore, dated the 22nd February 1879, modifying the decree of Moulvie Mahomed Noral Hossein, Munsif of Begoosherai, dated the 19th December 1878.

khoodkast in their own hands. These thirty-two bighas were apportioned between the proprietors according to their respective shares, the plaintiff taking eighteen bighas as a nine-anna shareholder, the first party defendants two bighas, and the second party defendants twelve bighas. The remainder of the mouza was let out to cultivating ryots, and the first party defendants, in addition to the two bighas kept in their hands as *khoodkast* under the above arrangement, separately as between them and the nine-anna and six-anna shareholders, but jointly as among themselves, occupied and cultivated fifty-four bighas on the mouza as ordinary tenants. The plaintiff, it appeared, had, for some time, with the consent of his co-proprietors, been collecting the rents on behalf of all concerned. Previous to the institution of the present suit, the plaintiff had instituted a suit against the first party defendants, on the basis of a *wasil-baki* account, to recover from them the rent due in respect of their occupation of the fifty-four bighas during the years 1281, 1282, 1283, and 1284 (1874—1877) and obtained a decree in the Court of first instance, which was afterwards reversed upon appeal, on the ground that the relation of landlord and tenant did not exist between the parties to the suit, and that the plaintiff was bound to frame his suit so as to claim whatever was due to him upon an account taken between him and his co-owners.

The plaintiff, accordingly, instituted the present suit against the first party defendants, making the second party defendants also parties, and asked for a decree for the sum of Rs. 412-8, against the first party defendants, as the sum due to him, on the footing that the fair rent of the land held by them was Rs. 3 per bigha, after deducting the share of the second party defendants in respect of the occupation by them of the said fifty-four bighas of land.

The first party defendants pleaded, *inter alia*, that the rate at which the plaintiff claimed to assess rent upon the land occupied by them was excessive.

The plaintiff obtained a decree in the Court of first instance, which, on appeal, was modified, on the ground that the plaintiff had not shown that Rs. 3 per bigha was the fair rent assessable

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on the lands occupied by the first party defendants, and that therefore the plaintiff was only entitled to the amount which would have been due to him if those lands had been assessed at Re. 1 per bigha.

Against this decree the plaintiff appealed to the High Court.

Mr. *M. L. Sandel* for the appellant.

Baboo *Chunder Madhub Ghose* for the respondents.

Baboo *Chunder Madhub Ghose* took a preliminary objection that the suit being to recover a sum not exceeding Rs. 500, and being also of a nature cognizable in a Court of Small Causes, and there having been an appeal already, a second appeal was barred by s. 586 of Act X of 1877. Suits which are cognizable by Courts of Small Causes are defined by s. 6 of Act XI of 1865. That a suit of this description is cognizable in a Court of Small Causes has been decided in the following cases:—*Huro Mohun Roy* v. *Khettro Monee Dossee* (1), *Sunkur Lall Pattuck Gyawal* v. *Mussamut Ram Kalee Dhamin* (2), *Joogul Kishore Roy* v. *Rughoonath Seal* (3), and *Dyebukee Nundun Sen* v. *Mudhoo Mutty Goopta* (4). In the last case, which was a suit to recover from the defendants a balance claimed to be due on account of rents of the plaintiff's zemindaries collected but not accounted for by the father of the defendants, Macpherson, J., expressed an opinion that such a suit "is none the less cognizable by the Small Cause Court, because it may have been necessary to go into the accounts of both parties to see whether the amount claimed is really due or not. Section 6 contemplates the possibility of having to examine accounts between the parties, for it says,—'the following are the suits cognizable by Courts of Small Causes, namely, claims for money due on bond or other contract, when the debt does not exceed in amount or value the sum of five hundred rupees, *whether on balance of account or otherwise:* the only balance of account excepted being a balance of partnership account, unless the balance shall have been struck

(1) 12 W. R., 372. (2) 18 W. R., 104. (3) 20 W. R., 4.
(4) I. L. R., 1 Calc., 123; S. C., 24 W. R., 478.

by the parties or their agents." See also the case of *Bulldeo Sing* v. *Ramsurun Lall* (1).

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Mr. *M. L. Sandel* for the appellant distinguished the cases cited for the respondents, and contended, that none of them supported the proposition that one of several co-partners, co-owners, or co-proprietors can bring a suit in a Court of Small Causes to adjust the account between him and his co-partners, co-owners, or co-proprietors, or to recover an amount to be found due to him upon the taking or adjustment of such account. A suit for an account is not a suit which can be entertained by a Small Cause Court: *Shurrut Chunder Kur* v. *Ram Sunkur Surmah* (2), *Krishna Kinkur Roy* v. *Madhub Chunder Chuckerbutty* (3). It is submitted that the only rule to be adopted is this: a suit for an account only, a suit between partners for an account, a suit between persons who have had mutual dealings for an account, and a suit between co-owners or co-proprietors for an account, cannot be brought in a Small Cause Court; but where a defendant has entered into a *contract*, express or implied, to pay to, or to hold to the use of the plaintiff, money received by him, then a Small Cause Court may entertain the suit, notwithstanding that it may be necessary to go into an account to ascertain the exact sum due.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—The plaintiff seeks to recover from the first party defendants the sum of Rs. 412-8 under the following circumstances.

The plaintiff is the owner of nine annas of Mouza Ishakpore, and the defendants, first and second parties, of one anna and six annas respectively. The plaintiff is in charge of the collection of the rent of the mouza from the tenants. There are thirty-two bighas of *khoodkast* lands, which have been distributed amongst the proprietors in proportion of two bighas per anna, for which no rent is realisable.

(1) 25 W. R.. 234. (2) 10 W. R., 214.
(3) 21 W. R., 283.

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Over and above their proportionate share of the *khoodkast* lands, the defendants first party cultivated fifty-four bighas in the years 1281, 1282, 1283, and 1284. The plaintiff brought a suit, under Beng. Act VIII of 1869, to recover rent for these years on account of these lands from the defendants first party, and obtained a decree in the Court of first instance. But on appeal the suit was dismissed on the ground that there did not exist the relationship of landlord and tenant between the parties, and that its frame was misconceived, inasmuch as the plaintiff could not recover anything without an adjustment of account between the shareholders regarding the profits of the mouza. The plaintiff has, accordingly, brought this suit, alleging that, on an adjustment of accounts of the profits of the mouza, he is entitled to recover the sum claimed. This being the nature of the suit, a preliminary objection has been taken to the hearing of this second appeal, on the ground that the suit was one of a nature cognizable by a Court of Small Causes. The appellant's pleader, on the other hand, urges, first,—that a Court of Small Causes, under s. 6 of Act XI of 1865, has no jurisdiction to try a case in which accounts have to be taken; and secondly, that, under the first proviso of the section in question, such a Court is not competent to take cognizance of the present suit. Several cases have been cited in support of their respective contentions:—*Shurrut Chunder Kur* v. *Ram Sunkur Surmah* (1), *Huro Mohun Roy* v. *Khettro Monee Dossee* (2), *Sunkur Lall Pattuck Gyawal* v. *Mussamut Ram Kalee Dhamin* (3), *Krishna Kinkur Roy* v. *Madhub Chunder Chuckerbutty* (4), *Joogul Kishore Roy* v. *Rughoonath Seal* (5), *Dyebukee Nundun Sen* v. *Mudhoo Mutty Goopta* (6), and *Buldeo Sing* v. *Ram Surun Lall* (7).

Having regard to the provisions of s. 6, Act XI of 1865, and to the authorities cited before us, we think the preliminary objection taken must prevail. The suit is substantially one in which one of the joint owners of a mouza seeks to recover, to

(1) 10 W. R., 214.
(2) 12 W. R., 372.
(3) 18 W. R., 104.
(4) 21 W. R., 283.
(5) 20 W. R., 4.
(6) I. L. R., 1 Calc., 123; S. C., 24 W. R., 478.
(7) 25 W. R., 234.

the extent of his share, profits of the mouza from a co-sharer, who has appropriated the same in excess of his own share. Such a claim as this is evidently based upon an implied contract which exists between the joint owners of a zemindary or other landed property, and by which one co-sharer binds himself to make good to the others any profits which he may have appropriated in excess of his own proper share : *Sunkur Lall Pattuck Gyawal* v. *Mussamut Ram Kalee Dhamin* (1).

The contention that a Court of Small Causes is not competent to take cognizance of any case in which an account is to be taken is, we think, untenable. If it were valid, there would have been no necessity for the proviso upon which the learned pleader for the appellant relies in the alternative. See also *Dyebukee Nundun Sen* v. *Mudhoo Mutty Goopta* (2). We are also of opinion that the present suit cannot be considered to be "on a balance of partnership account," in the sense in which these words have been used in the first proviso of s. 6 of Act XI of 1865. The word "partnership" here, it seems to us, refers to the relation which subsists between certain persons as defined in s. 239 of the Contract Act. The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Morris and Mr. Justice Prinsep.

MOKUNDO LALL ROY (DEFENDANT) *v.* BYKUNT NATH ROY (PLAINTIFF).*

1880
Sept. 10.

Hindu Law—Inheritance—Adopted Son.

An adopted son is not precluded from inheriting the estate of one related lineally, although at a distance of more than three generations from the common ancestor.

* Appeal from Appellate Decree, No. 539 of 1879, against the decree of T. T. Allen, Esq., Judge of Rajshahye, dated the 17th December 1878, confirming the decree of Baboo Koyelash Chunder Mookerjee, Subordinate Judge of that district, dated the 11th September 1878.

(1) 18 W. R., 104.

(2) I. L. R., 1 Calc., 123; S. C., 24 W. R., 478.