1900.

PURUSHOT-TAM v. CHATARGIR.

The present case is expressly stated to have been disposed of by the Mámlatdár under the first part of section 13; and it is clear that an order of rejection under section 13 was made. The decision in *Gulábbhai* v. *Kasanji*(1) governs the present case. It was stated in the judgment in that case that section 13 does not distinguish between cases where defendant appears and where he does not appear. The parties to the present suit admittedly represent the parties to the suit before the Mámlatdár; and as the present suit was brought more than three years after the date of the Mámlatdár's order of rejection, the claim must be held to be barred under article 47 of the Limitation Act.

We must, therefore, reverse the decrees of the Courts below and reject the claim with costs on the respondent throughout.

Decrees reversed and claim rejected.

(1) P. J. for 1897, p. 246.

APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Crowe.

1900. *July* 10.

ANTONE (ORIGINAL DEFENDANT No. 3), APPELLANT, *v.* MAHADEV ANANT (ORIGINAL PLAINTIFF), RESPONDENT.*

Mesne profits, suit for—Nature of suit—Jurisdiction—Appeal—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Cl. 31.

The plaintiff purchased certain land in June, 1892, at a sale in execution of a decree against R. He did not obtain formal possession until June, 1894. The defendant was in actual possession of the land under an alleged private sale by R. to him in October, 1892. The plaintiff now sued the defendant for mesne profits for three years, *viz.*, from 1894 to 1896, alleging that they had been wrongfully received by the defendant.

Held, that the suit fell within the exception of clause 31 of Schedule II of the Provincial Small Cause Courts Act (IX of 1887) and was not of a nature cognizable by Courts of Small Causes, and that, therefore, an appeal lay to the District Court from the Court of the Subordinate Judge.

SECOND appeal from the decision of H. L. Hervey, District Judge of Kánara, reversing the decree of Ráo Bahádur Jayasatya Bodhrav Tirmalrao, First Class Subordinate Judge of Kárwár.

* Second Appeal, No. 79 of 1900.

1900.

ANTONE v. MAHADEV ANANT.

Suit for mesne profits for three years, *viz.*, from 1894 to 1896.

On the 17th June, 1885, Ramchandra Subba mortgaged the lands in question to one Mattas, the father of defendants Nos. 2 and 3 (Reuben and Antone). Mattas died and on the 12th July, 1885, Reuben (defendant No. 2) sub-mortgaged the land to Chandru. In 1890, Chandru sued on his mortgage and obtained a decree, in execution of which the land was attached and sold on the 13th June, 1892, and was purchased by the plaintiff, who obtained formal possession on the 2nd June, 1894.

In the meantime, *viz.*, on the 6th October, 1892, Reuben and Antone (defendants Nos. 2 and 3) privately sold the land to one Sadashiv Narayan (defendant No. 1) and gave him actual possession.

The plaintiff brought the present suit against Sadashiv, Reuben and Antone for the profits of three years from 1894 to 1896.

The Subordinate Judge dismissed the suit against all the defendants, holding that the plaintiff's rights under his purchase at the execution sale were not superior to those of Sadashiv (defendant No. 1), the latter also having got possession without notice of the plaintiff's purchase.

In appeal the District Judge held that Reuben and Antone (defendants Nos. 2 and 3) were liable to the plaintiff, but not Sadashiv (defendant No. 1).

Antone (defendant No. 3) preferred a second appeal.

It was contended on his behalf that the District Court ought not to have heard the appeal; that it had no jurisdiction, as the suit was one cognizable by the Small Cause Court.

Ghanasham N. Nadkarni, for appellant (defendant No. 3).

Shamrao Vithal, for respondent (plaintiff).

RANADE, J.:—The first contention raised in this appeal relates to the question of jurisdiction. It was urged by Mr. Ghanasham, the appellant's pleader, that this suit was cognizable by a Court of Small Causes, and as such the decision of the First Class Subordinate Judge was final, and not open to appeal in the District Court. The original suit was brought by the plaintiff-respond-

ent to recover Rs. 75 on account of the profits of certain lands wrongfully received by the defendants.

The plaint stated that the lands belonged to one Ramchandra, who mortgaged them to the father of defendants Nos. 2 and 3 in 1885. Defendant No. 2 sub-mortgaged the lands to one Chandru, and Chandru obtained a decree on the sub-mortgage, and in execution of that decree the lands were sold and purchased by the plaintiff-respondent on 13th June, 1892. Plaintiff obtained formal possession through Court on 2nd June, 1894. In the meanwhile, defendant No. 1 had become a private purchaser of these lands under a deed of purchase dated 6th October, 1892, and he obtained possession and retained the same, notwithstanding the formal possession given to the plaintiff in 1894.

The present claim was brought by the plaintiff for the profits of three years from 1894 to 1896, and he sought to recover them from all the three defendants, namely, the private purchaser defendant No. 1, and his vendors defendants Nos. 2 and 3, or from whichever of them were held liable. The first Court held that plaintiff's rights under the auction purchase were not superior to those of defendant No. 1, who was previously in possession, and had no notice of the auction-purchase, and plaintiff's claim was accordingly dismissed against all defendants. In appeal the District Judge held that defendants Nos. 2 and 3 were liable to plaintiff's claim, but not defendant No. 1. The second appeal was brought by defendant No. 3, who contended that the District Court had no jurisdiction to entertain the appeal, as the suit was of a nature cognizable by Courts of Small Causes.

The first question for enquiry is whether the suit falls under clause 31[1] of Schedule 2 of Act IX of 1887. The latter part of that clause excepts from the cognizance of Provincial Small

(1) Provincial Small Courts Act (IX of 1887), Schedule II, clause 31—(Suits excepted).

* * * * * * *

"31 Any other suit for an account, including a suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee, and a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant; * *

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Cause Courts, suits for an account, including suits for the profits of immoveable property belonging to the plaintiff, which have been wrongfully received by the defendants. The plaint shows that defendant No. 1 claimed to have purchased the lands from the other defendants in October, 1892, after the date of plaintiff's auction-purchase of June, 1892, but before plaintiff was formally placed in possession in June, 1894. Defendant's possession was thus in adverse right and he received the profits for three years wrongfully within the meaning of clause 31. Following several previous decisions, it was held by the Calcutta High Court in *Sriram Samanta* v. *Kalidas Dey*(1) that suits for mesne profits of lands of which the plaintiff had been dispossessed fell under the exception laid down by clause 31. The appellant's pleader, however, relied chiefly on the Full Bench decision of the same Court in *Kunjo Behary Singh* v. *Madhub Chundra Ghose*(2), in which the previous decisions on the subject were considered by the Judges who differed in their views. The majority of the Judges (5 against 2) held that a suit for mesne profits was really a claim for damages for trespass, and such claims of damages did not fall under clause 31, which only applies to suits for an account of moneys which the defendant had wrongfully received, and to which the plaintiff was entitled. The majority of the Judges thought that the decision in *Sriram Samanta* v. *Kalidas Dey*(3) was not correct. On the other hand, the minority, consisting of Ghose and Bannerji, JJ., were of opinion that, though a suit for mesne profits was not necessarily a suit for accounts, yet in such suits accounts might have to be examined and that, therefore, clause 31 was applicable.

In this conflict of opinion, it becomes necessary to examine the course of decisions of our own High Court. The cases decided under section 6 of Act XI of 1865 cannot be accepted as guides at present, since the whole of the frame-work of the Act of 1837 differs essentially from the old Act on this point—*Khandu* v. *Tatia*(4) and *Kakaji Sakharam* v. *Govind Ganesh*(5). The decision in *Jamnadas* v. *Bai Shivkor*(6) was passed under somewhat

(1) (1891) 18 Cal., 316.
(2) (1896) 23 Cal., 884.
(3) (1891) 18 Cal., 316.
(4) (1871) 8 Bom. H. C. R., 23. (A.C.)
(5) (1871) 8 Bom. H. C. R., 96. (A.C.)
(6) (1881) 5 Bom., 572.

peculiar circumstances. Though the claim was in form one for damages for use and occupation, yet the Court held that the action was really brought to try the question of title, and it was, therefore, held that the Small Cause Court had no jurisdiction. In *Damodar Gopal* v. *Chintaman Balkrishna*[1] Sargent, C. J., held that a claim for a share in the profits of an inám village would fall under clause 31 if plaintiff had alleged in his plaint that the defendants had wrongfully received the profits. Where there was no such allegation, the claim must be regarded as one for money had and received, and the suit did not fall under clause 31. A distinction was thus made between cases where defendants had rightfully received, but wrongfully retained the profits, from others in which, as in the present case, defendant has from the first wrongfully received the profits. In a later case—*Shankar Trimbak* v. *Damodar*[2]—Farran, C.J., referred to the decision in *Damodar Gopal* v. *Chintaman Balkrishna*[3], and observed that the case suggested in that judgment was actually reproduced in *Sriram Samanta* v. *Kalidas Dey*[4], where it was held that a suit for profits brought by plaintiff dispossessed by the defendant was not cognizable by a Court of Small Causes, as it was in substance a suit for mesne profits.

It will be thus seen that, though a majority of the Judges in the Full Bench case noted above disapproved the decision in *Sriram Samanta* v. *Kalidas Dey*[4], the current of decisions in this Court has been in accordance with the view held by the minority of the Judges. Both Sir Charles Sargent and Sir C. Farran appear to have laid down that under clause 31 of Act IX of 1887, a claim of the plaintiff for mesne profits, based on the allegation that he had been dispossessed by the defendant, cannot be regarded as a claim in which the defendant rightfully received and wrongfully retained those profits. The claim must be treated as one to which clause 31 applied. The present case cannot, therefore, be regarded as one cognizable in a Small Cause Court and it falls within the excepted clauses.

(1) (1892) 17 Bom., 42.
(2) P. J. for 1896, p. 570.
(3) (1892) 17 Bom., 42.
(4) (1891) 18 Cal., 316.

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On the merits, I am satisfied that the appellant has a better case. Admittedly the party in possession was defendant No. 1, the purchaser. If for want of notice, or by reason of prior possession, defendant No. 1 was not held liable to plaintiff's claim, there seems to be no valid reason for holding defendant No. 3 liable, as he was admittedly not in possession. In the suit brought by Chandru this defendant was expressly exempted from all liability. I would, therefore, reverse the decree of the District Court, and dismiss the claim as against the appellant with costs.

CROWE, J.:—I concur.

Decree reversed and claim dismissed as against appellant.

APPELLATE CRIMINAL.

Before Mr. Justice Ranade and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* ANANT PURANIK.*

1 00.
July 19.

Criminal Procedure Code (Act V of 1898), Secs. 196 and 235—Sanction to prosecute—Joinder of charges—Trial for more than one offence—Offences falling under two definitions.

The accused was committed for trial before a Sessions Court on a charge of abetment of dacoity under section 116 of the Indian Penal Code (Act XLV of 1860). In the course of the trial the Assistant Sessions Judge added an alternative charge under section 511 of the Code and sentenced the accused under sections 395, 116 and 511 of the Indian Penal Code (Act XLV of 1860).

In appeal the Sessions Judge held that the evidence disclosed the offence of an attempt to commit the offence of collecting arms, &c., with intention of waging war against the Queen, under section 122, and as no charge under that section could be framed for want of the sanction of Government under section 196 of the Criminal Procedure Code (Act V of 1898), the accused could not be brought to trial at all. He, therefore, reversed the conviction and acquitted the accused.

Held, (reversing the order of acquittal), that the mere fact that no charge for the graver offence under section 122 of the Indian Penal Code (Act XLV of 1860) could be framed for want of Government sanction, did not render the trial for the minor offence of attempting or abetting dacoity either irregular or illegal.

Per FULTON, J.:—According to the 2nd clause of section 235 of the Criminal Procedure Code (Act V of 1898), if the accused abetted an offence under sec

* Criminal Appeal, No. 128 of 1900.