genuine, mentioned in those grounds. The third ground of appeal, which relates to payments and acknowledgments made by defendant No. 1, raised the question as to all of them. As to the other payments alleged to have been made by the defendant, the lower appellate Court has found the first credit entry of Rs. 300 to be proved and in the handwriting of the defendant and the other entries are admitted to be in his handwriting by the defendant. We must take them to be payments under section 20 of the Limitation Act.

We must therefore send the case back to the lower appellate Court for distinct findings on the following issues :—

1. What is the date of the loan advanced by the plaintiff to the defendant ?

2. Is the credit entry of Rs. 81-12 in Exhibit 32 in defendant No. 1's handwriting, and is it an entry of payment under section 20 of the Limitation Act ?

3. What is the date on which the written acknowledgment in Exhibit 55 was passed by defendant No. 1 ?

Findings to be returned within a month.

Issues sent down.

APPELLATE CIVIL.

Before Sir L. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.

VINAYAK GANGADHAR BHAT (ORIGINAL DEFENDANT), APPELLANT, *v.* KRISHNARAO SAKHARAM ADHIKARI (ORIGINAL PLAINTIFF), RESPONDENTS.*

1901. *March* 12.

Small Cause Court—Jurisdiction of—Question of title—Provincial Small Cause Courts Act (IX of 1887), section 23—Claim to possession of land when title to land disputed—Second appeal—Civil Procedure Code (XIV of 1882), section 586—Practice.

The plaintiff sued to recover Rs. 75 as the *utpan* (income) of certain lands. In his defence the defendant raised the question of the title to the land. The plaintiff obtained a decree, which was confirmed in appeal.

Held, that the suit, although raising the question of title, was a suit cognizable by a Small Cause Court, and that therefore under section 586 of the Civil Procedure Code (XIV of 1882) no second appeal lay.

* Second appeal No. 92 of 1900.

1901.

VINAYAK v. KRISHNARAO.

SECOND appeal from the decision of Ráo Bahádur M. R. Nadkarni, Additional First Class Subordinate Judge, with appellate powers at Ratnágiri, confirming the decree of Ráo Sáheb G. D. Deshmukh, Second Class Subordinate Judge of Dápoli.

Plaintiff sued the defendant to recover income arising from land for 1894. He alleged that the land was kowli land and had come to him from his father, and that the defendant's father had wrongfully collected the profits for the said year.

The defendant pleaded that by a prior decree the land had been declared to be *khoti* and not *kowli*, and that under section 244 of the Civil Procedure Code (XIV of 1882) the plaintiff's claim should have been made in the execution proceedings of that decree under which the defendant had possession.

The Subordinate Judge allowed the claim. The defendant appealed and the lower Court's decree was confirmed.

The defendant preferred a second appeal to the High Court.

At the hearing the respondent (plaintiff) took the preliminary objection that under section 586 of the Civil Procedure Code (XIV of 1882), no second appeal was permitted, the suit being one cognizable by a Small Cause Court.

C. H. Setalvad (with *N. V. Gokhale*) for the respondent (plaintiff):—The appellant has no second appeal to this Court: section 586 of the Civil Procedure Code (XIV of 1882). The suit is one cognizable by a Small Cause Court, being one to recover Rs. 75 as money had and received or as mesne profits wrongfully received by the defendant (appellant)—*Krishna Prosad* v. *Maizudden Biswas* (1) *Kunjo Behary* v. *Madhub Chundra*.(2) Paragraph 31 of the Provincial Small Cause Courts Act (IX of 1887) applies to suits involving accounts. Here no account is necessary. *Narayan Bhaskar* v. *Balaji*(3); *Kali Krishna* v. *Izzatannissa*.(4) As to paragraph 31 schedule 2 of Act IX of 1887, see *Kunjo Behary* v. *Madhub Chundra*.(5) No question of title to land is really raised in this suit. The defendant improperly raised it. That circumstance does not prevent the suit being a Small Cause Court suit

(1) (1890) 17 Cal. 707.
(2) (1896) 23 Cal. 884.
(3) (1895) 21 Bom. 248.
(4) (1897) 24 Cal. 557.
( ) (1896) 23 Cal. 884.

and within the jurisdiction of the Small Cause Court—*Dulabh* v. *Bansidhar Rai* (1); *Bapuji* v. *Kuvarji*.(2) In England questions of title are litigated in suits for money had and received—*Monypenny* v. *Bristow*.(3)

Branson (with *Daji A. Khare*) for the appellant (defendant 1).—We rely on paragraph 31 schedule 2 of Act IX of 1887.

JENKINS, C.J.:—The plaintiff has brought this suit to recover Rs. 75, or such sum as may be found due to him on account of the *utpan* of the lands described in the plaint collected in 1894-95.

His case is that these lands were originally acquired from Government, and ultimately under that title became vested in him: or, in other words, that they are his *kowli* lands: that though the lands are thus his, the defendant's father wrongfully collected the *utpan*: and it is this *utpan* he now seeks to recover.

The defence, or so much of it as is now material, is that the lands are *khoti* and not *kowli*, and that this is established beyond the possibility of controversy by reason of a prior decree: and next, that the point the plaintiff desires to raise should have been advanced in execution proceedings under that decree. It becomes therefore necessary to see what that decree is, and what led up to it.

In 1816 Laxman Govind Bhat obtained a *kowl* of the land from the Subhedár of Fort Suvarndrug, and on the 10th of February, 1827, Laxman sold his one-half share to Ramchandra Apaji Adhikari, who had already acquired the other half. These lands are situate within the boundaries of the *khoti* village of Umbershet. The *khoti* of this village at one time belonged half to the Bhat family and half to the Fadkes, but the managing member, Govind Hari Bhat, leased the 16 annas to the predecessors in title of the plaintiff. Later, the plaintiff alleges, his predecessor acquired 4 of the Fadkes' 8 annas, and went into management. Then a suit, No. 47 of 1888, was brought

(1) (1884) 9 Bom. 111. (2) 1890) 15 Bom. 400.
(3) (1830) 2 R. & M. 117.

1901.

VINAYAK v. KRISHNARAO.

against the successors of the original lessee to get back the village and a decree for possession was passed. The appellant alleges that in execution of that decree possession was obtained of the present plaint lands, and on this ground he claims that the plaintiff should have proceeded under section 244 of the Civil Procedure Code, and that failing this the suit is effectually barred by the plea of *res judicata*.

The respondent, however, by way of preliminary objection has urged that the appeal is barred by section 586 of the Civil Procedure Code. To this it was answered that this suit was not of the nature cognizable in Courts of Small Causes, for it fell within the description of either the 11th or the 31st paragraph of the second schedule to the Provincial Small Cause Courts Act. The point thus raised in this preliminary objection appears to me to be fraught with difficulties. It is clear that a Small Cause Court cannot entertain a suit for the determination or enforcement of any right to or interest in immoveable property, but the authorities decide that having regard to section 23 of the Provincial Small Cause Courts Act a Court of Small Causes can entertain a suit, the principal purpose of which is to determine a right to immoveable property, provided the suit in form does not ask for this relief, but for payment of a sum of money. What is the result of this? A sues B for a sum of money under Rs. 500, his right to which depends exclusively on his establishing his ownership of a piece of land. According to the cases a Court of Small Causes can itself hear the case, and in the course of it determine the issue of ownership. There would be no second appeal, but, on the other hand, the decision on the issue of ownership would not be *res judicata* in a subsequent suit to determine the ownership, because the Small Cause Court would not be competent to try the subsequent suit. But suppose the Small Cause Court, acting under the powers contained in section 23 of the Provincial Small Cause Courts Act, returned the plaint, and it was afterwards presented to a Court having jurisdiction to determine the title, what then would be the position? According to the decision in *Kali Krishna Tagore* v. *Izzatannissa Khatun*[1] no second appeal

(1) (1897) 24 Cal. 557.

would lie. Yet as the Court where the plaint was ultimately presented was a Court of jurisdiction competent to try the question of title, its finding on the issue of ownership would, according to *Rai Charan* v. *Kumud Mohun*,[1] give rise to the plea of *res judicata*. The result then would be this, that the right of the litigant to have his claim of title determined in this Court on second appeal would depend upon whether or not the Court of Small Causes in the exercise of its discretion acted under section 23 of the Provincial Small Cause Courts Act or not. It is difficult to suppose that the Legislature could have intended such a result. There is but one further case to consider, and it is where, as here, the plaint is presented in a Court having both ordinary and Small Cause Court jurisdiction. In *Narayan* v. *Balaji*[2] it was held that such a suit was cognizable by a Court of Small Causes, and that therefore no second appeal would lie. But as the Court in such a case was not a Court of Small Causes, it would, or at any rate might be a Court of jurisdiction competent to try a suit brought expressly for determining the right to the immoveable property, so the finding on the issue of ownership (which would not be subject to second appeal) would by the same process of reasoning be a bar to a subsequent suit for determining the right to the property where there would be a second appeal. In other words, a party might in this way be deprived of his right to have his claim to immoveable property determined in the High Court. This again appears to me to be a result that could not have been intended. This line of reasoning, it is true, depends upon the correctness of the view expressed in *Rai Charan's case*, and no doubt the authorities in this Court (e.g. *Bholabhai* v. *Adesang*[3] as well as in the Madras High Court) are the other way, but I must confess that the Calcutta decision appears to me to be more in consonance with the words of section 13 of the Civil Procedure Code.

It is enough for my purpose to indicate the difficulties that present themselves in connection with cases such as the one in hand. These difficulties would never have arisen had the Courts

(1) (1898) 25 Cal. 571. (2) (1895) 21 Bom. 248.
(3) (1884) 9 Bom. 75.

1901.

VINAYAK v. KRISHNARAO.

here, when borrowing from the English procedure the form of actions in *assumpsit*, observed the limitations to which the action was there subjected. It is there well established that where rents have been demanded and collected under an adverse title, and without any assumption of agency, no action can be brought to recover the amount of those rents as a debt or on *assumpsit*, unless the claimant establish his title by proper proceedings, if they still be open to him. This rule was first enunciated as far back as 1788 in *Cunningham* v. *Lawrents*,(1) and has since been repeatedly affirmed, as for instance in *Clarance* v. *Marshall*(2), in *Monypenny* v. *Bristow*(3) and in *Talbot* v. *Earl of Shrewsbury*.(4) I have referred to these out of the many cases there are on this subject, as they show how the doctrine has been adhered to at different periods of time. This rule of procedure seems to me to be based on sound policy: it affords a safeguard against multiplicity of suits, and protects a man against the harassment of constant litigation. If such a rule obtained in this Court, it would be a simple and conclusive solution of the difficult points to which I have alluded, but in the face of existing decisions it now could only be adopted by the decision of a Full Bench. In some future case the point may be worthy of consideration, but in the present it would serve no useful purpose to put the parties to the additional trouble and delay involved in a reference to a Full Bench, as even if we could entertain the second appeal, it would, on the materials before us, probably only result in an affirmance of the lower Court's decree.

In the present state of the authorities the preliminary point is a good one, and we consequently must dismiss the appeal on it and not on the merits. The appellant must pay the costs.

CHANDAVARKAR, J.:—I concur.

Appeal dismissed.

(1) (1788) 1 Bacon's Abridgment, 344 (6th Ed. p. 260).
(2) (1834) 2 C. & M. 495. (3) (1830) 2 R. & M. 117.
(4) (1872) L. R. 14 Eq. 503.