But any difficulty there might be in this respect is met by the assent of the Advocate General to the proposal that any decree for possession shall not be executed without the special permission of the Court until the value of the buildings has been estimated in the manner provided by the General Order, and by his further undertaking as soon as possible after the execution of the decree to pay the sum that may be so estimated. We say 'without the special order of the Court' with a view to safe-guarding the plaintiff against any possible hitch, which we cannot now foresee, that might perhaps interfere with our intention that the plaintiff shall recover possession upon the terms to which the Advocate General has assented on his behalf.

In our opinion there should be a decree to that effect, and the decree of the lower Court should be reversed with costs to be borne by the first three defendants. There will be no order as to costs against defendant No. 4.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Batty.

GIRJABAI BHRATAR GANGADHAR BALKRISHNA BHAT THAKAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAGHUNATH *alias* TATYA VISHWANATH (ORIGINAL DEFENDANT), RESPONDENT.*

Provincial Small Cause Court Act (IX of 1887), Sch. II, art. 31—Jurisdiction of Small Cause Court—Suit to recover an ascertained sum as profits of land—Second appeal—High Court—Practice.

The plaintiff sued to recover three specific sums of money amounting to Rs. 447-11-0, being her share of the revenues and profits of three sets of lands, alleging in her plaint that the money had been wrongly received by the defendant:—

Held, that the suit was one cognizable by a Court of Small Causes; and that, therefore, no second appeal lay.

SECOND Appeal from the decision of W. Baker, Assistant Judge of Poona, reversing the decree passed by G. V. Patwardhan, Subordinate Judge at Sáswad.

* Second appeal No. 183 of 1905.

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The plaintiff sued to recover from the defendant the sum of Rs. 447-11-0. The sum was made up as follows: Rs. 365-3-0 was her share of the revenues of the inam village of Valunja for three years 1899, 1900 and 1901; Rs. 52-8-0 on account of her share of the profits of the lands at Valunja; and Rs. 30 represented her share of the profits of the lands at Kamthadi, for the same years. The plaint alleged that the defendant had received the amounts mentioned but he had wrongly retained the same.

The defendant, in his written statement among other things denied the plaintiff's share in the inam village as well as the other lands.

The Subordinate Judge decreed the plaintiff's suit in his favour.

On appeal the Assistant Judge reversed the decree, and dismissed the suit.

The plaintiff preferred a second appeal.

At the hearing the respondent raised a preliminary objection that no second appeal lay as the suit was one cognizable by a Small Cause Court.

V. G. Ajinkya, for the respondent (defendant):—I take a preliminary objection that no second appeal lies—section 586 of the Civil Procedure Code (Act XIV of 1882); the present suit does not fall under Art. 31, Schedule II of the Provincial Court of Small Causes (Act IX of 1887), because this is not a suit for an account; the plaintiff in this case claims three specific sums, and thus the suit is of a nature cognizable by a Court of Small Causes; *Kunjo Behary Singh* v. *Madhub Chundra Ghose*[1], *Vasudev Narayan* v. *Damodar Waman*[2].

N. M. Samarth, for the appellant (plaintiff):—There are three items claimed in the plaint. As to one of them, namely, the profits of Kamthadi lands, plaintiff, in paragraph 3 of the plaint, alleges that she had been receiving her share, but for the three years prior to suit, defendant had wrongfully received plaintiff's share of the profits of those lands. As the plaint contains that allegation, the suit falls under clause (31), schedule II of the Provincial Small Cause Courts Act (IX of 1887): *Damodar Gopal Dikshit* v. *Chintaman Balkrishna Karve*[3]; *Antone* v. *Mahadev*

(1) (1896) 23 Cal. (F. B.) 884. (2) (1901) 6 Bom. L. R. 370.
(3) (1892) 17 Bom. 42.

Anant[1]; *Rameshar Singh* v. *Durga Das*[2]. The head-note in *Vinayak Gangadharbhat* v. *Krishnarao Sakharam*[3] is not correct in its statement that the suit in that case was to recover *utpan* of plaintiff's lands *wrongfully recovered by defendant*. There was no such allegation in that case. The misapprehension which the incorrect statement in the head-note was likely to lead to was corrected in *Vasudev Narayan* v. *Damodar Waman*[4]. In the case of *Vasudev* v. *Damodar* also, plaintiff did not allege in his plaint that defendant had *wrongfully received* plaintiff's share of the profits. The view of the majority of the Calcutta High Court in the Full Bench case of *Kunjo Behary Singh* v. *Madhub Chundra Ghose*[5] has been expressly dissented from by our High Court in *Antone* v. *Mahadev Anant*[1]. This case in *Antone* v. *Mahadev* was not brought to the notice of their Lordships in *Vasudev* v. *Damodar*[4]. The fact that plaintiff has claimed Rs. 30 as her share of the profits of Kamthadi lands for three years prior to suit at Rs. 10 per year cannot make her suit cognizable by the Court of Small Causes, when her allegation is that defendant had wrongfully received her share of the profits. In spite of the definite sum mentioned in the plaint, the Court has to ascertain whether the sum claimed is more or less than what plaintiff is entitled to. In the present case, the Court of first instance found that plaintiff was really entitled to Rs. 15 per year, but as she had claimed Rs. 10 per year, the decree in her favour was for Rs. 30 for three years. Thus, plaintiff's naming a definite sum in the plaint does not make the suit any the less a suit "for an account." Besides, as observed by Ghose, J., in *Kunjo Behary Singh* v. *Madhub Chundra Ghose*[5], "if the Legislature had really intended that a suit must be a suit for account properly so called, in order to bring it within the words 'including a suit, &c.,' as occurring in art. (31), they would have stopped with the words 'any other suit for account' and would not have *added* those words." As the view of the minority of the Judges in the Full Bench case of *Kunjo Behari Singh* has been accepted in the case

(1) (1900) 25 Bom. 85, at p. 89.
(2) (1901) 23 All. 437.
(3) (1901) 25 Bom. 625 : 3 Bom. L. R. 230.
(4) (1904) 6 Bom. L. R. 370.
(5) (1896) 23 Cal. 884 at p. 893.

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of *Antone* v. *Mahadev*[1], as being in accordance with the current of decisions in our High Court, and as that view has not been overruled by a Full Bench of our High Court, it is not open to this Court to depart from that view. I submit, therefore, that the preliminary objection ought not to prevail.

V. G. Ajinkya, in reply:—The case of *Antone* v. *Mahadev*[1] seems to create some doubt; but in that suit the claim was for profits "of three years" and not for any specific sum as claimed in the present case. The mere fact that the Court has to ascertain whether the sum claimed is more or less than what the plaintiff is entitled to does not make a suit one for an account; because in that way every suit whatever be its nature will become a suit for an account; in many cases something in the nature of an account is required to be taken, but a suit for account means a suit which seeks for a decree ordering the defendant to account to the plaintiff for moneys received by him and not for a definite sum of money. From the facts and arguments of pleaders as reported in *Vasudev* v. *Damodar*[2] it seems that the question of wrongful receipt of the plaintiff's share by the defendant was specifically before the Court and after all the Court held that the claim was one cognizable by a Court of Small Causes. The preliminary objection therefore ought to prevail and the appeal be dismissed with costs.

RUSSELL, J.:—In this case a preliminary point was raised, *viz.*, that no second appeal would lie to this Court. The question arises upon Article 31 of the second Schedule of Act IX of 1887. The Article excludes from the cognizance of a Small Cause Court "any other suit for an account including...a suit for the profits of immoveable property belonging to the plaintiff which have been wrongly received by the defendant." In the present case the plaintiff sues to recover three specific sums of money, her share of the revenues and profits respectively of three sets of lands. It is true that in para. 3 of her plaint, she says, that the profits had been wrongly received by the defendant.

Now clause 31 refers to suits for accounts, and it appears to us impossible to say that a suit for three specific items which

(1) (1900) 25 Bom. 85. (2) (1904) 6 Bom. L. R. 370.

are upon the face of the plaint itself, ascertained and defined, can be said to be a suit for an account. It was pointed out during the argument that a suit for an account was excluded from the cognizance of the Small Cause Court as it is well known that a Small Cause Court has no machinery for taking accounts. The question has been raised in several cases. In *Vinayak* v. *Krishnarao* (1) the plaintiff sued to recover Rs. 75 as the income of certain lands. The defendant raised the question of title, but it was held that the suit although raising question of title was cognizable by the Small Cause Court. There, it will be seen, the form of the plaint is the same as in the present case, *viz.*, for a specific sum, the profits of certain lands. A certain amount of difficulty was occasioned in our minds at first by the fact that the case of *Antone* v. *Mahadev* (2) was not cited in *Vinayak* v. *Krishnarao* (1). But *Antone* v. *Mahadev*, it appears, was brought by the plaintiff for the profits of three years. That is to say, it was not a suit brought for a specific sum of money but "profits of three years". It is obvious that to ascertain the profits for three years it was necessary or might be necessary to take an account to ascertain what these profits would come to. Then again in the case of *Wasudev* v. *Damodar* (3) it was held: "A suit by a co-sharer to recover his share of the profits of a *khoti takshim* recovered by another co-sharer is a suit cognizable by a Court of Small Causes; and if the claim is below Rs. 500, no second appeal lies as provided by section 586 of the Civil Procedure Code." And in this case the learned Chief Justice in delivering judgment explains the reason for the misapprehension which prevails as to the effect of *Vinayak* v. *Krishnarao* (1)* and says that the misapprehension arose from the form in which the head-note is framed, and that "the question under Article 31 in the Schedule to the Provincial Small Cause Courts Act was not considered in the judgment, as it was the opinion of the Court that the suit was not one for an account, but

* [The head-note of this case is correct in the case as reported in this Series. The allusion of the learned Judge to the incorrectness of the head-note refers to the case as reported in the Bombay Law Reporter. Ed.]

(1) (1901) 25 Bom. 625: 3 Bom. L. R. 239. (2) (1900) 25 Bom. 85: 2 Bom. L. R. 683.
(3) (1904) 6 Bom. L. R. 370.

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for a definite sum and so fell within the ruling of the majority of the Full Bench of the Calcutta High Court in the case of *Kunjo Behary Singh* v. *Madhub Chundra Ghose* (1)." Then again we have Second Appeal No. 736 of 1904 (2) which is to the same effect.

Under these circumstances we do not think it necessary to refer this to a Full Bench. We will follow the Bombay decisions referred to, and hold that the preliminary objection must prevail.

We accordingly reject this appeal with costs.

R. R. *Appeal dismissed.*

(1) (1896) 23 Cal. 884. (2) Unreported.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1905. *August* 29.

BINDAJI LAXUMAN TRIPUTIKAR (ORIGINAL OPPONENT), APPELLANT, *v.* MATHURABAI (ORIGINAL APPLICANT), RESPONDENT.*

Guardians and Wards Act (VIII of 1890), sections 39 and 52—Minors—Guardian of person—Guardian of property—Minor having proprietary interest with adults in joint family—Joint family comprising all minors—Guardianship liable to cease as soon as there is an adult person.

A guardian of the property cannot be appointed for a minor whose only proprietary interest is as co-parcener with adults in a joint family property.

This principle does not apply when all the co-parceners are minors and a guardian of the property is appointed for the whole number, *Lingangowda v. Gangabai*(1) followed.

As soon as there is an adult co-parcener, any guardianship of the property previously constituted either ceases or is liable to cease.

An order appointing a guardian of the property of minor co-parceners, who exclusively constitute the joint family, should reserve liberty to any minor on attaining majority to apply for the removal of the guardian of the property or restrictions of his power under section 52 of the Guardians and Wards Act (VIII of 1890).

APPEAL from the decision of W. Baker, Assistant Judge of Poona, appointing a guardian of the person and property of minors.

* Appeal No. 126 of 1904.

(1) (1896) P. J. p. 521.