

has"; and that question was decided on the ground that the widow there was bound by the special agreement of which specific performance was sought against her. The decision is, therefore, no authority for extending the carefully guarded rule laid down by the Privy Council to cases where the widow has made only a partial relinquishment of the estate.

For these reasons we reverse the decree of the lower appellate Court and decree the plaintiff's suit with costs throughout.

Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

MAHABANA SHRI DAVLATSINHJI, THAKORE SAHEB OF LIMDI
(ORIGINAL DEFENDANT 1), APPELLANT, v. KHACHAR HAMIR MON
(ORIGINAL PLAINTIFF), RESPONDENT.*

1909.

October 5.

Provincial Small Causes Courts Act (IX of 1887), sections 16, 27, 32, Schedule II, Clauses (2) and (3)—Suit for the recovery of certain sum representing a share in the produce of immoveable property—Cognizance by the Court of Small Causes—Decree final—Appeal—Jurisdiction by consent of parties.

A suit for the recovery of Rs. 12-11-6 representing plaintiff's share in the produce of immoveable property is a suit for money had and received to the plaintiff's use and is cognizable by the Court of Small Causes, and the decree in such a suit is final under section 27 of the Provincial Small Causes Courts Act (IX of 1887).

Notwithstanding its finality an appeal was preferred to the District Court of Ahmedabad, which Court entertained the appeal and reversing the decree allowed the plaintiff's claim. The defendant, thereupon, preferred a second appeal and at the hearing prayed that the second appeal might be treated as an application for revision under section 115 of the Civil Procedure Code (Act V of 1908), on the ground that the District Court acted without jurisdiction in entertaining the appeal. The respondent (plaintiff) urged that a second appeal lay: and further that by reason of the conduct of the parties and the fact that the appellant (defendant) had not objected to the jurisdiction of the District Court, it was too late in second appeal to take the point.

* Second Appeal No. 598 of 1907.

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Held, that the District Court had no jurisdiction to try the case and the conduct of the parties could not give it jurisdiction.

Ledgard v. Bull(1) and *Meenakshi Naidoo v. Subramaniya Sastri*(2) referred to.

Decree of the District Court reversed and that of the first Court restored.

SECOND appeal from the decision of L. P. Parekh, Judge of the Court of Small Causes at Ahmedabad, with appellate powers, reversing the decree of C. H. Vakil, Subordinate Judge of Dhandhuka.

The plaintiff sued to recover from the defendants Rs. 12-11-6 representing his share in the various items of the revenue of the village of Khambhada, alleging that some part of the land of the village was mortgaged to defendant 1, Thakore Saheb of Limdi, that the lands in the village were managed by the plaintiff and other sharers jointly with defendant 1, that defendant 1 paid to the plaintiff and other sharers their dues up to Samvat year 1955, paid nothing in Samvat 1956 owing to famine and appropriated all the proceeds for Samvat 1957, and that he had not paid the plaintiff his share.

Defendant 1, Thakore Saheb of Limdi, did not admit that the plaintiff had a particular share in the revenue of the village of Khambhada and contended that the land of the village was not mortgaged to him, that the plaintiff had no voice in the management of the lands in the village, that there was misjoinder of parties and causes of action and that the frame of the suit was bad as it was not brought in the name of the state of Limdi.

Defendants 2, 3 and 5 admitted the plaintiff's claim.

Defendants 4, 6—20 were absent though duly served.

Defendants 20—25 were originally plaintiffs but they were afterwards made defendants at their own request.

The Subordinate Judge dismissed the suit.

The plaintiff appealed and the appellate Court found that the frame of the suit was not defective and sent back the case to the Subordinate Judge for fresh findings on the issues involved in

(1886) L. R. 13 I. A. 134.

(2) (1887) L. R. 14 I. A. 160.

the case after admitting on behalf of the plaintiff certain documentary evidence which was originally excluded. On the remand the Subordinate Judge found that the plaintiff's share was proved and certified his findings on the issues to the appellate Court which reversed the decree of the Subordinate Judge and allowed the plaintiff's claim to the extent of Rs. 11-8-0 with costs against defendant 1.

Defendant 1 preferred a second appeal.

G. S. Rao for the appellant (defendant 1).

G. K. Parekh for the respondent (plaintiff).

SCOTT, C. J.—The plaintiff in this case sued the defendant for Rs. 12-11-6 representing his share in the produce of certain immoveable property of the value of Rs. 45-0-9 which was collected and lawfully received by the defendant 1 in the Samvat year 1957 but which in accordance with the practice of previous years it was his duty to distribute partly to the plaintiff.

The case is in all respects similar to that of *Damodar Gopal Dikshit v. Chintaman Balkrishna Karve*⁽¹⁾.

It is a suit for money had and received to the plaintiff's use. It does not fall under clause (4), Schedule 2 of Act IX of 1887, in that it is not a suit for possession of immoveable property or for recovery of an interest in such property, nor does it fall within clause (31) because it is not alleged that the produce was unlawfully received by the defendant. That being so the suit was cognizable by the Court of Small Causes.

Section 16 of the Provincial Small Causes Courts Act provides that "save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits."

By section 32 of the same Act it is provided that so much of Chapters III and IV as relates to the exclusion of the jurisdiction of other Courts in suits cognizable by Courts of Small Causes applies to Courts invested by or under any enactment for the

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(1) (1892) 17 Bom. 42.

1939.

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(MAHARANA
SHEJI)

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time being in force with the jurisdiction of a Court of Small Causes.

The plaintiff in the present suit was filed in the Court of Second Class Subordinate Judge of Dhandhuka and Gogha who was invested with the jurisdiction of a Judge of the Court of Small Causes. He tried the suit and passed a decree in favour of the defendants. That decree under section 27 of the Provincial Small Causes Courts Act was final.

Notwithstanding its finality an appeal was preferred to the District Court of Ahmedabad. The Judge remanded the case and after the remand order had been complied with again entertained the appeal and passed a decree in favour of the plaintiff for Rs. 11-8-0 and costs.

From that decree an appeal was preferred to this Court. But on the appeal coming on for hearing the pleader for the defendants submitted that the decision of the Second Class Subordinate Judge was final under section 27 of the Provincial Small Causes Courts Act, and that therefore the appellate Court of Ahmedabad had acted without jurisdiction in disposing of the appeal and asked that his second appeal might be taken to be an application under section 115 of the Civil Procedure Code in revision.

It has been contended on behalf of the respondent that a second appeal does lie and that it lies by reason of the conduct of the parties, that as the defendants had not objected to the jurisdiction of the Ahmedabad Court in appeal it was too late for them now to take the point that there was no appeal from the judgment of the first Court, and in support of that argument reference was made to *Suresh Chunder Maitra v. Kristo Rangini Dasi*⁽¹⁾ and *Parameshwaran Nambudiri v. Vishnu Embrandri*⁽²⁾.

It appears to us that having regard to the decision of the Judicial Committee in *Ledgard v. Bull*⁽³⁾ and in *Meenakshi Naidoo v. Subramaniga Sastri*⁽⁴⁾, we must accept the argument of the appellant and we must hold that the lower appellate Court had no jurisdiction to try the case and that the conduct of

(1) (1893) 21 Cal. 249.

(2) (1904) 27 Mad. 478.

(3) (1886) L. R. 13 I. A. 134.

(4) (1887) L. R. 14 I. A. 160.

the parties could not give it jurisdiction. The Judicial Committee in the second of the above-mentioned cases at page 166 say: "It has been suggested, and it is not right altogether to pass that suggestion over, that, by reason of the course pursued by the present appellants in the High Court, they have waived the right which they might otherwise have had to raise the question of want of jurisdiction. But this view appears to their Lordships to be untenable. No amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists. Upon this point it may be convenient to refer to the judgment of their Lordships delivered by Lord Watson in the comparatively recent case of *Ledgard v. Bull*⁽¹⁾".

Now we hold upon the words of section 32 of the Provincial Small Causes Courts Act that the exclusion of the jurisdiction of all Courts not vested with Small Cause Court powers is indicated in express terms, and the position of the appellate Court in Ahmedabad was that it was a Court where, in the words of the Judicial Committee, no jurisdiction existed.

We, therefore, set aside the decree of the lower appellate Court and restore that of the Second Class Subordinate Judge, but having regard to the conduct of the appellant we make no order as to costs.

Decree reversed.

G. B. R.

(1) (1886) L. R. 13 I. A. 134.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Heaton.

GANGABAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, v.
BASWANT BIN BALLAPPA (ORIGINAL DEFENDANT), RESPONDENT.*

1900.
October 6.

Regulation XVI of 1827—Transfer of Property Act (IV of 1882), section 43—Deshgat Vatan—Mortgage—Subsequent enlargement of the mortgagor's estate—Private property—Mortgagee's claim to hold the property against the mortgagor's heir.

A mortgagor of Deshgat Vatan knew that the property which was mortgaged to him was land appurtenant to an hereditary office and inalienable beyond the

* First Appeal No. 75 of 1907.

1909.
DAVLAT-
SINHIJI
(MAHARANA
SHRI)
v.
KHACHAR
HAMIR MON.