

*Special Appeal No. 150 of 1867.*1868.
Sept. 8.

VYASRA'V BA'LA'JI *Appellant.*
 SUBHA'JI NA'RA'YAN *et al.* *Respondents.*

Cause of Action heard and determined—Omission to sue for Portion of Claim—Civ. Proc. Code, Secs. 2 and 7.

A. B. instituted a suit against V. B. to recover possession of one-half of a field. S. N. and B. N., on their application, were made plaintiffs in that suit, but no alteration in the amount either of stamp or claim was made in the plaint.

The Principal Sadr Amín awarded to A. B. one-fourth of the field, and to S. N. and B. N. conjointly he awarded one-fourth, but as to the remaining one-half he passed no decree, as it had not been claimed in the plaint.

S. N. and B. N. thereupon filed a fresh suit to recover possession of their remaining one-fourth of the field, and the Principal Sadr Amín passed a decree in their favour. This decree was confirmed by the Joint Judge.

Held that the decrees of the lower courts were erroneous, and that the claim of the plaintiffs was barred by the provisions of Sec. 2 of the Civil Procedure Code, but leave was granted to them to apply to the court below for a review of the decree passed in the former suit.

THIS was a special appeal from the decree of W. Sandwith, Joint Judge of the District of Dhárwár, in Appeal Suit No. 369 of 1865, confirming the decree of the Principal Sadr Amín of Dhárwár.

Anáji Báláji brought a suit (No. 588 of 1860), in the Court of the Principal Sadr Amín of Dhárwár, against Vyasráv Báláji, to recover possession of one-half of a field (No. 38). Subháji Náráyaṇ and Raghvendra Náráyaṇ applied to be made plaintiffs in that suit. The Principal Sadr Amín granted their application, and by his decree awarded one-fourth of the field to Anáji, and one-fourth of it to Súbháji and Raghvendra conjointly. He did not make any award in respect of the other half of the field, on the ground that the original claim, as laid by Anáji, was only for one-half of the field, and that he could not make any award in respect of that which had not been claimed in the plaint.

Upon this decree being passed, Subháji and Raghvendra filed the present suit against Vyasráv Báláji, to recover their remaining one-fourth share in the same field, alleging

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that they and Vyasráv were related, and that they had a right to one-half of the field, of which one-fourth had already been awarded to them by the Principal Šadr Amín in the former suit.

The defendant answered that there had been a division in the family about fifty or sixty years ago, and that the plaintiffs were not entitled to the field.

On a remand, the Principal Šadr Amín awarded the claim of the plaintiffs, for the reasons given in his decision in the former suit (No. 588 of 1860).

The defendant, Vyasráv, appealed, on the ground that the decision of the Principal Šadr Amín was contrary to law, inasmuch as a decree regarding the field in dispute having been once given in Suit No. 588 of 1860, another suit for the same field between the same parties was inadmissible.

The following is an extract from the finding of the Joint Judge:—

“The technical objections raised under Secs. 2 and 7 of the Civil Procedure Code should not, I think, be any bar to the present claim, inasmuch as it does not appear that the respondents relinquished, or omitted to sue for, the remaining portion of the field. They appear to have been under the impression that they could obtain their whole share in the suit originally instituted by Anáji; and they were not told to increase the value of that suit to the total amount of their interest in the field, or to file a separate action. Since they were made parties to the other suit, proper care should have been taken by the Principal Šadr Amín, and as this does not appear to have been the case, the respondents should not suffer for any omission of a technical nature, which there is no reason to suppose they would have refused to remedy had they been told to do so.”

With reference to the merits of the case, the Joint Judge found that the division asserted by the defendant had not been proved. He, therefore, confirmed the decree of the Principal Šadr Amín.

Thereupon the defendant, Vyasráv, preferred a special appeal to the High Court, on the ground that the decision of the Joint Judge was contrary to law, in that he had, in determining the suit, contravened the provisions of Secs. 2 and 7 of the Code of Civil Procedure.

The case was heard before NEWTON and WARDEN, JJ.

Dhirajlál Mathurádás for the appellant.

Pándurang Balibhadra for the respondents.

NEWTON, J. :—We are reluctantly compelled to differ from the Court below with respect to this case. It appears that one Anáji instituted a previous suit against the special appellant, Vyasráv, to recover the half of a field, and the respondents in this special appeal applied to be made plaintiffs, alleging their title to half the field, but not increasing the value of the stamp on which the plaint was drawn up. The Principal Šadr Amín gave judgment in favour of Anáji for one-fourth of the field, and awarded one-fourth to the present respondents, holding himself barred from decreeing any larger share to them in that suit. They then filed this action, and the same Principal Šadr Amín awarded to them the remaining one-fourth, which they originally claimed. When the special appeal was first brought on, we allowed the respondents a delay of several months, in order that they might ascertain whether they could obtain a remedy by applying for a review of the Principal Šadr Amín's judgment in the former case, but, as they have neglected to take any steps for this purpose up to the present time, we must no longer defer the decision of the case.

Sec. 7 of Act VIII. of 1859 does not need consideration in the case. The respondents did not in the previous action relinquish or omit to sue for any portion of their claim, or in any way fail to bring the whole of the claim before the Court, except by their neglect to increase the stamp on which the suit was brought up to the amount which would have been necessary to cover the increased share of the field respecting which they desired the Court to adjudicate. But Sec. 2 of the Code seems to us to be decidedly against the

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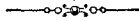
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present action, by providing that the Civil Courts shall not take cognisance of any suit, brought on a cause of action, which shall have been heard and determined by a court of competent jurisdiction in a former suit between the same parties. That the cause of action on which the present suit was brought was heard and determined in the former action is unquestionable, and it is sufficiently evident from the circumstance that the Principal Şadr Amín considered his decree in the previous suit to furnish sufficient ground for the decree now appealed against, and the language of the section referred to is too absolute to permit of any exception being made on the grounds which have been pleaded, that the Principal Şadr Amín admitted in the first suit the right of the respondents to the full share claimed, and that they then failed to obtain a decree for it only through a mistake as to the stamp, which they would have corrected had it been pointed out to them by the Court.

The decrees of the courts below are reversed, and the respondents must bear all costs throughout.

WARDEN, J., concurred.



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Special Appeal No. 505 of 1867.

AHILOJI valad KHANDOJI *Appellant.*
 DONGAR HARICHAND GUJAR *Respondent.*

Mortgage Deed—Secondary Evidence—Acknowledgment of Title—Act XIV. of 1859, Sec. 1., cl. 15.

Where the defendant denied a mortgage to his father set up by the plaintiff, the latter was held at liberty to give secondary evidence of its execution and contents.

Held that an acknowledgment of title, under cl. 15, Sec. 1. of Act XIV. of 1859, need not be made to the mortgagor, or his representatives.

THIS was a Special Appeal from the decision of A. C. Watt, Acting Assistant Judge of Puñá, in Appeal Suit No. 360 of 1865, confirming the decree of the Munsif of Júnar.