

*Regular Appeal No. 12 of 1870.*1871.  
July 17.

BHISTO SHANKAR PA'TIL ..... *Appellant.*  
 RA'MCHANDRA'RA'V RAGHUNA'TH JAHHA'GIRDA'R. *Respondent.*

*Cause of Action heard and determined—Res Judicata—Civ. Proc. Code,  
 Secs. 2, 7, 26, and 387.*

The plaintiff sued to recover certain land, on the ground that he had been forcibly dispossessed of it by the defendant. As the plaintiff did not prove the alleged dispossession his claim was rejected, but the Court suggested that he might recover in a fresh suit, treating the defendant as a trustee, and offering to make certain payments to him. The plaintiff then filed a fresh suit, framing it in the manner indicated by the Court.

*Held* that the latter suit, being based on a different cause of action from the former, was not barred, and that the question at issue between the parties was not *res judicata*.

THIS was an appeal from the decision of J. J. Saldanha, First Class Subordinate Judge at Dhárwár, in Original Suit No. 83 of 1868.

In 1862 the plaintiff instituted an action in the Court of the Principal Şadr Amín of Dhárwár to recover a piece of land, on the ground that the defendant had wrongfully dispossessed him of it. This action was filed in the Şadr Amín's Court at Hubli as Suit No. 504 of 1862, that is to say, after Act VIII. of 1859 came into operation; and the claim was disallowed, with an observation that the plaintiff might bring a fresh suit, resting his claim on the ground of breach of trust, and offering to pay to the defendant the rent, called *júdi*. The Şadr Amín's decree was upheld by the Joint Judge in appeal, and by the High Court in special appeal. The plaintiff, therefore, in 1868, brought the present suit, on the grounds suggested by the Şadr Amín, in the Court of the First Class Subordinate Judge of Dhárwár, who held that it was barred by Sec. 2 of the Code of Civil Procedure.

The appeal was heard, on the 5th of July 1871, by MELVILL and KEMBALL, JJ.

*Anstey* (with him *Bahiravnáth Mangesh*), for the appellant:—The suit is not barred by Sec. 2 of Act VIII. of 1859. Mofussil Judges have no power to pass judgments *in rem*:

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Sec. 2 of the Code must, therefore, be construed, not with reference to the subject-matter of the suit, but with reference to the parties and the particular cause of action involved: Broughton's Code of Civil Procedure, 4th ed., pp. 33 *et seq.* Under Reg. IV. of 1827, Sec. 25, which governed the first suit, it was quite competent to the plaintiff to sue again on a different cause of action, and, the Šadr Amín having given him permission to do so, the present suit cannot be barred. Under Sec. 387 of the Code of Civil Procedure, he is entitled to the benefit of the old Regulations.

*Shántárám Náráyan, contra*:—If the principle of allowing plaintiffs to bring fresh suits for the same relief on different grounds be admitted, there would be no end to suits. In *Chinniya Mudali v. Pillai (c)*, Chief Justice Scotland says: "But I take it to be also clear, as a general rule, both on principle and authority, that when a question of right or title has been adjudicated on in a suit," as I submit has been done in the present case, "the bar of the judgment cannot be avoided by suing on a new form of claim, or on a ground of relief, which might have been, but was not, raised or determined in the former suit, if such claim or ground arises out of, and depends upon, the same right or title as that which was directly in question in the former suit." So Vice-Chancellor Wigram, in *Henderson v. Henderson (d)*, cited in the above case, says that "the plea of *res judicata* applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the *subject of litigation*, and which the parties, exercising reasonable diligence, might have brought forward at the time." Now the first suit brought by the plaintiff was an ejectment suit. An ejectment suit always implies that the defendant holds wrongfully as against the plaintiff; and so he alleged in that suit. He makes the same allegation in the second suit, and asks for the same relief. The sole question is, was not

(a) 7 Calc. W. Rep., Civ. R. 338. (b) 2 Bom. H. C. Rep. 348.  
 (c) 3 Mad. H. C. Rep. 320. (d) 3 Hare 115.

the plaintiff bound to show *all* his title, such as it was, in his first suit; and if he did not do it, was he not himself to blame? Sec. 7 of Act VIII. of 1859 provides: "Every suit shall include the *whole of the claim* arising out of the cause of action," &c. This has been held to apply to property not sued for. The effect of Secs. 2 and 7 is that the plaintiff is bound to bring forward the whole ground of claim for the relief he seeks for. This is the best test to determine the question—that the relief is identical in both the suits.

The plaintiff cannot take advantage of Reg. IV. of 1827, Sec. 25, as there was no pending suit.

With regard to the permission granted by the Şadr Amín to file a fresh suit, I submit, an improvident and illegal permission does not enable a party to sue. [MELVILL, J.:—In *Watson v. The Collector of Rajshahye (e)* the Lords of the Privy Council said: "We have not been referred to any case, nor are we aware of any authority, which sanctions the exercise by the Country Courts of India of that power which Courts of Equity in this country occasionally exercise, of dismissing a suit with liberty to the plaintiff to bring a fresh suit for the same matter:" p. 49.]

*Anstey*, in reply:—The respondent has fallen into the fallacy of confounding possession with title. The former suit was for possession alone. It was held by the Şadr Amín that in that action the present question could not be raised. His judgment is a disclaimer against the decision of any but the question of possession.

When a court of competent jurisdiction, in deciding upon a particular subject-matter, thinks it necessary to go into collateral facts for the purposes of its decision, its opinion on those facts is not conclusively binding in a subsequent suit, which relates to a different subject-matter: *Modhoo Ram v. Boydonath (f)*.

To show that our second suit was pending in 1862, and that we are entitled to the benefit of the old law, I cite *Parrott v.*

(e) 3 Beng. L. R., P. C. C. 48. (f) 9 Calc. W. Rep., Civ. R. 592.

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*Ram Suhay Singh (g)*, in which it was held that a suit must be held to be pending, under Sec. 387 of Act VIII. of 1859, if anything remains to be done which might have been done under the old law, and a party in such a case is entitled to ask the court to proceed under the old law, inasmuch as the application of the new Code would deprive him of a right, in reference to the procedure of the case, which but for the passing of the Code would have belonged to him.

*Cur. adv. vult.*

July 17. MELVILL, J.:—We think that the Subordinate Judge was in error in holding that the cognisance of the present suit is barred by the decision passed in Suit No. 604 of 1862.

A reference to the record of that suit shows that it was instituted to recover the same land which is now in dispute, on the ground that the plaintiff had been forcibly dispossessed by the defendant. The Şadr Amín disallowed the claim, on the ground that the plaintiff had failed to prove the alleged dispossession; but he remarked that some of the evidence appeared to show that the defendant would be bound to restore the land on receiving payment of certain money, and that the plaintiff might bring a suit to recover the land on those terms. In appeal the Joint Judge laid down certain issues, on which he recorded no definite findings, and, after discussing the evidence in a manner unfavourable to the plaintiff, he concluded in the following terms: "If the plaintiff's father gave up his share in the *watan* from inability to pay the *júdi*, and accepted 3½ *márs* for his support, it is to be observed that the plaintiff makes no allusion to these circumstances in the plaint or reply, but alleges that he was forcibly ousted by the defendant, Rámchandra. Of this last, however, there is no evidence, and from what is recorded in the case it does not seem that the plaintiff, Bhisto, has correctly represented his grounds of action; and I concur with the Şadr Amín of Hubli in thinking that the evidence is unsatisfactory, and that the claim is not proved, and I, therefore, direct that the decree be confirmed." The Joint

Judge does not appear to us to have actually decided anything more than the Şadr Amín decided, but simply to have held that the plaintiff could not recover in that suit, because he had failed to make out the case stated in his plaint, namely, a forcible dispossession by the defendant.

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The present suit is brought in the manner suggested by the Şadr Amín to recover the land from the defendant, as a trustee, on payment of certain *júdi* due to him.

Sec. 2 of Act VIII. of 1859 provides 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, or between parties under whom they claim."

Sec. xxvi., cl. 4, of the Code shows clearly that the cause of action in the former suit was the alleged forcible dispossession by the defendant. In the present suit the cause of action (in the sense in which the term is used in the above section) is an alleged breach of trust by the defendant, and this cause of action was certainly not heard and determined in the former suit.

It may be that in the former suit the courts might have laid down an issue as to title, and have determined that the plaintiff had no title, or that the defendant had a title to the land. Such a decision would have been virtually a bar to the present suit,—not perhaps on a strict construction of the words of Sec. 2 of the Code, but on the general principle that the judgment of a court of concurrent jurisdiction, directly upon the point, is conclusive evidence between the same parties upon the same matter directly in question in another court. But in point of fact there was no such issue and no such decision, and the present suit cannot be held to be barred (the points at issue in it not having been decided), unless it be held that a man who brings a suit on one ground of action and fails is necessarily debarred from bringing another suit for the same thing on another ground of action. We cannot find any authority for so general a proposition as

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this. In *Hunter v. Stewart (h)*, which was a case in which the relief sought was in substance the same, and all the matters of fact alleged in the second bill were known to the plaintiff at the period of the first, it was held that the principle of *res judicata* did not apply, because there was not the same ground of claim, or one of the same causes for relief. In that case Lord Westbury said: "It is a different equity. It is indeed true that the case made by the second bill must be taken to have been known to the plaintiff at the time of the institution of the first, and might then have been brought forward; and it may be said, therefore, that it ought not now to be entertained. But I find no authority for this position in civil suits; and no case was cited at the bar, nor have I been able to find any, in which a decree of dismissal of a former bill has been treated as a bar to a new suit asking the same relief, but stating a different case, giving rise to a different equity."

We think this case must be remanded for a decision on the merits, and that the defendant should bear the costs of this appeal.

*Reversed and remanded.*

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Regular Appeal No. 21 of 1869.

LA'LJI UKHEDA' *et al.* ..... *Appellants.*  
JOWBA' DOWBA' and THE COLLECTOR AND  
MAGISTRATE OF KHA'NDESH ..... *Respondents.*

*Jurisdiction—Order by Magistrate for removal of Building, &c. from public place—Suit to establish Right—Entertainment of Suit—Crim. Proc. Code, Secs. 308 and 311.*

The concluding clause of Sec. 311 of the Code of Criminal Procedure, though it prevents the Civil Courts from entertaining a suit to restrain a Magistrate from carrying out an order made under Sec. 308, or a suit for damages against the Magistrate or any other person in carrying out such order in the manner provided by law, does not bar a person against whom such an order has been carried into effect from instituting a suit to prove that land declared by the Magistrate to be public is his private property.

THIS was an appeal from the decision of the Honorable G. A. Hobart, District Judge of Khándesh, in Suit No. 6 of 1868.

(h) 8 Jur. 317, 318.