

1871.  
BHISTO S.  
PA'TIL  
v.  
RA'MCHAN-  
DRA'RA'V B.  
JAHAGIRDA'R.

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.*

July 17.

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.

The facts of the case were as follows :—

On the 9th of January 1867, the Magistrate of the District of Khândesh, under Sec. 308 of the Code of Criminal Procedure, ordered the plaintiffs, Lálji and Málji, to remove certain woodwork erected by them, within four days from the receipt of the order, or to show cause why the order should not be enforced, it appearing to the Magistrate that the plaintiffs' woodwork was an unlawful obstruction to a public thoroughfare. The plaintiffs took no notice of this order, and the Magistrate caused the woodwork to be removed.

On the 2nd of September 1868, the plaintiffs brought this suit to recover from both the defendants, Jowbá and the Magistrate, possession of a piece of ground, and from the latter alone Rs. 20 as damages caused to them by his removal of the woodwork alluded to above, which had been erected by them upon a part of this ground.

The defendant Jowbá answered that the ground claimed had been purchased by him from the Collector and Magistrate at a public auction held by him in 1868.

The Collector and Magistrate stated that the land, being waste, had been sold by him to the defendant Jowbá by auction, at which the plaintiffs, though present, raised no objection; and that the woodwork had been removed because it was an obstruction to a public thoroughfare.

The District Judge rejected the claim, as he considered it not proved on the evidence.

The appeal was heard by MELVILL and KEMBALI, JJ.

*Dhirajlál Mathurádas*, for the respondents, contended that the suit would not lie—(I.) Because it would, if successful, in effect reverse the Magistrate's order under Sec. 308 of the Code of Criminal Procedure, contrary to the provisions of Sec. 311 and the provisions of Sec. 1 of the Code of Civil Procedure: *Ujalamayi Dasi v. Chandra Kumar Neogi (a)*.

*Shántárám Náráyan*, for the appellants, contended that there was nothing in the sections quoted to prevent the

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(a) 4 Beng. Law Rep., F. B. R. 24.

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plaintiff from suing in a civil court to establish his right to the land in question: *Ram Shodoy Ghose v. Juttadharee Holdar (b)*. He also cited *Reg. v. Dalsukram Haribhai (c)*.

MELVILL, J.:—A preliminary objection was taken by the respondents in this case, that the cognisance of the suit is barred by Sec. 311 of the Code of Criminal Procedure. We do not think that the provisions of the last para. of that section have any further effect than to bar a suit to prevent a Magistrate from carrying out an order made under Sec. 308, or a suit for damages on account of anything done by the Magistrate or any other person in carrying out such order in the manner provided by law: Reg. App. No. 11 of 1865, decided 8th October 1866, 4 Beng. Law Rep., F. B. R. 24. We do not think that it prevents 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 a public thoroughfare is his private property.

The Court then proceeded to review the evidence, and reversed the decree of the court below, with costs on the second defendant, the Collector and Magistrate of Khândesh.

*Decree accordingly.*

July 18.

*Special Appeal No. 128 of 1871.*

KA'KA'JI' SAKHA'RA'M ..... *Appellant.*  
 GOVIND GANESH et al. .... *Respondents.*

*Jurisdiction—Special Appeal—Mesne Profits, Suit for—  
 Small Cause Court.*

A suit for the recovery of mesne profits (not amounting to Rs. 500) is cognisable by a Court of Small Causes.

A special appeal does not lie in such a suit.

THIS was a special appeal from the decision of E. Cordeaux, Acting Assistant Judge of the Konkan, confirming the decree of the Subordinate Judge of Sinnar.

(b) 7 Calc. W. Rep., Civ. R. 95. (c) 2 Bom. H. C. Rep. 384 (2nd ed.)