Regular Appeal No. 59 *of* 1870.

1871. Dec. 11.

KA'KA'JI bin RA'NOJI *et al.* .....*Appellants.*
BA'PUJI bin MA'DHAVRA'V .....*Respondent.*

Civ. Proc. Code, Sec. 7—Suits instituted before Code came into operation—Mesne Profits—Costs.

In applying the provisions of Sec. 7 of the Code of Civil Procedure, the first thing to be considered is whether the cause of action in the second suit is the same as the cause of action in the first. If the cause of action be the same, the second suit is barred in respect of any portion of the claim omitted from the first suit; but not otherwise. Accordingly, where the plaintiff, as a member of an undivided Hindú family, sued for a share of a particular portion of the family property, leaving the rest undivided, and his suit was rejected, as it had not been brought for his whole share, it was held that this suit was no bar to a second suit to have the whole property divided, as the causes of action in the two suits were entirely distinct.

In a suit for partition of hereditary property, it is not necessary for the plaintiff to trace back his genealogy to the original grantee, and to prove that no other descendant of that grantee except himself and the defendants are in existence. It is sufficient for him to show that he and they are the only representatives of the person who last held the property. If others claim a share, it is for them to show that they have any rights which operate to restrict the plaintiff's *primâ facie* right to treat such property as the exclusive property of himself and the defendants.

There is no objection to the award of mesne profits or interest during the whole period for which a suit is pending, however long that period may be.

THIS was an appeal from the decree of Kṛishṇáji Vishṇu Limáye, First Class Subordinate Judge of Ahmednagar, in Suit No. 1897 of 1861.

The plaintiff, Bápuji, in 1856 brought a suit against the defendant Kákáji and three others, to recover his third-share from a half of the *deshmukhi* allowances in the *prayaṇá* of Sinnar, and reserved to himself the right of suing for a share of similar allowances in other places. This suit was ultimately rejected by the late Ṣadr Court, on the ground that the plaintiff was bound to sue for his whole share. He, accordingly, brought the present suit in September 1861 for his whole share in the entire ancestral property in the possession of himself and his four cousins.

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The defendants pleaded that the claim was barred; that the *watan* was not divisible, according to the custom of the family; and that there were thirteen other persons interested in the *watan* who had not been joined in the suit.

These latter persons were subsequently made defendants.

The First Class Subordinate Judge found the suit not to be barred, and awarded the share claimed, with mesne profits from the date of suit to the date of execution.

The appeal was heard by MELVILL and KEMBALL, JJ., on the 4th of December 1871.

Shántárám Náráyaṇ, for the appellants:—The suit is barred by Sec. 7 of Act VIII. of 1859. This Act was passed in May 1859, although it did not come into operation till January 1862. The suit was filed in September 1861; and Sec. 7 of the Act applies to it (*a*). In the first suit the plaintiff sued only for his share in the Sinnar district allowances, and omitted to sue for, or relinquished, his share in the other districts. Whether he did so from an accidental error or a voluntary omission does not matter, as has been held by the Privy Council in the above case. Besides the plaintiff and the defendants, there are other sharers in the allowances; and the plaintiff was bound to trace back his genealogy to the original grantee, and show who were the different parties entitled, and what was the share of each. The defendants are members of the elder branch of the family, and as such entitled, according to a custom in their family, to the enjoyment of the whole *watan*, the other members having no other claim than that of maintenance. The court below has awarded mesne profits for a period longer than six years, which is opposed to the practice of this court. The plaintiff has included in his plaint certain villages which are in his own possession, and has thereby increased the costs improperly against the defendants.

Dhirajlál Mathurádás, Government Pleader, for the respondent:—The Code of Civil Procedure, though it was

(*a*). *Moonshee Buzloor Ruheem* v. *Shumsoonissa Begum*, 11 Moo. Ind. App. 551; 8 Calc. W. Rep., P. C. 3.

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passed in May 1859, came into operation in January 1862, more than three months after the institution of this suit, and is, therefore, not applicable. Even if it be applied, Sec. 7 of the Code is no bar to its maintenance. The causes of action in the two suits are distinct. The plaintiff has shown that the *watan* of which a share is claimed by him was last held by Mádhavráv, the common ancestor of himself and the persons whom he originally sued. As to the family custom set up, it has been held by the High Court that it cannot be recognised (*b*). With regard to the mesne profits, there is no law restricting the award to a period of six years after the institution of a suit. Once an action is filed, the parties are in the hands of the court, and they ought not to suffer for any delay caused in the progress of a suit. The plaintiff has properly included in his plaint the villages in his own possession, for he is suing for a general partition of the whole family property.

Cur. adv. vult.

December 11. MELVILL, J.:—This is a suit for partition of the land and emoluments attached to a *deshmukhi watan*.

A preliminary objection has been taken that the claim is in part, if not entirely, barred by Sec. 7 of Act VIII. of 1859, the plaintiff having in a former action sued for a portion of the lands which he now claims.

The former suit was brought in 1856, and was decided by the Ṣadr Diváṇi Adálat in 1857. The plaint has not been produced before us, but from the judgment it appears that the plaintiff sued the present appellants to recover from them the third-share of the *deshmukhi haks* in the *pragaṇá* of Sinnar, at the same time reserving to himself the right to sue at a future time for a share of the same allowances in other *pragaṇás*. The final judgment of the Ṣadr Adálat was in these terms:—"The Court, concurring in opinion with the Judge who admitted this special appeal, that the Zillá Judge ought to have read exhibit No. 14 in conjunction with exhibit No. 39, and that Bápu is not thereby precluded

(*b*) *Basvantráv* v. *Mantúppá*, 1 Bom. H. C. Rep., Appx. XLII.

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from suing for his share of the *watan*, find, however, that he has only sued for a portion of his share, and not for his whole share, which it is requisite for him to do, as no division has yet taken place in the family. The Judge's decree, therefore, so far as it throws out Bápu's claim as being improperly brought, is affirmed."

From the judgment it is clear that the Ṣadr Adálat declined to enter into the merits of the claim. They rejected the claim on the ground that an action in that form was not maintainable, and they at the same time pointed out to the plaintiff the proper course for him to adopt.

He has now adopted this course, and it would certainly be strange, and but little creditable to our system of procedure, if we were obliged to hold that the present action is barred by the former suit, in which nothing was decided except that the present action was the remedy to which the plaintiff should resort.

There has been much argument at the bar on the question whether Sec. 7 of Act VIII. of 1859 can affect this case, seeing that the former suit was brought and decided before the Code of Civil Procedure was enacted. The Judicial Committee of the Privy Council seem* to have held the section applicable under such circumstances, and we are informed that a Division Bench of this court followed that precedent in S. A. No. 314 of 1866 (*c*), decided on the 26th August 1867. Were it necessary for us to decide this question, the great respect which we feel for every decision of the Privy Council would induce us (if we were satisfied that it was their deliberate intention to give retrospective effect to a provision of a statute affecting not only procedure, but rights) to find the best reasons we could for a decision which we should feel bound to follow, but which, standing, as it now does, unexplained, appears to be not easily reconcileable with the established rules for the construction of

* *Moonshee Buzloor Ruheem* v. *Shumsoonissa Begum*, 11 Moo. Ind. App. 551 ; 8 Calc. W. Rep , P. C. 3.

(*c*) *Malhárráv* v. *Krishnáráv*.

statutes. But we are happy to be spared the necessity of so doing, as we are of opinion that, even if it be admitted that Sec. 7 is applicable, it does not in any way bar the present suit.

That section says that "every suit shall include the whole of the claim arising out of the cause of action. * * * * If a plaintiff relinquish, or omit to sue for, any portion of his claim, a suit for the portion so relinquished shall not afterwards be entertained."

Now, evidently the first thing to be considered, in applying this section, is whether the cause of action in the second suit is the same as in the first. If so, but not otherwise, the second suit is barred in respect of any portion of the claim which was omitted from the first suit.

In the present case it seems quite clear to us that the plaintiff's claim does not arise out of the cause of action which was put forward in the former suit.

In the former suit the plaintiff's supposed cause of action was a right, as a member of an undivided family, to demand a share of a particular portion of the family property, and to leave the rest undivided. In the present suit, his cause of action is a right to have the whole family property (whether held by himself or others) brought together and divided. So far from these two being the same cause of action, they present all the difference which is expressed by saying that the one is a cause of action, and the other is no cause of action. If the former suit had been for a general partition, and the plaintiff had omitted to include in his claim the whole of the family property, there would have been some ground for the appellant's objection.

As was suggested by Mr. Justice Kemball in the course of the argument, the case is analogous to that of one of several partners who sues another partner for his share of the profits arising out of one particular partnership transaction, and is told that his proper course is to sue for a dissolution and an account. Could it be said that a suit for dissolution, and a general distribution of assets and liabilities

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among all the partners, was founded on the same cause of action as a suit of which the object was a continuance of the partnership, and the settlement of a single item in dispute between two of the partners?

Being of opinion that the cognisance of the suit is not barred by Sec. 7, we have further come to the conclusion that the plaintiff is entitled to succeed on the merits.

The suit was originally brought against the four appellants, who, together with the plaintiff, are the only descenddants of Mádhavráv, by whom it is admitted that the whole *watan* was held. The defence of the appellants was that there were a number of other sharers, remote relatives, and representatives of two other branches of the family; and it is contended that the plaintiff was bound to trace back his genealogy to the original grantee of the *watan*, and to prove that no other descendants of that grantee, except himself and the appellants, are in existence. We do not think that he is under any such obligation. *Primâ facie* it was sufficient for him to show that the whole *watan* was held by Mádhavráv, and that he and the appellants are the only representatives of Mádhavráv. Twelve other persons named by the appellants as co-sharers have been joined as defendants, and it is for them to show that they have any rights which operate to restrict the plaintiff's *primâ facie* right to treat as the exclusive property of himself and the appellants property which has for a great number of years been managed exclusively by them and their common ancestor Mádhavráv.

The case set up by the appellants is that, in accordance with a family custom, they, as representatives of the eldest branch of the family, are entitled to the exclusive management of the *watan*; that the plaintiff and the distant relatives who have been joined as defendants are entitled to maintenance, and nothing more; and that the plaintiff, having had three villages assigned to him for his maintenance, has no claim to anything more. There is no proof whatever of the existence of any such family custom. Of the twelve persons named by the appellants as co-sharers, ten only have appeared. Of these, three (witnesses Nos. 292, 294, and 295) know

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nothing about any maintenance having been paid out of the *watan* to their branch of the family. The rest declare that payments have been made to them for maintenance, and they are to a certain extent corroborated by the plaintiff's witness No. 223. Receipts for these alleged payments are also produced by the appellants (exhibits 94 to 141). We consider that this evidence is not sufficient to establish any right of these defendants to share in the *watan*. The receipts have all been given since the plaintiff's claim to a third share was first made, and the wording of the receipts clearly shows that at the time when the receipts were written, it was in contemplation to use them for the purpose of resisting the plaintiff's claim. They are, therefore, of little or no value. The statements of the defendants as to the payments made to them are very loose and vague. They do not say that they received any fixed annual sum for maintenance, but that when they wanted ten or twenty rupees for their expenses they received it from the first appellant or his father. Considering the extreme care which the sharers in a *watan* ordinarily take to define and to exact their full rights, we can hardly regard such a statement as credible. Such a primitive mode of dividing the proceeds of the *watan* might be intelligible if the defendants had been living together as a united family, but in point of fact they have been scattered about in different parts of the country for years, if not for generations. Their names are not entered in the Government books as sharers in the *watan*, and they have never had any voice in the management of the *watan*. The appellants now put forward these defendants as sharers in the *watan;* but it is shown that during the interval between the suit of 1856 and the present suit the appellants negotiated with the plaintiff on the basis that they and the plaintiff were the sole proprietors of the *watan*. On the whole, we do not think there is any satisfactory proof either that there are any sharers in the *watan* except the plaintiff and the four appellants, or that any payments have been made by the appellants for which they are entitled to credit in the calculation of mesne profits.

The defendants who were subsequently joined in the suit did not appeal against the decision of the Subordinate Judge;

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but at the last moment, when the Pleader for the appellant had almost concluded his reply, an application was made on their behalf that they might be joined as appellants. This was, of course, refused; but they have not, in fact, been at all prejudiced by the refusal. They have had the full benefit of Mr. Shántárám's able argument, the whole object of which was to establish the rights of those defendants whom he did not nominally represent, and thereby to procure the rejection of the claim against those for whom he appeared.

We think that the plaintiff is entitled to the share claimed by him, and to mesne profits from the date of suit till the date of execution. Mr. Shántárám has contended that mesne profits cannot under any circumstances be awarded for a longer period than six years; but we know of no provision of any law of limitation which prevents a court from awarding mesne profits or interest during the whole period for which a suit is pending, however long that period may be. We should be very sorry if any penalty of the kind were imposed upon the victims of the dilatory action of our courts. Another objection which Mr. Shántárám has taken in the matter of costs appears to us equally unsustainable. He contends that, in his valuation of the suit, the plaintiff ought not to have included the value of the three villages in his possession, since he was not suing for a share of those villages; but in fact he was suing for his share of the whole family property, and it was both right and necessary that he should bring into account, as the subject-matter of this suit, the whole of the property, whether held by himself or the defendants.

We affirm the Subordinate Judge's decree, and award mesne profits (to be determined at the execution of the decree) from the date of the institution of the suit till the date of execution, with costs throughout on the appellants.

Decree accordingly.