1874.
July 28.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 482 of 1873.

SHRIDHAR VINA'YAK .....*Appellant.*

NA'RA'YAN VALAD BA'BA'JI and another ...*Respondents.*

Res judicata—The Code of Civil Procedure, Sec. 2.

Failure in a suit of simple ejectment does not bar a subsequent suit for redemption, notwithstanding that the defendant had asserted the existence of his mortgage in the former suit.

THIS was a special appeal from the decision of Edward Cordeaux, Assistant Judge at Puná, reversing the decree of the Subordinate Judge of Puná.

The material facts are sufficiently stated in the judgment.

The special appeal was heard by WEST and LARPENT, JJ.

Bahiravnáth Mangesh for the special appellant:—The suit which the plaintiff's father in February 1866 filed against the father of my client, Vináyak, was brought with the object of removing his obstruction and recovering possession of the house in dispute. In form it was an ejectment suit, but from the first Vináyak grounded his defence on his mortgage, of which therefore the plaintiff's father had full knowledge. In *Soorjomonee Dayee* v. *Suddánund Mohápatter* (*a*) their Lordships of the Privy Council, adverting to Section 2 of the Code of Civil Procedure, lay down "that the term '*cause of action*' is to be construed with reference rather to the substance than to the form of action" (*b*). Further on their Lordships go on to say "It has probably never been better laid down than in a case which was referred to in the 3rd volume of Atkyns, *Gregory* v. *Molesworth*, in which Lord Hardwicke held that where a question was necessarily decided in effect, though not in express terms, between the parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the

(*a*) 20 Calc. W. R. 7 Civ. Rul. (*b*) P. 339.

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greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the *Duchess of Kingston*. If the plaintiff's father had more than one title to depend on, he was bound to bring them all forward in the previous suit, as was held by the Bengal High Court in *Dudsar Bibee* v. *Shakir Burkundáz* (*c*). He cannot be allowed to keep back one, and then, years after, to bring a fresh suit on the ground that he had still a right in reserve : *Brojo Láll Roy* v. *Khettur Náth Mitter* (*d*).

Dhirajlál Mathurádás, Government Pleader, for the special respondents :—Our father's suit was one for ejectment ; our present suit is to redeem as mortgagors. The causes of action are entirely different, and there is no objection to the present suit being maintained. It was held in *Bhisto Shankar Pátil* v. *Rámchandra R. Jakágirdar* (*e*) that the second suit being based on a different cause of action from the first, was not barred. The defendant relies on *Soorjomonee Dayee* v. *Suddánund Mohápatter* (*f*) ; but there the same question had been really adjudicated on previously. In *Hunter* v. *Stewart* (*g*) Lord Westbury said : "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." With regard to the case of *Dudsar Bibee* v. *Shakir Burkundáz* (*h*), I submit it is bad law.

The following cases were also referred to in the course of the argument :—

Sreemuthoo Raghoonadhá Perya Oodyá Taver v. *Khattama Nauchear* (*i*) ; *Vairicharlá Surya Narávaná* v. *Nadiminti Bhagávat Patánjali* (*j*) ; *Shri Shri Shri Rámá-*

(*c*) 15 Calc. W. R. 168 Civ. Rul. (*d*) 12 *Idem*. 55. Civ. Rul.
(*e*) 8 Bom. H. C. Rep. 89 A. C. J. (*f*) *Vide Supra*.
(*g*) 8 Jur. 317 S. C. 31 L. J. (N. S.) Ch. 346, see p. 350. (*h*) *Vide Supra*.
(*i*) 10 Calc. W. R. 1, P. C. (*j*) 3 Mad. H. C. Rep. 120.

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chandrá v. *Darvádá Rámáná Chándiri* (*k*); *Gopaláyyan* v. *Raghupáti Ayyán* (*l*); *Chiniyá Mudáli* v. *Venkatá Chellá Pillái* (*m*); *Doorga Churn* v. *Kassy Chunder Moitree* (*n*); *Kádir Buksh* v. *Golám Ali* (*o*), and *Sadu bin Mánáji* v. *Báizá kom Mánáji and another.* S. A. 361 *of* 1873, decided by MELVILL and NA'NA'BHA'I, JJ., on the 1st of April 1874.

Báhiravnáth, in reply, referred to the following additional authorities:—*Mohidin* v. *Muhammad Ibráhim* (*p*) and *Maktum valad Mohidin* v. *Imám valad Mohidin* (*q*).

WEST, J.:—The plaintiffs' father Bábáji, having purchased the rights of one Datto at an execution sale on a money-decree, sought to obtain possession of the house he had bought as Datto's. When this house had been attached by the judgment-creditor, Vináyak, the defendant's father, who was in possession, had endeavoured to raise the attachment on the ground that he held under a deed of mortgage and conditional sale, which had long ago become absolute. His application was disallowed on the ground that his rights as mortgagee would not be affected by the sale of Datto's interest in the property. Vináyak was not satisfied with this order, and brought a suit against Datto's judgment-creditor and Bábáji, who had meanwhile become the purchaser in execution, to establish his right to the house. The final decision in this suit rested on the grounds, first that Vináyak had not established the mortgage and conditional sale, on which he relied, as the contractual basis of his right, the document, adduced by him as evidence of the transaction, being inadmissible because unstamped, and secondly, that he had failed to make out a title by prescription through *bonâ-fide* possession as owner for 30 years.

In this position of affairs, Bábáji, having tried in vain to get possession of the house under Section 269 of the Code of Civil Procedure, instituted a regular suit for the eject-

(*k*) *Idem.* 207. (*l*) *Idem.* 217. (*m*) *Idem.* 320.
(*n*) Marshall 539. (*o*) 9 Calc. W. R. 90 Civ. Rul.
(*p*) 1 Mad. H. C. Rep. 245. (*q*) 10 Bom. H. C. Rep. 293.

ment of Vináyak. By the Munsiff his title was found proved, and this adjudication was confirmed by the Joint Judge in Regular Appeal, on the ground that the title set up by Vináyak had been conclusively pronounced against by the decree in the previous suit. On a special appeal, however, being made by Vináyak's son, Shridhar, the High Court reversed the judgments of the courts below, on the ground that though Vináyak had failed in the previous suit to establish an adverse possession against Bábáji's predecessor in title extending to 30 years, yet the decision showed that he had been in possession for more than 12 years, which was sufficient to raise a bar to Bábáji's suit according to the provisions of the Limitation Act. It was undoubtedly an erroneous application of the principle of *res judicata* when the Joint Judge made Vináyak's failure, as plaintiff, on the particular ground of right selected by him, a reason for denying that he could have any right at all as against his former defendants; but according to our view, it was perhaps an oversight when from the negative judgment that Vináyak had not been in possession for 30 years, the late learned Chief Justice of this Court deduced the affirmative conclusion as binding on the parties that Vináyak had been in possession for more than 12 years. The question and the sole question as to length of possession in the previous suit had been whether it had continued for 30 years. The defendant was not concerned to prove that it had not lasted for 13 or even for 29 years, and the decision of the Court was *res judicata* only as to the particular point in issue.

The defendant, Vináyak, or his son, Shridhar, could probably, as a matter of fact, have proved his adverse possession for more than 12 years, had such proof, according to the view of the District Court, been useful, or had it not, according to that of the High Court, been superfluous. He had been in possession for many years, and there was no document of title presentable in a Court, to which his possession could be referred. But on the day on which the judgment of the Court of first instance was delivered,

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Vináyak having got his original mortgage of 1830 stamped, filed it in support of his defence. It had thus become admissible in evidence, but could not properly be used in that suit not having been produced at the proper time, and the case was disposed of without reference to it. But by stamping his mortgage, Vináyak, at the same time that he made it a defence of his possession, if he should fail on other grounds, created a new right for Bábáji and his representatives. They, according to the received construction of Regulation XVIII. of 1827, Section 14, were third parties, against whom, as purchasers of the equity of redemption, the mortgage became an effectual instrument from the date on which it was stamped. Having failed in their suit for dispossession of Shridhar as in without any title, Bábáji's sons now seek to redeem the mortgage, which Shridhar himself has made the basis and limit of his rights.

The contention for the defendant Shridhar now is that as he from the first asserted a mortgage with a clause of conditional sale as the foundation of his right, Bábáji was fully apprized of his case and was bound in the former suit to bring forward every circumstance, by which his own claim to possession could be supported, and of which he was at the time aware. This view prevailed with the Subordinate Judge, who held that the present suit for redemption was barred by Section 2 of the Code of Civil Procedure. The Assistant Judge, on the other hand, considering the cause of action to be quite distinct in this suit from that in the previous one, reversed the judgment of the Subordinate Judge. It is against this reversal that appeal is now made.

The principle of *res judicata*, simple enough in its statement, is one that seems to present considerable difficulty in its application. We have according been referred to a great number of decisions of the Hight Courts, which it would be hard, perhaps impossible, to reconcile in all respects with each other. The principal variances have arisen from different views of what did not or did constitute for the

purposes of a second suit a ground of right identical with the one relied on in a previous suit between the same parties. In the case of *Dadsar Bibee* v. *Shakir Burkundáz and others* Bayley and Mitter, JJ., ruled that after suing as a donee, the plaintiff could not sue again for the same property as heir. His whole title, whatever it might be, ought, those learned Judges thought, to have been brought forward at once. The same view is taken in *Brojo Láll Roy* v. *Khettur Náth Mitter*, and that all the grounds of suit must be brought forward at once is repeated in *Premánand Gossáme* v. *Ram Churn Deb and another* (*r*). On the other hand, Lord Westbury's *dictum* in *Hunter* v. *Stewart*, that knowledge of a second ground of right, when a first one is relied on in a suit, does not prevent that second ground being afterwards made the basis of a second suit seeking the same relief as the first, has been fully adopted by this Court in *Bhísto* v. *Rámchandra*, and has been recognized in other cases. In the case of *Woomatárá Debiá* v. *Unnopoorna Dássee* (*s*) the Privy Council may at first sight seem to have departed from the principal enunciated by Lord Westbury, but there the whole cause of action was considered as having arisen out of the decision of the revenue authorities. The transaction between the parties had been such as for juridical purposes should properly be regarded as one, and on that one transaction several suits between the same parties could not proceed. As is said by Cleasby, B., in *Death* v. *Harrison* (*t*) "though the particular claim.....was not in controversy [in the previous suit], the subject-matter, out of which it arose, was," and in such circumstances the allowance of repeated suits would lead to vexatious litigation. In the case of *Stevens* v. *Tillett* (*u*), Willes, J., says that "matter in respect of which no evidence was given on the former occasions may be inquired into," and the matter must be regarded as essentially different when it did not originate in the same transaction and when it constitutes, as averred, a

(*r*) 20 Calc. W. R. 482 Civ. Rul. (*s*) 11 Beng. L. R. 158.
(*t*) L. R. 6 Exch. 15, see p. 19. (*u*) L. R 6 C. P. 147, see p. 174 *ad fin.*

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wholly different right in the plaintiff giving rise to a different duty on the part of the defendant. In Special Appeal 488 of 1873 it is said that a plaintiff, suing for ejectment, cannot in that suit obtain a decree for redemption of a mortgage, of which he had notice when he filed his suit, but it is not said that he is debarred from enforcing redemption in another suit. The relative rights and duties of owner and trespasser on the one hand and of mortgagor and mortgagee on the other are wholly different, and failure in a suit of simple ejectment does not in our opinion in any way bar the plaintiff in a subsequent suit to enforce his right to redeem as mortgagor. Least of all can this be so when the mortgage being in the defendant's hands was not at the institution of the previous suit stamped so as to be a valid instrument, though subsequently it has acquired validity.

We, therefore, confirm the decree of the Assistant Judge with costs.

Decree confirmed.