

APPELLATE CIVIL.

(28)

Before Mr. Justice West and Mr. Justice Pinhey.

HAJI HASAM IBRAHIM (ORIGINAL PLAINTIFF), APPELLANT, v. MAN-
CHARAM KALLANDAS AND OTHERS (ORIGINAL DEFENDANTS), RES-
PONDENTS.*

1878
December 4.

Res Judicata.

The plaintiff purchased certain lands from the heirs of a Musulman proprietor the defendant M. purchased other lands of the same estate from their co-heirs.

In 1864 the plaintiff sued to have the sale to the defendant M. set aside. In the course of the suit, however, he admitted that he was in possession of all the lands he had brought and his claim was therefore rejected.

In 1869 the plaintiff brought a suit, in the form of a partition-suit, paying for demarcation of the lands brought by the defendant M. and himself. It was treated as substantially an ejectment-suit, and rejected on the same grounds as the first suit, namely, his admission as above stated. In appeal to the High Court it was urged by the plaintiff that, since the date of his admission in the first suit, some of his tenants had attorned to the defendant M. and thus deprived him of part of his land; but as this allegation had not been made in his plaint, the Court refused to allow the point to be raised.

The present suit was founded on the attornment of plaintiff's tenants to the defendant M. alleged to have been made in 1868. The plaintiff contended that although the cause of action was in existence when the second suit was brought in 1869, yet that it had not been adjudicated upon, and that in appeal he had been prevented from arguing it.

Held that the plaintiff was estopped. The causes of action in the second and third suits were identical. Having striven to establish his title by one means and failed, the plaintiff could not establish the same title by other means which were equally at his command when the previous suit was instituted, and which were so connected with the grounds on which he in that suit relied, that they ought to have been submitted together for the consideration of the Court.

In determining whether a question is *res judicata*, the Court will have regard to the substance of the previous suit rather than its form. If the cause of action is based on a right identical in both suits, or on the same group of facts infringing that right, the second suit is barred.

THIS was an appeal from the decision of Rav Bahadur V. M. Bhide, Subordinate Judge, First Class, of Surat.

Dec. 4.—*Branson* with him *Shantaram Narayan*, for appellant.

Nanabhai Haridas for respondent.

The judgment was delivered by

WEST, J.—This is the third of a series of suits in which the

* Regular Appeal, No. 31 of 1878.

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plaintiff has sought to dislodge the defendant Mancharam from certain lands acquired by purchase from heirs of a Musalman proprietor, the plaintiff himself having purchased other lands of the same estate from their co-heirs. In the first suit the plaintiff Haji Hasam sought to have the sale to the defendant Mancharam set aside; but, as he admitted that he himself was in actual possession of all that he had purchased, his claim was on that ground rejected. In the second suit he stated that he and Mancharam being vendees from different co-heirs, their respective lands had not been demarcated according to the shares of their respective vendors, and he asked that such a demarcation should be made. This was, in form, a suit for partition. The plaintiff having failed in his previous suit, and having admitted that he was in possession of what he had purchased, adopted this device of a suit for division as the only one upon which he could hope to succeed under the circumstances. It was clear, however, that being in sole possession of one part of the estate, while Mancharam was in sole possession of another, Haji Hasam desired that some land should be transferred from the latter to the former. As the Subordinate Judge said: "This clearly shows that plaintiff now wishes to affirm that he is not in possession of all that he had purchased by his deed," as a ground for getting his holding enlarged at the expense of Mancharam's. In this, the Subordinate Judge held, he could not succeed in the face of his admission in the previous suit, which showed that he was already in possession of as much as he has entitled to.

On appeal this decision was confirmed by the High Court. At the hearing of the appeal it was urged that, since the admission made by the plaintiff in the earlier suit, some of his tenants had attorned to the defendant, and thus deprived him of possession of part of his land; but this not having been stated in his plaint, which had not alleged any dispossession of lands actually acquired by the plaintiff, the Court refused to allow the question to be raised. As to the substance of the proceeding, the Court agreed with the Subordinate Judge. "This suit," their Lordships say, "appears, under the guise of a partition-suit, to have been an attempt on the part of the plaintiff to wrest from the possession of his neighbours a portion of their property, and to

have been rightly dealt within the Court below as such, and not to have been regarded as in reality a partition-suit.”

In this third suit the plaintiff grounds himself once more on the alleged attornment of his tenants (of whom defendant No. 2 is one,) in June 1868, to the defendant Mancharam. His second suit was brought in 1869, so that the cause of action, which arose to him from the attornment was in existence when that suit was brought. But this particular cause of action, the plaintiff contends, was not then adjudicated on; he was, indeed, prevented in appeal, from arguing on it; and he relies on the case of *Hunter v. Stewart*(1) and the cases in which it has been followed as authorities for his being at liberty to bring this new suit on what he contends is a different cause of action.

The case of *Kashi Kishore Roy Chowdhri v. Kristo Chander Sandyl Chowdhri*(2) is an authority for the proposition that a plaintiff must, in suing, bring forward all his ground of right to the relief he seeks; failing which he cannot be allowed by successive modifications of his case to harass and impoverish his antagonist, but must be taken to have abandoned the causes on which he did not choose to rely, so as to preclude him from asserting them in any fresh action. Thus expressed, the principle is not apparently, reconcileable with the case of *Hunter v. Stewart*, or perhaps with those decisions of this Court in the 8th and 11th volumes of its Reports(3) to which Mr. Branson has directed our attention; but there is a sense in which it may be accepted consistently with these cases, and if the cases are attentively considered, we think that by the same method a general harmony may be established amongst the decisions. In the case of *Naro Hari v. Anpurnabai*(4) this subject is discussed at some length, and the chief precedents are referred to. While the authority of *Hunter v. Stewart* is full admitted, it is recognized, also, that the cause of action may be the same, though the form of action on the second occasion is different; and the “cause of action,” it is said, “is to

(1) 8 Jur. (N.S.) 317. S.C. 31 L. J. Chan. 346. (2) 22 Calc. W. Rep. 464, Civ. Rul.

(3) See *Bhiso Shankar Patil v. Ramchandra Raghonath*, 8 Bom. H.C. Rep. 89 A.C.J. and *Shridhar Vinayak v. Narayan*, 11 Bom. H.C. Rep. 224.

(4) Reg. Ap. No. 55 of 1873. See Printed Judgments for 1874, page 218.

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be regarded as the same if it rests on facts which are integrally connected with those upon which a right and an infringement of the right have already been once asserted as a ground for the Court's interference." Reference may be made, also, to the remarks of Lord Cairns, C., in *Lockyer v. Ferriman*(1) and of Blackburn, J., in *Newington v. Levy*(2) In the present instance it is said that the infringement of right relied on was not even alleged in the previous suit; but if we look to the substance of that suit, rather than its form, we find that it rested on an assertion that the defendant had more and the plaintiff less land than was the just property of each, and sought a rectification of the alleged injustice. In the present case, also, the plaintiff says that the defendant Mancharam possesses too much, and that he himself possesses too little. That this excess and this defect are now ascribed to particular acts as a means, does not, in our opinion, constitute a really different case or a different cause of action. That cause in the one suit as in the other is that plaintiff, vested with a right identical for both cases, is kept by defendant out of what belongs to him. That is not an allegation of a wholly different right or of a wholly different group of facts infringing in this suit from what there was in the former one. The facts are connected in an essential juristic unity, so that, had the plaintiff's whole case been brought forward before, it would not have involved separate investigations. This being so, we think that the plaintiff cannot now sue on the ground merely subsidiary to his main ground on which he seeks to re-open the litigation. Having striven to establish his title to land by one means and failed, he cannot now establish that title by other means which were equally at his command when the former suit was tried, and so connected with the grounds on which he in that case relied that they ought to have been submitted for consideration together.

We must therefore confirm the decree of the Court below with costs.

(1) L.R. 2 Ap. Cas. 519.

(2) L.R. 6 C.P. 180.