

As to the sixth defendant having property liable to division, but not included in that mentioned in the plaint, this fact (if fact it be) affords no ground for dismissing the plaintiff's suit. As the sixth defendant is a party to the suit, the Court in disposing of the case will be competent to make any order in respect of property in his possession that may appear right.

We must reverse the order of the subordinate Court, and remand the case for trial on its merits. Costs to follow the final result.

*Order reversed and case remanded.*

### APPELLATE CIVIL.

*Before Mr. Justice Kemball and Mr. Justice Pinhey.*

BHAU BALAJI (ORIGINAL DEFENDANT), APPELLANT, v. HARI  
NILKANTHRAV (ORIGINAL PLAINTIFF), RESPONDENT.\*

1883  
JANARDAN  
VITHAL  
v.  
A'NANT  
MAHADEV.

1883  
April 17.

*Practice--Relinquishment of portion of claim--Res Judicata--Dekkan Agriculturists' Relief Act XVII of 1879--Mortgagor--Mortgagee--Suit for account merely--Subsequent suit for possession--Code of Civil Procedure, Act XIV of 1882, Secs. 13 and 43.*

Where there has been a suit between an agriculturist mortgagor and his mortgagee for an account merely, a subsequent suit for possession on payment of the money declared to be due is barred under either section 13 or section 43 of the Code of Civil Procedure.

THIS was a second appeal from the decision of R. F. Mactier, Judge of Satara, confirming the decree of the Subordinate Judge of Tasgaon.

The plaintiff, who was an agriculturist, mortgaged a piece of land to the defendant, and borrowed from him various sums of money. The land, under the agreement between the parties, remained in the possession and management of the defendant. The plaintiff sued the latter for a settlement of accounts, and on the 14th of January, 1881, got a decree which declared that the plaintiff owed the defendant Rs. 72-12-0. The plaintiff paid this sum into the Court, and by the present action sued the defendant to recover possession from him of the land mortgaged.

\* Second Appeal, No. 207 of 1882.

1883

BHAU  
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NILKANTH-  
RAY.

The defendant contended that the plaintiff owed him a larger sum, until the payment of which he was not liable to vacate the land, and that this suit was barred.

Both the Courts below held that there was no objection to the maintenance of the present suit, and that as the amount of the debt due to the plaintiff had been fixed by the previous decree, no further inquiry could be gone into. They, therefore, decreed redemption on payment of Rs. 72-12-0. The defendant appealed to the High Court.

*Ganesh Ramchandra Kirloskar* for the appellant.—This suit is *res judicata*. In *Hari v. Lakhsman*(1) it was held that, under the Dekkhan Agriculturists' Relief Act XVII of 1879, sec. 16, an agriculturist mortgagor had no right to sue his mortgagee in a mere action for account, and that such a suit could not ordinarily be maintained without asking, at the same time, for redemption. Such an action having been brought in this case, the second suit is barred, and it is immaterial whether this omission to pray for redemption in the first suit was accidental or intentional: *Moonshee Buzloor Rubeem v. Shumsoonnissa Begum*(2). The decree-holder may possibly apply for a review of his previous decree and get it amended, but his second suit must fail, both under section 13 as well as section 43 of the Code of Civil Procedure.

No one appeared on behalf of the respondent.

The judgment of the Court was delivered by

KEMBALL, J.—It is objected, and we think the objection is well founded, that this claim to possession is *res judicata*. It has been held by this Court under the Dekkhan Agriculturists' Relief Act, as it stood before it was altered by Act XXII of 1882, in the case of *Hari v. Lakhsman*(1) that an agriculturist mortgagor had no right to sue his mortgagee in a mere action for an account: in other words, that he must, when asking for an account, add a prayer for redemption; and it follows, therefore, that where there has been a suit for an account, a subsequent suit, for recovery of possession on payment of the money declared due, is barred, under either section 13 or section 43 of the Civil Procedure

(1) I. L. R., 5 Bom., 614.

(2) 11 Moo. I. A., 551.

Code. We have, consequently, no alternative but to reverse the decrees of the Courts below, and reject the claim, with costs. What the effect of the decree of the 14th January, 1881, may be, it is not for us to decide now ; but, supposing that the decree-holder is not able to get possession under it, it might be that he could get the decree amended so as to give him that power.

1883

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RAY.

*Decree reversed and claim rejected.*

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## REVISIONAL CRIMINAL JURISDICTION.

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*Before Mr. Justice Kemball and Mr. Justice Pinhey.*

EMPRESS v. BHAGVAN BHIIVSAN.\*

1883

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March 29.

*Act XIII of 1859—Breach of contract by artificers, workmen and labourers—Service for agricultural and other purposes.*

Act XIII of 1859 (to provide for the punishment of breaches of contract by artificers, workmen and labourers in certain cases (1), extended to all the collectorates of the Bombay Presidency by notification of the Government of Bombay dated 10th of May, 1860,) does not apply to a contract whereby a person, in consideration of receiving Rs. 45, bound himself to another to render service for "agricultural and other purposes" for the period of one year.

THIS was a reference by W. H. Probert, Magistrate of the District of Khandesh, for the exercise of the High Court's revisional jurisdiction.

The accused entered into a contract with the complainant, whereby, in consideration of the receipt in advance of a sum of Rs. 45, the former bound himself to render to the latter "service for agricultural and other purposes" for one year. The accused having failed to perform his part of the contract, the complain-

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\* Criminal Reference, No. 30 of 1883.

(1) The preamble of the Act is as follows :—

Whereas much loss and inconvenience are sustained by manufacturers, tradesmen, and others in the several Presidency towns of Calcutta, Madras and Bombay, and in other places, from fraudulent breach of contract on the part of artificers, workmen, and labourers who have received money in advance on account of work which they have contracted to perform ; and whereas the remedy by suit in the Civil Courts for the recovery of damages is wholly insufficient, and it is just and proper that persons guilty of such fraudulent breach of contract should be subject to punishment : It is enacted as follows :—