1885.

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applied to the Small Cause Court within eight days from the dismissal of his suit, which he failed to do.

SARGENT, C. J.—The First Judge of the Small Cause Court was wrong, we think, in dismissing the case for want of jurisdiction, on the ground, as we have been told, that the case raised a question of title. It is true that it has been held by this Court on the corresponding section 91 of Act IX. of 1850 that "a defence resting upon an adverse title to the fee" takes the case out of that section—*Nowla Ooma* v. *Bálá Dharmáji*[1]; and the same ruling would equally apply, if not with greater force, to section 41 of Act XV of 1882, under which the present summons was taken out; but in the present case the defendant does not dispute the plaintiff's right to the ownership, but admits that he is his tenant; and the only question to be determined is, whether the defendant was holding, as he alleges, under an unexpired term of four years, or as a monthly tenant, as the plaintiff avers. We must, therefore, in exercise of the power vested in the High Court by section 622 of the Code of Civil Procedure, direct the Judge of the Small Cause Court to proceed to try the case. Costs of this application to follow the result.

(1) I. L. R., 2 Bom., 91.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1885. *May 4.*

BÁLKRISHNA MORESHWAR KUNTE, (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE MUNICIPALITY OF MAHA'D (ORIGINAL DEFENDANT), RESPONDENT.*

Parties—Practice—Procedure—Joinder of parties—Right of co-sharer to sue alone.

Unless there is a special provision of the law, co-owners are not permitted to sue through some or one of their members, but all co-owners must join in a suit to recover their property. The defendant cannot be deprived of his right to insist on the other co-owners being joined on the record by the fact that they approve of the suit being brought by the plaintiff alone.

THIS was a second appeal from the decision of W. H. Crowe, Judge of Sátára, confirming the decree of the Subordinate Judge of Mahád.

* Second Appeal, No. 541 of 1883.

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The plaintiff, who was proved to be a sharer with other members of his family in a piece of land in the town of Mahád, sued the municipality of Mahád to recover possession of it, and for the removal of a wharf constructed thereon by the municipality. The municipality contended that the plaintiff could not sue alone. The Subordinate Judge rejected the plaintiff's suit, and the District Judge confirmed his decision, holding that the plaintiff could not maintain his suit in its present form.

The plaintiff appealed to the High Court.

Yashvant Vásudev Athlye for the appellant.—It is only when a right to sue arises out of a contract that all the persons jointly interested must join in suing. The case of *Kattusheri Pishareth Kanna Pisharody* v. *Vallotil Manakel Narayanan Somayajipád*[1] does not apply. In that case there was a demise, and the suit was brought by the plaintiffs on behalf of an association to recover lands demised by the association to the defendant. In the present case injury to any part of the plaintiff's land by the defendant would necessarily affect the plaintiff's right, and give him a cause of action One of several co-owners of a patent has a right to sue alone for the recovery of profits due for the use of the patent—*Sheehan* v. *Great Eastern Railway Company*.[2] An action for libel may be brought by two or more persons jointly, although they are not in partnership, or otherwise jointly interested—*Booth* v. *Briscoe*.[3] The plaintiff's co-sharers approved of the suit.

Shámráv Vithal for the respondent.—The approval of the co-sharers does not affect the question. It is the right of the defendant to insist upon all interested persons joining in the suit —*Rámsebuk* v. *Rámlall Koondoo*.[4] In the case of *Kandhiya Lal* v. *Chandar*[5] a Full Bench of the Allahabad High Court, with the exception of Mahmood, J., held that when, upon the death of the obligee of a money bond, the right to realize the money has devolved in specific sharers upon his heirs, each of such heirs could not maintain a separate suit for recovery of his share of the money due on the bond. The present case is on all fours

(1) I. L. R., 3 Mad., 234.
(2) L. R., 16 Ch. Div., 59.
(3) L. R., 2 Q. B. Div., 496.
(4) I. L. R., 6 Calc., 815.
(5) I. L. R., 7 All., 313.

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with the case of *Kattusheri Pishareth Kanna Pisharody* v. *Vallotil Manakel Narayanan Somayajipad*(1), which follows the principle laid down in section 30 of the Code of Civil Procedure (Act XIV of 1882.)

SARGENT, C. J.—The general rule is, as stated in *Kattusheri Pishareth Kanna Pisharody* v. *Vallotil Manakel Narayanan Somayajipad* (2), that, "unless there is a special provision of law, co-owners are not permitted to sue through some or one of their members, but that all must join in a suit to recover their property"; nor can the defendant be deprived of his right to insist on the other co-owners being joined on the record by reason of there being evidence to show that they approve of the suit being brought by the plaintiff alone. This was ruled in the analogous case of joint contracts in *Kalidás Kevaldás* v. *Nathu Bhagván*(3). We must, therefore, confirm the decree, with costs.

(6) I. L. R., 3 Mad., 234. (7) I. L. R., 3 Mad., 234.
(8) I. L. R., 7 Bom., 217.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1885. *May* 4.

JAMA'L SA'HEB (ORIGINAL DEFENDANT), APPELLANT, *v.* MURGA'YA SWA'MI (ORIGINAL PLAINTIFF), RESPONDENT.*

Math—Mortgage of lands attached to a math—Act II (Bombay) of 1863, *Sec.* 8, *Cl.* 3, *effect of declaration by Government under—Power of a jangam guru to alienate land given to math—How far such alienation is binding on his successor in the office—Limitation—Cause of action.*

The defendant was in possession of three fields (survey Nos. 222, 360 and 372) as mortgagee under mortgages executed by one Guláya, who was the plaintiff's *guru* and his predecessor in office as *jangam*, or presiding Lingáyat priest of the *math*. Two of the fields (Nos. 360 and 372) had been mortgaged in 1863. Guláya died in 1874, and in 1882 the plaintiff brought this suit to recover possession of the fields, on the ground that it was not competent to Guláya to mortgage them beyond the period of his own life, and also on the ground that under clause 3 of section 8 of Bombay Act II. of 1863 they were not alienable from the *math*.

It appeared that in 1862 a *sanad* was issued by Government to Guláya, declaring the land in dispute to be his personal *inám*, and continuable for ever as

* Second Appeal, No. 446.