

1888  
JUNE 19.

title in his written statement : White and Tudor's Leading Cases, Vol. 2, p. 728 ; *Gopalrao Ganesh v. Kishor Kalidas* (1).

APPEL-  
LATE  
CIVIL.

## JUDGMENT.

The judgment of the Court (BIRDWOOD and PARSONS, JJ.) was delivered by

13 B. 323.

BIRDWOOD, J.—The plaintiff sued to eject the defendant, his tenant, on the ground that he had failed to pay rent for three [325] years. Under the lease, such failure operated as a forfeiture. The defendant pleaded that he had paid rent, either to the plaintiff's co-sharer, or to the plaintiff and the co-sharer jointly. The Courts below rightly disregarded this plea, as it was not open to the defendant to set it up after taking a lease from the plaintiff alone—*Sayad Fatulla v. Bola* (2) ; *Jethu Jadhavji v. Ganpatrav* (3). The Subordinate Judge relieved against the forfeiture for non-payment of rent by allowing the defendant to pay the five years' rent due at the date of the decree, with interest and costs, within three months. The District Judge, however, awarded possession of the land to the plaintiff, because the defendant's plea in his written statement amounted to a denial of the plaintiff's exclusive title—*Jethu Jadhavji v. Ganpatrav* (3); and he ordered the defendant to pay costs throughout. We think that this decree is wrong, because the plaintiff's alleged cause of action was not any disclaimer of his title by the defendant, but merely the non-payment of rent ; and forfeiture for such a breach of the covenants in a lease can be relieved against by a Court of Equity—*Timmarsa Puranik v. Badiya Kuppagouda* (4) ; (Woodfall's Landlord and Tenant, 13th ed., p. 326). The question whether there had been such a disclaimer and denial of the plaintiff's title as would entitle him to a decree for possession, was not dealt with at all by the Subordinate Judge. Indeed, such a cause of action could not well have been considered, as it was not alleged in the plaint—*Prannath Shaha v. Madhu Khulu* (5)—and any question regarding it ought not, we think, to have been raised in the appeal. We, therefore, amend the District Judge's decree by restoring that of the Subordinate Judge. The period of three months therein provided is to date from to-day. Each party to bear his own costs in the District Court and here.

*Decree reversed.*

13 B. 326.

## [326] APPELLATE CIVIL.

*Before Mr. Justice Birdwood and Mr. Justice Parsons.*

NARO BALVANT (*Original Plaintiff*), *Appellant v. RAMCHANDRA TUKDEV AND OTHERS* (*Original Defendants*), *Respondents*.\*

[11th July, 1888.]

*Civil Procedure Code (Act XIV of 1882), s. 43—First suit to redeem—Second suit to eject—Causes of action in the two suits not identical.*

A. filed a suit against B. to redeem the land in dispute, alleging that it had been mortgaged to B. and that the mortgage-debt had been more than paid off.

\* Second Appeal, No. 346 of 1886.

(1) 9 B. 527.

(2) Printed Judgments for 1884, p. 33.

(3) Printed Judgments for 1884, p. 286.

(4) 2 B.H. C. R. 66.

(5) 13 C. 96.

He, therefore, prayed for an account and restoration of the land on payment of the sum that might be found due. The Court found that the alleged mortgage was not proved, and dismissed the suit. Thereupon A. filed a suit in ejectment against B.

*Held*, that the ejectment suit was not barred under s. 43 of the Code of Civil Procedure (Act XIV of 1882).

Failure in a redemption suit does not bar a subsequent suit in ejectment, the causes of action in the two suits being essentially different.

*Shridhar Vinayak v. Narayan* (1) followed.

[D., 25 B. 189 (195) ; 37 B. 224 = 15 Bom. L.R. 266 = 19 Ind. Cas. 558.]

THIS was a second appeal from the decision of G. Jacob, Assistant Judge of Satara, in appeal No. 265 of 1884.

The plaintiff sued to recover possession of certain lands, alleging that his father had purchased them in 1859 from one Shripat Krishna, that the lands had been transferred to his name in the Government records, and that he was dispossessed by the defendants on 9th July, 1872. The suit was brought in 1883.

The defendants Nos. 2 to 6 denied the plaintiff's title, and pleaded that they had been in possession and enjoyment of the lands in dispute as owners for more than twelve years before suit.

Defendant No. 1 did not appear.

The Subordinate Judge, who tried the case, found that the plaintiff had no title to the lands in suit, and rejected his claim.

On appeal the Assistant Judge raised an additional issue of his own motion, as to whether the suit was not barred under s. 43 of the Code of Civil Procedure.

It appeared that the plaintiff had formerly filed a suit against the same defendants to redeem the lands in dispute, alleging [327] that the defendants held them in mortgage, and that the mortgage-debt had been paid off. The plaintiff, therefore, asked that accounts should be taken under the Dekkhan Agriculturists Relief Act (XVII of 1879), and possession of the lands awarded to him. The Court found that the alleged mortgage was not proved, and rejected the plaintiff's claim. The plaintiff thereupon filed the present suit in ejectment.

The Assistant Judge held that the present suit was barred under s. 43 of the Code of Civil Procedure. He therefore affirmed the decree of the Subordinate Judge. His reasons are given in the following extract from his judgment :—

"The former suit was brought by the plaintiff against the same defendants, alleging that the property had been mortgaged, that he had paid a certain sum to the mortgagee, and asking that accounts might be taken with a view to redemption under the Dekkhan Agriculturists' Relief Act, the whole of the mortgage-debt having been discharged. The Court apparently held that there was no mortgage subsisting, and rejected the plaintiff's claim, being of opinion that the plaint could not be amended, because it was unstamped and for other reasons.

"The opinion expressed as to the plaintiff's right to bring another suit has, of course, no binding effect on the parties. What the plaintiff ought to have done, was to have withdrawn his suit with permission to bring a fresh one. If he had already discharged the mortgage-debt, he was entitled to sue in ejectment. He, however, sued on the mortgage, and his claim was rejected. The full proprietary title may be resolved into

1888  
JULY 11.  
—  
APPEL-  
LATE  
CIVIL.  
—  
13 B. 326.

1888  
JULY 11.  
—  
APPEL-  
LATE  
CIVIL.  
—  
13 B. 326.

two component parts of the equity of redemption and the rights of the mortgagee. The plaintiff, having in the first suit, waived his claim to the latter, cannot sue again upon the whole cause of action, a portion of which he omitted. What he wanted in the first suit was the possession of the land, and he further averred that there was nothing remaining due to the mortgagee. He was, therefore, bound to bring forward every ground upon which his claim to recover possession was based. The decision, in *Denobundhoo Chowdhry v. Kristomonee Dossee* (1), quoted by [328] the respondent's pleader, supports this opinion. The decision in *Haji Hasam Ibrahim v. Mancharam Kaliandas* (2) does not appear to be relevant."

Against this decision the plaintiff preferred a second appeal to the High Court.

V. K. Bhatavdekar, for appellant.

Ghanasham N. Nadkarni, for respondents.

The following authorities were referred to in argument:—*Thyila Kandi Ummatha v. Thyila Kandi Cheria Kunhamed* (3); *Muttu Chetti v. Muttan Chetti* (4); *Shridhar Vinayak v. Narayan* (5); *Nilo Ramchandra v. Govind Bullal* (6); *Konerrav v. Gurrav* (7); *Denobundhoo Chowdhry v. Kristomonee Dossee* (1); *Girdhar Manordas v. Dayabhai Kalabhai* (8); *Varathayyanganar v. Krishnasami* (9); *Moro Abagi v. Narayan Dhonbhat Pitre* (10).

#### JUDGMENT.

The judgment of the Court (BIRDWOOD and PARSONS, JJ.) was delivered by

BIRDWOOD, J.—The plaintiff sued in 1883 to redeem from the defendants Nos. 2 to 6 an alleged mortgage of the land now in suit. He said in the plaint that it was likely that the mortgage-debt had been more than paid off, and he asked that an account should be taken under the Dekkhan Agriculturists' Relief Act (XVII of 1879), and possession of the land awarded to him. The defendants Nos. 2 to 6 denied the mortgage. The Subordinate Judge, who tried the suit of 1883, held that it was not maintainable, the alleged mortgage not having been established as against the defendants Nos. 2 to 6. He refused to allow the plaintiff to change the suit to one in ejectment. The present suit has, therefore, now been brought as an ejectment suit, and the lower appellate Court has held it to be barred by s. 43 of the Code of Civil Procedure (XIV of 1882), on the ground that, if the plaintiff had discharged the mortgage-debt when he brought the former suit, he was then entitled to sue in [329] ejectment, and, not having then done so, could not now do so. This objection to the present suit was not taken by the defendants themselves, but the issue on the point was raised by the Court of its own motion. We think it was wrongly raised and decided, inasmuch as the cause of action alleged in the former suit was the refusal of the defendants to give an account and to restore the land. It was such a suit that a mortgagor could properly bring. All that it was necessary for the plaintiff to establish was the alleged relationship of mortgagor and mortgagee between himself and the defendants Nos. 2 to 6, and the liability of the defendants to give an account and to restore the property on the payment by the plaintiff of any balance that might be due. It was not

(1) 2 C. 152.

(2) 3 B. 137.

(3) 4 M. 308.

(4) 4 M. 296.

(5) 11 B.H.C.R. 224.

(6) 10 B. 24.

(7) 5 B. 589.

(8) 8 B. 174.

(9) 10 M. 102.

(10) 11 B. 355.

necessary for the plaintiff, and therefore not incumbent on him, to sue in ejectment, merely because he believed that on taking the account, it would be found that nothing was due by him.

Under s. 43 of the Code of Civil Procedure, as was said in *Thyila Kandi Ummatha v. Thyila Kandi Cheria Kunhamed*(1), "a plaintiff is only bound to include the whole of the claim which he is entitled to make in respect of the cause of action." In the former suit, the obligation to restore the land on the payment of the mortgage-debt constituted the cause of action. The question of title was not even an incidental question. In the present case the plaintiff's right of action is based on his title. The evidence in the two suits would be essentially different. In *Shridhar Vinayak v. Narayan* (2), it was said "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 any way bar the plaintiff in a subsequent suit to enforce his right to redeem as mortgagor." The converse of this proposition is applicable to the present case.

We, therefore, reverse the Assistant Judge's decree, and remand the appeal for trial on the merits. Costs to abide the result.

*Decree reversed.*

13 B. 330=13 Ind. Jur. 391.

[330] APPELLATE CIVIL.

*Before Mr. Justice Birdwood and Mr. Justice Parsons.*

WAGHELA RAISANGJI, SHIVSANGJI (*Original Defendants*), *Applicant v.*  
SHAIK MASLUDIN AND OTHERS (*Original Plaintiffs*), *Opponents.\**  
[25th July, 1888.]

*Review—Civil Procedure Code (Act XIV of 1882), ss. 623 and 624—“New and important matter”—Money paid into Court under a decree to abide the result of an appeal to the Privy Council from a former decree on which it is based—Application to recover the money on the reversal of the former decree.*

By a deed of sale dated 9th May, 1858, certain lands belonging to a minor talukdar were sold by his mother and natural guardian to the plaintiffs' father. The lands were described as *nakri* (i.e., held free of assessment), and the sale-deed provided that in case the vendee were at any future time compelled to pay assessment to Government in respect of the *nakri* lands, the vendor would recoup the vendee for any payment so made.

In 1872 Government for the first time levied assessment on the *nakri* lands. In 1876 the plaintiff filed a suit against the talukdar to recover the amount of assessment paid by them in respect of the *nakri* lands for the years 1872-76. The High Court passed a decree in plaintiffs' favour in March, 1883. Against this decree the talukdar appealed to the Privy Council.

In April, 1883, the plaintiffs filed a second suit on the same cause of action to recover from the talukdar the amount of assessment levied on the *nakri* lands for the years 1877-82. In this suit a decree was passed against the talukdar solely on the strength of the High Court's decree in the former suit.

In execution of this decree the plaintiffs attached the talukdar's property. Thereupon the talukdar deposited in Court the amount due under the decree, and applied to the Court for removal of the attachment, and for stay of further

\* Application No. 19 of 1888 under Extraordinary Jurisdiction.

(1) 4 M. 308 (310).

(2) 11 B.H.C.R. 224 (230).