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 rsstore 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.

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

[330] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

WAGHELA RAISANGJI, SHIVSANGJI (*Original Defendant*), *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 talukar deposited in Court the amount due under the decree, and applied to the Court for removal of the attachment, and for stay of further

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* Application No. 19 of 1888 under Extraordinary Jurisdiction.

(1) 4 M. 308 (310). (2) 11 B.H.C.R. 224 (230).

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proceedings in execution pending the disposal of his appeal to the Privy Council in the former suit. This application was granted.

In March, 1887, the Privy Council decided the appeal in favour of the talukdar, and reversed the High Court's decree.

Thereupon the talukdar applied for a refund of the money he had deposited in Court. The Court suggested that his proper remedy was by an application for review of the decree in the second suit. The talukdar accordingly presented a petition of review. This petition was rejected by the District Judge, on the ground that he had no jurisdiction to grant a review of his predecessor's decision, except on the grounds set forth in s. 624 of the Code of Civil Procedure.

Held, that the District Judge had jurisdiction to entertian the application for review. The decision of the Privy Council, reversing the decree of the High Court in the first suit, having been passed subsequently to the decree in the [331] second suit, which depended on the reversed decree of the High Court, was "new and important matter" within the meaning of ss. 623 and 624 of the Code of Civil Procedure.

[N.F., 4 M.L.T. 86; R., 33 A. 566=8 A.L.J. 584=10 Ind. Cas. 244; 31 B. 123=8 Bom L. R. (932) 939.]

THIS was an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

The material facts of the case as set out in the application, were as follows :—The applicant, Raisangji, was the proprietor of certain talukdari villages in the Ahmedabad district. During his minority his mother and natural guardian sold certain lands in those villages to Shaik Gulam Mohidin, by a deed of sale dated 9th May, 1858. Part of the lands sold were described as *nakri* (or rent-free), and the sale-deed contained a covenant to the effect that if the Government should at any future time levy any assessment, or make any other demand in respect of the *nakri* lands and the vendee were compelled to pay the same to Government, he would be entitled to recover it from the vendor personally and from his landed estate.

In 1872, Government for the first time levied assessment on the *nakri* lands.

Thereupon in 1876, Shaik Masludin and others, the sons and heirs of Shaik Gulam Mohidin, deceased, filed a suit (No. 2201 of 1876) in the Court of the First Class Subordinate Judge of Ahmedabad against Raisangji and his mother, to recover the amount of assessment which Government had levied from them in respect of the *nakri* lands for the years 1872-76.

The Subordinate Judge passed a decree for Rs. 12,750 against Raisangji personally. The High Court, on appeal, varied the decree by directing the amount to be recovered from Raisangji personally as well as from his landed estate. This decree of the High Court was dated 1st March, 1883. From this decree Raisangji preferred an appeal to the Privy Council.

In April, 1883, Shaik Masludin and others filed a second suit (No. 7 of 1883) on the same cause of action against Raisangji and his mother in the District Court of Ahmedabad, to recover the amount paid by them to Government on account of assessment leviable on the *nakri* lands for the years 1877-82. Raisangji and his mother did not contest this suit, and an *ex-parte* [332] decree was passed against them. The following is an extract from the judgment delivered in that case :—

"In a similar suit between the parties the High Court has held that the plaintiffs should recover the amounts paid for land revenue with simple interest at 9 *per cent*, but not the amount paid for local fund and compound interest.

"The plaintiffs must recover, therefore, Rs. 12,000, and simple interest Rs. 3,616-8-3—total Rs 15,616-8-3; and *copying the words of the judgment of the High Court*, I enter judgment for the plaintiffs for Rs. 15,616-8-3, with interest at 6 *per cent.* from the date of the plaint till the date of execution, and costs, &c. The amount to be recoverable from the property hypothecated and from the defendant Raisangji personally and from his property, and from the property of the deceased defendant."

This decree was dated 20th July, 1883.

In execution of this decree certain property belonging to Raisangji was attached. On 17th June, 1886, he applied for the removal of the attachment and for stay of all further proceedings in execution until the decision of his appeal to the Privy Council. This application was granted on the applicant's depositing in Court the amount due under the decree.

On the 3rd March, 1887, the Privy Council decided the appeal in Raisangji's favour, and reversed the decree of the High Court in the former suit (1).

Thereupon Raisangji applied to the District Judge for a refund of the amount he had deposited in Court.

At the suggestion of the Court, Raisangji presented a petition of review of the decree in suit No. 7 of 1883.

The District Judge rejected this petition of review, holding that he had no power to review his predecessor's decree. His reasons are stated in his judgment, which was as follows:—

"This is an application for review of judgment in civil suit No. 7 of 1883, dated 19th April, 1883, by the late Mr. Phillpots. The grounds on which the application is made, is that the judgment, of which review is sought, was based on the decision of the High Court in a similar suit between the same parties on a similar cause of action, whilst the decision was overruled by **[333]** the Privy Council on the 3rd March, 1887—*Waghela Raisangji* v. *Shaik Masludin* (1).

"The applicant, judgment-debtor, had telegraphic intimation of the decision of the Privy Council on the 5th March, 1887, and produced a copy of that decision in this Court on the 28th June last. An application for review of judgment was made on an insufficiently stamped paper on the 1st August, 1887, and was rejected for that reason. An application on proper stamp was made on the 29th August.

"Without entering into the question whether the applicant has shown sufficient cause for not presenting the application within the period of limitation prescribed therefor, or whether he has shown sufficient reason for obtaining a review, it appears to this Court that the objection taken under s. 624 of the Civil Procedure Code is fatal to this application; because it is not made upon the ground of the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by the applicant at the time when the decree was passed, or of some clerical error apparent on the face of the decree.

"The application is, therefore, rejected, though it is to be observed that if the decree of this Court, of which review is now sought, had expressly stated, as was no doubt intended at the time it was passed, that the relief decreed was contingent upon the decree on which it was based being upheld in appeal, then it would apparently have been open to this Court

(1) 11 B. 551.

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to order the refund to the judgment-debtor of the money paid into Court by him under the decree, which in such case would have been superseded by the decision of the Privy Council quoted above: see *Mohamed Elahee Buksh* v. *Kally Mohun Mookhopadhya* (1). As, however, the decree was not so worded, the application of the judgment-debtor for refund of the money paid into Court by him under the decree, of which review is sought, must also be rejected."

Against this order Raisangji made the present application to the High Court under its extraordinary jurisdiction.

A rule *nisi* was granted, calling upon the decree-holders to show cause why the lower Court's order refusing to grant a review should not be set aside.

Jardine (with him Rav Saheb *V. J. Kirtikar*), showed cause.

Latham, Advocate-General (with him *Ganpat Sadashiv Rav*), *contra*.

Latham:—The decree in the second suit was passed solely on the strength of the High Court's decree in the first suit. The High Court's decree was subsequently reversed on appeal by the Privy Council. The Privy Council's decision is, therefore, a "new and important matter" within the meaning of s. 624 of the [334] Code of Civil Procedure. Refers to *Shama Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery* (2); *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (3); *Rajah Nilmoney Singh Deo Bahadoor* v. *Sharoda Pershad Mookerjee* (4); *Mohamed Elahee Buksh* v. *Kally Mohun Mookhopadhya* (1); *Jonmenjoy Mullick* v. *Dassmoney Dassee* (5).

Jardine—The defendant allowed an unconditional decree to be passed against him in the second suit. At the date of that decree the appeal to the Privy Council had not been filed. The decree was not made contingent on the decision of the Privy Council. The cases cited do not, therefore, apply. In the case of *Shama Pershad Roy Chowdery* v. *Hurro Purshad Roy Chowdery* (2) all the matters involved in the second suit were provided for by the order in the first suit. That is not so in the present case. The Privy Council's decision in the first suit is not "new and important matter" within the meaning of s. 624 of the Code of Civil Procedure. Refers to *Ellem* v. *Basheer* (6).

JUDGMENT.

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

BIRDWOOD, J.—The opponents, after obtaining in the High Court a decree against the applicant for a sum of money to be paid out of the rents and profits of the applicant's *talukdari* estate for certain years prior to their suit, brought a second suit in 1883 against the applicant to recover on the same cause of action a further sum of money out of the rents and profits of the same estate for certain subsequent years. This second suit was not contested; and the District Judge passed a decree in favour of the opponents in April, 1883, solely on the strength of the decree of the High Court in the first suit. The opponents took out execution; and, to prevent the sale of his lands, the applicant deposited in Court the sum of Rs. 14,877-7-3. He asked, however, that the money should be held in deposit pending the result of an appeal he had presented to Her Majesty in [335] Council against the decree of the High Court in the first suit. The District Judge appears to have

(1) 5 C. 589. (2) 10 M.I.A. 203. (3) 3 C. 30. (4) 18 W.R.C.R. 434,
(5) 8 C. 700. (6) 1 C. 184.

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granted this application; for, after receiving the money in deposit, he made an order staying further proceedings in execution. The Privy Council reversed the decree of the High Court in March 1887 (1). The applicant then applied to the District Judge for the refund of the money he had deposited in Court. The District Judge was of opinion that the applicant's proper remedy was by an application for review of the District Court's decision of April, 1883. The applicant accordingly presented an application for review; but the District Judge, who was not the Judge who had decided the case, rejected the application, on the ground that he had no jurisdiction to entertain it under the provisions of s. 624 of the Code of Civil Procedure. In so ruling, we think that he was wrong; for the decision of the Privy Council, reversing the decree of the High Court in the first suit and ruling that the opponents had no right to sue, having been passed subsequently to the decree in the suit which depended on the reversed decree of the High Court, was, in our opinion, "new and important matter" within the meaning of ss. 623 and 624 of the Code. It was new matter, for it was not in existence in April, 1883, and it was certainly most important matter in the litigation between the parties. It, therefore, justified the application for review made to the successor of the Judge who delivered the judgment sought to be reviewed. We are supported in this opinion by the decision of the Calcutta High Court in *Jonmenjoy Mullick* v. *Dassmoney Dassee*(2). We, therefore, reverse the order of the District Judge, and direct that he entertain the application for review made to him under s. 624 of the Code, and dispose of it according to law. Costs of this application to be costs in the cause.

Order reversed.

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13 B. 336.

[336] APPELLATE CIVIL.

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

GULAM AND OTHERS (*Original Plaintiffs*), *Appellants* v. HAJI BADRUDIN (*Original Defendant*), *Respondent.** [4th October, 1888.]

Practice—Omission to examine witnesses—Second appeal, objection on, on the ground of such omission.

A Subordinate Judge after examining some only of the plaintiffs' witnesses was of opinion that there was no necessity for further evidence, and passed a decree for the plaintiffs. Ten witnesses whom the plaintiffs had summoned, were not examined. The defendant appealed to the District Judge. At the hearing of the appeal the plaintiffs did not inform the Judge that some of their witnesses had not been examined, nor did he become otherwise aware of the fact. He reversed the lower Court's decree, being of opinion, on appeal, that the plaintiffs' evidence had not proved their case. The plaintiffs appealed to the High Court, and contended that the decree of the lower appellate Court should be set aside, in order that the excluded evidence might be taken.

Held, that there was no sufficient reason, on second appeal, to set aside the decree. The plaintiffs ought to have brought the facts to the notice of the lower appellate Court, and not having done so they could not on second appeal take the objection in order to have a chance of a second trial.

[F., 5 Bom. L.R. 264 (265); R., 13 Bom. L.R. 1021; D., 4 Ind. Cas. 599=3 S.L.R. 106 (108).]

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* Second Appeal No. 399 of 1886.

(1) 11 B. 551.

(2) 8 C. 700.