

ought to be supported. The entire income of the property had been appropriated to the interest of part of the mortgage-debt, and 12 per cent. was running on the remaining [537] Rs. 50, which would necessarily have to be added to the principal when the entire mortgage-debt was paid off. The reversioners could, under the above circumstances, be in no way prejudiced by the widow's anticipating the date at which the mortgage-debt fell due.

We must, therefore, reverse the decree of the Court below and dismiss the plaint with costs on the plaintiffs throughout.

Decree reversed.

18 B. 537.

APPELLATE CIVIL.

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

NATHU VALAD PANDU (*Original Plaintiff*), *Appellant v.* BUDHU VALAD BEIKA (*Original Defendant*), *Respondent.**

[7th September, 1893.]

Civil Procedure Code (Act XIV of 1882), s. 13 (1), expl. II, and s. 43—Suit for specific performance of a contract of sale and to execute a sale-deed—Sale-[538] deed subsequently executed by the Court under s. 262 (2) of the Civil Procedure Code—Suit on sale-deed to recover possession.

The plaintiff claiming specific performance of a contract of sale sued the defendant to compel him to execute a deed of sale, alleging that he had paid the

* Second Appeal No. 256 of 1892.

(1) Sections 13 and 43 of the Civil Procedure Code (Act XIV of 1882);—

13. *Res judicata.*—No Court shall try any suit or issue in which the matter directly and substantially in issue

has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and

has been heard and finally decided by such Court.

Explanation I.—The matter above referred to must in the former suit have been alleged by one party, and either denied or admitted, expressly or impliedly, by the other.

Explanation II.—Any matter which might and ought to have been made ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

43. *Suit to include whole claim.*—Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Relinquishment of part of claim.—If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Omission to sue for one of several remedies.—A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but, if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

For the purpose of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action.

Illustration.

A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the year 1891 and 1892 is due and unpaid. A sues B only for the rent due for 1892. A shall not afterwards sue B for the rent for 1891.

(2) 262. *Form and effect of execution of conveyance by Court.*—The execution of a conveyance, or the endorsement of a negotiable instrument, by the Court under the last

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purchase-money to the defendant and had obtained possession, but was subsequently dispossessed. The plaintiff had claimed the value of standing crop or damages for the same. The Court found that the plaintiff had paid the purchase-money, but had not got possession, and ordered defendant to execute a deed of sale. On failure of the defendant to do so, the Court executed a deed of sale in plaintiff's favour under s. 262 of the Civil Procedure Code (Act XIV of 1882). The plaintiff thereupon brought the present suit to recover possession on the strength of the deed of sale. Defendant pleaded that this second suit was barred under ss. 13 and 43 of the Civil Procedure Code.

Held, that s. 43 was not applicable and did not bar the present suit, because the alleged cause of action was not the breach of the contract, but a new and distinct one arising from the deed of sale which the defendant had contracted to pass.

Held, also, that s. 13, expl. II, was not applicable, because the object of that explanation would seem to be to compel the plaintiff to rely on all grounds which were open to him in support of the claim made by his plaint, which in the first suit was confined to obtaining a regular deed of sale.

[*Diss.*, 22 M. 24 (26)=8 M.L.J. 147; F., 4 N.L.R. 14 (17); *Appl.*, 5 Ind. Cas. 439 (440)=13 O.C. 19; *Appr.*, 8 Ind. Cas. 9 (12); R., 14 C.L.J. 159=11 Ind. Cas. 228; 15 M.L.T. 103; *Cons.*, 37 C. 57 (61)=14 C.W.N. 527=5 Ind. Cas. 205.]

SECOND appeal from the decision of A. Steward, District Judge of Khandesh.

Suit to recover possession of land. The land had been mortgaged by the defendant Budhu valad Bhika to one Sena Chowdari for [539] Rs. 1,550. On the 5th June, 1889, the defendant agreed to sell the land to the plaintiff for Rs. 1,550 which should be applied by the defendant in paying off the mortgage-debt. After it was paid off, the defendant was to execute a deed of sale to the plaintiff. In pursuance of the agreement, the plaintiff paid Rs. 1,550 to the defendant; but as the defendant failed to perform his part of the agreement by executing a deed of sale in plaintiff's favour, the plaintiff on the 5th October, 1889, filed a suit (No. 790 of 1889) against the defendant, praying, first, that either the defendant be directed to execute in his favour the sale deed in respect of the land as agreed upon, or that he be ordered to refund to the plaintiff the sum of Rs. 1,550 together with Rs. 100 as damages; and, secondly, that the crops standing on the land be delivered into plaintiff's possession, or that Rs. 200 be awarded as compensation for the same. The plaintiff further alleged that the land had been delivered into his possession, and he had sowed it on the 1st July, 1889, but that the defendant dispossessed him of the same, with the standing crops thereon, on the 15th September of the same year, and refused to execute the sale-deed.

The Court awarded the plaintiff's claim in respect of the sale deed, but disallowed his claim in respect of compensation, holding that he had not obtained possession of the land as alleged.

The defendant, however, did not execute the sale-deed as directed. The Court, therefore, executed the deed in plaintiff's favour on the 15th April, 1890, under s. 262 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff now, relying on the sale-deed, brought the present suit to recover possession of the land.

The defendant contended that the suit was barred under ss. 13 and 43 of the Civil Procedure Code (Act XIV of 1882).

The Subordinate Judge overruled the defendant's pleas and awarded possession to the plaintiff.

preceding section may be in the following form: "C. D., Judge of the Court of (or as the case may be), for A. B., in suit by E. F., against A. B.," or in such other form as the High Court may from time to time prescribe, and shall have the same effect as the execution of the conveyance or endorsement of the instrument by the party ordered to execute or endorse the same.

On appeal by the defendant, the Judge reversed the decree, and rejected the claim, holding that it was barred under section [540] 43 of the Civil Procedure Code. He referred to *Abhiram Doss v. Sriram Doss* (1).

The plaintiff perferred a second appeal.

Vasudeo Gopal Bhandarkar, for the appellant (plaintiff).—The Judge dismissed our suit under s. 43 of the Code, because in our former suit we did not claim possession. In that suit we alleged that we were in possession and that we were dispossessed, and, therefore, in that suit we merely claimed the value of the crop. The Court found that our allegation as to possession was not proved; it, therefore, dismissed our suit for the value of the crop. The plaintiff's former suit was for the specific performance of the contract to convey, and it was not necessary to demand possession. That suit was on a different cause of action. The cause of action to recover mesne profits is different from the cause of action to recover possession. Section 43 is not applicable to the present case, and the Judge was wrong in holding that our present suit is barred because we did not ask for possession in the former suit—*Tirupati v. Narasimha* (2); *Lalessor Babui v. Janki Bibi* (3).

Mahadeo Chimnaji Apte (with *Mahadeo Vaman Bhat*), for the respondent (defendant):—We rely on ss. 13 and 43 of the Civil Procedure Code. In the former suit the plaintiff asked for possession of the standing crop sown by himself. When a person asks for possession of the standing crop sown by himself, his prayer virtually amounts to a prayer for possession of the land itself. If it did not, we submit he ought to have asked for possession in that suit, and having failed to do so, he cannot now sue on the same cause of action—Sections 13 (exp. II) and 43 of the Civil Procedure Code. A plaintiff cannot bring one suit for a title-deed and another for possession—*Anderson, Wright and Co. v. Kalagarla Surji Narain* (4); *Abhiram Doss v. Sriram Doss* (1).

[SARGENT, C.J.—The question is, whether the plaintiff, having got a conveyance, has got a fresh cause of action for possession?]

[541] We submit not, because a conveyance is merely evidence of title.

[SARGENT, C.J., referred to *Kalidhun Chuttapadhya v. Shiba Nath Chuttapadhya* (5).]

In that case the first suit was for an account and the second for the result of the account, and, therefore, it was held that the second suit could be maintained. Our contention is supported by *Shib Kristo Duh v. Abdool Sobhan Chowdhry* (6).

Vasudeo Gopal Bhandarkar, in reply.—The words in s. 43 are "cause of action." In the present case the cause of action is different from that in the former one. In that suit the cause of action was the right to a conveyance. In the present suit, the cause of action is the right to possession. They, no doubt, are the result of the same transaction, but they are distinct, and separate suits are maintainable. The execution of the conveyance by the Court gave us a separate cause of action for the present suit.

JUDGMENT.

SARGENT, C.J.—The plaintiff sues to recover possession of the property in suit on the strength of a sale-deed executed in his favour

(1) 3 B.L.R. 421.

(2) 11 M. 210.

(3) 19 C. 615.

(4) 12 C. 339 (346).

(5) 8 C. 483.

(6) 15 W.R. 408.

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on the 15th April, 1890, by the Court in execution of a decree passed against the defendant in suit No. 790 of 1889. The defendant pleaded that the suit was barred by ss. 13 and 43 of the Civil Procedure Code. The Joint Subordinate Judge held that it was not barred. The lower appeal Court held that it was barred under s. 43.

The previous suit, No. 790 of 1889, was one by the plaintiff for specific performance of an alleged contract of sale to him by defendant, by which the plaintiff was to pay Rs. 1,550, and the defendant undertook to execute a deed of conveyance to him. It was contended by Mr. Apte, for the respondent, that the plaintiff's present claim to be put into possession was part of the entire claim, which the plaintiff was then entitled to make in respect of the cause of action, *viz.*, the defendant's default in performing his contract. In that suit, the plaintiff alleged that he had paid the purchase-money and had been put into possession; but the Court found that he had paid the purchase-money but had never had possession, and Mr. Apte argued that s. 43 [542] must be applied as if the facts had been as found by the Court, and not as alleged in the plaint in that suit, and in that case he urged that the plaintiff's claim would have included not only this right to have a deed of sale executed, but also to be put into possession, and that the plaintiff, therefore, cannot now sue in respect of the latter portion of the claim. We think this contention is a valid one, so far as the claim to possession is based on the contract; but it does not dispose of the question as to the applicability of s. 43 to the present suit, where the alleged cause of action is not the breach of the contract, but a new and distinct one arising from the deed of sale itself, which the defendant had contracted to pass. It was also argued by Mr. Apte that s. 13, exp. II, applied to the present suit, but the object of that explanation would seem to be to compel the plaintiff to rely on all the grounds which were open to him in support of the claim made by his plaint, which in the first suit was confined to obtaining a regular deed of sale.

For the above reasons, we reverse the decree of the Court below and restore that of the Subordinate Judge, with costs on the respondent here and in the lower Court of appeal.

Decree reversed.

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APPELLATE CIVIL.

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

SHIVLAL KALIDAS AND OTHERS (*Original Plaintiffs*), *Applicants v.*
JUMAKLAL NATHIJI DESAI, DECEASED, BY HIS HEIRS, HIS SONS
MITHLAL AND ANOTHER (*Original Defendants*), *Opponents.**

[26th September, 1893.]

Decree—Amendment of decree—Civil Procedure Code (Act XIV of 1882), s. 206—Practice—Appeal.

In the lower appeal Court the plaintiff obtained a decree which directed parties to bear their own costs in proportion in both the Courts, while the judgment directed that the parties should bear each other's costs in proportion in both the Courts. The decree was confirmed by the High Court in cross second

* Civil Application No. 552 of 1892.