APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Aston; and, on reference, before Mr. Justice Chandavarkar.

NARAYAN BHAGWAN GANDHI (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHAMRAO LAXUMAN AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1903. *February* 27.

Civil Procedure Code (Act XIV of 1882), section 43—Cause of action—Splitting of cause of action—Suit to recover exclusive possession of land—Suit to obtain a share by partition of land—Certificate of sale relied upon in both suits.

The plaintiff, in execution of a decree obtained by him, purchased at a Court-sale the right, title and interest of his judgment-debtors, Rajaram and Sitaram, in certain lands; and on the 12th November, 1886, he obtained a sale certificate in respect of all the properties so purchased. In 1891 he brought a suit (No. 519 of 1891) against the heirs of Sitaram, then deceased, for possession of certain of the lands included in the sale certificate, of which they were in exclusive possession, and he obtained a decree. In the next year, 1892, he brought another suit (No. 518 of 1892) against the heirs of Rajaram, then deceased, and another person, for possession of other lands included in the sale certificate, of which they were in exclusive possession, and he again obtained a decree. In both the above suits he based his claim on the sale certificate showing his title as purchaser. The remainder of the lands included in the sale certificate were held by the heirs of Rajaram and Sitaram jointly with other members of the family who were co-parceners with them, and in 1897 the plaintiff filed this suit to recover by partition the shares of the heirs of Rajaram and of Sitaram in these lands, basing his claim upon the sale certificate. The lower Courts rejected the claim on the preliminary ground that the suit was barred by the provisions of section 3 of the Civil Procedure Code (Act XIV of 1882).

Held, by *Chandavarkar* and *Aston, JJ.* (*Crowe, J.*, dissenting), reversing the decree and remanding the case, that the suit was not barred by section 43. That section does not apply where the cause of action is different. The title on which the former suits were based was exclusive ownership, while that on which the present suit was based was joint ownership. A person who has succeeded in recovering one property under one title is not debarred from suing to recover another property under another title.

The certificate of sale is not the title; it is merely the title-deed.

SECOND appeal from the decision of Ráo Bahádur Raghavendra Ramchandra Gangolli, Additional First Class Subordinate Judge

* Second Appeal No. 140 of 1900.

1903.

NARAYAN v. SHAMRAO.

with Appellate Powers, at Thána, confirming the decree passed by Ráo Sáheb C. R. Karkare, Joint Subordinate Judge at Mahád.

Suit to recover possession of land.

The plaintiff, Narayan Bhagwan Gandhi, obtained a decree against Rajaram Haibat and Sitaram Haibat in Suit No. 260 of 1878. In execution of that decree, he caused the right, title and interest of Rajaram Haibat and Sitaram Haibat in certain lands situate in the villages of Shiravali, Vasape, Ravatale and Vinhere to be sold, and at the sale he himself became the purchaser. The sales took place on the 11th, 22nd, 27th and 29th March, 1886, and the 8th, 9th and 10th September, 1886, and in respect of all the lands so sold one certificate of sale, dated the 12th November, 1886, was granted to the plaintiff.

In 1891, the plaintiff sued (No. 519 of 1891) Vinayak (present defendant No. 5), the son and heir of Sitaram Haibat, then deceased, for possession of some of the lands so purchased as above stated and obtained a decree. These lands were situated in the village of Ravatale and were in the exclusive possession of Vinayak.

In the following year, viz. 1892, the plaintiff brought a suit (No. 518 of 1892) against the sons and heirs of Rajaram Haibat (viz., the present defendants 4, 9, 10 and 12) and against another person (defendant 6) to obtain possession of other lands included in his above purchase, and he obtained a decree. These lands were situate in the village of Vasape and were in the exclusive possession of the defendants to that suit.

In both the above suits the plaintiff relied on the certificate of sale dated the 12th November, 1886.

The remaining lands of those purchased by the plaintiff at the execution sale in 1886 and included in the certificate of sale of 12th November, 1886, were held by the heirs of Rajaram Haibat and Sitaram Haibat jointly with other members of the family who were coparceners with them, and the plaintiff now filed this suit (No. 502 of 1897) to recover the shares of the heirs of Rajaram and Sitaram in these lands. In this suit he made all the coparceners interested in the lands defendants, and he prayed for partition and possession of the shares, and based his claim upon the certificate of sale showing his title as purchaser.

Some of the defendants filed written statements which are not material to this report. The others did not appear.

The Subordinate Judge *suo motu* framed an issue as to whether the present suit was barred by sections 42 and 43 of the Civil Procedure Code. He found this issue in the affirmative and dismissed the suit. In his judgment he said:

No reasons have been shown why plaintiff did not ask for relief in respect of these lands in the former suits. Plaintiff ought to have sued for those lands in the previous litigation as the cause of action was the same. It is well established that the law does not encourage multiplicity of suits. The same principle is laid down in sections 42 and 43 of the Civil Procedure Code. In my opinion the present suit is barred by previous litigations under the aforesaid sections. Plaintiff has omitted to sue for the lands in question in previous suits, and so he must take the consequences.

Against this decree plaintiff appealed. The lower Appellate Court confirmed the decree on the following grounds:

A party is bound to bring forward his *whole case* in respect of the matter in litigation and *open to him* upon the points for decision in the suit: *Udaiya Tewar* v. *Katama Nachiyar* (2 Mad. H. C. 131).

The correct test when a second suit is brought for something omitted to be sued for in a previous suit is whether the claim in the new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit: *Buzloor Raheem* v. *Shumsoonissa Begum*; *Judoonath Bose* v. *Shumsoonissa Begum* (8 W. R. P. C. 3; 11 Moore's I. A. 551). It is a well established rule of law that a plaintiff is bound to include in his plaint *all* the grounds upon which his suit is based. A second suit *upon a different ground which existed before the commencement of the first suit would not be allowed*, as it would be splitting the cause of action: *Abhiram Doss* v. *Shriram Doss* (3 Beng. L. R. 421, s. c. 12 W. R. 336).

A plaintiff's cause of action consists of every fact which it would be necessary for him to prove, if traversed, in order to support his right to the judgment of the Court: *Read* v. *Brown* (L. R. 22 Q. B. D. 128).

The term "cause of action" includes *all* the reliefs covered by the facts, on the strength of which a plaintiff comes into Court, and therefore if he omits to ask for any of them he shall not be allowed to do so in a subsequent suit: *per* Stuart, C.J., in *Sarsuti* v. *Kunj Behari Lal* (I. L. R. 5 All. 345 at p. 359); *vide* also *Nanoo Sing Mandu* v. *Anand Sing Mandu* (I. L. R. 12 Cal. 291); *Andi* v. *Thatha* (I. L. R. 10 Mad. 347); *Ukha* v. *Daya* (I. L. R. 7 Bom. 182).

A second suit may be brought only where some property was not available for partition when the previous suit was instituted: *Balkrishna Vithal* v. *Harishankar* (8 Bom. H. C. (A. C. J.) 64), followed in *Narayan Bapuji* v. *Pandurang Ramchandra* (12 Bom. H. C. 148 at p. 149).

Such is not the case in the present suit. On the authorities cited above and the facts of the case I think the learned Subordinate Judge was right in

1903.

NARAYAN v. SHAMRAO.

dismissing the suit as barred by the provisions of sections 42 and 43 of the Code of Civil Procedure.

The plaintiff appealed to the High Court.

The case was heard by a Division Bench (Crowe and Aston, JJ.).

P. P. Khare for the appellant (plaintiff).

M. V. Bhat for respondent 5; *G. B. Rele* for respondents 4 and 5.

CROWE, J.:—The only question to be determined in this appeal is whether the present suit is barred by the provisions of sections 42 and 43 of the Civil Procedure Code.

The plaintiff sues on a certificate of sale dated the 12th November, 1886, under which he purchased the right, title and interest of Rajaram and Sitaram Haibat in certain *khoti* and *dhara* lands situate in the villages of Shiravali, Vasape, Ravatale and Vinhere. Exhibits 89 and 90 are the certified copies of the decrees passed in two suits—No. 518 of 1892 brought by plaintiff for the possession of certain lands situate in Vasape against defendants 4, 9, 10, 11 in the present suit, and No. 519 of 1891 for the possession of the *khoti* share of the village Ravatale against defendant 5 in the present suit. The present suit is to recover separate possession by partition of a one-third share of the lands situate in the villages of Shiravali, Vasape, Ravatale and Vinhere mentioned in the sale certificate, together with mesne profits and costs. The cause of action is the same as that in the previous suits, namely, the right to possession under the certificate of sale.

Section 42 provides that every suit shall as far as practicable be so framed as to afford ground for a final decision upon the subjects in dispute and so as to prevent further litigation concerning them. The object of this section is to give effect to the maxim *Interest reipublicae ut sit finis litium*. Section 43 lays down that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. A plaintiff is not entitled to split up an entire cause of action so as to bring distinct suits in respect of distinct parts of the same cause of action. If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not

afterwards be allowed to sue in respect of the portion so omitted or relinquished. Both suits have been based on the same cause of action. It was open to plaintiff to ask for possession of the property now claimed in the previous suits. The cause of action does not vary, as urged by Mr. Khare, with the relief claimed. The observations of Stuart, C.J., in *Sarsuti* v. *Kunj Behari Lal*[1] on this point may be cited in this connection. He says:

> I may point out what appears to me to be a misapprehension of the law by which the term "relief" is confounded with the larger and more comprehensive expression "cause of action." Neither in section 7 of Act VIII of 1859, nor in the corresponding section (section 43) of Act X of 1877, is the word "relief" or any single term corresponding to it to be found. On the contrary, it is "the *whole of the claim arising out of the cause of action*" that must be included in the suit, and the term "relief," to my mind, ought to be understood as synonymous with the words "any portion of the claim," which are to be found both in section 7 of Act VIII of 1859 and section 43 of Act X of 1877. The word "relief," at least as used in this country, is not a term of exact or precise technicality, but simply means the remedy which a Court of justice may afford in regard to some actual or apprehended wrong or injury, such remedy being large or small as the case may be. But it is not synonymous with "cause of action," that term including all the reliefs covered by the facts, on the strength of which a plaintiff comes into Court, and therefore if he omits to ask for any of them, he does so under the sanction of section 7 or section 43.

Nothing has supervened, as far as the defendants in the former litigations are concerned, since those suits were filed, to give a new cause of action. The property now claimed was available for partition when the previous suits were brought.

In the case of *Brunsden* v. *Humphry*,[2] relied on by the pleader for the appellant, it was held that damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights and give rise to distinct causes of action. It was there laid down that when the question arises as to whether the cause of action in two suits is the same, one of the tests is whether the same evidence would support both the suits; if it would, the cause of action is the same in both suits. Both in this suit and the previous litigations plaintiff has relied on the title as evidenced by the certificate of sale. He may be entitled to more than one

(1) (1885) 5 All. 345.

(2) (1884) 14 Q. B. D. 141.

1903.

NARAYAN v. SHAMRAO.

remedy in respect of the same cause of action, and he may sue for all or any of his remedies; but if he omits (without leave of a Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

It was contended that the present suit relates to partition of joint property in which persons not interested in the previous suits are interested. But the fact that other parties are made defendants does not relieve plaintiff from the necessity of suing the former defendants at one and the same time for all the reliefs to which he was entitled under the same cause of action. One of such reliefs was partition of the share of the properties now claimed. I think the lower Courts have taken a correct view of the case, and I would affirm the decree of the lower Appellate Court with costs, and direct that this appeal be dismissed with all costs.

ASTON, J.:—Under the plaintiff's purchase at a Court sale which lasted over several days, the plaintiff acquired the right, title and interest of the four sons of Rajaram Haibat and of the son of Sitaram Haibat in the properties specified in the sale certificate, as sold to him at the Court's sale.

The sale certificate does not state whether the sale was of a divided or undivided share in respect of any of the properties specified. The plaintiff rests his title upon the purchase aforesaid, but his cause of action in any suit to recover on such title, and the frame of his suit or suits, would depend to a great extent upon the nature of the interest acquired by the purchase and upon the conduct subsequent to the Court sale of the persons whose interests were sold, and upon possession, if any, of third persons.

From the decrees in Suits 518 of 1892 and 519 of 1891, it appears that in Suit 519 of 1891 plaintiff sued Vinayak, son of Sitaram Haibat, for possession of certain specified *khoti* land in Ravatale in possession of Vinayak, alleging that he had become owner of the said specified land, and that Vinayak wrongfully retained possession after demand. In Suit 518 of 1892 he sued the four sons of Rajaram Haibat, to whom were subsequently added Vinayak Sitaram and Vaman Mahadev, for possession of other specified land in possession of the four sons of Rajaram,

alleging that they wrongfully retained possession after the Court sale aforesaid, after demand. In each of these two suits he obtained a decree for possession of the lands he sued for, and in neither of these two suits, as summarised in the decrees, is there any indication that the property comprised in either suit was joint undivided property.

In the present case the plaintiff sues to recover on partition the shares of the sons of Rajaram and Sitaram Haibat aforesaid in other property comprised in his sale certificate, but described in the plaint as undivided property. He has joined as defendants fifteen persons including the sons of Rajaram and Sitaram Haibat and all other coparceners, alleging that on demand he was refused possession of the share to which he became entitled by purchase at the Court sale.

"Title," "cause of action," and "relief" may be inter-dependent, but are not synonymous terms. For instance, where a plaintiff had purchased two houses under the same sale deed and was dispossessed of both on different dates, and thereafter brought consecutive suits, it was held in *Riayatullah* v. *Nasir* [1] that although the plaintiff's title to both the houses rested on the title acquired by him under one and the same sale deed, yet his ouster on two different occasions from the two houses gave rise to two separate causes of action, which he was not bound to join in the earlier suit, there being nothing in the Civil Procedure Code to compel him to do so.

Again, "the whole cause of action includes every fact essential to the maintenance of the action, and each of these facts separately is but a part of the cause of action": *DeSouza* v. *Coles*.[2] If *A* and *B* and *C* each sell me on the same day a different house, I may have no cause of action against *A* though *A*'s title may be complete and be acquired by my purchase, for *A* may do all the law requires to put me in possession. I may have a cause of action against *B* though *B* may have no title in the house he pretends to sell to me. The frame of my suit to recover the property sold by *C* may be quite different if I have reason to believe that *C* has only a limited interest in the house he has affected to sell to me. So far as sections 42, 43 of the Civil

(1) (1884) 6 All. 616.

(2) (1868) 3 Mad. H. C. R. 384

1903.

NARAYAN v. SHAMRAO.

Procedure Code are concerned, my position with regard to suits to recover what I had purchased would be the same if *A, B, C* were my judgment-debtors and their rights on the same three houses had been bought by me at one and the same Court sale in execution of my decree.

The remedy sought in the present suit could not have been sought in either of the earlier suits which related to other property. The claim in the present case is entirely distinct from the two earlier ones, and is based upon a separate cause of action though the plaintiff rests his title upon one and the same Court sale. I can find no support in sections 42, 43 of the Civil Procedure Code, or in the cases cited at the hearing, for the contention of the respondent's pleader, Mr. Bhat, that the plaintiff by bringing the two earlier suits aforementioned has split up his cause of action with respect to the subject matter of the present suit. That contention was based entirely upon the assumption that the plaint property in the two earlier suits, Nos. 519 of 1891 and 518 of 1892, was an undivided share in joint property with which the present suit is concerned—an assumption contradicted by the record.

A suit on exclusive title for possession of specified land set out in a plaint as in possession of a defendant and a suit for recovery, on partition, of a share in joint and different property set out in a plaint filed against the same defendant and others, constitute in my opinion suits of a different nature based upon separate causes of action.

I would reverse the decree of the Court below and remand the case for a decision on the merits.

Owing to the above difference of opinion, the case was referred to Mr. Justice Chandavarkar, under section 575 of the Civil Procedure Code (Act XIV of 1882).

P. P. Khare for the appellant (plaintiff):—The lands sought to be recovered in the previous suits were in the exclusive possession of the defendants to those suits. Those were suits in ejectment, while the present suit is for a partition of the joint family property impleading all the coparceners, the cause of action being founded upon plaintiff's title as a joint owner. These were two different causes of action. The term "cause of

action" is to be understood in each suit to mean cause of action alleged by the plaintiff in his plaint. The subject-matter and the parties in the two litigations were quite different. I rely on *Brunsden* v. *Humphrey*.(1)

M. V. Bhat for respondent 5 (defendant 5):—The basis of the plaintiff's claim in this suit is the same as that in the two former suits, viz., the certificate of sale dated the 12th November, 1886, which conveyed to him the right, title and interest of the judgment-debtors, Rajaram and Sitaram, in all the property sold.

The plaintiff ought to have brought one suit for possession by partition of the lands covered by the certificate: *Narayan* v. *Pandurang*(2); *Ukha* v. *Daya*(3); *Rangayya* v. *Nanjappa*(4); *Abhiram Doss* v. *Sriram Doss*.(5) To hold that the words "cause of action" in section 43 of the Civil Procedure Code (Act XIV of 1882) mean the cause of action which the plaintiff chooses to put forward on each occasion is to frustrate the very object of the section.

G. B. Rele for respondents 4 and 5 (defendants 4 and 5).

CHANDAVARKAR, J.:—This is a suit brought by the plaintiff Narayan Bhagwan claiming a one-third share in the properties in dispute. The plaintiff's allegation is that those lands with certain other lands were purchased by him at a Court sale in execution of a decree obtained by him against (1) Rajaram, deceased, by his sons and heirs Pandurang, Shankar, Balkrishna and Shivram, and (2) Sitaram Haibat, deceased, brother of Rajaram, by his son and heir Vinayak. The sale certificate in respect of all the properties so purchased by the plaintiff at the Court sale is dated the 12th of November, 1886.

After the Court purchase the plaintiff brought two suits, Nos. 519 of 1891 and 518 of 1892, to recover exclusive possession of some of the properties included in the sale certificate. Those were properties other than the lands now in dispute and he

(1) (1884) 14 Q. B. D. 141.
(2) (1875) 12 B. H. C. R. (A. C. J.) 143.
(3) (1882) 7 Bom. 182.
(4) (1901) 24 Mad. 491.
(5) (1869) 3 Beng. L. R. (A. C. J.) 365 at p. 421.

1903.

NARAYAN v. SHAMRAO.

alleged that he was entitled to them as absolute owner. Suit No. 519 of 1891 was brought against one Vinayak by the plaintiff, while Suit No. 518 of 1892 was brought by him against all his judgment-debtors whose right, title and interest he had purchased and also against one Wamanji Mahadev, who is defendant No. 6 in the present suit. The plaintiff succeeded in recovering exclusive possession of the lands in respect of which those two suits had been brought.

The present suit is brought in respect of lands other than those to which the two previous suits related and in it the plaintiff seeks to recover a one-third share by partition in those lands. He alleges in his plaint that the defendants whose right, title and interest in these lands he purchased at the Court sale owned them jointly with the other defendants and that he is entitled to recover his share by partition. Both the Courts below have rejected his claim without going into evidence on the preliminary ground that under section 43 of the Civil Procedure Code (Act XIV of 1882) he is debarred from maintaining the present suit, because in the two previous suits he omitted to include the property for which he now sues.

I am of opinion that both the Courts below have wrongly applied section 43 to the plaintiff's present claim. Section 43 only applies where the cause of action is the same in the two suits. The cause of action alleged by the plaintiff in the two previous suits was founded upon his title as absolute and exclusive owner of the properties to recover which those suits were brought. He sued the defendants in those suits as trespassers, and his claim in both of them was one in ejectment. In the present suit the property is different and the cause of action alleged in the plaint is founded upon the plaintiff's title as a joint owner with the defendants, other than those whose right, title and interest he purchased at the Court sale. It seems to me clear, therefore, that the cause of action in the present suit is quite different from the cause of action of the two previous suits and section 43 can have no application to the present case. To borrow the language of their Lordships of the Privy Council in *Amanat Bibi* v. *Imdad Husain*[1] the plaintiff's "present claim certainly did not arise out

(1) (1888) 15 I. A. 106, 112; 15 Cal. 800.

of the cause of action which was the foundation of the former suit." The title on which the present claim is based, viz., that of joint ownership, is different from the title on which the two previous suits were brought, viz., that of exclusive ownership. I think the present suit falls within the principle of law enunciated in *Konnerrao* v. *Gurrao*[1] by Melvill, J., "that a person who has failed to recover one property under one title can sue to recover another property under a different title." *A fortiori*, a person who has succeeded in recovering one property under one title is not debarred from suing to recover another property under another title.

It is urged, however, that the plaintiff's cause of action in the present suit is identical with that on which the two previous suits were founded, because, it is said, the properties now in dispute are part of those specified in his certificate of sale. It is contended that the defendant's title, whatever it is, flows from one source, viz., his certificate of sale dated the 12th November, 1886. I am of opinion that the certificate of sale is not the plaintiff's title: it is merely his title-deed. Because the same deed related to several properties, it does not necessarily follow that the title or the cause of action as to all of them must be the same. If in fact the plaintiff were entitled to the properties now in dispute on the same title on which he recovered the properties in the two previous suits, section 43 might apply, but that is the case of neither side.

Upon these grounds, I concur with Mr. Justice Aston's view of the law and reverse the decrees of the Courts below, and remand this case for a decision on merits. Costs to abide the result.

Decree reversed. Case remanded.

(1) (1881) 5 Bom. 589.