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a clear and definite decision has once been arrived at, that decision ought to be maintained and followed.

I therefore concur that both these appeals should be dismissed and the decrees of the lower appellate Court confirmed with costs.

Decrees confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1914. *February* 24.

KASHINATH RAMCHANDRA (ORIGINAL PLAINTIFF), APPELLANT, *v.* NATHOO KESHAV AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Order II, Rule 2—Landlord and tenant—Lease—Landlord to recover possession on tenants' failure to pay rent—Suit by landlord to recover possession on tenants' failure—Decree directing plaintiff to recover possession on tenants' failure to pay rent within three months—Defendants' failure and recovery of possession by plaintiff—Prayer in the plaint for reservation of leave to bring a suit for rent not granted—Subsequent suit by the plaintiff to recover rent—Subsequent suit barred.

A lease provided that on the tenants' failure to pay rent the landlord should be entitled to take possession of the lands. The tenants having failed to pay the rent of two years, the landlord sued them and obtained a decree which directed that on the defendants' default to pay all the arrears of rent and costs within three months, the plaintiff should take possession of the lands. In the said suit the plaintiff had asked for permission to bring a separate suit for the rent in arrears for two years, but none was given. Subsequently the plaintiff having brought a suit for the said rent of two years,

Held, that the suit was barred under Order II, Rule 2 of the Civil Procedure Code (Act V of 1908) as the claim in the suit for rent up to the date of forfeiture arose upon the same contract as did the landlord's right of forfeiture for non-payment of rent; that no necessity or reason existed for a separate suit for rent where there had been a forfeiture for non-payment and that the claim for possession and the claim for rent ought to be enforced in one suit, provided the cause of action was the same, unless the Court should give leave for the reservation of one of the remedies.

* Second Appeal No. 566 of 1913.

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SECOND appeal against the decision of N. B. Mujumdar, First Class Subordinate Judge of Dhulia with appellate powers, confirming the decree of D. T. Chaubal, Subordinate Judge of Yaval.

Suit by a landlord to recover rent.

On the 3rd January 1907 the plaintiff let out his lands to the defendants for a period of ten years under a lease which provided that if the rent was not paid for any year the lands should be given back to the plaintiff. The defendants having failed to pay rent for two years, namely, 1907-08, 1908-09, the plaintiff brought the present suit to recover from the defendants Rs. 381-4-0 for the rent of the said two years. The suit was filed in the year 1910.

The defendants contended *inter alia* that under Order II, Rule 2 of the Civil Procedure Code the suit was barred because the plaintiff had filed a suit, No. 983 of 1909, against the defendants for possession of the lands owing to their failure to pay the rent and obtained a decree, but in that suit he had not claimed the rent.

The plaintiff in his additional statement asserted that in his suit for possession on the ground of forfeiture he had expressly stated that he would bring a separate suit for rent and no question about rent having been raised in that suit, the present claim was not barred.

The Subordinate Judge upheld the defendants' contention and found that the claim for the rent of the two years in suit was barred under Order II, Rule 2 of the Civil Procedure Code. He, therefore, dismissed the suit.

On appeal by the plaintiff the appellate Judge confirmed the decree.

The plaintiff preferred a second appeal.

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P. B. Shingne for the appellant (plaintiff):—The cause of action for the suit for possession was entirely different from the cause of action for the present suit for profits. The liability to deliver possession and the liability to pay profits arose, no doubt, under one and the same lease, but in the former suit the cause of action was default in paying rent plus enforcement of the covenant as to delivery of possession; whereas in the present suit the cause of action is not so very complicated. The cause of action in the present suit is failure to pay rent or profits. A consideration of Order II, Rule 4 (*a*) and (*c*) would also show that the present case cannot be governed by Order II, Rule 2: *Lalessor Babui* v. *Janki Bibi*[1], *Tirupati* v. *Narasimha*[2], *Gutta Saramma* v. *Maganti Raminedu*[3].

N. M. Samarth for the respondents (defendants):—This is not a suit for rent. It is rather a suit for mesne profits. Moreover, the cause of action in the present case is the same as the cause of action for the former suit. Both suits are based on one and the same lease. Order II, Rule 4, does not help the plaintiff. The cases relied on by the plaintiff have no bearing. The ruling in *Gutta Saramma* v. *Maganti Raminedu*[3] was practically based on the decision in *Lalessor Babui* v. *Janki Bibi*[1] which was decided under the Code of 1882. The provisions of the present Code are different from those of the Code of 1882. In connection with the present case, see *Mussummat Chand Kour* v. *Partab Singh*[4], *Read* v. *Brown*[5], *Gledhill* v. *Hunter*[6], *Sheo Shunkur Sahoy* v. *Hridoy Narain*[7].

(1) (1891) 19 Cal. 615.
(2) (1887) 11 Mad. 210.
(3) (1908) 31 Mad. 405.
(4) (1888) L. R. 15 I. A. 156 at p. 158.
(5) (1888) 22 Q. B. D. 128.
(6) (1880) 14 Ch. D. 492 at p. 495.
(7) (1882) 9 Cal. 143.

SCOTT, C. J. :—The material facts are stated by the appellate Judge as follows :—

"The lease provided that on the defendants' failure to pay the rent the plaintiff should be entitled to take possession of the lands. Defendants having failed to pay the rent of the two years in question the plaintiff sued them in 1909 for possession and obtained a decree which directed that on the defendants' default to pay all the arrears of rent and costs within three months the plaintiff should take possession of the lands and recover his costs from them. See Exhibit 19. It is admitted that the defendants did not pay the rent and costs and that consequently the plaintiff took possession of the lands. In the said suit the plaintiff asked for permission to bring a separate suit for the rent of the two years in question, but none was given to him. The question therefore is whether the present suit is barred under Civil Procedure Code, Order II, Rule 2. I think it is clearly barred."

In our opinion the decision of the lower Court is correct. The claim in the present suit for rent up to the date of the forfeiture arises upon the same contract of tenancy as did the landlord's right of forfeiture for non-payment of rent.

The "cause of action" upon which the plaintiff may base various claims in one suit under Order II, Rule 2 does not depend upon the character of the relief for which he prays. "It refers ... to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour" *Mussummat Chand Kour* v. *Partab Singh*[1] "to every fact which it would be necessary for the plaintiff to prove ... in order to support his right to the judgment of the Court": *Read* v. *Brown*[2]. If the evidence required to support two claims is different in any material respect the causes of action are different: see *Brunsden* v. *Humphrey*[3]. The Rule of the Supreme Court in England (adopted in Order II of the Civil Procedure Code) which prohibits with certain exceptions the union in one suit of other claims with a claim for the recovery of immoveable property is as pointed out by Sir George Jessel in *Gledhill* v. *Hunter*[4] a sur-

(1) (1888) L. R. 15 I. A. 156 at p. 158.
(2) (1888) 22 Q. B. D. 128.
(3) (1884) 14 Q. B. D. 141 at p. 147.
(4) (1880) 14 Ch. D. 492 at p. 495.

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vival from the rule prevailing in ejectment actions modified by a limited application of the rule in Chancery that you might join in a suit to establish title to land any other cause of action so long as you did not make your bill open to objection on the ground of multifariousness. Up to the time of the Judicature Act of 1873 the Common Law Courts entertained actions for rent upon the covenant in the lease after ejectment on the ground of forfeiture for non-payment of rent: see *Hartshorne* v. *Watson*[1] but no necessity or reason exists for a separate suit for rent where there has been a forfeiture for non-payment, under the practice established by the Judicature Acts and the Civil Procedure Codes. Both the claim for possession and the claim for rent may be enforced in one suit without any inconsistency. And since they may be enforced they ought to be enforced in one suit provided the cause of action is the same, unless the Court gives leave for the reservation of one of the remedies.

We agree with the criticism expressed by the Allahabad High Court in *Mewa Kuar* v. *Banarsi Prasad*[2] that the wording of sections 43 and 44 (now Order II, Rules 2 and 4) "is not happy and suggests confusion," which confusion does not appear to us to be diminished by the addition of clause (*c*) in Rule 4. We do not however think that the words of Rule 4 imply that in all cases a suit for the recovery of immoveable property must necessarily be based upon a different cause of action to a suit for arrears of rent for the same land. There may be cases in which a suit for recovery of land will involve the production of different evidence to that necessary to support a suit for rent in respect of the same land: for example a suit for rent up to the date of a forfeiture for breach of covenant to repair would depend upon different evidence to that necessary to

[1] (1838) 4 Bing. N. C. 178. [2] (1895) 17 All. 533.

establish the breach of covenant and consequent right to possession. That however is not the case here.

The plaintiff apparently recognized that his claim for rent and his claim for possession arose out of one and the same cause of action but though in his plaint in the earlier suit he stated that he reserved his right to claim rent, he omitted to obtain the assent of the Court to the reservation. He is therefore barred by the express provisions of Order II, Rule 2, from now suing for the relief so omitted. We affirm the decree of the lower Court and dismiss the appeal with costs.

Decree affirmed.

G. B. R.

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ORIGINAL CIVIL.

Before Mr. Justice Beaman.

JAN MAHOMED ABDULLA DATU AND ANOTHER, PLAINTIFFS *v.* DATU JAFFER AND OTHERS, DEFENDANTS.*

1913.
August 28.

Khojas—Hindu law, how far applicable to Khojas—Joint family—Presumption as to membership of joint family—Mahomedan law—Spes successionis, *transfer of—Family arrangement in the nature of a partition, reasonableness of—Limitation Act (IX of 1908), Articles 91 and 127.*

In the year 1879 one D a Khoja was living at Malad in the Thana District, where he carried on a small business, together with *inter alia* his mother and unmarried daughter, his sons A and I and A's wife and A's son J. In that year it was agreed that A should separate from the rest of the family and should receive what was considered to be his share in the family property. The family property was valued at Rs. 4,500 and Rs. 900 or the fifth part of it was made over to A or the members of his family as his share, namely Rs. 400 in cash given to A, ornaments of the value of Rs. 200 given to A's wife and a house of the value of Rs. 300 settled on J. The terms of this transaction were contained in a deed of release dated the 13th of February 1879, by which deed A released all claims of himself and his wife and son against the family and family property.

* Suit No. 1021 of 1912.