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DWARKADAS DAMODAR v. DWARKADAS SHAMJI.

We affirm the decree of the lower Court except in this respect that the tenth defendant is entitled to his costs out of the estate. We dismiss the appeal ordering all parties to the appeal to have their costs out of the estate.

Solicitors for the appellant :—Messrs. *Chitnis, Motilal and Kanga.*

Solicitors for the respondents :—Messrs. *Madhavji, Kamdar and Chhotubhai.*

G. G. N.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

1915. *October* 18.

SONU VALAD KHUSHAL KHADAKE (ORIGINAL PLAINTIFF), APPELLANT v. BAHINIBAI MURD KRISHNA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*

Civil Procedure Code (Act V of 1908), Order II, Rule 2—Cause of action, splitting up of—Bar does not apply where causes of action are different.

On T's death, his widow sold two of his Survey Numbers (403 and 404) to D, and shortly afterwards sold Survey No. 324 to Z, who was a brother of D, joint in estate. After the widow's death, B, a daughter of T, sued D and T (another daughter of T) to recover possession of Survey No. 324 ; but the suit was at her request dismissed. B then having sold the three Survey Numbers to the plaintiff, the present suit was brought against the two daughters, and D and Z, to recover possession of the three Survey Numbers. The lower Courts dismissed the suit on the preliminary ground that since B omitted to sue in respect of Survey Nos. 403 and 404 in the first suit, the plaintiff was debarred from preferring his claim to those numbers in the present suit. The plaintiff having appealed,

Held, that the suit was not barred by the provisions of Order II, Rule 2 of the Civil Procedure Code inasmuch as the two sets of facts which required to be proved in both suits in order to enable the plaintiff to succeed were different sets of facts, and the causes of action accordingly were different.

* Second Appeal No. 628 of 1914.

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SONU VALAD KHUSHAL v. BAHINIBAI.

SECOND appeal from the decision of C. C. Dutt, acting District Judge of Khandesh, confirming the decree passed by V. P. Raverkar, Subordinate Judge at Jalgaon.

Suit to recover possession of land.

Three Survey Nos. (403, 404 and 324) which formed the subject matter of dispute belonged to one Tukaram. After Tukaram's death, his widow Bhagirathi sold two of them (S. Nos. 403 and 404) to Dagadu (defendant No. 3) in January 1906; and shortly afterwards sold Survey No. 324 to Zagadu (defendant No. 4). Dagadu and Zagadu were brothers who lived joint in estate with their brother Ukhardu (defendant No. 5).

In April 1910, Bahinibai (defendant No. 1), a daughter of Tukaram, filed a suit No. 270 of 1910 against Zagadu and Tapi (defendant No. 2), another daughter of Tukaram, to recover possession of Survey No. 324. Both sisters Bahini and Tapi passed a deed of gift of the three Survey numbers to Tukaram (defendant No. 6), son of Dagadu. The suit was, on Bahini's request, dismissed on the 7th October 1910.

On the 7th October 1910, Bahini sold the three Survey numbers to the plaintiff.

The present suit was filed by the plaintiff to recover possession of the three Survey numbers.

At the hearing a preliminary issue was raised: "Whether this suit is barred under Order II, Rule 2 of the Civil Procedure Code particularly as Survey Nos. 403 and 404 were not included in the previous suit?"

The first Court found the issue in the affirmative as the parties and the causes of action in both suits were the same.

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On appeal, the District Judge came to the same conclusion.

The plaintiff appealed to the High Court.

W. B. Pradhan, for the appellant:—The cause of action in the first suit was the right of Bahini to succeed to the property of her father to the exclusion of her sister Tapi; whereas the cause of action in the present suit is the ouster of the plaintiff from the property which he is entitled to possess under the sale deeds. The causes of action being thus different the case is not covered by Order II, Rule 2 of the Civil Procedure Code. The Rule does not say that every suit shall include every cause of action, but that every suit shall include the whole claim arising out of the cause of action: see *Rajah of Pittapur* v. *Sri Rajah Venkata Mahipati Surya* [1]; *Kashinath Ramchandra* v. *Nathoo Keshav* [2].

P. V. Nijsure, for respondent No. 2.

G. S. Rao, for respondents Nos. 3 to 6:—The cause of action in the present suit is the same as the cause of action in the earlier suit: viz., (1) Bahini's right to succeed to her father's property to the exclusion of Tapi; and (2) the wrongful possession of the defendants. The parties to both suits are the same.

The present suit is not competent, for the cause of action alleged here had arisen at the time the first suit was brought. It is therefore barred under Order II, Rule 2: see *Nundo Kumar Nasker* v. *Banomali Gayan* [3], *Umabai* v. *Vithal* [4], *Sayed Gulam Nabi* v. *Ajubibi* [5] and *Alisaheb* v. *Mohidin*. [6]

BATCHELOR, J.:—This appeal is brought by the plaintiff. His suit has been dismissed by both the Courts below

(1) (1885) L. R. 12 I. A. 116 at p. 119.
(2) (1914) 38 Bom. 444.
(3) (1902) 29 Cal. 871 at p. 880.
(4) (1908) 33 Bom. 293 at p. 304.
(5) (1893) P. J. 417.
(6) (1911) 13 Bom. L. R. 874.

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on the ground that it was incompetent under Order II, Rule 2 of the Civil Procedure Code.

The suit was brought on a sale deed of October 1910 passed in the plaintiff's favour by the 1st defendant Bahini. Bahini and Tapi were the daughters of one Tukaram Narayan who died in 1901, leaving his widow Bhagirthi and the two daughters I have named. In the year 1910 Suit No. 270 of that year was brought by Bahini, the present 1st defendant, against her sister Tapi, the present 2nd defendant, and Zagdu, the present 4th defendant, for possession of Survey No. 324 which had been sold to Zagdu in January 1906 by Bhagirthi. In the same month, January 1906, but a few days earlier, Bhagirthi had sold Survey Nos. 403 and 404 to the present 3rd defendant, Dagdu. It is found as a fact that Dagdu and Zagdu and the 3rd brother Ukhardu, defendant No. 5, are joint in estate. The present suit by Bahini's vendee was to recover possession of the three Survey Nos. 324, 403 and 404.

The question is, whether the lower Courts were right in holding that the suit was barred by Order II, Rule 2 of the Code. That rule provides that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action," and that "where a plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted." In the view of the lower Courts the present claim in respect of Survey Nos. 403 and 404 was, or was to be regarded as, a portion of the claim agitated in Bahini's suit of 1910 and was based upon the same cause of action. It was consequently held that since Bahini omitted to sue in respect of Survey Nos. 403 and 404 in 1910, the plaintiff was debarred from preferring his claim to those numbers in the present suit.

The question whether that decision is right seems to me to turn entirely upon whether the cause of action in the earlier suit was identical with, or different from, the cause of action in the present suit, and I differ from the learned Judges of the Courts below, because, in my opinion, the two causes of action are distinct. As was said in *Kashinath Ramchandra* v. *Nathoo Keshav* [1] "the expression 'cause of action' refers ... to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour" and "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." Where the question is, whether the causes of action in two suits are different or identical, one of the most valuable tests appears to me to be that supplied by the authority of *Brunsden* v. *Humphrey* [2] where Lord Justice Bowen, in delivering judgment, quoted the following words used by De Grey C. J. in *Kitchen* v. *Campbell* [3] :

"The principal consideration is, whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case. And one great criterion of this identity is that the same evidence will maintain both actions."

And that test was applied by the Lord Justice for the decision of the particular case then before the Court. Adopting that same test here, it seems to me clear that the causes of action in the two suits were distinct. In the former suit the facts, which the then plaintiff was under obligation to prove in order to entitle her to the Court's judgment, were that on the death of her mother the property devolved upon her and that the alienation to Zagdu of Survey No. 324 was invalid. But the facts, which Bahini or her vendee, the plaintiff, would have to prove in this suit in order to recover judgment, would be not only that Bahini took the property on the

[1] (1914) 38 Bom. 444 at p. 447. [2] (1884) 14 Q. B. D. 141 at p. 147
[3] (1771) 2 W. Bl. 827.

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death of her mother, but that the sale to Dagdu of the different Survey Nos. 403 and 404 was invalid in law; in other words, the two sets of facts which require to be proved in both suits in order to enable the plaintiff to succeed were different sets of facts, and it follows, in my opinion, that the causes of action must be pronounced to be different. Mr. Rao in support of the judgment under appeal has called our attention to *Nundo Kumar Nasker* v. *Banomali Gayan* [1] which was cited with approval in *Umabai* v. *Vithal.* [2] But these decisions do not, in my opinion, conflict with the view which I have expressed. They go no further, as I understand them, than deciding that it is open or competent or lawful for a plaintiff suing in ejectment to join as co-defendants various alienees who are in possession of portions or fragments of the property in suit. They do not, I think, decide, what alone would assist the respondents here, that it is obligatory upon such a plaintiff to join all such alienees as co-defendants at the risk of forfeiting his right to recover from those whom he fails to join in his first suit: in other words, they do not decide that the cause of action supplied by one alienation is identical with the cause of action supplied by another.

Upon these grounds I am of opinion that the lower Courts were wrong in dismissing the plaintiff's claim upon the preliminary ground that it was bad under Order II, Rule 2.

The decree of the lower Court must be reversed and the suit must be remanded to be heard and decided on its merits in regard to Survey Nos. 403 and 404. As to Survey No. 324 the decision of the lower Courts has not been impugned before us and will stand.

Costs of the appeal will be costs in the suit.

(1) (1902) 29 Cal. 871. (2) (1908) 33 Bom. 293.

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HAYWARD, J. :—I concur. The causes of action were, in my opinion, not the same in the two suits. The cause of action in the suit of 1910 consisted of the title arising on the death of Bhagirthi and the alleged invalidity of the sale deed relating to Survey No. 324 in favour of Zagdu. The cause of action in the present suit of 1912 consisted of the title arising on the death of Bhagirthi and the alleged invalidity not, for present purposes, of the sale deed relating to Survey No. 324 in favour of Zagadu, but of another sale deed relating to other Survey Nos. 403 and 404 in favour of another man, Dagdu. No doubt those two separate causes of action *might* have been joined together in one suit, as raising the common question of title arising out of the death of Bhagirthi and affecting to some extent each of the two different defendants, under the permissive provisions of Order I, Rule 3 of the Schedule of the Civil Procedure Code as in the cases of *Nundo Kumar Nasker* v. *Banomali Gayan* [1] and *Umabai* v. *Vithal.* [2]

But that is quite another thing from holding that those two separate causes of action *ought* to have been joined together in one suit against the two different defendants. The two causes of action were clearly separate because the invalidity of the sale deed in favour of Zagadu could not have been established solely by proof of the invalidity of the sale deed in favour of Dagadu. Nor would proof of the invalidity of the sale deed in favour of Zagdu alone have sufficed to settle the invalidity of the sale deed in favour of Dagdu. They could not be supported by the same evidence and that was the test adopted in the case of *Kashinath Ramchandra* v. *Nathoo Keshav.* [3] Moreover the two causes of action affected different defendants. There was, therefore, no legal necessity to join them in one suit, as

(1) (1902) 29 Cal. 871 at p. 880. (2) (1908) 33 Bom. 293 at p. 304.
(3) (1914) 38 Bom. 444.

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neither claims under separate causes of action nor claims affecting different defendants are contemplated by the peremptory provisions of Order II, Rule 2 of the Schedule of the Civil Procedure Code. It would not have mattered even if the two separate causes of action had *jointly* affected the different defendants and had not involved a *several* liability of each of the two different defendants. For they would still have been beyond the contemplation of the peremptory provisions of Order II, Rule 2, though within the permissive provisions of Order II, Rule 3 of the Schedule to the Civil Procedure Code.

I have ventured to add these remarks as it seems to me essential for the proper determination of these somewhat difficult questions of non-joinder and mis-joinder that not only should the causes of action in each case be exactly comprehended but that a clear distinction should be maintained between the permissive nature of the provisions of Order I, Rule 3 and Order II, Rule 3 and the peremptory nature of the provisions of Order II, Rule 2 of the 1st Schedule to the Civil Procedure Code.

Decree reversed : suit remanded.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

1915.

November 16.

MAHOMED BEG AMIN BEG AND ANOTHER (HEIRS OF ORIGINAL PLAINTIFF NO. 2) APPELLANTS *v.* NARAYAN MEGHAJI PATIL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Pre-emption—Rule of pre-emption does not exist in the Khandesh District—Bombay Regulation IV of 1827, clause 26.

In the District of Khandesh in the Bombay Presidency, the rule of pre-emption does not exist either as a rule of law or as a rule of justice, equity and good conscience.

* Second Appeal No. 198 of 1913.