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I am, therefore, of opinion that the gift in this case is beyond the powers of the widow and consequently invalid, and that it cannot bind the reversioner.

I agree that under the circumstances defendant No. 1 is fairly entitled to Rs. 1,500 as compensation for improvements effected by him.

The appeal should, therefore, be allowed, and the decree of the lower Court should be modified as proposed by the learned Acting Chief Justice.

Decree modified.

R. R.

APPELLATE CIVIL.

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

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November 7.

RAKHMABAI KOM PIRAJI SAPKAL, HEIR OF THE DECEASED PIRAJI BIN KRISHNA SAPKAL (ORIGINAL DEFENDANT), APPELLANT *v.* MAHADEO NARAYAN BUNDRE (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XXIII, Rule 1—Suit for ejectment—Insufficiency of notice to quit—Withdrawal of the suit without permission of the Court—Fresh suit after proper notice—Whether the previous suit a suit for the same subject matter—Res Judicata—*Subject matter, meaning of.*

A suit was brought by the plaintiff to eject the defendant. Finding however that there was no sufficient notice to quit, he withdrew the suit without obtaining the leave of the Court. Subsequently the plaintiff having given a formal notice to quit brought a fresh suit for ejectment. The defendant contended that the withdrawal of the former suit without permission operated as a bar to the second suit under Order XXIII, Rule (1) of the Civil Procedure Code, 1908.

Held, that the withdrawal did not operate as a bar as the previous suit was not a suit for the same subject matter as the second suit within the meaning of Order XXIII, Rule 1 of the Civil Procedure Code, 1908.

* Appeal from Order No. 1 of 1917.

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'Subject-matter' means 'the series of acts or transactions alleged to exist giving rise to the relief claimed.'

APPEAL from order passed by G. K. Kale, Assistant Judge, A. P., at Satara reversing the decree passed by V. V. Pandit, Joint Subordinate Judge, Satara.

Suit to recover possession.

This suit was instituted by the plaintiff to eject the defendant from the plaint land. Plaintiff alleged that he was the owner of the Inam and Miras rights over the land and that the defendant held it as an annual tenant under a registered rent note dated May 12, 1882.

Prior to the institution of the suit, the plaintiff had brought another suit (No. 597 of 1912) in ejectment against the defendant in respect of the very land in dispute. That suit was withdrawn without obtaining Court's permission to bring a fresh suit as it was found defective for want of a sufficient notice to quit.

The plaintiff, therefore, gave a formal legal notice to quit dated December 26, 1912. The defendant having failed to comply with the notice, the plaintiff brought the present fresh action to eject him.

The defendant contended *inter alia* that the withdrawal of the previous suit (No. 597 of 1912) without permission operated as a bar to the second suit under Order XXIII, Rule (1) (*3*) of the Civil Procedure Code, 1908.

The Subordinate Judge upheld the defendant's contention and dismissed the plaintiff's suit.

On appeal, the Assistant Judge reversed the decree, his reasons being:—

"I feel satisfied that the plaintiff withdrew from the suit on account of the defective notice, which was fatal to the claim. It is conceded on behalf of the respondent that a dismissal of the previous suit by the Court after recording a finding on the preliminary issue against the plaintiff would not have

barred the present suit based on a valid cause of action. The question is whether plaintiff should be in a worse position by honestly withdrawing from the suit, instead of allowing it to be dismissed by the Court for want of a good cause of action. It appears to me that, though the material issue about the plaintiff's title in both the suits is the same, the cause of action is different, and therefore it cannot be said that the subject matter of both the suits is the same. To me it appears that, in effect, the subject matter in the previous suit was the determination of the question about the sufficiency of the notice, while the subject matter in the present suit is the determination of the merits of the case. In both the suits, the defendant has pleaded his permanent tenancy, and the lower Court has followed the ruling reported in I. L. R. 21 Mad. page 35. But a recent Full Bench Ruling (*Singa Reddi* v. *Subba Reddi*, reported in the Madras Law Journal, Volume 31, page 48) of the Madras High Court has over-ruled the case reported in I. L. R. 21 Mad. page 35, and it is laid down that a plaintiff in the second suit is not debarred from contesting the allegations made by the defence in the first suit, when the causes of action and the reliefs claimed in the two suits are substantially different. It is argued for the respondent that the subject matter of the two suits would not become different simply because plaintiff created a different cause of action by giving a fresh notice. I think it must be said to the plaintiff's credit that he created no cause of action to avoid the effect of Order XXIII, Rule 1, but he gave a valid notice, as the previous notice was insufficient in law and was fatal to his claim. Under these circumstances it appears to me that the causes of action being different, the present suit cannot be considered to have been brought in respect of the same subject matter which was involved in the previous suit. Order XXIII, Rule 1 of the Civil Procedure Code is not then a bar to the present suit."

The defendant appealed to the High Court.

K. N. Koyajee for the appellant.—The lower Court erred in holding that the claim is not barred. The previous suit was withdrawn without obtaining leave of the Court to bring a fresh suit, see Order XXIII, Rule 1 of the Civil Procedure Code, 1908. The result of the previous suit precludes the plaintiff from instituting any fresh suit in respect of the same subject matter. I submit that the subject matter of the previous suit and the present suit is the same. The cause of action was substantially the same and this suit is, therefore, barred. It should be taken that in the previous litigation the whole cause of action for the suit had accrued :

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see *Achuta Menon* v. *Achutan Nayar*[1]; *Kamini Kant Roy* v. *Ram Nath Chuckerbutty*[2].

P. B. Shingne, for the respondent, was not called upon.

SCOTT, C. J.:—This is an appeal against the decision of the lower appellate Court allowing a suit to proceed and remanding it for trial to the first Court on the ground that the provisions of Order XXIII, Rule 1 are no bar to the prosecution of the suit. The material facts are that a suit was brought by the plaintiff for the ejectment of persons who claimed to be Mirasdars or permanent tenants on the allegation that they were not Mirasdars, and that he was entitled to determine the tenancy. Finding, however, that there was no sufficient notice to quit, he withdrew the suit without obtaining the leave of the Court, and having given a formal notice to quit complying with the provisions of the law, he brought this suit for ejectment. The question is whether the previous suit was a suit for the same subject-matter as the present suit within the meaning of Order XXIII, Rule 1. We are of opinion that "subject-matter" means, to use the words of Order I, Rule 1, "the series of acts or transactions alleged to exist giving rise to the relief claimed." Obviously the first series of acts or transactions which formed the basis of the first suit was incomplete, or the plaintiff would have been able to prosecute his suit to decree. It was incomplete because there was no notice to quit. The second series of acts or transactions is complete because the notice to quit has been given, and therefore, the two suits are not in respect of the same subject matter.

The same result arises if "subject matter" is to be taken to be "the cause of action" in the sense in

(1) (1897) 21 Mad. 35.

(2) (1893) 21 Cal. 265.

which it is usually understood, namely, the bundle of facts which have to be proved in order to entitle the plaintiff to relief. In that sense the word "subject-matter" was understood by the Madras High Court in *Achuta Menon* v. *Achutan Nayar*[1], and by the Calcutta High Court in *Kamini Kant Roy* v. *Ram Nath Chuckerbutty*[2], in cases arising under section 373 of the Code of 1882.

In the first suit between the present parties there was no cause of action because notice had not been given. In the present suit there is a cause of action because notice has been given. Therefore, the causes of action are not the same. We, therefore, affirm the order and dismiss the appeal with costs.

Decree confirmed.

J. G. R.

ORIGINAL CIVIL.

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

BIRDICHAND JIVRAJ (1ST DEFENDANT), APPELLANT *v.* THE STANDARD BANK, LIMITED (PLAINTIFFS), RESPONDENTS.*

1916. November 9.

Company—Pledge of shares in a Company—Shares transferred to the name of the pledgee in the register of the Company—Shares not fully paid up—Compulsory liquidation of the Company—Payment of calls as contributory by pledgee of shares—Pledgee not entitled to recover calls paid on the footing of an indemnity—Pledgee paying calls not a trustee for the pledgor—Contract—Agent and Principal.

From March to October 1913, the plaintiff Bank advanced to B, the agent of the undisclosed principal defendant No. 1, various sums aggregating Rs. 1,74,200 on the security of 3,605 shares of the Indian Specie Bank, B undertaking to maintain a margin of Rs. 15 per share. The shares deposited

* O. C. J. Appeal No. 24 of 1916.

(1) (1897) 21 Mad. 35, (2) (1893) 21 Cal. 265,