APPELLATE CIVIL.

Before Sir Charles A. Turner, Kt., Chief Justice, and Mr. Justice Forbes.

1879. May 5.

SADAYA PILLAI (PLAINTIFF), APPELLANT, *v.* CHINNI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Act VIII, 1859, Section 2—Res judicata.

Act VIII of 1859, Section 2, does not require a plaintiff at once to assert all his titles to property or to be thereafter estopped from advancing them.

The maxim *Nemo bis vexari debet in eadem causâ* cannot apply where the right on which the second suit is brought is not the same as that asserted in the former suit.

THIS was a suit to establish plaintiff's title to 5-14 acres of land; to have first defendant's name removed from the pattá granted by the Revenue authorities; and to have a pattá issued in plaintiff's name alone.

The plaintiff alleged that the first three defendants were the sons of his uncle Paradásia Pillai by his concubine the fourth defendant; that he and his uncle were undivided in interest, and lived together till the death of the latter in 1852, when a partition of the property was made between plaintiff and defendants; that this partition was finally carried out in 1864, since when defendants had been in separate possession of their share of the land; that the Sub-Collector ordered the first defendant's name to be substituted for that of Paradásia Pillai as joint pattádár with plaintiff, which led to a civil suit in 1872.

Plaintiff in that suit, as the undivided nephew of Paradásia, sued first defendant, alleging that the latter was not the son of Paradásia, and had no claim to the land in dispute; but at the hearing the Court allowed plaintiff to put in a petition with certain documents, which wholly altered the nature of the claim, for plaintiff now admitting that first defendant was the son of

* S.A. 568 of 1878 against the decree of the Subordinate Judge at Cuddalore reversing the decree of the District Munsif of Chidambaram, dated 18th March 1878.

Paradásia, claimed under a partition-deed executed after Paradásia's death.

Judgment was given for plaintiff, but on appeal in 1875 the suit was dismissed, the Court remarking that plaintiff's right to assert his claim under the partition-deed was not affected by this decree.

This suit was brought in 1875, and the question was whether plaintiff's claim was barred by Section 2 of Act VIII of 1859. (The Sub-Collector was made a party to the suit.)

The Múnsif found in plaintiff's favor on the ground that there had been no final decision either granting or withholding the plaintiff's prayer (*Saikappa Chetti* v. *Rání Kolandapuri Nachiár*),(1) and because, in dismissing the suit, the Appellate Court 'allowed the option to plaintiff of maintaining a separate suit.'

On appeal the Subordinate Judge dismissed the suit, holding that the plaintiff was bound to bring forward his whole cause of action, and, if he failed upon one title, could not bring another suit upon another of a wholly different character; and that it was very doubtful whether an Appellate Court could permit the withdrawal of a suit already heard and determined by a Court of First Instance, but that in this case the order of the District Court had no such meaning.

The plaintiff appealed on the grounds that the suit was not barred, and that he was allowed under Section 97, Act VIII, 1859, to withdraw his former suit with permission to bring a fresh one.

T. Ráma Ráu for Appellant.

C. Rámachandra Ráu Sahib for Respondent.

The Court (TURNER, C.J., and FORBES, J.) delivered the following

JUDGMENT:—The plaintiff, appellant, instituted this suit to obtain a declaration that he is solely entitled to the land described in the plaint, without participation on the part of the defendants Chinni, Sinnan and Virappen; and that, being so entitled, the pattá for the land, which has been issued in his name and in the name of the defendant Chinni, ought to be cancelled and a pattá issued in his name solely.

(1) 3 M.H.C.R., 84.

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The plaintiff averred that he lived in commensality and as a member of a joint family with his uncle, one Paradásia Pillai, up to the time of his uncle's death, which occurred 25 years ago; that the property in suit was at that time joint property, and the pattá was in his name and in the name of his uncle Paradásia Pillai; that the defendant Thyli was the concubine of his uncle Paradásia Pillai, to whom she had borne three sons, the defendants Chinni, Sinnan and Virappen; that subsequently to the death of Paradásia Pillai he had come to an agreement with the defendant Chinni, and the defendant Thyli as the *de facto* guardian of her sons Sinnan and Virappen, who were at the time minors, whereby they accepted as their share of the joint property three-sixteenth cawni of land and some buffaloes, and it was arranged they should reside in the plaintiff's house until he built a house for them on the land assigned to them; that on 23rd December 1864 the defendants Chinni, Sinnan and Virappen took from him Rs. 10-8 in lieu of the house he was bound to erect and executed an acquittance, and that they have since retained sole possession of the land assigned to them, and he has held sole possession of the land mentioned in the plaint; that the Sub-Collector nevertheless issued a pattá for the land mentioned in the plaint, in which the defendant Chinni is included as co-occupier of the land.

In a former suit instituted by the plaintiff in 1872 he claimed the same relief as he now seeks, but on different averments. While asserting, as he now asserts, that the property in suit was the joint property of himself and his uncle Paradásia Pillai, he then averred that the defendant Chinni was not the son of his uncle and had no claim on the property. In the course of the proceedings in that suit the plaintiff produced the documents on which he now relies to prove a partition subsequently to his uncle's death, and endeavoured to obtain from the Court a decree on the strength of that partition; but it was ruled that in that suit his claim must stand or fall on the case originally set up by him, and that if he derived any title from the alleged partition, he might assert it in another suit. It being found that Chinni was the son of Paradásia Pillai, the suit was dismissed.

To the present claim the defendants plead among other pleas that the plaintiff is estopped from maintaining this suit by the provisions of Section 2, Act VIII of 1859. This is clearly not so,

because the claim he now advances has not been determined in any previous proceedings. He claimed the same property it is true, but he based his claim on inheritance—succession by survivorship to the interest of his united uncle; that claim was inquired into and determined. He now sues on the title created by the agreement made between him and the defendants through their guardian subsequently to the death of Paradásia Pillai. This claim has not been heard and determined; the provisions of Section 2, Act VIII of 1859, do not therefore apply to it. Nor is there anything in that Act which required a plaintiff at once to assert all his titles to property or to be thereafter estopped from advancing them. The only ground on which objection could be taken to a second claim under the circumstances is the rule of law *Nemo debet bis vexari pro eâdem causâ*, but that rule cannot apply where the right on which the suit is brought is not the same as that asserted in the former suit. *Munshee Buzloor Raheen* v. *Shamsoomjee Begum*,(1) and *Rão Kurun Sing* v. *Nawab Mahomed Fyz Ali Khan*.(2)

The further question arises whether the plaintiff can claim the relief awarded to him by the Court of First Instance. As his title is impugned by the defendants, it is not obvious why he should not obtain a declaratory decree. It is true this Court cannot go on to give him other relief than an injunction restraining the defendants from interfering with his possession, and that it cannot direct the issue of a Revenue pattá (in making which direction the Múnsif exceeded his powers), but it can make a declaration of the plaintiff's right, and this declaration the plaintiff can carry to the Collector, who will grant him a pattá.

The plaintiff must of course establish that his suit is brought within the time limited for suits for such a declaration, and that on the merits he is entitled to relief.

The decree of the Lower Appellate Court is set aside and the case remanded to that Court for trial. The costs of this appeal will abide and follow the result.

(1) 11 M.I.A., 551. (2) 14 M.I.A., 187.