

[3 Mad. 104.]

APPELLATE CIVIL.

The 25th January, 1881.

PRESENT :

MR. JUSTICE INNES AND MR. JUSTICE MUTTUSAMI AYYAR.

Chinnasami Pillai.....(Plaintiff) Appellant.

versus

Krishna Pillai..... (Defendant) Respondent.*

Res judicata—Civil Procedure Code, Sections 331, 332—Specific Relief Act, Section 9.

An investigation under Section 331 of the Civil Procedure Code (prior to the Amendment Act of 1879) is limited to the fact of possession, and is no bar to a subsequent suit brought to try the title to the land in dispute.

THIS suit was brought to recover certain land from the defendant on the ground that it was the jennm property of the *Kappulath tarwad* and had been leased to plaintiff's grandmother, *Shangu Ammal*, in 1046 (1871). In the same year *Shangu Ammal* [105] leased it to one *Sahib Rawutan*, and in 1878 sued him for recovery of the land and got a decree. Defendant resisted execution of this decree on the ground that he was in possession of the land.

Shangu Ammal then put in a petition under Section 328 of the *Civil Procedure Code*, which was registered as a suit (286 of 1878), and dismissed on the ground that the land was not in possession of *Sahib Rawutan*.

The defendant denied the truth of the *plaint in toto*, and pleaded that it was barred by Section 13 † of the *Civil Procedure Code*.

The Munsif dismissed the suit on the latter ground.

The District Judge confirmed this decision on appeal.

* Second Appeal No. 624 of 1880 from the decree of H. Wigram, Officiating District Judge of South Malabar, in A.S. 143 of 1880, confirming the decree of the District Munsif of Palghat, dated 15th June 1880.

† [Sec. 13.—No Court shall try any suit or issue, in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they or any of

them claim, litigating under the same title.

Explanation I.—The matter above referred to must in the former suit have been alleged by one party and either denied or confessed, expressly or impliedly, by the other.

Explanation II.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation III.—Any relief claimed in the *plaint*, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused.

Explanation IV.—A decision is final within the meaning of this section when it is such as the Court making it could not alter (except on review) on the application of either party or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.

Explanation V.—Where persons litigate *bona fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.

Explanation VI.—Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction.]

The material part of his Judgment is as follows :—

“ Under Section 331 of the present Code as amended, a claim made in course of execution, in good faith, by a person other than the judgment-debtor, is to be numbered and registered as a suit between the decree-holder as plaintiff and the claimant as defendant, and the claim is to be investigated in the same manner and with the like power as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of Chapter V. In other words, the plaint must show that the defendant is, or claims to be, interested in the subject-matter, and is liable to be rejected if, *inter alia*, it is not so framed as to afford ground for a final decision upon the subject in dispute (Sections 50*-53e). It may be argued that as the claim is registered as a suit, it is not open to the decree-holder to frame his suit in the manner provided by Section 42; but I presume that the Courts would be at liberty to allow the decree-holder to state his case in a supplemental plaint if the particulars contained in the former plaint were insufficient. The order passed under Section 331 is to have the force of a decree, and if the original decree-holder fails to establish his right of possession to the land claimed, I infer that he is barred by Section 13 from again trying the same question in a fresh suit.

“ But it is argued that the present claim was investigated under Section 331 of the Code before it was amended, and that the reference to Section 9 of the *Specific Relief Act* shows that it [106] was intended that the only question to be tried was one of possession as distinguished from title.

“ This may be so, but nevertheless under Section 333 the order passed in the suit was to have the force of a decree.

“ The real question, therefore, is whether the matter directly and substantially in issue in this suit was directly and substantially in issue in Original Suit No. 286 of 1878, and was heard and finally decided. That the parties are the same in point of law admits of no doubt. Now, it seems to me that the matter directly and substantially in issue in the former suit was whether the present defendant held the land on his own account, or whether it was held under the demise sued on by plaintiff's grandmother. That was heard and finally decided in favour of the present defendant, and I fail to see how any other matter is now in issue.

Particulars to be contained in plaint. * [Sec. 50:—The plaint must contain the following particulars :—

- (a) the name of the Court in which the suit is brought;
- (b) the name, description and place of abode of the plaintiff;
- (c) the name, description and place of abode of the defendant, so far as they can be ascertained;
- (d) a plain and concise statement of the circumstances constituting the cause of action, and where and when it arose;
- (e) a demand of the relief which the plaintiff claims; and
- (f) if the plaintiff has allowed or relinquished a portion of his claim, the amount so allowed or relinquished.

In money-suits.

If the plaintiff seek the recovery of money, the plaint must state the precise amount, so far as the case admits.

In a suit for mesne profits: and in a suit for the amount which will be found due to the plaintiff on taking unsettled accounts between him and the defendant the plaint need only state approximately the amount sued for.

Where plaintiff sues as a representative. When the plaintiff sues in a representative character, the plaintiff should show, not only that he has an actual existing interest in the subject-matter, but that he has taken the steps necessary to enable him to institute a suit concerning it.]

"I can of course assume a case in which plaintiff might say 'granted that the land was never in possession of *Sahib Rawutan*, my grandmother's tenant, I will now show that defendant was a trespasser *ab initio*,' and would be entitled to have the question tried. But that is not the case put forward by him, and I think that the suit as framed is *res judicata*."

Plaintiff appealed.

A. *Ramachandrayyar* for the Appellant.

Mr. *N. Subramanyam* for the Respondent.

The Court (INNES and MUTTUSAMI AYYAR, JJ.) delivered the following

Judgment :—We cannot agree with the District Judge and the District Munsif that the matter in question in this suit is *res judicata*.

Section 331 of the *Civil Procedure Code*, before it was amended, required that the suit should proceed as a suit under Section 9 of the *Specific Relief Act*. Section 332* of the *Procedure Code* allowed an appeal from the decree passed in the suit which Section 9 of the *Specific Relief Act* would otherwise have precluded. In other respects the suit was altogether regulated by Section 9 of the *Specific Relief Act*. If we refer to that provision of the law, we find that the question tried in such a suit is necessarily only the question of possession, for by Clause [107] 2 of Section 9† the parties are permitted, notwithstanding the decision, to proceed afterwards to try the title.

The question in the present suit is clearly one of title and it is not *res judicata*.

We must reverse the decrees of the Courts below, and remand the case to the Court of First Instance for readjudication on the merits.

*[Sec. 332.—If any person other than the defendant is dispossessed of any property in execution of a decree, and such person disputes the right of the decree-holder to dispossess him of such property under the decree, on the ground that the property was *bona fide* in his possession on his own account or on account of some person other than the Judgment-debtor, and that it was not comprised in the decree, or that, if it was comprised in the decree, he was not a party to the suit in which the decree was passed, he may apply to the Court.

If, after examining the applicant, it appears to the Court that there is probable cause for making the application, the application shall be numbered and registered as a suit between the applicant as plaintiff and the decree-holder as defendant, and the Court shall proceed to investigate the matter in dispute in the same manner and with the like power as if a suit for the property had been instituted by the applicant against the decree-holder under the provisions of the *Specific Relief Act* 1877, Section 9,

and shall pass such order as it thinks fit for executing or staying execution of the decree.

In hearing applications under this section, the Court shall confine itself to the grounds of dispute above specified.

Nothing in this Section or Section 330 applies to a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree is made.]

†[Sec. 9.—If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming

Suit by person dispossessed of immovable property. through him may, by suit instituted within six months from the date of the dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit.

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against the Government.

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.]

The costs of the second appeal will abide and follow the result, and be provided for in the revised decree.

NOTES.

[CIVIL PROCEDURE—Sec. 331—LIMIT OF ENQUIRY.]

I. Enquiry under Sec. 331 of the Civil Procedure Code (1882) is not limited to questions of mere possession. Questions as to title also have in some cases to be determined :—

- (1) When in an enquiry under Sec. 331 the person obstructing to possession being given to decree-holders, was setting up adverse title to the Judgment-debtors, the question regarding title must necessarily be decided :—(1890) 14 Bom. 627 ; (1905) 27 All. 453 ; (1901) 25 Bom. 478, where possession was with the tenants whose landlord was obstructing to possession being given to the decree-holder.
- (2) When possession is shown to be with the plaintiff in an enquiry under Section 331, defendants must show title in themselves and they cannot be allowed to set up *jus tertii*.

II. EXCEPTION.

But no question requiring the decree to be re-opened can be raised.

So in a case where a tenant was obstructing possession as against the decree-holder, the only question to be decided is on whose behalf is the tenant holding possession :—(1903) 27 Bom. 302.]

[3 Mad. 107.]

APPELLATE CIVIL.

The 15th February, 1881.

PRESENT :

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE INNES.

The British India Steam Navigation Company, Limited.....(Defendants)
Appellants.

versus

Hajee Mahomed Esack and Company.....(Plaintiffs) Respondents.*

Bill of lading—Claim for short delivery to be made at a certain place within a month—Reasonable condition—Limitation Act, Sch. II, Cls. 30, 49, 63, 115—Common carrier, duration of liability of—Indian Carriers' Act III of 1865.

A stipulation by persons carrying on extensive business as carriers that they should be appraised of claims made on them for default on the part of their servants at a specified place and no other and within a time which will render inquiry likely to be attended with some result is not unreasonable.

The defendants were owners of a fleet of steamships plying periodically along the coasts of British India, by which they undertook to convey for freight parcels of goods for all persons indifferently from and to specified ports. They stipulated in their bills of lading that claims for short delivery should be made at the port of Calcutta only, and within one month after delivery of any portion of the goods entered in the bill of lading.

Held, in a suit against defendants for compensation for value of goods short delivered, that this was not an unreasonable stipulation, and that a claim made on agents of the

* Appeal No. 40 of 1880 from the Original Side, in C. S. 375 of 1879.