APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

ÁNDI AND OTHERS (DEFENDANTS), APPELLANTS,

and

THATHÁ AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1887. April 4, 6.

Civil Procedure Code, s. 43—Declaration of title to continue to enjoy separate possession of land—Suit for partition.

The plaintiffs having obtained a declaration of title to continue to enjoy separate possession of certain lands sued the former defendants again for partition of the same lands :

Held, that the suit was unnecessary and should be dismissed.

Per cur. The claim and the remedy mentioned in section 43 of the Code of Civil Procedure have reference to the cause of action litigated in the previous suit.

SECOND appeal against the decree of J. W. Reid, District Judge of Coimbatore, in Appeal Suit No. 86 of 1885, modifying the decree of W. E. T. Clarke, Subordinate Judge, Nílgiris, in Original Suit No. 45 of 1884.

This was a suit for partition of the plaintiffs' share in certain specified lands and for damages. In 1875, the present defendants sued to eject the plaintiffs from specific portions the lands now in question, but the suit was dismissed. Subsequently, in 1882, the present plaintiffs instituted a suit with regard to the same land against the present defendants and obtained a decree declaring that they were entitled to the specific portion in their possession which were described by them, the Court holding that the actual area in their enjoyment and its proportion to the entire area were not matters to be adjudicated on in that suit. The present suit was brought for partition of the lands, and for damages for obstruction to their title; and the plaint alleged that the defendants had been requested by the plaintiffs but had refused to divide the lands according to the shares decreed in their favor in the suit of 1882.

The Subordinate Judge passed a decree in favor of the plaintiffs, but the District Judge modified it on appeal and passed a

* Second Appeal No. 872 of 1886.

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decree "that the defendants have partitioned off to them the part corresponding to the parts marked in Mr. Fraser's plan in burnt sienna (as to which it was in evidence that the plaintiffs had been long in possession), and that the suit for damages be dismissed."

The defendants preferred this second appeal.

Mr. *Wedderburn* for appellants argued that no cause of action was disclosed, and that in any case the suit was barred by section 43 of the Code of Civil Procedure; the plaintiffs obtained substantially no relief beyond what they had obtained in the previous suit, and no obstruction had been offered to their demarcating the area in their possession.

Mr. *Grant* for respondents argued that the plaintiffs had not in fact gained any relief from the former suit; and further objected that the decree for damages should have been allowed to stand.

The further arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.).

JUDGMENT.—The parties to this second appeal are Badagas, on the Nílgiri hills, and it arises out of a suit for partition instituted by the respondents against the appellants. The plaint prayed for partition of the plaintiffs' 5, 2, and 3 equal shares in the plaint lands known as Ekkadahalli, Sarvahalli, and Annahalli, and for damages to the extent of Rs. 100. This litigation was commenced in continuation of two previous suits, Original Suits, No. 53 of 1875 and No. 82 of 1882. The first-mentioned suit was brought by the appellants to eject the respondents from specific portions of the three fields named above on the ground that they were demarcated as included in the pattá standing in the names of the former, and that the latter dispossessed them otherwise than in due course of law about eleven months previous to that suit. The Judicial Commissioner found that there was no dispossession as alleged, that the land in dispute had been in the respondents' possession for many years previous to the institution of that suit, that the appellants had no title, and that the respondents' pedigree (which went to show that they were co-sharers with the appellants) was supported by reliable evidence. Upon these findings, the High Court upheld the decree of the Court of first instance which dismissed that suit with costs. It will be observed that the land then in litigation consisted of specific portions of the

three fields. The respondents then instituted Original Suit No. 82 of 1882 to have it declared that they were entitled to separate enjoyment of 5, 2, and 3 shares in the three fields, and stated that they had been for many years in exclusive possession of 3·45 acres which they said represented those shares. The Court of first instance made a declaration accordingly, adding that such separate possession and enjoyment might be ascertained in execution proceedings. The District Court considered in appeal that that suit was in the nature of a suit for the partition of the respondents' shares. But on second appeal, the High Court held that it was only a suit for a declaratory decree and in that view cancelled the direction contained in the decree of the District Court that the exact area of the portions in the respondents' possession be ascertained in execution, and passed an amended decree, declaring that the respondents were entitled to the specific portions in their possession which were described by them to be 3·45 acres and to represent their 5, 2, and 3 shares in the three fields named in the plaint. In its judgment, the High Court observed that "this was not a suit for partition, but was a suit for a declaration that the land in the respondents' possession has been enjoyed by them for many years in right of inheritance, and that they are entitled to enjoy it in such right by prescriptive title, whatever may be its area, whatever may be its proportion to the entire area." It will be observed that the grounds of decision were that the suit was one for a declaratory decree, and that the declaration to which the respondents were entitled was of title to continue in enjoyment in right of inheritance by reason of the prescriptive title which they had acquired, and that the actual area in their enjoyment and its proportion to the entire area were not matters to be adjudicated upon in that suit. Thereupon the present suit was instituted. The plaint prayed for a partition of the respondents' 5, 2, and 3 equal shares in the three fields mentioned above and for declaration of the areas of the said shares in the said three pieces of land and for Rs. 100, damages for obstruction to their title and to partition, and for the costs of the suit. The Subordinate Judge decreed the claim with costs, but on appeal the District Judge set aside the decree of the Subordinate Judge, so far as it awarded damages, and directed the appellants to pay the respondents' costs on the relief awarded and the respondents to pay the appellants their costs on the amount of damages.

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Both parties object to this decree. It is argued for the appellants that the plaint discloses no cause of action and it is alleged for the respondents that damages should have been decreed.

The ground of action mentioned in paragraph 8 of the plaint is that the defendants have been requested by the plaintiffs to divide the lands according to the shares decreed in their favor but that the defendants have refused to do so. The contention, therefore, that the plaint discloses no cause of action cannot be supported. The right asserted is an incident of an alleged coparcenary, and it was not adjudicated upon in any previous suit. If there were a subsisting coparcenary in regard to the lands mentioned in the plaint and if the respondents were entitled to the shares specified by them, they would be entitled to a decree for partition. As to the objection that the suit is barred by section 43 of the Code of Civil Procedure, it must be observed that the cause of action disclosed by the plaint is distinct from the cause of action in the suit of 1882, and that it has been held that the claim and the remedy mentioned in section 43 have reference to the cause of action litigated in the previous suit, *Pathuma* v. *Ayissa*(1).

As to the merits, the Judge observes that the claim to half shares in the three fields in dispute must be taken as made in ignorance. The averment in the plaint that certain shares were decreed to the respondents in the suit of 1882 is opposed to the judgment of the High Court in that suit pronounced on Second Appeal which declared that the area then mentioned and the shares which it was said to represent were mere matters of description; the Judge therefore properly disallowed the claim to any excess area which was not already in their possession. Nor is the decree of the Judge open to objection, so far as it directs that the plaintiffs have partitioned off to them the portions corresponding to the parts marked in Mr. Fraser's plan in burnt sienna. It simply ascertains the precise area and the position of the land already in the respondents' possession in right of inheritance by prescriptive enjoyment, and thereby avoids future litigation on the ground that the area and the site were not defined by the final decree in the suit of 1882. It is contended, however, that the respondents obtained substantially no further relief beyond what they had in the previous suit and that no obstruction was offered to their

(1) Second Appeal No. 699 of 1883.

demarcating the area in their possession and defining it. The Counsel for the respondents is unable to meet this objection. We must, therefore, hold that this litigation was practically unnecessary. On this ground we decree that the respondents do bear their own costs and pay the appellants' costs throughout, and, with this modification, confirm the decree of the Lower Appellate Court. As to the memorandum of objections, it must be dismissed. The damages claimed were in the nature of a fine claimed for vexatious litigation, and the Judge was right in holding that such claim must be disallowed.

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APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

LAKSHMANA AND ANOTHER (DEFENDANTS), APPELLANTS,

and

RÁMACHANDRA (PLAINTIFF), RESPONDENT.*

1887. Feb. 14, April 19.

Landlord and tenant—Forfeiture—Waste—Planting a mango tope on dry land.

In the absence of local custom, tenants are not entitled to convert land under cultivation into a mango grove. Tenants from year to year are not at liberty to change the usual course of husbandry without the consent of the landlord.

SECOND appeal against the decree of J. Kelsall, District Judge of Vizagapatam, in Appeal Suit No. 259 of 1885, reversing the decree of V. A. Narasímha, District Múnsif of Párvatipúr, in Original Suit No. 5 of 1884.

This was a suit to eject the defendants from certain lands of which they were tenants from year to year, on the ground that they had committed waste by planting mango trees on some dry land which formed part of their holding.

The District Múnsif dismissed the suit. His decree was reversed on appeal by the District Judge, who observed :—"The land is dry land, but the plaintiff hopes at some future time to convert it into wet. Whether it will be practicable for him to do so is beside the question. He leased the land to defendants for cultivation and

* Second Appeal No. 547 of 1886.