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When the appeal was before us for the first time the point was not taken as to what was the right period of limitation calculated under Act XIV of 1859, and hence there was an oversight in assuming that the time was three years as under the present law.

The second appeal must, therefore, be dismissed with costs, but we make no order as to costs in the review.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

1887. Aug. 31.

TIRUPATI AND OTHERS (DEFENDANTS), APPELLANTS,

and

NARASIMHA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 43.

A leased certain land to B. The lease expired in 1877. B continued to hold over and refused to accept a fresh lease from A. A sued B in 1882 for mesne profits for three years, but did not claim possession of the land. The suit was dismissed on a preliminary point. A then sued B to recover possession of the land and mesne profits. It was argued that A's claim to the land was barred by s. 43 of the Code of Civil Procedure, because he omitted to claim the land in the former suit for mesne profits:

Held that the suit was not barred.

APPEAL from the decree of Venkata Rangayyar, Acting Subordinate Judge at Ellore, confirming the decree of M. Ramayya, District Múnsif of Tanuku, in suit No. 139 of 1884.

Bhashyam Ayyangar for appellants.

Rama Rau for respondent.

The facts appear from the judgment of the Court (Muttusámi Ayyar and Brandt, JJ.).

JUDGMENT.—The land in dispute, which is in the appellants' possession, belongs to the respondent. The appellants originally entered into possession under a lease which expired in 1877. They continued, however, to hold over, and refused to accept a fresh lease from the respondent. In 1882 the landlord claimed mesne profits for three years, but did not claim possession of the land on the ground that the appellants were liable to be evicted. The District

* Second Appeal No. 908 of 1886.

Múnsif, who tried the suit of 1882, considered that he could not adjudicate upon it until the respondent set aside a lease granted by his uncle for a term of 25 years, and which the appellants then contended was binding upon the respondent. The latter then brought the suit, out of which this second appeal arises, to recover possession of the land and mesne profits for five years, namely, Bahudhanya, Pramadi, Vikrama, Vishu, and Chitrabhanu, at the rate of Rs. 25 per annum. The courts below disallowed the claim to mesne profits for the year Bahudhanya as barred by limitation, and in other respects passed a decree in favor of the respondent. Two questions are argued in appeal. The first of them is that the respondent's claim to possession of the land is barred by s. 43 of the Code of Civil Procedure, inasmuch as he omitted to include that claim in the suit which he instituted in 1882 to recover mesne profits for three previous years. It is urged that, if the former suit had been instituted for the recovery of the land and if the respondent omitted to claim mesne profits, which had then accrued due, he could not again be permitted to institute a second suit for the recovery of such mesne profits, and that the case before us is only its converse. Reliance is placed on *Debi Dial Singh* v. *Ajaib Singh*(1). In that case the defendants interfered with the plaintiff's possession of certain trees and wrongfully took their fruit at the same time, viz., on the 19th June 1879, and it was held that the claim to mesne profits was one which the plaintiffs were bound to have included in the suit for possession of the land on which the trees stood, and that both claims arose out of the same wrong or cause of action. In the case before us it is argued by the appellants' pleader that, when a tenant holds over in opposition to the landlord, the latter is under an obligation to eject him at once and has not the option of suing simply for mesne profits on the ground of adverse occupancy until either the tenant gives up possession or he desires to eject him; but in applying s. 43, it should be remembered that there is a distinction between splitting of the same cause of action into two or more suits and instituting different suits upon distinct causes of action. Though it is true that claims, such as those mentioned in the illustration to s. 43, are referable to the same cause of action on the ground that, when the rent remains unpaid for several years, the debts due, though consisting of several items, are so connected

(1) I.L.R., 3 All., 543.

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as to form one entire demand, yet it cannot be held that, when the causes of action are distinct and independent, the plaintiff is bound to unite all the claims founded upon them in one suit. We are of opinion that the suit to recover mesne profits and the suit to eject are not parts of a claim founded on the identical cause of action within the meaning of s. 43, and that if mesne profits are alone claimed in the first suit as damages due for adverse occupancy, a second suit can be maintained to recover possession of the land.

It was held in *Monohur Lall* v. *Gouri Sunkur*(1) that a plaintiff suing for possession of land was not precluded from maintaining a second suit for mesne profits. Although that case was decided with reference to Act VIII of 1859, we do not consider that the difference in the language of s. 43 of the present Act and ss. 7, 9 and 10 of Act VIII of 1859 warrants the appellants' contention. The only alteration consists in the substitution of the words "which the plaintiff is entitled to make" for the words "arising out of the cause of action." It would be preposterous to say, as is suggested for the appellants, that, assuming that the respondent succeeded in the former suit and obtained a decree for mesne profits, he would still be precluded from claiming possession of the land. The first contention must, therefore, be overruled. As to the second contention, it is conceded by the respondent's pleader that the claim to mesne profits due for the year Pramadi is barred, and the decree appealed against must be modified by diminishing the amount allowed by the Judge for mesne profits by Rs. 25. As to the mesne profits claimed for the other three years, the question of limitation does not arise, inasmuch as they accrued due within three years prior to the date of the suit. In the former suit there was a refusal to adjudicate upon the respondent's claim to mesne profits claimed for Vikrama, but whether the refusal was right or wrong the claim is not barred by s. 13 as there was no adjudication on the merits. Upon the facts found, we are of opinion that the appellants must be taken to be trespassers or in possession in opposition to their landlord, and that they are not entitled to any notice. We modify the decree of the Lower Appellate Court as indicated above and confirm it in other respects. The appeal has substantially failed, and we direct that the appellants do pay the respondent's costs in this court.

(1) I.L.R., 9 Cal., 283.