APPELLATE CIVIL.

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

1887.
July 18.
August 5.

PULAMADA AND OTHERS (DEFENDANTS), APPELLANTS,

and

RAVUTHÚ AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code, ss. 50, 53—Amendment of plaint—Change in form of suit, the cause of action being unchanged.

The plaintiffs alleged that the defendants had encroached on the bed of a tank, raised embankments, and cultivated crops which interfered with the plaintiffs' supply of water; and they prayed for a decree ejecting the defendants from the land encroached on and restraining them from interfering with it:

Held, that the Court was not precluded by s. 53 of the Code of Civil Procedure from passing a decree declaring the plaintiffs' right to the water of the tank, directing the defendants' embankments, &c., to be removed, and regulating the cultivation of their lands; but that the defendants' liberty of cultivation should not be restricted more than was necessary to secure the plaintiffs' supply of water.

SECOND appeal against the decree of S. Gopalachâryar, Subordinate Judge of Madura (East), in Appeal Suit No. 520 of 1884, reversing the decree of P. S. Gurumúrthi Ayyar, District Múnsif of Tirumangalam, in Original Suit No. 100 of 1883.

The plaintiffs alleged that they were owners of some of the land in a certain village, and that the rest of the village belonged to, or was in the occupation of, the defendants: that the land was irrigated by a tank of which the water-spread was about $3\frac{1}{2}$ gulies: that the defendants had encroached on gulies 2-4-1 and made wells and embankments and raised wet crops, and thus prevented the full accumulation of water in the tank and diminished the supply of water for the plaintiffs. The plaint prayed for a decree ejecting the defendants from, and preventing them from interfering with, the land encroached on.

The District Múnsif dismissed the suit, but the Subordinate Judge on appeal passed a decree declaring the plaintiffs' right to be supplied with water from the tank, directing that the defendants' land be restored to its former condition, and restricting its cultivation to certain specified crops.

* Second Appeal No. 611 of 1886.

The defendants preferred this second appeal.

Subramanya Ayyar for appellants.

Rámá Ráu for respondents.

The further facts of this case and the 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 suit from which this second appeal arises was in the nature of an ejectment brought by the respondents against the appellants. The plaint, as originally framed, prayed for a decree restraining the defendants from interfering with, and ejecting them from, 2-4-1 gulies of land in their possession lying in the bed of the tank in the village of Vattuvappatty in the district of Madura.

The respondents' case was that they and defendants Nos. 3, 7, 13, 19 and 20 owned wet lands under that tank; that 3½ gulies was its original area; that defendants 6–10 encroached upon it in 1285, and that by digging wells on and using the portion encroached upon as they liked, narrowed the water-spread, prevented the tank on which the respondents' land depended for irrigation from receiving its usual supply, and thereby caused to them loss of produce. The appellants who resisted the claim contended that the land in suit was their ancestral property, that it did not form part of the water-spread of the tank in question, that the respondents owned no wet land under it, and that the tank was not an old reservoir. They also denied the alleged encroachment, pleaded limitation in bar of the claim and alleged that the tank never exceeded one guli in extent.

The District Múnsif found that for more than 12 years before suit, the extent of the tank had consisted only of one and odd gulies, and that the land in dispute had not been submerged during that period, and upon that finding, he came to the conclusion that the suit was barred, and dismissed it with costs.

Thereupon the plaintiffs preferred an appeal and they urged that the nature of their claim was misapprehended by the Court of First Instance, and that they were, at all events, entitled to a declaration that defendants were not at liberty to use the land in dispute in the way they have done since fasli 1285, viz., raising garden crops, and that they were bound to raise only such crops as they used to raise prior to 1285. This contention, the appellant

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opposed on the ground that no relief should be decreed in appeal, which was not claimed in the plaint. The Subordinate Judge decided that the relief claimed before him was included in, and formed part of, the case disclosed by the plaint. On this view he remitted three issues for trial, viz., (1) whether the plaintiffs owned nunja lands depending for their water-supply on the tank in question; (2) whether the defendants interfered with the tank so as to diminish its water-spread; (3) whether the right of the defendants was only of a qualified nature as alleged by the plaintiffs, and whether the plaintiffs' claim as founded thereon was barred by limitation. On the first issue, he found that the plaintiffs owned nunja lands which were entitled to a regular supply of water from the tank through the two sluices or openings now in existence. On the second issue he found that the extent of the tank consisted originally of 3-8-3 gulies, that its water-spread extended at present only to 1-4-2 guli, that gulies 2-4-1 lying to the east of the present water-spread were submerged until 8 or 9 years before suit, and that they since ceased to be submerged, because the tank ceased to receive its usual supply in consequence of the defendants having raised the level of their lands and of the embankments erected by them subsequently to 1285. On the third issue he held that the respondents' claim was good and not barred by limitation so far as it related to the securing of the usual supply of water in the tank and to the restoration of its capacity. Upon these findings he was of opinion that it was necessary to direct defendants Nos. 6 to 10 and 21 to 24 to restore their lands to their original level, and to use them as they did before 1285, and decreed that the lands be reduced in level as specified in the decree, that no vegetation or crops other than those mentioned in exhibit F, viz., cucumber, pagal, melons, and gourds be raised, and that they might raise such crops only when they could do so without obstruction to the flow of water into the tank or retention of water by it. Defendants 8–10 and 22–24 have preferred this second appeal.

The first objection taken in support of this second appeal is that the Subordinate Judge allowed the suit as originally framed to be altered in appeal into a different suit. It is no doubt provided by the proviso to s. 50 of the Code of Civil Procedure that the plaint cannot be altered so as to convert a suit of one character into a suit of another and inconsistent character. But we observe

that the ground of action, viz., the unauthorized diminution of the extent of the tank-bed so as to diminish its capacity and the supply of water available to the plaintiff, was throughout the same. Though the respondents' prayer for ejectment of the appellants and for an injunction restraining all interference with the lands in question on their part was not one which could be granted, this did not preclude the Subordinate Judge from decreeing a relief less than what they claimed. The specific right and its infraction alleged were not altered in appeal and we cannot therefore say that the procedure of the Subordinate Judge is in construction of the provisions of s. 53.

Another objection urged on behalf of the appellants is that the lands in suits are their private property and that the Subordinate Judge has recorded no finding to the contrary. We are not prepared to attach weight to this contention. The Subordinate Judge has distinctly found, as facts, that the extent of the tank was reduced from more than three gulies to about one guli, that though this reduction took place more than 12 years before suit, it did not prejudice the respondents' right until the appellants raised subsequently to 1285 the level of their lands and put up embankments so as to prevent the tank from receiving and retaining its usual supply of water. We cannot then say that the appellants' lands did not form part of the tank-bed, or that they were held otherwise than subject to the condition that they shall not so enjoy them as materially to diminish the capacity of the tank and diminish the supply of water available for lands depending upon such supply for their irrigation.

The third question argued in second appeal is that so long as appellants' lands continue on their former level, the restriction imposed in regard to the specific crops which the appellants are to raise and the time when they are to raise them, is an unwarranted interference with freedom of enjoyment. The respondents' pleader is unable to show that this objection is not well founded and concedes that the decree under appeal, requires to be modified. The restriction goes beyond what is necessary for the protection of the respondents' rights, and it cannot be assumed that because the appellants raised four specific crops prior to 1285, they are not at liberty to raise other crops hereafter, provided they do so without diminishing the supply of water available in the tank for the respondents' land. We therefore amend the decree of

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APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

1887. Aug. 23.

QUEEN-EMPRESS

against

ENGADU AND OTHERS.*

Criminal Procedure Code, ss. 61, 167, 170, 344—*Remand of prisoners in custody of the police.*

The right construction of s. 167 of the Code of Criminal Procedure is that in proceedings before the police under chapter XIV, the period of remand cannot exceed in all fifteen days, including one or more remands.

CASE reported for the orders of the High Court under s. 438 of the Code of Criminal Procedure by G. Stokes, Acting District Magistrate of Cuddapah.

The case was reported as follows :—

"These are dacoity cases. The prisoners were remanded for fifteen days under s. 167 of the Code of Criminal Procedure. The police applied for a remand for the collection of further evidence for a further period, but the Sub-Magistrate refused to grant any further remand on the authority of the ruling of the High Court, communicated with G.O., No. 3092, dated 22nd November 1883, and directed the prisoners to be released. As the ruling in question seems to me to be highly dangerous to the administration of public justice and unnecessary, and as, with all deference, I think it founded on a mistaken view of the law, I make this reference.

"These three dacoities were committed, the first at Kallur in Chandragiry taluk, North Arcot district, the second in the limits of Srirangarajapaliem village, Pullampet taluk, *i.e.*, on the road from Rajempet to Rayachoti, and third at Ghatlu in Madanapalle taluk, Cuddapah district. The distance of the scene of offence in the first case from that in the second I am unable to state, but it can

* Criminal Revision Case, No. 289 of 1887.