

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice,
and Mr. Justice Handley.*

MARIATHODI (DEFENDANT No. 1), APPELLANT,

v.

APPU (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 43—Res judicata —“ Omit to sue.”

The plaintiff, having previously obtained against his brother, defendant No. 1, who had been the managing member of their family a decree for partition of the family property including certain debts scheduled in the plaint therein, now sued to recover his share of certain other family debts collected by defendant No. 1 without the plaintiff's knowledge :

Held, that the claim was not barred by Civil Procedure Code, s. 43.

SECOND APPEAL and memorandum of objections against the decree of V. P. DeRozario, Subordinate Judge of South Malabar, in appeal suit No. 638 of 1890, modifying the decree of M. Achuthan Nayar, District Munsif of Nedunganad, in original suit No. 105 of 1888.

The plaintiff's case was summarized by the Subordinate Judge as follows :—

“Plaint states that plaintiff and first defendant are brothers ;
“that plaintiff brought suit No. 17 of 1886 for his share of the
“family properties which were in first defendant's possession,
“and obtained a decree ; that first defendant and his son, second
“defendant, fraudulently collected large sums of money from
“several creditors of their family and illegally retained it in their
“possession ; that he had no notice of this at the time when his
“suit for partition was filed ; that he was aware of this only
“recently, and that he is entitled to a proportionate share thereof.
“Plaintiff therefore sues to recover his share in 16 items of family
“debts alleged to have been collected and misappropriated by
“first defendant, and to recover the arrears of *micharam* which
“had accrued before the passing of his decree, but which he had
“to pay to the *jenmi*.”

* Second Appeal No. 106 of 1891.

The District Munsif passed a decree for the plaintiff which was in substance affirmed by the Subordinate Judge.

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Defendant No. 1 preferred this second appeal.

. *Sundara Ayyar* for appellant.

Sankaran Nayar for respondent.

JUDGMENT.—We think the Lower Courts were right in holding that the suit was not barred in any part by section 43 of the Civil Procedure Code. The former suit by plaintiff was for a general partition of the family property and in that suit he obtained a declaration that he was entitled to $\frac{1}{2}$ of the debts due to the family. In the present suit he sues for some of the debts which, he alleges, were collected by the managing member, first defendant, without his knowledge. It is clear that plaintiff's omission to claim from 1st defendant in that suit a share of debts, which he did not know had been recovered, cannot be a bar to his now suing for that purpose. The words "omit to sue" in section 43 must refer to an omission which might have been avoided, not to an omission to claim that which a party could not know he was entitled to.

As to the items 1 to 4, 9, 10, 12, 13, and 14, the Subordinate Judge finds that they are clearly proved, and that decision cannot be questioned in second appeal. As to items 5 and 11 we think the decision of the Subordinate Judge is correct.

The memorandum of objections relates to items on which the Subordinate Judge has given decisions upon the evidence and we must refuse to discuss them.

The appeal and memorandum of objections are dismissed with costs.