APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

ACHUTA MENON (PLAINTIFF), APPELLANT,

1897.
April 25, 30.

v.

ACHUTAN NAYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 373—Suit withdrawn without liberty to bring a fresh suit—Subsequent suit for the same matter.

In 1893 the plaintiff sued to eject the defendants alleging that they were in occupation of the land in question under a lease of 1880 from the late Zamorin of Calicut. The plaintiff's title rested on an instrument executed by him in 1892. It was objected that the instrument was not binding after the death of the grantor. The plaintiff thereupon withdrew his suit without obtaining leave to sue again. He subsequently obtained a like instrument from the present Zamorin and sued again to eject the defendants:

Held, that the second suit was not maintainable by reason of Civil Procedure Code, section 373.

SECOND APPEAL against the decree of J. A. Davies, District Judge of South Malabar, in Appeal Suit No. 245 of 1895, reversing the decree of P. Raman Menon, District Munsif of Nedunganad, in Original Suit No. 495 of 1893.

Suit for land. The facts of this case as far as material for the purposes of this report were stated by District Munsif as follows:—

"The lands are the jenm of the fifteenth defendant and are "held by defendants on Tiruvezhutu right. Plaintiff obtained a "melcharth from the fifteenth defendant's predecessor and sued "on it in Original Suit No. 189 of 1893. The fifteenth defend- "ant denied the validity of the melcharth on the ground that "the Melcharth was given before the expiry of the term and by "the time the term expired the grantor of the melcharth died. "Plaintiff then applied for permission to withdraw the case with "leave to sue again. The suit was allowed to be withdrawn, but "the leave to sue again was refused. Plaintiff then obtained "a fresh melcharth from fifteenth defendant and sues. Defend- "ants contend that the suit is barred by the provisions of "section 373, Civil Procedure Code. I do not think the con- "tention is good. No doubt both suits are upon the same

* Second Appeal No. 772 of 1896.

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"demise, but it must be remembered that plaintiff's right to "bring the former suit was different from the one on which this "suit is based. If, for instance, the plaintiff's former suit had "been dismissed on the ground that the melcharth was invalid, "would the fifteenth defendant be barred from recovering the "lands in a fresh suit? I think not, and I do not see why "plaintiff should be barred from suing on a melcharth given by "the fifteenth defendant. Since the authority on which the "plaintiff now sues is different from the one on which the former "suit was brought, the provisions of section 373, Civil Procedure "Code, are not applicable. The accident of the same man being "plaintiff in both cases, cannot bar the second suit inasmuch "as the right on which the former suit was brought was different from the one now alleged. I find the seventh issue for "plaintiff."

The District Munsif passed a decree as prayed.

The District Judge reversed his decree on the ground that the suit was barred under section 373, Civil Procedure Code. He said:—"In this case the plaintiff here had been the plaintiff in "Original Suit No. 189 of 1893, which was a suit for ejectment "against the same defendants as in this suit and upon the same "lease, and he withdrew that suit without permission of the "Court. The only difference here is that the melcharth which "clothes plaintiff with the right of suit is not the same melcharth "upon which he is entitled to bring the former suit. The cause "of action is the same, but the plaintiff's particular right to sue "is based on a different document. The individual is the same, "but he has put on new apparel for old apparel. It seems to "me clear that the words 'the plaintiff' in section 373 must "refer to the individual, and that a penalty is intended for that "particular person who sets a Court of Law in motion and then "wantonly stops the machinery. He is not to be allowed to sue "in Court again in any guise for the same matter. That the "matter is the same here as in that suit is not disputed, and the "person suing now is the same individual who was plaintiff in "that suit."

The plaintiff preferred this second appeal.

Sankaran Nayar and *Ryru Nambiar* for appellant.

Sundara Ayyar and *Govinda Menon* for respondents.

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JUDGMENT.—Prior to the institution of the present suit, the plaintiff had instituted another, viz., Original Suit No. 189 of 1893, against these same defendants who are contesting this suit. In that suit he sought to compel these defendents to surrender certain plots of land on receiving from him the value of improvements, if any, made by them. He then alleged that the said defendants held the lands as tenants under the lease of the 10th October 1880, which was to enure for twelve years and which was granted to the first defendant by the late Zamorin, to whose 'stanom', of dignity the lands are attached. As to the right to claim the surrender of the lands, the plaintiff relied on a demise by the same Zamorin, dated 28th July 1892. The present Zamorin, who was also one of the defendants in the case, contended that the demise of the 28th July 1892 was not granted under circumstances which, in law, rendered it binding on him as the present holder of the stanom. The present contesting defendants denied their liability to surrender the lands, and alleged that the tenancy under which they held was a permanent one, or that they were entitled to hold for a further period.

The plaintiff on or about the 12th December 1893 withdrew the suit without leave to sue again. Having, however, on the 16th idem obtained a demise from the present Zamorin himself, the plaintiff brought this suit for the surrender of the same property alleging it, in this suit also, to be in the occupation of the defendants under the lease of 10th October 1880 relied on by the plaintiff in the prior suit.

The Lower Appellate Court was of opinion that the plaintiff was precluded by section 373 of the Civil Procedure Code from maintaining the present suit, and it was accordingly dismissed. It was urged before us on behalf of the plaintiff that the Lower Appellate Court was wrong in holding that the present suit was for the 'same matter' within the meaning of section 373 of the Civil Procedure Code as that involved in the previous suit, and that consequently that section ought not to be held applicable.

Now the term 'matter' in a context like that in the abovementioned section means clearly "the subject of legal action, consideration, complaint or defence or the fact or facts constituting "the whole or a part of a ground of action or defence" (See Anderson's 'Dictionary of Law'). The point, then, for determination is whether there exists in the present instance the identity

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of 'matter' required by law in order to make the section applicable.

Now, taking first for convenience sake the defence or the facts constituting the basis of the right set up by the contesting defendants, the case is doubtless the same now as it was in the earlier suit.

Turning next to the nature of the plaintiff's claim or the facts constituting the basis of his right and its infraction, or, in short, his cause of action, it is equally clear that there is identity at all events with regard to that portion thereof which relates to the alleged liability of the defendants to surrender the lands, since the contract by virtue of the provisions of which it was alleged they had to surrender the property is one and the same, viz., the lease of 10th October 1880 granted by the late Zamorin. As to the remaining portion of the plaintiff's own case, no doubt, there is some difference, inasmuch as the demise relied on in the former suit was one granted by the late Zamorin, while that now relied on is one granted by the present Zamorin. The question whether, in these circumstances, the matter constituting the cause of action is the same or different is one of considerable difficulty, and must depend on the facts of the two suits as pointed out by West, J., in *Girdhar Manordas* v. *Dayabhai Kalabhai*(1)—a case relating to section 13 of the Civil Procedure Code, in which section also the term 'matter' seems to be used in the sense explained above. In that case West, J., observed that the authorities cited therein showed that "where there has been a real separateness of the legal relations and of the evidence necessary to establish it in two successive suits between the same parties, the second is not barred by the first" (*Girdhar Manordas* v. *Dayabhai Kalabhai* (1)). In *Shridhar Vinayak* v. *Narayan Valad Babaji*(2) the same learned Judge expressed himself in connection with that very point thus: "The matter must be regarded as essentially different when it did not originate in the same transaction and when it constituted, as averred, a wholly different right in the plaintiff giving rise to a different duty on the part of the defendant," or again, as West, J., himself put the question in another aspect of it in *Naro Hari* v. *Anpurnabai*(3), "the cause of action is to be regarded as the same if it rests on facts which are integrally connected

(1) I.L.R., 8 Bom., 174. (2) 11 B.H.C.R., 224. (3) I.L.R., 11 Bom., 160.

"with those upon which a right and infringement of the right "have already been once asserted as a ground for the Court's inter-"ference" and *Haji Hasam Ibrahim* v. *Mancharam Kaliandas*(1). What is the conclusion which the facts in the present case suggest in the light of the above statements of the law? Now, in the present, as well as in the previous suit, the allegation that the defendants held under the self-same lease of 1880 was an essential part of the plaintiff's cause of action. Consequently in our opinion, it cannot properly be said that there is no integral connection whatever between the plaintiff's allegations in the two suits, that there is a *complete* difference between the cause of action alleged before and that alleged now, and that the transaction of 1893 between the plaintiff and the present Zamorin, which is the only distinguishing circumstance relied on, imposed on the defendants a duty wholly or to any extent different from that to which they were subject before that transaction took place. It follows, therefore, that that part also of the matter in issue in the two suits which had or has reference to the plaintiff's case by itself is substantially the same within the meaning of the authorities cited above, and section 373 must, therefore, in our opinion, be held to be applicable. Suppose, however, that the plaintiff's cause of action in the previous suit was different from that in the present suit. Nevertheless, the suit must be held to be unsustainable for the simple reason that the identical defence raised by the contesting defendants in the two suits is of such a nature as would, if it had been established in the previous suit, have precluded the plaintiff from maintaining this suit even on the demise of 1893. It is scarcely necessary to say that one of the objects of section 373 is to protect a defendant from being harassed by repeated litigation with reference not only to the allegations constituting the plaintiff's case, but also as to those which constitute the defence or any part of it. The defendants here are, therefore, under the section in question, entitled successfully to contend that the plaintiff having once, without obtaining the necessary leave, withdrawn from the contest respecting the tenancy set up by them is now prevented from agitating that question in this suit, or, in other words, his claim completely fails.

For these reasons, agreeing with the conclusion arrived at by the Lower Appellate Court, we dismiss the second appeal with costs.

(1) I.L.R., 3 Bom., 137.