APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

SAYED SILIMAN SAIB AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

BONTALA HASSON AND FOUR OTHERS (DEFENDANTS), RESPONDENTS.*

1913. January 28 and March 26.

Civil Procedure Code (Act V of 1908), O. II, rr. 1, 2 and 3—Previous suit for declaration, dismissal of, for want of prayer for possession—Later suit for declaration and possession, maintainability of.

The dismissal of a previous suit for a declaration of title to certain properties on the ground that the plaintiff was found entitled to possession is no bar to a suit for possession based on the same title as the causes of action, for which the allegations in the plaints must be looked to, are different in the two cases.

Chand Kour v. *Partab Singh* (1889) I.L.R., 16 Calc., 98 (P.C.), *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnan Nair* (1906) I.L.R., 29 Mad., 153, *Ramaswami Ayyar* v. *Vythinatha Ayyar* (1903) I.L.R., 26 Mad., 760, *Nonoo Singh Monda* v. *Anand Singh Monda* (1886) I.L.R., 12 Calc., 291, *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (1882) I.L.R, 8 Calc., 819, and *Mohan Lal* v. *Bilaso* (1892) I.L.R., 14 All., 512, followed.

Muthu Narayana Reddi v *Rayalu Reddi* (1896) 6 M.L.J., 51, and *Rangasami Pillai* v. *Krishna Pillai* (1899) I.L.R., 22 Mad., 259, not followed.

SECOND APPEAL against the decree of N. LAKSHMANA RAO, the Subordinate Judge of Kurnool, in Appeal No. 160 of 1909, preferred against the decree of P. N. SATAGOPA NAYUDU, the District Munsif of Kurnool, in Original Suit No. 244 of 1908.

In Original Suit No. 208 of 1907, the plaintiffs in the present suit, who were also plaintiffs in that suit, sued for a declaration of their right to certain properties; that suit was dismissed solely on the grounds that the plaintiffs were not in possession of those lands and that a mere suit for a declaration when the plaintiffs were entitled to ask for possession also, was not maintainable. The issue relating to the title of the plaintiffs was not decided. The plaintiffs now filed the present suit for a declaration of their title to and for possession of the very same properties. Besides the issue as to title, the following issue, viz., "whether Original Suit No. 208 of 1907 bars this suit" was raised. Both

* Second Appeal No. 1994 of 1911.

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the Lower Courts decided on the strength of *Rangasami Pillai* v. *Krishna Pillai*(1) and *Ambu* v. *Kethilamma*(2) and *Narayana Kavirayan* v. *Kandasami Goundan*(3) that Original Suit No. 208 of 1907 was a bar and dismissed this suit on the ground that it was open to the plaintiffs to have sued for possession also in the previous suit.

The plaintiff preferred this Second Appeal.

The other necessary facts are given in the judgment.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the appellants.

K. Parthasarathi Ayyangar for the first respondent.

V. C. Seshachariar for the fifth respondent.

SANKARAN NAIR AND OLDFIELD, JJ.

JUDGMENT.—This suit for possession of certain lands is dismissed on the ground that it is barred by the institution of a prior suit, Original Suit No. 208 of 1907. In that suit, which was brought by the same plaintiffs against the same defendants, the plaintiffs prayed only for a declaration of title. It was dismissed because the plaintiffs were found entitled to possession.

The title alleged by the plaintiffs in both the suits is undoubtedly the same. The first suit for declaration was brought on the ground that it was necessary to remove some cloud on the plaintiff's title. The facts which it is necessary for a plaintiff to allege in a suit for declaration are not the same as those in a claim for possession. In the declaratory suit there was no interference with possession alleged, and it was not necessary to allege the same. In the suit before us title and deprivation of possession are alleged. The causes of action in the two suits are different. To determine whether the suit is barred and the cause of action is the same, we have to look to the plaint or the facts relied upon to constitute the cause of action in the first suit; and if on those facts it was open to him to ask for the relief prayed for in the second suit, the latter would be barred. It is only when the cause of action is the same that Order II, rules 1, 2 and 3 bar the suit. This has been settled by numerous decisions of this Court.

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(1) (1899) I.L.R., 22 Mad., 259. (2) (1891) I.L.R., 14 Mad., 23.
(3) (1899) I.L.R., 22 Mad., 24.

The Calcutta High Court in *Nonoo Singh Monda* v. *Anund Singh Monda*(1) following another decision in *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty*(2) and the Allahabad High Court in *Mohan Lal* v. *Bilaso*(3) have decided that a suit for possession in similar circumstances would not be barred. I agree with them. The Subordinate Judge refers to certain decisions of this Court in support of his conclusion that the suit is barred. *Ambu* v. *Ketlilamma*(4) held that section 43 does not apply and is therefore not in favour of the respondent. In *Narayana Kavirayan* v. *Kandasami Goundan*(5) the fact relied upon in the plaint in the first suit, the contract of sale, entitled the plaintiff to possession, the relief prayed for in the subsequent suit. The decisions in *Muthu Narayana Reddi* v. *Rayalu Reddi*(6) and *Rangasami Pillai* v. *Krishna Pillai* (7) which proceed on the same grounds, may be said to be in favour of the respondent. But the grounds on which they and certain other decisions proceeded were fully considered in *Ramaswami Ayyar* v. *Vythinatha Ayyar*(8) and disapproved. As to the observations on section 43 see page 770 and as to *Rangasami Pillai* v. *Krishna Pillai*(7), see page 777. In a later case, however this case relied upon by the Subordinate Judge was again followed and on account of this conflict, the question was referred to a Full Bench which followed the decision in *Ramaswami Ayyar* v. *Vythinatha Ayyar*(8) and over-ruled the judgment relied upon by the Subordinate judge *Thrikaikat Madathil Raman* v. *Thiruthiyal Krishnan Nair*(9); nor is the decision in *Naganatha Aiyar* v. *Krishnamurthi Aiyar*(10) applicable. The scope of section 43 was not considered there. The previous suit was dismissed by an order which did not mention the section under which it was made, and the learned Judges held that it was dismissed under section 102 read with section 157 rather than under section 158, and the question which they had to consider was whether that dismissal was a bar to the second suit, not under section 43 but another section of the Code. They had however to consider whether the cause of action was the same, and they held that in the first suit

(1) (1886) I.L.R., 12 Calc., 291.
(2) (1882) I.L.R., 8 Calc., 819.
(3) (1892) I.L.R., 14 All., 512.
(4) (1891) I.L.R., 14 Mad., 23.
(5) (1889) I.L.R., 22 Mad., 24.
(6) (1896) 6 M.L.J., 51.
(7) (1899) I.L.R., 22 Mad., 259.
(8) (1903) I.L.R., 26 Mad., 760.
(9) (1906) I.L.R., 29 Mad., 153.
(10) (1911) I.L.R., 34 Mad., 97.

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"the cause of action was the denial of the plaintiff's right to the property accruing on the death of Sellathammal, and Sreenivasa taking possession of the property on the strength of the order of the authorities though he claimed that such order of the Government and the action taken under it should not affect his title nor the possession he had by virtue of the leases." So, the plaint in the first suit disclosed the fact that the plaintiff had been deprived of actual possession. He should have therefore claimed possession. The learned Judges also refer to the judgment of the Judicial Committee in *Chand Kour* v. *Partab Singh*(1) to the effect that the cause of action refers entirely to the grounds set forth in the plaint.

We are of opinion therefore that the decrees of the lower Courts should be set aside, and the Munsif be directed to restore the suit to his file and dispose of it according to law. Costs will be provided for in the final decree.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1913. March 20 and 28.

KAYAROHANA PATHAN (PLAINTIFF), APPELLANT,

v.

SUBBARAYA THEVAN AND ANOTHER (DEFENDANTS NOS. 2 AND 10), RESPONDENTS.*

Hindu Law—Inheritance—Leprosy, anaesthetic, not a ground of exclusion from—Incurability, not a safe test—Grounds of exclusion in texts, some obsolete.

Under the Hindu Law a person suffering from the anaesthetic form of leprosy, though considered incurable by medical men, is not disentitled to inherit.

Obiter :—Both under the Hindu Law texts and the decided cases it is only the agonizing, sanious or ulcerous type of leprosy that is a disqualification to inherit.

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(1) (1889) I.L.R., 16 Calc., 98.

* Second Appeal No. 695 of 1912.