perfectly clear that this refers to a petition which could have been filed under the Indian Divorce Act. Thus she might, in answer to her husband's suit, claim if there are circumstances which justify such relief, decree for judicial separation or for dissolution of marriage. In case such a decree is passed at her instance, the Court would be in a position to act under section 37. It is not contended that a bare application for maintenance can be put in by the wife against the husband under the Indian Divorce Act. If she wants maintenance without either judicial separation or divorce, she can have the remedy only by filing a suit or an application under the Criminal Procedure Code. The order therefore granting maintenance to the wife is *ultra vires*. It must therefore be set aside. In the result we vary the decree of the lower Court by striking out the order for maintenance and otherwise dismiss the appeal with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Krishnan and Mr. Justice Ramesam.

1922, November 1.

T. S. N. MUHAMMAD ROWTHER (APPELLANT), DEFENDANT,

v.

M. M. ABDUL REHMAN ROWTHER (RESPONDENT), PLAINTIFF.*

Civil Procedure Code (Act V of 1908), sec. 11, explanation 4—Res judicata—Might and ought to have made a ground of attack—Previous suit for partition and recovery of possession, as co-purchaser under a common purchase with two others—Sale in name of one—Purchase held not to be joint—Subsequent suit by the same plaintiff as heir of the sole purchaser—Bar of res judicata—Ground of attack—Duty to join different grounds of title in one suit—Suit against trespasser in ejectment.

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* Appeal No. 85 of 1921.

MUHAMMAD ROWTHER v. ABDUL REHMAN ROWTHER.

Where a person instituted a suit against a trespasser in possession, for partition and recovery of his share in certain lands on the footing that he was a co-owner under a joint purchase made by himself and his two deceased brothers, but his claim was dismissed on the ground that the purchase was not a joint one but the sole purchase of one of the deceased brothers, and the former instituted a subsequent suit to recover his share as one of the heirs of the deceased purchaser.

Held, that the suit was barred by the rule of res judicata, as the plaintiff ought to have joined his subsequent ground of title in the former suit under section 11, explanation 4, Civil Procedure Code.

Woomatara Debia v. *Unnopoorna Dassee*, (1872) 11 Beng. L.R., 158; *Srimut Rajah Moottoo Vijaya* v. *Kattama Nachiar*, (1866) 11 M.I.A., 50; *Kameswan Pershad* v. *Rajkumari Ruttan Kore*, (1893) I.L.R., 20 Calc., 79 (P.C.) and *Moosa Goolam Ariff* v. *Ebrahim Goolam Ariff*, (1913) I.L.R., 40 Calc., 1 (P.C.), applied. *Payana Reena Saminathan* v. *Pana Lana Palaniappa*, (1913) 41 I.A., 142, distinguished. *Ramaswami Ayyar* v. *Vythinatha Ayyar*, (1903) I.L.R., 26 Mad., 760, explained.

APPEAL against the decree of T. N. LAKSHMANA RAO, Subordinate Judge of Madura, in Original Suit No. 56 of 1921.

The material facts appear from the judgment. The lower Court held that the previous suit was not a bar as res judicata in the present suit, and awarded a decree directing the delivery of possession of the suit lands to the plaintiff from the defendant. The latter preferred this appeal.

A. Krishnaswami Ayyar for the appellant.—The previous suit was in ejectment against the present defendant as a trespasser. So also is the present suit. The plaintiff ought to have joined his present ground of title in the previous suit, section 11, explanation 4, Civil Procedure Code. His title as residuary heir of M. ought to have been joined in the previous suit which was also on his title as owner by purchase. The matter is concluded by several decisions of the Privy Council. The learned vakil cited various authorities which are referred to in the judgment.

K. V. Krishnaswami Ayyar for respondent.—The title and the cause of action in the present suit is different from those in the previous suit. Though he might have joined the present ground of title, he was not bound to join it in the previous suit. Claim for one-third share as one of the sharers under a common purchase is a different ground of title and cause of action from that as a residuary heir under Muhammadan Law to M.'s estate on his death. *Ramaswami Ayyar* v. *Vythinatha Ayyar*(1), *Payana Reena Saminathan* v. *Pana Lana Palaniappa*(2) show that cause of action as co-owner, and title as heir-at-law are different. Reference was also made to the cases dealt with in the judgment.

JUDGMENT.

KRISHNAN, J.

KRISHNAN, J.—This is an appeal by the defendant against the decree of the second Additional Subordinate Judge of Madura, in Original Suit No. 56 of 1921 on his file. The only point argued before us by the appellant is that the present suit is barred by res judicata under section 11 read with explanation 4 of the Civil Procedure Code. The Subordinate Judge has held that it is not so barred and hence the appeal by the defendant.

The plea of res judicata is based on the former suit, Original Suit No. 1 of 1916, brought by the present plaintiff along with the widow and the daughter of his deceased brother one Muthu Mahomed Ravuther against the heirs of one Varisai Ravuther, defendants 1 to 5, and against the present defendant as the sixth defendant and against the heirs of his third deceased brother Naina Mahomed Ravuther. His case there was that the properties in suit, the title-deeds of which stood in the name of Muthu Mahomed Ravuther, were purchased by all the

(1) (1903) I.L.R., 26 Mad., 760. (2) (1913) 41 I.A., 142.

MUHAMMAD ROWTHER v. ABDUL REHMAN ROWTHER. — KRISHNAN, J.

three brothers with their joint earnings benami in the name of Muthu Mahomed and they really belonged to all of them in equal one-third shares. One of the items sued for was a house in Madura Town. Muthu Mahomed had executed a sale-deed regarding it to one Varisai Ravuther and after the latter's death it had been sold by his heirs—defendants 1 to 5—to the sixth defendant and he was in possession. It was alleged by the plaintiff that the sale-deed to Varisai Ravuther was a nominal transaction not intended to convey title and that the sixth defendant had no title either, as he was a purchaser with notice of the defect of title. The present plaintiff therefore claimed a one-third share for himself and plaintiffs 2 and 3 claimed another one-third share as heirs of Muthu Mahomed allowing the other one-third to the heirs of Naina Mahomed.

The Subordinate Judge who tried the suit found that the property was not the joint acquisition of the brothers but belonged to Muthu Mahomed alone and on that finding he dismissed the plaintiff's claim. He also found that the sale to Varisai Ravuther was a nominal one and that the sixth defendant obtained no title as he was a purchaser with notice of the infirmity of title of his vendor. He thus gave a decree to plaintiffs 2 and 3 as the heirs of Muthu Mahomed but only for a one-third share as they had not asked for more although they were entitled to a five-eighths share under the Muhammadan Law of inheritance on his finding. Plaintiff did not appeal but the sixth defendant filed an appeal in the High Court. Plaintiffs 2 and 3 filed a memorandum of objections claiming their five-eighths share in the property under the Muhammadan Law on the footing that the whole property belonged to Muthu as found by the Subordinate Judge. The High Court dismissed the sixth defendant's appeal but gave a decree for five-eighths

share to plaintiffs 2 and 3. They have executed that decree and got possession of that share.

It is for the balance three-eighths share of the house in Madura that the plaintiff brings the present suit against the sixth defendant. He now claims as the sole residuary heir to Muthu Mahomed being his sole surviving brother. Defendant contends that the plaintiff "might and ought to have" claimed this relief in the alternative in the previous suit and not having done so he is barred by section 11 read with explanation 4 from claiming it again.

The previous suit was, so far as the present defendant is concerned, a suit for his ejectment from the suit house on the ground that he had no valid title to it or in other words that he was a trespasser; and it was based upon plaintiff's title as owner by joint purchase with two others. The prayer for partition was only against the heirs of the brother. It did not concern the present defendant. It is conceded that in that suit plaintiff might have put forward his claim to ownership by inheritance as heir to Muthu Mahomed as an alternative claim. In fact though the case of the plaintiffs 2 and 3 was also one based on Muthu Mahomed being entitled to only a third share as joint purchaser they were given a decree for their five-eighths share in the whole property on the footing that it belonged solely to Muthu Mahomed. Plaintiff could have got relief on the same footing in that suit if he had put forward his claim as Muthu Mahomed's residuary heir.

The question then is whether he "ought" to have put his present claim forward in that suit. The ruling in *Woomatara Debia* v. *Unnopoorna Dassee*(1) is in point where their Lordships of the Privy Council held that a suit to recover property on the ground that it was part

(1) (1872) 11 Beng. L.R., 158.

MUHAMMAD ROWTHER v. ABDUL REHMAN ROWTHER.

KRISHNAN, J.

of plaintiff's taluk was barred by a previous suit for the same land on the ground that it was tanfir land or land which was obtained by adverse possession as the two claims should have been combined in the first suit. In the case before us the first case was for possession against the defendant as owner on the strength of plaintiff's title by purchase ; the present case is again for possession on the strength of plaintiff's title as owner by inheritance. In both cases plaintiff is litigating under the same title namely, his ownership. He should therefore according to this ruling have combined the two claims in the first suit.

In that case their Lordships followed an earlier ruling of theirs in *Srimut Rajah Moottoo Vijaya Raganadha Bodha Gooroosawmy Periya Odaya Tevar* v. *Katama Nachiar, Zamindar of Sivagunga*(1), where in the first suit the party rested his title upon the property being the separate property of the zamindar, whereas in the second suit he claimed title under a will. That plea was held to be barred.

The case of *Woomatara Debia* v. *Unnopoorna Dassee*(2) is referred to in *Ramaswami Ayyar* v. *Vythinatha Ayyar*(3). The learned Judge while distinguishing it from the case before him which was one of redemption of a mortgage different from the one sought to be redeemed in the first case though on the same property observes that the suits in *Woomatara Debia* v. *Unnopoorna Dassee*(2) were " both suits based upon plaintiff's title as owner " and that

" the case is an authority only for the position that if one is dispossessed of land and brings a suit to recover possession on the strength of his title, he must establish his title in that very suit, by urging and proving all that would go to establish his title and cannot reserve one or more of such grounds for a

(1) (1866) 11 M.I.A., 50. (2) (1872) 11 Beng. L.R., 158.
(3) (1903) I.L.R., 26 Mad., 760, at p. 774 and 775.

future suit, and this is what is laid down in explanation 2 of section 13, Civil Procedure Code"

which is the same as explanation 4 to section 11 of the present Code. Even taking this restricted view of the scope of the decision without deciding whether it is correct to so restrict it, it appears clear that the present case falls within it and is covered by the explanation.

The Privy Council again held in *Kameswar Pershad* v. *Rajkumari Ruttan Koer*(1) that a suit to enforce a charge on property barred a second suit for the same amount on a personal covenant to pay under the same agreement. Their Lordships say that

"the question whether the second claim ought to have been put forward in the first case depends on the particular facts of each case. When matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' would become important. In this case, matters were the same. It was only an alternative way of seeking to impose a liability upon Run Bahadur and it appears to their Lordships that the matter 'ought' to have been made a ground of attack in the former suit."

This case shows that if a person has two grounds on which he could base his claim or title to a thing he must bring forward both in the first suit itself and he will be barred from bringing a second suit, unless indeed the union leads to confusion. In the case before us the joining together of the two claims, the one under the purchase and the other as heir, would have led to no confusion or embarassment. If plaintiff failed to prove the joint purchase he alleged, the property must have necessarily been taken to be Muthu Mahomed's as the deed was in his name, and as the plaintiff claimed title through him, for his alternative claim he would then have to prove only that he is a residuary to get relief on that

(1) (1893) I.L.R., 20 Calc., 79 (P.C.).

MUHAMMAD ROWTHER v. ABDUL REHMAN ROWTHER.

KRISHNAN, J.

ground. In either case the invalidity of the sixth defendant's title must be proved so that the addition of the alternative case will have led to no confusion at all and no embarassment to plaintiff in leading his evidence.

The case of *Kameswar Pershad* v. *Rajkumari Ruttan Koer*(1) was followed by their Lordships again in *Moosa Goolam Ariff* v. *Ebrahim Goolam Ariff*(2). Thus it would seem clear on the authority of the Privy Council ruling that the plaintiff should have put forward all his grounds of attack to recover the suit house from the defendant and not having put forward his claim based on his right of inheritance in the former suit he is now barred from doing so. The fact that plaintiff claimed in the first suit a one-third share by partition whereas now he claims a specific three-eighths share which alone is left with the defendant, the balance having been recovered from him by Muthu Mahomed's widow and daughter, can make no difference to the application of the rule of res judicata; for according to both his claims the defendant had no right to any portion of the property he being a trespasser. A plaintiff cannot by claiming a larger or a smaller share in the same property than in his first suit get rid of the effect of res judicata against him. In both cases the relief against the defendant is to recover possession from him of the whole or part of the same property.

Besides the above mentioned authorities the appellant cited *Masilamania Pillai* v. *Thiruvengadam Pillai*(3), *Rangaswamy Patrudu* v. *Applaswamy*(4) and *Guddappa* v. *Tinkappa*(5). The respondent, on the other hand, has quoted a number of cases where it was held that the second suit was not barred but I think it is not necessary

(1) (1893) 20 Calc., 79 (P.C.).
(2) (1913) I.L.R., 40 Calc., 1 (P.C.).
(3) (1908) I.L.R., 31 Mad., 385.
(4) (1916) 1 M.W.N., 286.
(5) (1901) I.L.R., 25 Bom., 189.

to discuss them all. It is not possible to reconcile all the cases; but it may be conceded that a plaintiff is not bound under Order II, rule 2, to join in one suit all the causes of action he has got against the defendant; but that principle is not the one applicable to the question before us which refers to a plaintiff's duty to bring forward all the grounds of his attack in support of the title that he is litigating. Reference must, however, be made to two of the cases relied on by the learned vakil for the respondent, *Ramaswami Ayyar* v. *Vythinatha Ayyar*(1) a decision of this Court and *Payana Reena Saminathan* v. *Pana Lana Palaniappa*(2), a decision of the Privy Council in an appeal from Ceylon. In the former case it was ruled that the dismissal of a suit to redeem one mortgage did not bar subsequent suit to redeem another mortgage on the same property. I agree with this decision as the two suits are different from one another being based on two different contracts. The title or jural relationship in the two litigations are different as the terms of the two mortgages which regulate that relationship are different. But I do not wish to be understood as agreeing to all the observations in that judgment. That case is really an illustration of the rule that a plaintiff is not bound to combine different causes of action in the same suit and does not apply here.

In the Privy Council case *Payana Reena Saminathan* v. *Pana Lana Palaniappa*(2), the first suit was on certain promissory notes, which failed as the notes were found to have been materially altered. The second suit was for money due under a certain award or settlement for which the notes had been given. The question considered in that case was not one of res

(1) (1903) I.L.R., 26 Mad., 760. (2) (1913) 41 I.A., 142.

MUHAMMAD ROWTHER v. ABDUL REHMAN ROWTHER.

KRISHNAN, J.

judicata but whether the second suit was barred by reason of section 34 of the Ceylon Procedure Code corresponding to Order II, rule 2, of our Code. Their Lordships held that the claim on the notes and the claim on the original consideration under the award or settlement were quite independent claims and constituted "two inconsistent and mutually exclusive causes of action" and therefore the second suit did not offend against the section quoted. No question of the kind before us was raised and we cannot therefore treat it as an authority on that question.

For the above reasons I hold that the present suit is barred by section 11, explanation 4, Civil Procedure Code, and must be dismissed. I allow the appeal and dismiss the suit with defendant's costs throughout.

RAMESAM, J.

RAMESAM, J.—The facts are fully stated by my learned brother.

The decision depends on a construction of the words "litigating under the same title" taken with explanation 4 in section 11 of Civil Procedure Code. As a large number of decisions, including those of the Judicial Committee are available as guides, it is futile to attempt to work out the details in the application of the section by mere consideration of the words of the section. On an analysis of the decisions cited before us, the following propositions may be gathered from them (without attempting to generalize) :—

(1) Where the creditor (hypothecatee) of a Hindu widow claimed to recover the debt from a reversioner who got into possession of the estate through a surrender by the widow, a claim based on the ground of an express covenant at the time of surrender to pay the debt, is barred by a prior suit to recover the identical debt where it was based on the ground that it was beneficial

to and binding on the reversion—*Kameswar Pershad's* case(1).

(2) Where the first suit was to redeem one mortgage it does not bar a suit to redeem a mortgage of a different date, though the property sought to be redeemed and the principal amount of the mortgage are identical. *Ramaswami Ayyar* v. *Vythinatha Ayyar*(2), *Veerana Pillai* v. *Muthukumara Asari*(3) and *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishen Nair*(4).

(3) Where the first suit was based merely on the relationship of landlord and tenant between plaintiff and defendant (and not on plaintiff's title as owner or otherwise) a second suit based on title is not barred : *Mangalathammal* v. *Veerappa Goundan*(5).

In the first case the claimant litigates under the same title but not in the second and third cases.

(4) Where the plaintiff sought to recover a property as owner, a second suit to recover the same property also as owner is barred, even though the details for the ownership are different from those in the first.

It is scarcely necessary to add that in cases 1 and 4 the facts which are the basis of the second suit must have existed at the time of the first suit to attract the bar of res judicata. The fourth proposition is supported by *Woomatara Debia* v. *Unnopoorna Dassee*(6), *Moosa Goolam Ariff* v. *Ebrahim Goolam Ariff*(7), *Guddappa* v *Tirkappa*(8), *Masilamani Pillai* v. *Tiruvengadam Pillai*(9), *Rangaswamy Patrudu* v. *Appalaswamy*(10).

In my opinion the decisions in *Subrahmanian Chetti* v. *Authinarayanan*(11) and in Second Appeal No. 1606 of

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(1) (1893) I.L.R., 20 Calc., 79 (P.C.).
(2) (1903) I.L.R., 26 Mad., 760.
(3) (1904) I.L.R., 27 Mad., 102.
(4) (1906) I.L.R., 29 Mad., 153(F.B.).
(5) (1919) M.W.N., 287.
(6) (1872) 11 B.L.R., 158 (P.C.).
(7) (1913) I.L.R., 40 Calc., 1 (P.C.).
(8) (1901) I.L.R., 25 Bom., 189.
(9) (1908) I.L.R., 31 Mad., 385
(10) (1916) 1 M.W.N., 286.
(11) (1897) 7 M.L.J., 288.

MUHAMMAD ROWTHER v. ABDUL REHMAN ROWTHER. — RAMESAM, J.

1914 and Second Appeal No. 1 91 of 1917 (unreported) are inconsistent with *Woomatara Debia* v. *Unnoppoorna Dassee*(1). I also agree with SESHAGIRI AYYAR, J.'s dissent in *Rangaswamy Patrudu* v. *Appalaswamy*(2) from the remarks at page 779 of *Ramaswami Ayyar* v. *Vythinatha Ayyar*(3).

In the application of the fourth proposition it must be remembered that the claim in the second suit must be either substantially identical with or part of the claim in the first suit.

Coming to the present case, can there be any difference for the purposes of res judicata merely because (1) the share claimed by the plaintiff in the present case is three-eighths and that in the former case was one-third and (2) there was a claim for partition in the first suit and none now? I think not. In the first place the share to which the plaintiff was entitled in the former suit (on the footing that all the three brothers originally acquired the property) was not one-third but one-third plus three-eighths of one-third or eleven twenty-fourths, the plaintiff being entitled to the extra one-eighth by reason of succession from the second brother. Though the results of this succession were overlooked, in so far as the two-thirds claimed by all the three plaintiffs in the former suit were concerned, it was a claim for ejectment against the present defendant (whether the two-thirds consisted of one-third belonging to first plaintiff and one-third to second and third plaintiffs or eleven twenty-fourths to first plaintiff and five twenty-fourths to second and third plaintiffs). The fact that a partition was asked for because the heirs of the first brother did not join as co-plaintiffs was a mere accident and does not change the character of the suit.

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(1) (1872) 11 B.L.R., 158 (P.C.).
(2) (1916) 1 M.W.N., 286. (3) (1903) I.L.R., 26 Mad., 760.

The share now claimed (viz., three-eighths of the plaintiff) was certainly less than the eleven twenty-fourths to which he was entitled at the time of the former suit (even on the allegation of acquisition by all the three brothers) though by an oversight as to the results of the death of the second brother, his title was described as that to a third; and it certainly overlaps substantially the claim actually made. If the shares are identical though there is no claim for partition in the second suit, it cannot be said that the second suit is not barred and the non-identity of the shares is a mere accident and can make no difference for the application of the principle.

In *Balbhaddar Nath* v. *Ram Lal*(1), *Shivram* v. *Narayan*(2) and *Konerrav* v. *Gurraw*(3) the plaintiff's right as co-owner (using the term generally) was admitted in the first and only the fact of a partition resulting in plaintiff's right to a specific plot was in dispute. In the interval between the two suits, he continued to be co-owner and the second suit for partition was not barred. In *Nilo Ramchandra* v. *Govind Ballal*(4) (a suit for vatan property) some of the defendants in the first suit admitted plaintiff's right though not the one who was the contesting defendant in the second suit. In *Thandavan* v. *Valliammal*(5) the first suit was for a declaration and there was neither identity of suit nor identity of issue as to the validity of the will and in *Dhanapala Chetti* v. *Anantha Chetti*(6) the construction of the will in the second suit was not in question in the first suit. In *Allunni* v. *Kunjusha*(7) the karnavan had not exercised his right to

(1) (1904) I.L.R., 26 All., 501.
(2) (1881) I.L.R., 5 Bom., 27.
(3) (1881) I.L.R., 5 Bom., 589.
(4) (1886) I.L.R., 10 Bom., 24.
(5) (1892) I.L.R., 15 Mad., 336.
(6) (1913) 24 M.L.J., 418.
(7) (1894) I.L.R., 7 Mad., 264.

MUHAMMAD RGWTHER v. ABDUL REHMAN ROWTHER. — RAMESAM, J.

resume as karnavan at the time of the first suit. In Second Appeal No. 1391 of 1917 if the plaintiff's right to his own undivided share was admitted in the first suit, that decision would have been distinguishable like *Balbhaddar Nath* v. *Ram Lal*(1) and the cases in *Shivram* v. *Narayan*(2). As it is, I am not able to agree with it. It cannot be said either in Second Appeal No. 1391 of 1917 or in the present suit that if the second claim was made alternatively in the first suit, the first suit would have been bad for misjoinder of parties and of causes of action either under the present Code or the old Code. In the result, I agree with my learned brother that the plaintiff's suit should be dismissed with costs throughout.

K.R.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, and Mr. Justice Wallace.

1922, November 1.

ABDUL SHAKER SAHIB, (FIRST) DEFENDANT, APPELLANT,

v.

ABDUL RAHIMAN SAHIB AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Specific Relief Act (I of 1877), sec. 35—Specific performance—Contract for sale of lands—Decree of original Court, giving time to plaintiff for payment of price—Appeal by defendant—Power of original Court to extend time—Nature of Original decree—Preliminary decree—Power of Appellate Court to extend time in the appeal by the defendant—Jurisdiction of original Court to pass necessary orders, including granting of further time.

Where, in a suit for specific performance of a contract for sale of certain lands, the original Court passed a decree directing the

(1) (1904) I.L.R., 26 All., 501. (2) (1881) I.L.R., 5 Bom., 27.

* Original Side Appeal No. 126 of 1921.