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We think it is to be regretted that in dealing with suits for partition of immoveable property not being estates paying revenue to Government, the lower Courts should be in the habit of passing what are termed decrees in the suits containing merely declaratory orders, leaving still open for determination the main issues. Such matters should be decided before any decree is passed, and this would seem to be contemplated by s. 396 which refers to proceedings in a suit. We are inclined to think that this mode of dealing with cases of this description arises in a great measure from a desire of the lower Courts to clear their files of such suits as involve tedious and lengthened enquiries, and thus not to lay themselves open to animadversion for dilatory proceedings when their work comes before their executive superiors. As we are of opinion that no appeal lies in the present stage of the proceedings, but that, if so advised, the appellant can hereafter raise the points which he desires to raise in the present proceedings, the appeal is dismissed, but, under the circumstances, without costs.

J. V. W. *Appeal dismissed.*

Before Mr. Justice Wilson and Mr. Justice Beverley.

1885. *August* 11.

KRISTO CHUNDER DASS AND OTHERS (DEFENDANTS) v. O. STEEL (PLAINTIFF.)*

Waste lands—Act XXIII of 1863, *ss.* 8, 18—*Suit for possession—Statute, Interpretation of.*

Where an Act expressly takes away one particular remedy which would otherwise have been open for enforcing a right of property, or in any other particular interferes with proprietary rights, but does not, in express words or by necessary implication, declare that those rights shall cease, the method of interpretation which ought to be adopted is to give effect to the Act exactly so far as its words extend, and no further.

There is nothing in Act XXIII of 1863 to prevent a person who has a good title and has throughout been in possession, or who has a good title, and at any time succeeds in peaceably getting possession, and is not ousted in a possessory suit, or who for any other reason is in the advantageous

* Appeal from Appellate Decree No. 590 of 1884, against the decree of H. Muspratt, Esq., District Judge of Sylhet, dated the 28th December 1883, reversing the decree of Baboo Ram Coomar Pal, Rai Bahadur, Subordinate Judge of that District, dated the 31st of January 1883.

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position of a defendant, from defending his rights notwithstanding any sale which the Government may have professed to make under the Waste Lands Act.

Quære—Whether the terms of the Act are not sufficiently satisfied, by making it apply to waste lands of Government, and by understanding the claims and objections, mentioned in the Act as claims in respect of Government land, and objections with the same limitation.

THIS was a suit brought to recover a piece of land. The plaintiff's case was, that on the 5th August 1878, the proper officer on behalf of Government, acting under Act XXIII of 1863, sold to him the proprietary right in certain waste lands, and settled with him in respect of them, the lands being described in waste land pottah No. 58; that the land in question was included in that pottah; that this land continued waste but that he was in possession; and that in 1881 the defendants Nos. 1 to 13 settled the other defendants upon the land as tenants and so ousted the plaintiff.

The defence of the defendant who appeared was that the land was not waste land, and was not included in the plaintiff's pottah, but formed part of a taluk long vested in the principal defendants and their predecessors in title.

In the first Court the suit was dismissed, the Subordinate Judge holding that the land in question was within the defendants' taluk, and that it was not waste land and not covered by the plaintiff's pottah.

The District Judge on appeal reversed that decision and gave the plaintiff a decree for possession for the land in dispute, coming to the conclusion that the land was included in the plaintiff's pottah, and that he had obtained possession: and that being so, and none of the defendants having preferred any claim before the Collector in the manner prescribed by Act XXIII of 1863 at or since the time of the sale to the plaintiff, he held that the plaintiff's title must prevail, and that the defendants could not now in a Civil Court set up any adverse title. He however came to no decision upon the alleged prior title of the defendants.

The defendants appealed to the High Court.

Mr. *Bell* (with him Baboo *Joygobindo Shome*) for the appellant.—The lower Appellate Court has not tried the real question at

issue in this case. The land in dispute is claimed by the plaintiff under a settlement from Government under the Waste Lands Act (Act XXIII of 1863). The defendant claims the land as part of his taluk, which is contiguous to certain waste lands of the Government. The lower Appellate Court holds that whether the lands belong to the defendants' taluk or not, the title of the plaintiff under the settlement must prevail. For this conclusion ss. 18 and 19 of the Act are relied upon. These sections provide that no claim to any land which has been sold or otherwise dealt with on account of Government as waste land, shall be received after three years from the date on which such land shall have been delivered by the Government to the purchaser or otherwise dealt with ; and if any claim is made within the three years, the claimant is not to recover the land from the purchaser, but to receive compensation from the Government. But these sections must receive a reasonable interpretation. The word "land" in these sections must refer to waste land the property of Government. This is clear from the preamble and the whole scope of the Act. The Act merely deals with waste lands, the property of Government; it certainly does not authorise the Collector to take the land of a neighbouring proprietor and sell it to a third party as Government waste land. If he does he exceeds his authority, and the proprietor of the land has his remedy in the ordinary Civil Courts. The Act merely deals with waste lands which belong to Government, and it provides compensation for persons, who have any right, such as right of occupancy or pasturage, in such lands : but it does not profess to deal with lands which are not the property of Government and are therefore outside the scope of the Act. The Act moreover gives the Collector no jurisdiction to decide disputed questions of boundary between the Government and the neighbouring proprietors: all such questions must be decided by the Civil Court. The lower Court is wrong in refusing to try the question whether the land in dispute formed part of the waste land of the Government or belonged to the defendants' taluk.

Mr. *Adkin*, for the respondent.

Judgments were delivered by WILSON and BEVERLEY, JJ.

WILSON, J. (after setting out the facts continued as follows) :—

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I am unable to concur in the view of the law taken by the learned District Judge. In order to make clear the reasons why I cannot do so, it will be necessary to examine the provisions of Act XXIII of 1863 in some detail.

The Act is entitled "an Act to provide for the adjudication of claims to waste lands." The preamble recites that it is expedient to make special provisions for the speedy adjudication of claims which may be preferred to waste lands proposed to be sold, or otherwise dealt with, on account of Government, and of objections taken to the sales or other disposition of such lands. Section 1 says: That when any claim shall be preferred to any waste land proposed to be sold, or otherwise dealt with, on account of Government, or when any objection shall be taken to the sale or other disposition of such land, the Collector shall, if the claim or objection be preferred within the period mentioned in the advertisement to be issued for the sale or other disposition of such land, which period shall be not less than three months, proceed to make an inquiry into the claim or objection; section 2 provides for the procedure to be observed by the Collector and the order to be made by him; section 3 for stay of sale pending the inquiry; section 4 for an absolute stay if the Collector finds the claim or objection well founded. By section 5, if the Collector's decision is adverse to the claimant or objector, his order is final, unless the claimant or objector, within a week after receipt of the order, or such extended time as the Collector may allow, give notice that he wishes to dispute the order. If he does, the matter is to be reported to the Board of Revenue or other superior Revenue authority. If the decision of the higher Revenue authority is adverse to the claimant, that decision is to be communicated to the special Court, constituted under a subsequent section, and the decision is final unless within thirty days the claimant or objector files a suit in the special Court. The latter part of this section is altered in form but not in substance by the subsequent Limitation Act.

Section 6 gives power to the Government to institute a suit in the special Court to dispute the finding of the Collector if in favour of the claimant or objector. Section 7 provides for the constitution of the special Court.

Then follows a very material section, section 8, "whenever any Court is constituted under this Act notice thereof shall be given by a written proclamation, copies of which shall be affixed in the several Courts, and in the offices of the several Collectors and Magistrates of the districts and from the date of the issue of such proclamation, no other Court shall be competent to entertain any claim or objection belonging to the class of claims or objections for the trial and determination of which such Court is constituted." By s. 10 in suits in this special Court the parties are to be the claimant or objector and the Government. Sections 11, 12 and 13 relate to procedure. By s. 14 "no appeal shall lie from any decision or order passed under this Act, nor shall any such decision or order be open to revision." Section 15 provides for a reference from the special Court to the High Court on questions of law. Sections 16 and 17 again deal with procedure.

Down to this point in the Act there is no provision for dealing with any claim or objection which has not been submitted to the Collector before the date fixed by advertisement for the sale or other disposition of the land. But by s. 18, "No claim to any land, or to compensation or damages in respect of any land sold or otherwise dealt with on account of Government as waste land, shall be received after the expiration of three years from the date on which such land shall have been delivered by the Government to the purchaser or otherwise dealt with. If within three years after any lands have been delivered by the Government to the purchaser or otherwise dealt with, any claimant or objector shall prefer a claim to the land so delivered or otherwise dealt with, or an objection to such sale, or to compensation or damages in respect thereof, in the Court constituted under this Act for the district in which the land is situate; and shall show good and sufficient reason for not having preferred his claim or objection to the Collector or other officer as aforesaid within the period limited by s. 1 of the Act; such Court shall file the claim or objection making the claimant or objector plaintiff and the Collector of the district or other officer defendant, and the foregoing provisions of this Act shall be applicable to the trial and determination of the suit."

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By s. 19, "in any case in which the land has been sold, if the Court shall be of opinion that the claim of the claimant is established, the Court shall not award the claimant possession of the land in dispute, but shall order him to receive from the Government treasury by way of compensation a sum equal to the price at which the land was sold in addition to the costs of suit." Section 20 contains somewhat similar provisions for the case in which the land has been dealt with otherwise than by absolute sale.

By s. 21, "an award under any of the provisions of the two last preceding sections shall be in full satisfaction of the claim of the claimant or objector and shall bar any future claim on his part, in respect of the land in suit, resting on the same cause of action or on a cause of the action which existed prior to the date of the sale or other disposition of the land on account of Government."

Sections 22 and 23 reserve to the Local Government the power of granting compensation, although no claim or objection may have been made within the prescribed period.

We must construe this Act in accordance with the settled rules of construction. Now it is a familiar rule of construction that an Act is not to be so interpreted as to interfere with rights of property, except by express words or necessary implication. And that rule has been acted upon in this country no less than in England.

On the one hand, where the Legislature has intended to take away proprietory rights it has expressed that intention in clear language.

Thus in Regulation VIII of 1819, when it was intended that the sale of a tenure for arrears of rent should put an end to intermediate incumbrances, the language of s. 11 stated that intention expressly. So again in the Limitation Act, XV of 1877, when it is intended that on the determination of the period for suing to recover property the right shall be extinguished, the words of s. 28 clearly say so.

On the other hand, where an Act expressly takes away one particular remedy which would otherwise have been open for enforcing a right of property, or in any other particular interferes with proprietory rights but does not, in express words or

by necessary implication, declare that those rights shall cease to exist, I think the method of interpretation which has been and ought to be adopted is to give effect to the Act exactly so far as its words extend, and no further. A good example of this rule will be found in the case of the provisions as to *benami* purchases, contained in the Revenue Sale Acts, and in those portions of the Procedure Codes relating to execution sales. It has there been enacted that, if a purchaser at any of such sales purchases in the *benami* name of another, no suit shall lie against the *benamdar* to oust him from the property. It has always been held that the effect of these provisions is not to take away the right or title of the true owner, or to vest them in the *benamdar*, but merely to preclude the specific thing forbidden by the words of the law, that is to say a suit in which the real purchaser is the plaintiff and the *benamdar* is the defendant and the object is to oust the latter.

Applying these principles to the present case, I think that the defendant's title is not barred by the operation of the Waste Lands Act. The only claims dealt with by the Act are claims set up by persons objecting to or complaining of the sale of lands as waste lands. And the section which, if any, bars the present defence is s. 8, which forbids the Civil Courts to entertain any claim belonging to the class for the trial of which the special Court is constituted. There are no words in the Act declaring, either expressly or by necessary implication, that a purchaser of waste lands shall take an absolute title, or that the rights of any other person shall be barred, or that any such person shall be disabled from asserting his rights in any way whatever, except in the one case in which the Act itself forbids it; and that is where he is the claimant. I can see nothing in the Act to prevent a person, who has a good title and has throughout been in possession, or who has a good title, and at any time succeeds in peaceably getting possession, and is not ousted in a possessory suit, or who, for any other reason, is in the advantageous position of a defendant, from defending his rights, notwithstanding any sale which the Government may have professed to make under the Waste Lands Act.

On the contrary I think there are indications, in the Act itself,

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that this distinction was present to the minds of the framers, for by s. 18, the period within which a claim adverse to a sale must be filed begins to run, not from the sale, but from the time when the land has been delivered by the Government to the purchaser.

I think, therefore, that the Court below was wrong; and that s. 8 has no application in this case, because the persons against whom it is sought to apply it are not plaintiffs but defendants.

This ground is sufficient to dispose of the present appeal. But I think it right to say that upon other grounds also I think the decision of the Court below is open to great question. The learned Judge seems to hold that it is not necessary for the purchaser of waste lands, in order to entitle him to rely upon s. 8 or s. 18, to show that the lands were waste at the time of the purchase; and indeed that the question cannot be gone into; but that the fact of the Government having dealt with the land as waste land is conclusive. I think this very doubtful. Throughout the Act, except in one instance, what is spoken of is waste land; and had it not been for that one instance, I should have thought it clear that the land being waste land was a condition precedent to the Acts applying at all. The one instance I refer to is in s. 18, where the words occur "sold or otherwise dealt with on account of Government as waste lands." Having regard to the immediate context in which the words occur, and to the connection of that section with the earlier parts of the Act, I very much doubt whether these words extend the scope of the Act, and whether the Act applies at all to any lands which are not waste at the date of the sale or other dealing relied upon. Another question is, whether the Act applies at all to any lands except lands which are the property of Government. An Act interfering with private right is, as I have pointed out, to be construed strictly. And I am by no means sure the terms of the Act are not sufficiently satisfied by making it apply to waste lands of Government; and by understanding the claims and objections mentioned in the Act as claims in respect of Government land and objections with the same limitation—claims for example of tenants and others claiming to hold under Government, claims to easements and other rights over the

land, claims and objections based upon contract. If this be the true construction, the restrictions relied upon do not affect any person claiming under a title adverse to the proprietory right of Government.

The only reported case, as far as I knew, decided upon the section in question is *Magun Pollan* v. *Money* (1). In that case none of the questions which I have considered appear to have arisen. The claimant in that case, who was held to be barred, was the plaintiff in the suit. No question seems to have arisen as to the lands being waste. And the claim was not one adverse to the proprietory right of Government, but a demand for a pottah by one who claimed to have held under Government.

The consequences of holding that the provisions of this Act bar the right of the real owner, especially if those provisions be extended to titles adverse to the proprietory right of Government whom it professes to sell, would be very serious; and the effect might be in many cases not to promote security of titles, but insecurity. For I suppose that if the rule suggested applies to any sale of waste land, it applies to every sale of waste land, and therefore one who purchased waste land to-day, and entered into possession of, it might be deprivedof it afterwards if by a mistake of the Government officials the same land were included in a subsequent grant to another person.

The consequences of holding that the Act applies to lands sold as waste land, though not so in fact, would be not less serious.

It may well happen that, by a mistake of the officers employed, a grant of lands to one person as waste lands might include land which had been turned into a tea garden by another. If the view of the District Judge be right, the grantee would take his neighbour's tea garden, and the real owner could only recover from Government, under s. 19, the price of waste land. This would be a great injustice.

The result is that, in my opinion, the judgment of the lower Appellate Court cannot be supported; and the case should go back to that Court to decide the case upon the merits, that is to say, to try the first part of the fourth issue. Costs should abide the event.

(1) 7 W. R., 474.

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BEVERLEY, J. (after stating the facts and proceedings in the lower Courts continued):—In second appeal it is contended before us, (1) that the Judge has put a wrong construction on Act XXIII of 1863, and (2) that the southern boundary of the plaintiff's land being stated to be Bagmara Cheg, the plaintiff was not entitled to recover any land shown to fall within the defendant's taluk.

It is admitted that the land in dispute is included in the plaintiff's grant, as shown in the map annexed to his pottah. This map is only incidentally referred to in the deed, and it was disregarded by the first Court on the ground that it was not "published in the notification." But the notification makes distinct reference to a map which was advertised as being open to inspection in the Deputy Commissioner's Office, and there is no reason to suppose that that map was any other than the map which is annexed to the pottah. Under these circumstances it can hardly be said that the subject-matter of the grant was not notified as defined in the map; and as has been pointed out above, it was distinctly admitted by the defendants that the land in dispute was as a matter of fact settled with the plaintiff.

And there is no reason for saying that the proceedings were other than regular, and that defendants had not sufficient notice as to the land that was applied for. Even putting aside the map which the defendants, as adjoining proprietors, might be expected to consult, the Judge has pointed out that the notification itself was so worded as to put them on enquiry. The defendant's case is that the northern boundary of Bagmara Cheg is the Erania path and the Pekieharra. Now the notification distinctly mentioned the Erania path as the northern boundary of the land applied for. Here then was a statement in the notification itself that should have attracted their attention and which suggested the necessity of further enquiry.

It being conceded, then, that as a matter of fact the land in dispute is covered by the plaintiff's pottah and was in fact granted to him, the next question is whether, that being so, the defendants are barred by Act XXIII of 1863 from asserting their claim to the land in the present suit. The object of that Act is stated in the preamble to be "to make special provision for the speedy adjudication of claims which may be preferred to waste lands

proposed to be sold or otherwise dealt with on account of Government and of objections taken to the sale or other disposition of such lands." The special provision referred to is as follows : In the first place the land proposed to be sold or otherwise disposed of is to be advertised for a period of not less than three months, and if during that time any claim or objection be preferred, the sale or other disposition of the lands is to be postponed, pending an enquiry. The Act then goes on to provide for the constitution of special Courts for the investigation and trial of claims, and by s. 8 when proclamation has been made of the establishment of any such special Court "no other Court shall be competent to entertain any claim or objection belonging to the class of claims or objections for the trial and determination of which such Court is constituted." It is admitted that in the district of Sylhet a special Court has been constituted. The next few sections relate to the procedure of the special Court; and s. 14 provides that "no appeal shall lie from any decision or order passed under this Act, nor shall any such decision or order be open to revision.

Then s. 18 says : "No claim to any land or to compensation or damages in respect of any land sold or otherwise dealt with on account of Government as waste land, shall be received after the expiration of three years from the date on which such land shall have been delivered by the Government to the purchaser or otherwise dealt with." If within such period of three years any claim or objection is preferred it may, under certain conditions, be tried by the special Court, but even if the claim is established the claimant is not to recover the land itself but merely money compensation. Lastly, by ss. 22 and 23, the Government is authorized to award compensation even after the period of limitation in cases in which the claim is proved to its satisfaction.

The object of the Act, therefore, would seem to have been to give a purchaser or lessee of waste land under Government a clear title to the land itself, the Government holding itself responsible to compensate any person who may establish a claim to the land within a certain time.

This view of the Act has been adopted by this Court in the case of *Magun Pollan* v. *Money* (1), in which it was held that

(1) 7 W. R., 474.

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claims to land sold under the Act can only be preferred in accordance with the provisions of the Act, and that the jurisdiction of the ordinary Court is barred.

At the same time the Act must be construed strictly so far as it interferes with private rights, and I think there is no doubt that, whatever may have been the intention of its framers, its language, while probably sufficient to bar a suit in the ordinary Courts for the recovery of waste lands sold or otherwise disposed of by Government, does not go to the extent of barring the ordinary Courts from considering claims to such lands when raised by way of defence. There are no words in the Act such, for instance, as those contained in s. 16 of the Land Acquisition Act, giving the purchaser an indefeasible title. By s. 8 the ordinary Courts are barred from entertaining claims and objections belonging to the class of claims or objections for the trial or determination of which the special Court is constituted. Such claims and objections could only be put forward before the special Court by a claimant or plaintiff. It is difficult to see how claims or objections raised by way of defence could come before the special Court at all. It seems to follow that what is barred by s. 8 is a claim or objection brought by a plaintiff and not the assertion of a title set up by way of defence.

It is contended that unless the land is shown to have been actually waste land, the property of Government, the Act will not apply. No definition of waste land is given in the Act, and the expression may therefore be taken to have its usual meaning of unoccupied or uncultivated land. And nowhere in the Act is it said that the waste lands spoken of must be unoccupied lands, the property of Government. It is assumed of course that lands will not be sold unless they are the property of Government; but the very object of the Act is to dispose of claims preferred on the ground that the land sold or otherwise disposed of is not the exclusive property of Government, but that the claimant has a proprietory right or some other interest in it.

I agree with my learned colleague therefore that the case must go back to the lower Appellate Court for a distinct finding as to whether the defendants have succeeded in proving their title to the land in suit.

T. A. P. *Case remanded.*

Before Mr. Justice Tottenham and Mr. Justice. Agnew.

1885.
August 14.

NONOO SINGH MONDA (ONE OF THE DEFENDANTS) *v.* ANAND SINGH MONDA AND ANOTHER (PLAINTIFFS.)*

Civil Procedure Code (Act XIV of 1882), s. 43—Splitting Cause of action—Suit for declaration of title—Subsequent suit for possession.

When a suit for a declaration of title and confirmation of possession of certain land has been dismissed on the ground that the plaintiff was not in possession of the land at the time of instituting the suit, a subsequent suit on the same title to recover possession is not barred under s. 43 of the Civil Procedure Code.

A cause of action consists of the circumstances and facts which are alleged by the plaintiff to exist, and which, if proved, will entitle him to the relief or to some part of the relief prayed for, and is to be sought for within the four corners of the plaint. *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (1) followed.

IN this case the plaintiffs sued to recover possession of mouzah Balmoda as being their ancestral *khutkati* property and also for mesne profits.

The plaint set out that one Pahar Singh, the ancestor of plaintiff No. 1 and defendant No. 1, on his death left three sons, *viz.*, Surjan Singh, Chamu Singh and Nonoo Singh (defendant No. 1), and that Surjan Singh being the eldest succeeded to the estate according to family custom, the other sons getting maintenance allowance. In Assar 1929 S. Surjan Singh died, and Chamu Singh (father of plaintiff No. 1) succeeded to the estate, and obtained possession. In Bhadro 1931 S. Chamu Singh died, and plaintiff No. 1 succeeded and leased his rights to plaintiff No. 2. The plaintiffs having sued one of the ryots for rent, and having failed to get a decree, instituted a suit for a declaratory decree, declaring their right to the property as against defendant No. 1, paying stamp duty on the plaint of Rs. 10. That suit was dismissed on the 15th December 1882, the Court finding that the plaintiff No. 1 had not been in possession of the property. Defendant No. 1 thereupon dispossessed the plaintiffs from the

* Appeal from Appellate Order No. 139 of 1885, against the order of G. E. Porter, Esq., Judicial Commissioner of Chota Nagpore, dated the 12th of February 1885, reversing the decree of Lieutenant-Colonel W. L. Samuells, Deputy Commissioner, Lohardagga, dated the 26th June 1884.

(1) I. L. R., 8 Calc., 819.

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property, and the plaintiffs accordingly sought in the present suit to recover possession.

The defendants denied that Chamu Singh, or plaintiff No. 1, was in possession, or that by family custom either of them had any right to succeed, as Nonoo Singh was older than Chamu Singh, and a son by a first wife, whereas Chamu Singh was born of the second wife. They also contended that the suit was barred under s. 43 of the Civil Procedure Code, as the plaintiffs should have included their claim for possession in the former suit which ended in the decree of the 15th December 1882, and that they should have then sued for possession as well as a declaratory decree and not merely for the latter.

The first Court decided the case upon the issue raised as to whether the suit was barred or not without going into the merits. It found that after the hearing of the former case the plaintiffs had prayed to be allowed to pay stamp duty on the whole value of the property, but that the Court had declined to allow that course as it would be changing the whole character of the suit. In that suit there had been four issues raised on the question of who was entitled to succeed to the property, and one issue on the question of possession. On the former issues the Court found that Chamu was the elder, and as such entitled to succeed Surjan, and upon the latter issue that the defendants were in possession. Upon these facts the first Court came to the conclusion that the question as to who was entitled to succeed to the property was *res-judicata,* but that the suit was also barred under s. 43, and the Deputy Commissioner in his judgment held that the decision in the case of *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (1), upon which the plaintiffs relied, did not apply to the present case, inasmuch as in the present case the question of possession was gone into, and he considered that the plaintiffs never *bonâ fide* believed that they were in possession.

The plaintiffs appealed against that decision, and the lower Appellate Court reversed it, and remanded the case for trial upon the merits. That Court was of opinion that the case quoted by the lower Court was exactly in point, and that the cause of action in the two suits was not the same.

(1) I. L. R., 8 Calc., 819.

Nonoo Singh now preferred this special appeal to the High Court against the order of the lower Appellate Court remanding the case. The only question argued at the hearing of the appeal was whether or not the suit was barred under s. 43 of the Civil Procedure Code.

Baboo *Rash Behari Ghose,* and Baboo *Golap Chunder Sirkar,* for the appellant.

Baboo *Mohesh Chunder Chowdhury,* and Baboo *Jogesh Chunder Dey,* for the respondents.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows:—

This is an appeal against an order of the lower Appellate Court remanding the case under s. 562 of the Code, the suit having been dismissed by the first Court on the ground that it was barred by s. 43 of the Code. Other matters were brought to our notice by the appellant's pleader, and he proposed to argue against the order of remand in respect of those other matters, but we confined him to the one point which is before us in this appeal, namely, whether the District Judge was right or wrong in holding that the suit is not barred by s. 43.

The case set up in support of the first Court's decision was that the plaintiff had previously brought a suit for a declaratory decree alleging himself to be in possession of the property in dispute. That suit was dismissed on the ground that the plaintiff was not in possession.

The present suit is brought to recover possession of the same property. It is urged, and was held by the first Court, that inasmuch as the plaintiff was found to be out of possession when he brought his first suit, he ought then to have brought his suit to recover possession. The lower Appellate Court has set aside that finding following the decision of this Court in *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (1), which decision was followed in another case given in the footnote of the same report. We think that the lower Appellate Court was right in following that decision. Section 43 refers to cases brought upon one and the same cause of action. In the case to which the lower Appel-

(1) I. L. R., 8 Calc., 819.

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late Court refers—*Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (1)—the learned Judge who delivered the judgment says, at page 822, that "a cause of action consists of the circumstances and facts, which are alleged by the plaintiff to exist, and which, if proved, will entitle him to the relief, or to some part of the relief prayed for, and is to be sought for within the four corners of the plaint." It appears that the circumstances and facts alleged in the present plaint were not the same as those alleged in the plaint in the former suit. That being so, we think that the Judge was right in saying that the two suits were not on the same cause of action.

We accordingly dismiss this appeal with costs.

H. T. H. *Appeal dismissed.*

Before Mr. Justice Tottenham and Mr. Justice Agnew.

1885
August 24.

DEBOKI NUNDUN SEN (PLAINTIFF) *v.* HART AND OTHERS (DEFENDANTS.)*

Civil Procedure Code (*Act XIV of* 1882), *s.* 295—*Rateable distribution of Sale Proceeds—Same judgment-debtor—Sale in execution of decree—Execution Proceedings.*

Where a judgment-creditor has obtained a decree against two judgment-debtors *A* and *B*, and in execution of that decree has attached and caused to be sold joint property belonging to such judgment-debtors, another judgment-creditor holding a decree against *A* alone, who has also applied for execution, is not entitled to claim under the provisions of s. 295 of the Civil Procedure Code to share rateably in the sale proceeds, the decree not being against the same judgment-debtor, and a Court having no power in execution proceedings to ascertain the respective shares of joint judgment-debtors.

In *Shumbhoo Nath Poddar* v. *Luckynath Dey* (2), it was not intended to lay down that a person who has obtained a decree for money against a single judgment-debtor is entitled to come in and share rateably with a person who has obtained a decree against the same judgment-debtor and other persons.

THIS was a suit under the penultimate clause of s. 295 of the Civil Procedure Code, for rateable distribution of sale proceeds which had been paid to the defendant Hart.

* Appeal from Appellate Decree No. 546 of 1885, against the decree of T. F. Bignold, Esq., District Judge of Beerbhoom, dated the 23rd of December 1884, reversing the decree of Baboo Gobind Chandra Bose, Sudder Munsiff of Suri, dated the 16th of September 1884.

(1) I. L. R., 8 Calc., 819. (2) I. L. R., 9 Calc., 920.