

1892

JHINKA  
v.  
BALDEO  
SAHAJ.

in 1872. Ss. 270 and 271 of Act No. VIII of 1859 were not as wide or as carefully drafted as is s. 295 of the present Act. The plaintiff's suit ought to have been dismissed on two grounds, that he was estopped from alleging that the biswa in suit was the biswa mortgaged to him, and that even if there had been no estoppel he had failed to establish the identity of the two biswas. The suit as against Musammat Jhinka will stand dismissed with costs in all Courts, this appeal being allowed.

*Appeal decreed.*

1892

May 16.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.*

MOHAN LAL AND ANOTHER (DEFENDANTS) v. BILASO (PLAINTIFF).\*

*Civil Procedure Code, s. 43—Splitting remedies—Suit for declaration of title and for possession—Subsequent suit for possession.*

Where a previous suit for a declaration of title to immovable property has been dismissed on the ground that the plaintiff was not in possession at the time of filing the suit, a subsequent suit on the same title for recovery of possession of the land is not barred under s. 43 of the Code of Civil Procedure. *Jibanti Nath Khan v. Shib Nath Chuckerbutty* (1) followed.

THE facts of this case are as follows :—On the 13th of September 1878 one Dodraj made a disposition of his property by way of a deed of gift, or deed of partition, in favour of his daughter-in-law, the plaintiff, Musammat Bilaso, and of Mohan Lal, his grandson, and Vidya Ram, his great-grandson, who were defendants in the suit. Under this deed the plaintiff became entitled to a share in certain property known as the "White Mahál" of mauza Barkhera, and certain other land known as "Talayawali" land. On the 8th of September 1888, the plaintiff instituted a suit in the Court of the Subordinate Judge in which she claimed a declaration of her rights in respect of mauza Barkhera, but that suit was dismissed on the ground that her possession over the land in question was not proved. On the 5th of March 1889 the plaintiff instituted a second suit, on this occasion for partition and separate possession of her share in mauza Barkhera and also in the "Talayawali" land. The suit was resisted

\* Second Appeal, No. 223 of 1890, from a decree of T. R. Redfern, Esq., District Judge of Bareilly, dated the 27th November 1889, confirming a decree of Maulvi Abdul Qaiyum, Khan, Subordinate Judge of Bareilly, dated the 12th June 1889.

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

by the defendants, the grandson and great-grandson of the donor, on the ground, amongst others, that the claim was barred by s. 43 of the Code of Civil Procedure. They also impugned the validity of the deed of gift upon which the claim was based. The Subordinate Judge decreed the plaintiff's claim in full. The defendants then appealed to the District Judge, who, agreeing with the lower Court that the deed of gift was proved and that there was no bar to the suit by reason of s. 43 of the Code of Civil Procedure, dismissed the appeal. The defendants thereupon appealed to the High Court.

Mr. *D. Banerji* and *Babu Jogindro Nath Chaudhri*, for the appellants.

Mr. *Roshan Lal*, for the respondent.

EDGE, C. J., and BLAIR, J.—The short question is whether s. 43 of the Code of Civil Procedure is a bar to a suit for possession of land in relation to which the plaintiff had brought a previous suit under s. 42 of the Specific Relief Act for a declaration of title, which suit had been dismissed on the ground that the plaintiff was not in possession. We are not aware of any authorities in this Court. We have not been referred to any case in this Court in which it was even suggested that s. 43 of the Code of Civil Procedure was applicable to such a case. The point has been decided by the High Court at Calcutta in *Jibunti Nath Khan v. Shib Nath Chuckerbutty* (1), and, we think, rightly. In our opinion s. 43 does not apply to such a case as this. The appeal is dismissed with costs.

*Appeal dismissed.*

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blair.*

MUSAHEB ZAMAN KHAN (JUDGMENT-DEBTOR) v. INAYAT-UL-LAH.

(DECREE-HOLDER).\*

1892  
May 20.

*Mortgage—Suit for sale on a mortgage—Rights of mortgagee in respect of non-hypothecated property of the mortgagor—Res judicata—Act IV of 1882, ss. 68, 88, 89 and 90—Civil Procedure Code, sch. IV, forms Nos. 100 and 128.*

Where there is nothing to show a contrary intention of the parties every mortgage carries with it a personal liability to pay the money advanced; but a mortgagee

\* Appeal No. 38 of 1891 under s. 10 of the Letters Patent.

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