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concerned so as to give him an opportunity of appearing and being heard."

The opinion of the Full Bench was as follows:—

In our opinion no notice is necessary to the person against whom it is intended to proceed, before the Court, before which the alleged offence has been committed, can, under s. 195 of the Code of Criminal Procedure, sanction a complaint being made to a Magistrate regarding one of the offences specified in that section.

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Ghose.

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PRAMADA DASI (PLAINTIFF) *v.* LAKHI NARAIN MITTER AND OTHERS (DEFENDANTS).*

Civil Procedure Code (XIV of 1882), s. 43—Res judicata—Suit for maintenance and suit for a share of the inheritance, distinguished—Hindu Law, Bengal School—Election, Doctrine of—Indian Succession Act (X of 1865), s. 172, excep.

A testator bequeathed all his property to his nephew, in which he included the share of his brother's widow in the ancestral property; but at the same time made a suitable provision for her maintenance and worship. The widow at first sued for and obtained the allowance allotted to her under the will, and afterwards brought a suit for a share in the ancestral property.

Held, that, although having regard to the doctrine of election (Succession Act, s. 172) the widow was precluded from again bringing a suit for a share of the ancestral property, it could not be said that the suit was barred under the provisions of s. 43 of the Code of Civil Procedure, inasmuch as the two claims were distinct and indeed inconsistent, and did not arise out of the same cause of action.

THIS was a suit by a Hindu widow for her husband's share of the ancestral property. From the evidence, it appeared that she had on a former occasion sued for and obtained an allowance for maintenance under the following circumstances: one Brindabun Chunder had in the year 1871 made a will whereby he gave away to

* Appeal from Appellate Decree No. 2714 of 1883, against the decree of J. P. Grant, Esq., Judge of Hooghly, dated the 25th of June 1883, reversing the decree of Baboo Bhuban Chunder Mukherji, Subordinate Judge of that District, dated the 24th of April 1882.

his nephew not only all his ancestral and self-acquired property, but included in the devise the share of a deceased brother, who had left a widow (the plaintiff). He, however, made a suitable provision for the widow under his will in those words: "The little ancestral property there is, is insufficient to support my sister-in-law, so if she lives with my nephew he is to support her, or if she does not live with him, he is to provide for her maintenance and give her Rs. 8 a month for worship." The Court of first instance held that the former maintenance suit could not be treated as a relinquishment by the plaintiff of her husband's share in the ancestral property, and consequently the provisions of s. 43 of the Code did not stand in the way of the present suit; and gave the plaintiff a decree to the extent of her actual share. On appeal the District Judge dismissed the claim, (1) because the suit was barred under the provisions of s. 43, and (2) because the doctrine of election as laid down in the exception to s. 172 of the Succession Act (Hindu Wills Act, s. 2) prevented the suit.

The plaintiff appealed to the High Court.

Baboo *Kali Charan Banerji* for appellants.

Mr. *Palit*, Mr. *Mullick* and Baboo *Umbica Churan Bose* for respondents.

The judgments of the Court (GARTH, C.J., and GHOSE, J.) were as follows:

GARTH, C.J.—We think that the judgment of the Court below should be confirmed; but upon one only of the grounds, upon which the District Judge has proceeded.

The facts, so far as it is necessary to mention them for our present purpose, are, that in the year 1871 Brindabun Chunder, by his will, professed to dispose of not only the property belonging to himself, over which he had a disposing power, but also certain property belonging to Gonesh Chunder, who was the husband of the present plaintiff.

By that will, he devised the whole property belonging to himself and Gonesh Chunder in favor of his nephew, Apara Prosad; and by way of making a larger provision for the plaintiff than she would have had from her husband's ancestral property, he

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goes on to say in his will: "The little ancestral property there is, is insufficient to support my sister-in-law (meaning the plaintiff), so, if she lives with my nephew, he is to support her, or if she does not live with him, he is to provide for her maintenance, and give her Rs. 8 a month for worship.

Now, the ancestral property which he is speaking of there, was a property which belonged to Gonosh, and which of right belonged to the plaintiff as her husband's heir.

Upon Brindabun's death in 1871 the plaintiff never claimed that ancestral property; but on the contrary, in the year 1873, she brought a suit to recover the provision that had been made for her by the will, as well out of the property which had belonged to Brindabun, as out of the ancestral property which properly belonged to herself; and in that suit she got a decree for the maintenance that was intended to be provided for her by Brindabun, as well as for the Rs. 8 a month for worship.

From that time until the year 1880 she has never made any claim whatever to the ancestral property which she now claims. That property, with the other property devised by the will, remained in Apara's possession, until a decree was obtained against him; when, in the year 1877, that property was sold under that decree to the present defendants. It was then, and not till then, that the plaintiff brought this suit in the year 1880 to recover the ancestral property.

We are of opinion, that, having regard to the doctrine of election, the plaintiff was not entitled to make this claim. It is clear, that she must have known that this ancestral property, which was insufficient for her support, was devised to her nephew, for the very purpose of his providing her with a maintenance. In other words, she must have known that this maintenance was provided for her *in lieu of her ancestral property*, and knowing this, she brought a suit in 1873 to enforce her claim for maintenance against the whole of the property devised by Brindabun including this ancestral property.

She therefore clearly made her election within the meaning of s. 172 of the Succession Act, and she cannot now, after the property has been sold as belonging to Apara, revert to her former position (and especially under the very suspicious circum-

stances that she does bring it now) to recover the property from the defendants who have bought it *bonâ fide* under the decree against her nephew.

This is one of the grounds upon which the District Judge has decided against the plaintiff, and in that we entirely agree.

But with regard to the other ground, upon which he has based his judgment, we cannot agree with him. He seems to consider that the plaintiff is barred from maintaining this suit, upon the ground that her present claim is a part of the same cause of action for which she brought her suit in the year 1873 ; and that she is consequently barred by s. 43 of the Civil Procedure Code.

Now, speaking for myself, I am one of those who believe that, however construed, s. 43 has done, and will do, a vast amount of injustice ; and I am therefore particularly careful to give it a construction no larger than it will reasonably bear.

That section enacts that "every suit shall include the whole claim which the plaintiff is entitled to make in respect of the cause of action." Now, in my view of the case, the claim which the plaintiff makes in this suit is a totally different claim from that which she made in her suit in 1873. One claim is for land, the other is for maintenance, and, moreover, the two claims seem to me entirely inconsistent with each other.

If the plaintiff had a right to bring her suit in 1873, she had no right to bring her present suit, and *vice versâ*. It can hardly be, therefore, that in making her present claim, she is suing *for the same cause of action*, which she sued for in 1873.

We think that the appeal should be dismissed and with costs.

GHOSE, J.—I concur.

Appeal dismissed.