

1895

BITHAL DAS
v.
SHANKAR
DAT DUBE.

for respondent. It was objected here that the copy of the deposition could not be looked at as the witness was alive. To that it is sufficient to reply that it was by appellant's own act that the copy of deposition was put on the record and made evidence in this case. As to this deposition of Anand Kishore we need say no more than that it conclusively disproves any idea of a separation between the two brothers.

For the above reasons we are of opinion that the appellant, on whom the burden of proof lay, has failed to prove any separation at any time between the brothers, Hari Har Dat and Shankar Dat, and we find that no separation occurred.

We accordingly, though not for exactly the same reasons as those given by the Court below, dismiss this appeal with costs.

Appeal dismissed.

1895

February 12.

Before Mr. Justice Knox and Mr. Justice Aikman.

AMBIKA DAT (DEFENDANT) v. RAM UDIT PANDE AND ANOTHER
(PLAINTIFFS).*

Civil Procedure Code, s. 44—Misjoinder—Cause of action—Pre-emption—Zamindari and appurtenant sir-land sold by separate deeds—Suit to pre-empt both zamindari and sir.

Where a zamindari share and the sir-land held with it were sold to the same vendee by two separate deeds of sale executed on the same day, it was held that a suit to pre-empt both the zamindari share and the sir-land was not liable to be defeated on the ground of misjoinder of causes of action.

THIS was a suit for pre-emption under the terms of a *wajib-ul-arz*. The plaintiffs were two co-sharers in the village. The defendants were the vendor, who did not oppose the suit, and the vendee, who was a stranger. The plaintiffs alleged that the vendor had on the 20th of January 1892 sold to the vendee defendant a certain zamindari share and also certain sir-land attached thereto in one and the same transaction, but that to avoid claims for pre-emption he had caused two fictitious sale-deeds to be prepared, one relating to the zamindari share and the other to the sir-land, and

* First Appeal No. 110 of 1894, from an order of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 30th June 1894.

that in both these sale-deeds the price had been stated at more than it really was.

The defendant vendee pleaded *inter alia* that on the plaintiffs' own allegations the suit was bad for misjoinder of causes of action, there being two separate sale-deeds the subject of each of which was different.

The Court of first instance (Munsif of Jaunpur), accepting the contention of the defendant, dismissed the suit *in toto*.

The plaintiffs appealed, and the lower appellate Court (Subordinate Judge of Jaunpur), being of opinion that there was no misjoinder, remanded the suit under s. 562 of the Code of Civil Procedure for trial on the merits.

From this order of remand the defendant vendee appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Munshi *Jwala Prasad* and Munshi *Kabindi Prasad*, for the respondent.

KNOX, J.—This is an appeal from an order whereby the Subordinate Judge of Jaunpur remanded to the Court of first instance under the provisions of s. 562 of the Code of Civil Procedure for trial on the merits a suit in which the Munsif of Jaunpur dismissed the claim of the plaintiffs before him, respondents before us, on the ground that the claim as brought, without any leave of the Court obtained under s. 44, was bad for misjoinder of causes of action. The suit was a suit for the recovery of immovable property, the plaintiffs claiming to have a right of pre-emption over that property. It is true that the property claimed had formed the subject-matter of two distinct deeds of sale to one and the same vendee. Under one deed of sale the zamindari share was sold, and under the second deed of sale the *sir*-lands comprised in the zamindari were sold to the same vendee. The respondents entered in their plaint that their cause of action *quoad* the whole property claimed accrued on the 22nd of January 1892, when they expressed their readiness to buy and were refused. The learned Subordinate Judge was perfectly

1895

AMBIKA DAT

v.
RAM UDIT
PANDE.

1895

AMBIKA DAT
v.
RAM UDIT
PANDE.

right in holding that this suit was a suit for recovery of immovable property and that no cause of action of a different character had been joined with the suit; in fact, in my opinion there was one and only one cause of action, *i.e.*, the offer made by the respondents, and the refusal which compelled those respondents to bring a suit, and gave them the cause of action on which they came to the Civil Courts. The order passed by the Subordinate Judge was a good order and the appeal will have to be dismissed.

AIKMAN, J.—The appellant in this case, by two separate sale-deeds, executed on the 21st of January 1892, purchased, by one sale-deed the *sír*-land appertaining to a certain zamíndári share, and by the other sale-deed the zamíndári share itself. The idea with which two separate sale-deeds were executed was probably to evade the provisions of ss. 7 and 9 of the N.-W. P. Rent Act (Act No. XII of 1881). The respondents brought a suit to establish a right of pre-emption in respect of this zamíndári share and *sír*-land. The vendee resisted the claim on various grounds, one of which was that, as there had been two separate sale-deeds, the suit was bad owing to misjoinder of causes of action. Without entering into the merits of the case, the Munsif of Jaunpur on this plea dismissed the suit. The plaintiffs appealed to the Subordinate Judge, who set aside the decree of the lower Court and remanded the suit under the provisions of s. 562 of the Code for trial on the merits. Against this order of remand the present appeal is brought by the vendee. In my opinion the learned Subordinate Judge was perfectly right in remanding the suit. Section 45 of the Code of Civil Procedure provides that “subject to the rules contained in chapter II and section 44, the plaintiff may unite in the same suit several causes of action against the same defendant or defendants.” Chapter II relates only to the place of suing, and has nothing to do with the present case. Section 44 provides that, except in certain specified cases, no cause of action shall be joined with a suit for the recovery of immovable property, or to obtain a declaration of title to immovable property. The Munsif, in support of his order, says that the case is on all-fours with the case of *Harbans Singh v. Lachmina*

Kuar (1). This case is not in reality on all-fours with the case referred to, for in the latter one pre-emption suit was brought in respect of the sale of properties situate in two different villages, in which possibly the terms of the *wajib-ul-arz* might differ. But even if it had been on all-fours, I find myself unable to hold that the terms of s. 44 apply to this case. In the case of *Chidambara Pillai v. Ramasami Pillai* (2) it was held that s. 44 prohibits, not the joinder of several causes of action entitling a plaintiff to the recovery of immovable property, but a joinder with such causes of action of causes of action of a different character, except as excepted in the section. I quite concur with the interpretation there put upon the provisions of s. 44. Even if the Munsif was right in thinking that s. 44 applied, this was certainly a case in which he should have given leave under that section. The Munsif ignored the desirability of preventing a multiplicity of suits and overlooked the principle which is embodied in the opening section of chapter IV of the Code of Civil Procedure, which deals with the frame of a suit.

I concur in the order proposed by my brother Knox.

The order of the Court will be that the appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Know and Mr. Justice Aikman.

TODAR MAL (PLAINTIFF) v. SAID MUHAMMAD AND OTHERS (DEFENDANTS).*

Civil Procedure Code, s. 174.—Non-attendance of witnesses in obedience to a summons—Lawful excuse.

There is no obligation on a Civil Court to issue a warrant for the arrest of a witness who having been summoned has failed to attend when it is shown to the Court that the absence of such witness is due to the non-payment or non-tender by the person at whose instance the summons had been issued of the necessary expenses of such witness as specified in s. 160 of the Code of Civil Procedure.

THIS was a suit for recovery of possession of a certain bagh, the plaintiff asserting his title to be based, as to one-half, on a purchase at an auction sale in execution of a decree, and as to the other half on a

*Second Appeal No. 507 of 1894, from a decree of Syed Siraj-ud-din, Additional Subordinate Judge of Mainpuri, dated the 8th March 1894, confirming a decree of Maulvi Muhammad Abbas Ali, Munsif of Etáh, dated the 11th January 1893.

(1) Weekly Notes, 1883, p. 230.

(2) I. L. R., 5 Mad. 161.

1895

AMBIKA DAT

v.

RAM UDDIT
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1895

February 13.