

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
BALBHADDAR NATH AND ANOTHER (PLAINTIFFS) v. RAM LAL AND OTHERS
(DEFENDANTS).*

1904
March 12.

Civil Procedure Code, ss. 13 and 43—Partition—Suit for possession of a portion of a house alleged to have been partitioned in proceedings before a Court of Revenue—Subsequent suit for partition of the same house in a Civil Court.

As the result of partition proceedings in a Court of Revenue the sites of certain houses were partitioned. The plaintiffs believing that the buildings themselves had been partitioned brought a suit for recovery of their share in the houses, alleging a dispossession from that share by the defendants. But they were defeated in this suit upon the ground that the supposed partition of the houses by a Court of Revenue never could have taken place. Upon a second suit brought by the plaintiffs in a Civil Court asking for partition of the house property, it was held that neither section 13 nor section 43 of the Code of Civil Procedure was a bar to the suit.

THIS was a suit for partition of certain house property. The Court of first instance (Munsif of Bansi) gave the plaintiffs a decree, and this decree was on appeal confirmed by the lower appellate Court (Additional Subordinate Judge of Gorakhpur). The defendants appealed to the High Court, and their appeal coming before a single Judge of the Court was allowed, and the plaintiffs' suit dismissed, on the ground that the suit was barred by reason of certain previous litigation between the parties. The plaintiffs and the defendants were co-sharers in a number of villages. The plaintiffs made an application to the Court of Revenue for partition of the joint property; and some of the parties to those proceedings applied to the Court of Revenue to partition also the house property, which that Court had no power to do. The land forming the site of the houses now in dispute was, however, partitioned between the parties. The plaintiffs, under the erroneous impression that not only the land but the houses had been partitioned, brought a suit in a Civil Court to recover their share of the houses, alleging a dispossession therefrom by the defendants. Their suit was dismissed on the ground that the Court of Revenue had no power to partition the house property, and that in consequence the plaintiffs had no title to the specific share which they claimed. The plaintiffs then filed the present suit for partition. Under these circumstances the learned Judge of the High Court before whom the

* Appeal No. 22 of 1903 under section 10 of the Letters Patent.

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appeal first came was of opinion that the plaintiffs' cause of action was the same in both suits and the property in dispute the same, and the suit was therefore barred by sections 13 and 43 of the Code of Civil Procedure. The plaintiffs thereupon appealed under section 10 of the Letters Patent.

Pandit *Sundar Lal*, for the appellants.

Babu *Durga Charan Banerji* (for whom Dr. *Tej Bahadur Sapru*), for the respondents.

STANLEY, C.J., and BANERJI, J.—This is an appeal under section 10 of the Letters Patent against the decision of a learned Judge of this Court, setting aside the decrees of the lower Courts. The suit was brought by the plaintiffs for partition of certain house property. The plaintiffs and the defendants are co-sharers in a number of villages, and it appears that the plaintiffs made an application to the Revenue Court for partition of the joint property. Some of the parties to those proceedings applied to the Revenue Court to partition the house property, which the Revenue Court had no power to do. The land forming the site of the houses in dispute was, however, partitioned, and certain portions allotted to the plaintiffs, who were under the belief that by the partition not merely the site but the houses were partitioned. The defendants ousted the plaintiffs from possession of the portions of the houses which the plaintiffs so believed had fallen to them on partition, and in consequence of this they instituted a suit for recovery of possession, which was properly dismissed on the ground that the Revenue Court had no power to partition house property and consequently the plaintiffs had not acquired any title to the specific portions of the houses which they claimed. They thereupon instituted the present suit for partition, and their suit has been met by the contention that it is barred by the provisions of section 13 and section 43 of the Code of Civil Procedure, it being alleged that the plaintiffs ought, in their former suit, to have claimed partition, and having failed to do so they could not in an independent suit maintain a claim for partition. Both the Courts below ruled against this contention and held that there was nothing in either section 43 or section 13 of the Code to prevent the maintenance of the plaintiffs' suit. The learned

Judge of this Court, however, on appeal came to an opposite conclusion, holding that the cause of action in both suits was dispossession of the plaintiffs by the defendants in January, 1899, that is, that the cause of action alleged in both suits was one and the same, that the property in dispute was also the same, namely, one-half of a house with its appurtenances. It appears to us that the learned Judge in arriving at this conclusion laboured under a misapprehension as to the true facts in the former suit. The plaintiffs' cause of action in that suit was the ouster of them by the defendant from possession of a specific portion of the house in question which the plaintiffs believed had been allotted to them on partition. The property in dispute in the present suit is the entire house with its appurtenances and not merely a specific portion of it; and the claim of the plaintiffs is based not upon a wrongful ouster by the defendants but upon the right which every joint owner has to come into Court and have joint property partitioned. Therefore, as it appears to us, the cause of action was not the same, and the property, the subject matter of the two suits, was not identical; nor was the title upon which the two suits were brought the same. In the former case the title was based, wrongly, no doubt, upon a partition alleged to have been carried out by the Revenue authorities. In the latter case the title of the plaintiffs depends upon their rights as members of a joint family to have the property partitioned. The learned Subordinate Judge appears to us to have put the matter very clearly. He says in the course of his judgment:—"The suit does not seem to me to be barred either by section 13 or section 43 of the Civil Procedure Code. It is true that a previous suit for possession of particular portions of the properties now in dispute between these same parties was fought, the plaintiffs in the present suit being also plaintiffs in the former suit, and that was dismissed. But it appears that the cause of action in the two suits was not the same. In the previous suit the plaintiffs sought to recover possession of particular portions of the disputed houses, &c., on the allegation that according to a perfect partition made by the Revenue Court they were owners and in possession of those portions and that they were illegally dispossessed by the defendants.

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That suit was dismissed by the Court holding that the partition was not proved, and that, even if the Revenue Court had made such partition, it was infructuous and illegal and it was never acted upon. Being defeated in that suit the plaintiffs have brought the present suit for partition, asserting that the house, *gari*, etc., are joint, as the Court in the previous suit held that partition was not proved, and that they be allowed to recover possession over half of them to which they are entitled. It is thus clear that the cause of action for the present suit is not the same as it was in the previous suit. But it is urged that the present prayer for relief could have been included in the former suit in the alternative. I do not think that such a relief could have been prayed for in the other suit on the statement of facts made in it, and in the next place I do not think, assuming that the plaintiffs could have prayed for such a relief, that it was incumbent upon them to do so.* We concur in the view thus expressed by the learned Subordinate Judge. It appears to us that the two causes of action could not conveniently in any case have been put forward in the original suit, and we are of opinion that the plaintiffs, who, under a misapprehension of their rights in the former suit, failed in that suit, were not precluded from relying upon the title which they clearly had to a partition of the joint property. We therefore must allow this appeal, set aside the judgment of this Court with costs, and restore the decree of the lower appellate Court.

Appeal decreed.

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March 14.

Before Mr. Justice Know and Mr. Justice Aikman.

JAMNA DAS AND OTHERS (OPPOSITE PARTIES) v. MISRI LAL,
(APPLICANT).*

Act No. IV of 1862 (Transfer of Property Act), section 89—Prior and subsequent incumbrancers—Rights of puisne mortgagee who has satisfied in part a prior mortgage.

A prior mortgagee obtained a decree for sale upon his mortgage in a suit to which the puisne mortgagee was a party, though the Court refused to let an account be taken in that suit of what was due on the second mortgage. The prior mortgagee's decree being partly satisfied, the puisne mortgagee paid the balance of what was due under that decree and then proceeded to

* First Appeal No. 72 of 1903 from a decree of Maulvi Muhammad Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 10th of February 1903.