CIVIL REFERENCE.

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

MAHABEER SING (PLAINTIFF) *v.* RAMBHAJJAN SAH AND OTHERS (DEFENDANTS).* 1889 *March* 29.

Civil Procedure Code (Act XIV of 1882), ss. 13, 43—Res judicata—Cause of action—Damages.

In September 1886 the plaintiff sued in a Munsiff's Court certain defendants for possession of one biggah of land, and for damages for the cutting and carrying of certain paddy from such land on the 23rd December 1885. This suit was dismissed on the ground that no dispossession had taken place, the plaintiff being referred to a Small Cause Court for his damages. No appeal was made against this decision.

In March 1887 the plaintiff sued these defendants in the Munsiff's Court for possession of 5 biggahs 6 cottahs of land and for mesne profits, and obtained a decree for possession of 3 biggahs 6 cottahs of land with mesne profits; possession of the one biggah, the subject of the suit of 1886, being included in the 3 biggahs 6 cottahs decreed. He subsequently sued the same defendants in a Small Cause Court for damages for the paddy cut and carried on the 23rd December 1885: *Held*, that such suit was not barred by either s. 13 or s. 43 of the Civil Procedure Code.

REFERENCE from a Provincial Court of Small Causes.

This was a suit brought in the Small Cause Court of Chupra to recover Rs. 46 and interest for the price of certain paddy and straw which the defendants on the 23rd December 1885 forcibly cut and took from off one biggah out of 3 biggahs 16 cottahs of land held by the plaintiff.

The plaintiff alleged in the plaint that he had brought, on the 7th September 1886, a suit No. 50 of 1886, against these same defendants in the Munsiff's Court, for possession of this one biggah of land on which the said paddy had been grown, and for the price of the paddy which had been forcibly carried away; but that such suit had been dismissed by the Munsiff, who held that the taking of the paddy did not amount to an act of dispossession, and that as to the price of the paddy the plaintiff should have brought his suit in a Court of Small Causes.

* Civil Reference No. 1A of 1889, made by Baboo Menu Lal Chatterjee, Judge of the Court of Small Causes, Chupra, dated the 13th of February 1889.

1889

MAHABEER SING v. RAMBHAJAN SAH.

No appeal was filed against this judgment. He further alleged that, in August 1886, after that decision, the defendants had dispossessed him from 5 biggahs 1 cottah of land, and that he had brought, on the 21st March 1887, a suit No. 26 of 1887 against them for possession and mesne profits, and had obtained a modified decree for possession of 3 biggahs 16 cottahs only, with mesne profits, of which lands the one biggah referred to above formed part.

The defendants contended the suit was barred by ss. 13 and 43 of the Civil Procedure Code.

The Judge of the Small Cause Court held that, if the Munsiff had jurisdiction to take cognizance of the suit for recovery of possession, he could have dealt with the claim for the price of the paddy, and that the plaintiff having allowed the Munsiff's judgment to pass unappealed, it was final; that the plaintiff having brought suit No. 26 of 1887 for possession and mesne profits with partial success, had waived his claim for the price of the paddy, said to have been taken on the 23rd December 1885, because at the time of bringing his suit for possession on the 7th September 1886, his cause of action for forcible deprivation of the paddy had already arisen on the 23rd December 1885; and that the terms "mesne profits" and "value of produce cut and carried away" were controvertible and in reality meant the same thing: he therefore held that the suit was barred both by ss. 13 and 43 of the Civil Procedure Code, but, on the request of the plaintiff, made his judgment contingent on the opinion of the High Court as to whether the suit was barred by either s. 13 or s. 43 of the Code.

No one appeared for the plaintiff.

Babu *Kali Kristo Sen* for the defendants.

The opinion of the Court (TOTTENHAM and BANERJEE, JJ.,) was delivered by

TOTTENHAM, J.—The question referred to us by the Judge of the Small Cause Court of Chupra is, whether or not that Court was right in deciding that the suit before it was barred by s. 13 and by s. 43 of the Code of Civil Procedure?

The suit was brought to recover damages in respect of the crop cut by the defendants and carried away from the plaintiff's

1889

MAHABEER SING v. RAMBHAJAN SAH.

land in the month of December 1885. It seems that the plaintiff, in 1886, brought a suit in the Munsiff's Court to recover from the defendants possession of the land of which the crop had been cut and also for the value of the crop. The Munsiff held that there had, in fact, been no dispossession, and that the act of cutting the plaintiff's crop and carrying it away did not disturb him in his possession of the land. He, therefore, dismissed the suit and referred the plaintiff to the Small Cause Court for recovery of the damage which he had sustained. Subsequently, in the month of August 1886, the plaintiff was actually dispossessed of the land in question, together with some larger area; and, in 1887, he brought a suit against the defendants, being the same parties as he had sued before, to recover from them possession of the land of which they had dispossessed him in August 1886, together with mesne profits. In that suit he obtained a decree as respects part of the land in that suit with mesne profits. The present suit was brought, in the Small Cause Court of Chupra, to recover the damages alleged to have been sustained in December 1885.

The Judge of the Small Cause Court was of opinion that the suit was barred as *res judicata* by s. 13, and also barred by s. 43 of the Code of Civil Procedure. He thought that it was barred as *res judicata* by s. 13, because the plaintiff had made no appeal against the Munsiff's decision in 1886 by which his suit for possession and for the value of the crops was dismissed. He considered therefore, that the plaintiff had allowed the Munsiff's decision to become final and that it finally disposed of the present question. And as regards s. 43, he thought that that section barred the suit, because the plaintiff, when he sued for possession on a subsequent cause of action accruing in August 1886, did not include, in his claim for mesne profits, the damages which had accrued in December 1885. The Small Cause Court Judge, therefore, dismissed the suit contingently upon the opinion of this Court on the question referred under s. 617 of the Code.

The plaintiff is not represented before us. Baboo Kali Kisto Sen has appeared for the defendants in support of the view of the Judge of the Small Cause Court, but he has not been able to show us any reason why s. 43 should apply to this case. It appears to us clear that that section has been erroneously applied to

1889

MAHABEER SING v. RAMBHAJ-JAN SAH.

it. We fail to see how the plaintiff could have included in a claim for mesne profits arising out of an act of dispossession committed against him in August 1886, a demand for compensation in respect of damage said to have been done to him when he was still in possession of the land in December 1885. "Mesne profits" are defined in s. 211 of the Code of Civil Procedure, to be those profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom, together with interest on such mesne profits. Mesne profits, therefore, could only be recovered from the date of dispossession, and not in respect of any period anterior to dispossession. Section 43 provides that every suit shall include the whole claim which the plaintiff is entitled to make in respect of the cause of action. The cause of action in the present suit was a totally different one from that in the suit of 1887. The cause of action in this case accrued in December 1885, whereas the cause of action in the other suit accrued in August 1886. Section 43, therefore, does not in our opinion bar the suit. Nor, we think, does s. 13. As regards the present claim the Munsiff did not deal with it. He thought he had no jurisdiction to deal with it being merely a claim for damages. If there was no dispossession of the plaintiff, we think that the Munsiff was right in so finding, and in declining to go into the other question. Up to this time there has been no adjudication of the plaintiff's claim for damages in respect of the crop cut in December 1885. We do not think the plaintiff was bound to appeal against what was obviously a proper decision; and that decision did not touch his present claim. That being so we think that our answer to this reference must be that in our opinion the Judge of the Small Cause Court was wrong in dismissing the suit upon the grounds stated. As the plaintiff has not appeared there will be no costs in this reference.

T. A. P. *Judgment for plaintiff.*