

terms as the bond in the present case. The learned Judge held that the bond was a simple bond and the article of the Limitation Act applicable was article 66. They calculated the period from the expiry of the term given in the bond. In the present case the term expired in September, 1909; the mortgagee instituted his suit in 1914 and his suit was therefore within time.

The appeal fails and is dismissed with costs. The stay order is discharged.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

BINDO BIBI (PLAINTIFF) v RAM CHANDRA AND OTHERS (DEFENDANTS).
Civil Procedure Code, (1908), order II, rule 2—Cause of action—Property different in the two suits, also titles of defendants—One defendant only common to both.

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The plaintiff claimed possession of a considerable amount of property as having been the property of her father, to which she became entitled on the death of her mother. She brought two suits. The first was for possession of a specific house and grove, the defendants being two persons, Ram Chandra and Kedar Nath, as to whom she alleged that Ram Chandra had had his name recorded in respect of the grove in order that he might assist the plaintiff's mother, and that Kedar Nath had been allowed to live in the house by the leave and licence of the plaintiff's mother. The second suit was for possession of various other items of property, and, with the exception of Ram Chandra, the defendants also were different persons.

Held that the second suit was not barred by order II, rule 2, of the Code of Civil Procedure. *Murti v. Bhola Ram* (1) distinguished by RICHARDS, C. J. *Balmakund v. Sangavi* (2) and *Gbind Krishna Narain v. Sivaj-un-nissa* (3) referred to by BANERJI, J.

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Pandit *Moti Lal Nehru*, Mr. *Jawahir Lal Nehru* and Babu *Sital Prasad Ghosh*, for the appellants.

Babu *Sarat Chandra Chaudhri*, The Hon'ble Dr. *Tej Bahadur Sapru*, Mr. *A. P. Dube*, *Munshi Damodar Das* and Pandit *Radha Kant Malaviya*, for the respondents.

RICHARDS, C. J.:—This appeal arises out of a suit in which the plaintiff claimed a considerable amount of property of

* First Appeal No. 157 of 1916, from a decree of Gokul Prasad, Subordinate Judge of Allahabad, dated the 27th of March, 1916.

(1) (1893) I. L. R., 16 All., 165. * (2) (1897) I. L. R., 19 All., 379.

(3) (1907) 7 A. L. J., 627.

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different descriptions. There were a considerable number of houses, a number of cultivatory holdings, situated in different mauzas and mahals. There were also a number of defendants who were in occupation of different parts of the property claimed. The principal defendant was Ram Chandra. When I say the principal defendant I mean that he appears to have been in possession of a greater number of the houses and some of the holdings. The plaintiff's title was that the property belonged to her father, one Beni Prasad; that he died leaving a widow Musammat Kausilla, the mother of the plaintiff; that the mother died and that the plaintiff thereupon became entitled to the property.

The defences by the different defendants vary considerably. Some of the defendants allege that the property did not belong to Beni Prasad at all and that the property belonged to other persons. Some of the defendants did not even claim through Ram Chandra. Ram Chandra pleaded that he was the adopted son of Beni Prasad. He did not at all admit that all the property belonged to Beni Prasad, on the contrary, he alleged (see paragraphs 17 and 18 of the written statement) that some of the property never belonged to Beni Prasad. The court below dismissed the plaintiff's suit on the ground that the bringing of the present suit violated the provisions of order II, rule 2, of the Code of Civil Procedure. Order II, rule 2, is as follows:—"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." Clause 2 provides that where a plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. It appears that, prior to the institution of the present suit, the plaintiff instituted another suit against Ram Chandra and a man called Kedar Nath, in which she claimed possession of a grove and a house. The court below has held that in this previous suit Musammat Bindo Bibi ought to have claimed all the property she claims in the present suit, and not having done so the present suit is barred by the provisions of the Code of Civil Procedure to which I have just referred. The plaintiff has appealed. In the absence of authority I should have been reluctant to hold that the plaintiff is bound by the provisions of order II, rule 2, to include in the same suit two separate properties

held under separate titles. It seems to me that the keeping of the plaintiff out of possession of two separate properties held under different title are distinct "causes of action" within the meaning of that expression in order II, rule 2. There is, however, a Full Bench decision of this Court *Murti v. Bholu Ram* (1), which goes this length. In that case a creditor had attached mortgagee rights in one property and proprietary rights in another in execution of a simple money decree. A claimant to the property objected and the objection was allowed. Thereupon the judgment-creditor instituted two suits one in respect of the mortgagee rights and the other in respect of proprietary rights. The Full Bench held that the second suit was barred by the corresponding rule of the Code of Civil Procedure of 1882. It must be borne in mind, however, that both suits in that case were against the *same party*. It is strongly urged on behalf of the respondents that the present case cannot be distinguished from the Full Bench ruling to which I have just referred. It seems to me that there is a clear distinction. Not only were the two suits brought by the present plaintiff in respect of entirely different property, but the only defendant who is common to the two suits was the defendant Ram Chandra. Kedar Nath, Ram Chandra's co-defendant in the previous suit, is not a defendant to the present suit and he appears to have no connection of any kind with the property which it is now sought to recover. In the same way none of the defendants to the present suit had anything to say to the property, the subject-matter of the previous suit, except Ram Chandra. Even the allegations made in the previous suit as to how the defendants had taken possession of the property were different from the allegation in the present suit. In the previous suit it was alleged that Ram Chandra had had his name recorded in respect of a grove, in order that he might assist the plaintiff's mother and that the other defendant had been allowed to live in the house by the leave and licence of the plaintiff's mother. In my opinion the "cause of action" in the present suit is not the same as the cause of action in the previous suit brought by the same plaintiff within the meaning of order II, rule 2. Furthermore, I may

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point out that it has been expressly held by the High Court in a Full Bench ruling that for a suit to be barred by a previous suit, not only must the "cause of action" be the same, but the defendants must also be the same. I would allow the appeal and remand the cases for disposal on its merits.

BANERJI, J.:—I am also of opinion that the suit is not barred by the provision of order II, rule 2, of the Code of Civil Procedure. As was said by me in my judgment in the case of *Balmakund v. Sangari* (1), order II, rule 2, which corresponds to section 43 of Act XIV of 1882, was enacted with the object of preventing a splitting up of the same cause of action and to prevent the same persons being twice vexed for the same cause. To make the section applicable two things are essential, namely, first, that the previous suit and the present suit must arise out of the same cause of action and, secondly, that they must be between the same parties or between parties under whom they or any of them claim. As I said in that judgment, "A plaintiff's cause of action is not only the right which he asserts but the infringement of that right by the defendant. Where the plaintiff's right is infringed by more persons than one and by different acts done separately by each of them, the plaintiff has a separate cause of action against each of those persons." In the present case the cause of action alleged is not the act of the same defendant which was alleged in the previous suit to be an infringement of the plaintiff's alleged title, but the acts of various defendants who set up various rights in respect of different portions of the numerous properties which were claimed in the present suit. It cannot, therefore, be said that the present suit is based on the same cause of action as that which existed in the first suit. Furthermore, as pointed out by the learned CHIEF JUSTICE, the defendants to the two actions are not identical and all the defendants to the present suit do not claim title from Ram Chandra. The view which I took in the case to which I have already referred was affirmed in the later case of *Gobind Krishna Narain v. Siraj-un-nissa* (2), and I see no reason to alter it. I, therefore, agree in remanding the case to the court below for trial upon the merits.

(1) (1897) I. L. R., 19 All., 279. (2) (1907) 7 A. L. J. 627.

BY THE COURT.—The appeal is allowed, the decree of the court below is set aside and the case remanded under order XLI, rule 23, with directions to re-admit the same on its original number and to proceed to hear and determine the same according to law. Costs here and heretofore shall be costs in the cause.

Appeal decreed and cause remanded.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

*EMPEROR v. MANSUB HUSAIN.

High Court—Revision—Practice—Discretion of Court—Criminal Procedure Code, sections 435 and 439—Act No. XLV of 1860 (Indian Penal Code), sections 448 and 451.

Where at the hearing of an application in revision it appears that the facts established by the record do not justify the conviction of the applicant of the offence of which he has been convicted but do justify his conviction of a minor offence of a similar nature, it is within the discretion of the Court to convict the applicant of such minor offence; but it is also within the discretion of the court to refrain from doing so.

The rule of practice according to which the High Court ordinarily refuses to entertain an application in revision where the applicant might have gone in the first instance to the Sessions Judge or to the District Magistrate, is not a rule of absolutely invariable application, and an order of admission made by a Judge of the High Court under clause (1) of section 435 of the Code of Criminal Procedure, though passed *ex parte*, will be sufficient to take the case out of the operation of such rule of practice.

THE facts of this case were briefly as follows:—

There was a dispute between the complainant and the accused as to the title to and possession over a certain shop. The complainant had placed some bricks in the shop for the purpose of re-construction; the accused removed the bricks and threw them out on to the road. The accused was thereupon convicted by a Magistrate of the second class under section 451 of the Indian Penal Code, and sentenced to one day's simple imprisonment and a fine of Rs. 100. He appealed to the District Magistrate. The District Magistrate came to the conclusion that though the complainant's title and possession were both insecure, yet at the same time the accused had no *bona fide* claim of

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* Criminal Revision, No. 88 of 1919, from an order of E. F. Shaden, District Magistrate of Bareilly, dated the 31st of December, 1918.