FULL BENCH.

1882
January 16.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, and Mr. Justice Tyrrell.

RAM SEWAK SINGH AND OTHERS (PLAINTIFFS) *v.* NAKCHED SINGH (DEFENDANT).*

Act X of 1877 (*Civil Procedure Code*), *ss.* 13, 43—*Act I of* 1877 (*Specific Relief Act*), *s.* 42—*Res judicata*—*Misjoinder.*

In December, 1878, *H*, a Hindu widow, in possession, by way of maintenance, of a certain estate, of which *R* owned one-third, and *P*, *B*, and *S* one-third, jointly, made a gift thereof to *N*. *H* died in January, 1879. In February, 1879, *R* and *P*, *B*, and *S* joined in suing *N* for a declaration of their proprietary right to two-thirds of the estate and to have the deed of gift set aside. The Court trying this suit treated it as one for a mere declaration of right, and dismissed it, with reference to the provisions of s. 42 of the Specific Relief Act, 1877, on the ground that the plaintiffs had omitted to sue for possession, although they were not in possession and were able to sue for it. In November, 1879, *R* and *P*, *B*, and *S* again joined in suing *N*. In this suit they claimed possession of two-thirds of the estate and to have the deed of gift set aside.

Held by the Full Bench (reversing the judgment of PEARSON, J., and affirming that of OLDFIELD, J.,) that the decision in the first suit was no bar to the determination in the second suit of the question as to the validity of the deed of gift.

Per STUART, C. J., and STRAIGHT and OLDFIELD, JJ., that the causes of action in the two suits being different, the second suit was not barred by the provisions of s. 43 of the Civil Procedure Code.

Per TYRRELL, J., that the plaintiffs being entitled to only one remedy in the former suit, the provisions of s. 43 were not applicable to the second suit.

Held by the Full Bench that there was no misjoinder of plaintiffs in the second suit.

S. A. No. 1050 of 1879 distinguished (1).

THE plaintiffs in this suit joined in suing the defendant for possession of two-thirds of a four-anna share of two villages the plaintiff Ram Sewak Singh claiming one-third, and the remaining plaintiffs, Puran Singh, Bhagwant Singh, and Raghunandan Singh, one-third), and to have a deed of gift of such share, bearing date the 10th December, 1878, executed in the defendant's favour by one Hiseba Kuar, set aside. The plaintiffs had formerly sued the

* Appeal, No. 3 of 1881, under s. 10 of the Letters Patent. Duthoit, J., was present at the hearing of this appeal, but had left the Court when judgment was delivered. He concurred in the judgment of Straight, J.

(1) Decided the 12th May, 1880; not reported.

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defendant for a declaration of their right to two-thirds of such share, and to have such deed set aside. The Court trying this former suit, finding that the plaintiffs were not in possession of such share, dismissed the suit on the 30th May, 1879, having regard to the provisions of s. 42 of the Specific Relief Act, 1877, on the ground that they were not entitled to the relief claimed, being in a position to claim further relief in the shape of possession of the share. The defendant set up as a defence to the present suit, *inter alia*, that the plaintiff Ram Sewak Singh, being separate in estate from the other plaintiffs, there was misjoinder of parties, and that the suit was barred by the provisions of ss. 43 and 13 of the Civil Procedure Code. The Court of first instance held that the frame of the suit was bad, there being misjoinder of plaintiffs and of causes of action; and that as the plaintiffs had omitted to sue for possession in the former suit, they were debarred from suing for it in the present suit by the provisions of s. 43; and dismissed the suit. On appeal by the plaintiffs the lower appellate Court agreed with the Court of first instance that the frame of the suit was bad by reason of misjoinder of plaintiffs and causes of action, and that the suit was barred by s. 43. On second appeal by the plaintiffs to the High Court the Divisional Bench (PEARSON, J., and OLDFIELD, J.) before which the appeal came for hearing differed in opinion on the point whether the suit was or was not barred by s. 13. The Bench delivered the following judgments:—

PEARSON, J.—The finding in the former suit that the plaintiffs were not in possession of the property claimed by them was, I take it, a finding that the defendant was in possession thereof under the deed of gift which they sought to set aside. The dismissal of that suit precludes them, I conceive, from again suing for the avoidance of that deed, and without avoiding it they cannot be entitled to oust the defendant. I am therefore constrained to hold that the present suit is unmaintainable, and would dismiss the appeal with costs.

OLDFIELD, J.—The plaintiffs in their plaint aver that a four annas share in the mauzas Bamhanpur and Juahpur is ancestral property of the parties to this suit, and that they placed Hiseba Kuar, widow of Ram Narain, one of the brotherhood, in posses-

sion of the said four annas share for her life without power of alienation. In July 1871 she gave a lease of four annas in Bamhanpur and the lessee is in possession, and on the 10th December, 1878, she made a gift of the above shares in both mauzas to defendant. She died in the January following (Pus, Sambat 1931): the four annas share in Bamhanpur is in possession of the lessee, and since her death there have been disputes between plaintiffs and defendant as to the four annas in Juahpur, and hence plaintiffs have not been able to realize the rent, and defendant asserts the property to be his on the strength of the deed of gift. Plaintiffs allege that their cause of action for this suit arose on the death of the lady; and they seek to be put in possession of a two annas eight pies share in Bamhanpur and in Juabpur, and that the deed of gift be declared null and void as far as it affects their property.

It appears that plaintiffs brought a suit against defendant on the 18th February 1879, in which they sought merely to have the said deed of gift declared null and void as far as it affected their interests. In their plaint they averred that defendant did not get possession of the four annas conveyed prior to the lady's death, and that on her death both parties were jointly in possession of their shares, and they alleged their cause of action arose on the execution of the deed of gift, which had thrown a cloud on their title. The Subordinate Judge dismissed the former suit without adjudication on the merits on the ground that it was a suit for a declaration of a right in property, and not maintainable under s. 42 of the Specific Relief Act, since he held that the plaintiffs were out of possession at the time they instituted the suit, and should sue for possession.

The Judge has now dismissed the present suit on the grounds of misjoinder of plaintiffs, and that it is barred under s. 43 of the Civil Procedure Code.

I am unable to hold that there is any misjoinder. The plaintiffs, though owning different shares in the property, are alike affected by the deed of gift and acts of obstruction of the defendant to their possession, and many join in bringing the suit (s. 26, Civil Procedure Code).

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The second point is of some difficulty. The Subordinate Judge was, in my opinion, in error in looking on the former suit as one for a mere declaration of a right in property coming within the provisions of s. 42 of the Specific Relief Act. It was a suit for consequential relief, *i.e.*, to have declared void a deed of gift so far as it affected plaintiffs' interests in the property; that is something more than a mere declaration that plaintiffs had certain rights in property. Had the suit been of the nature of one under s. 42 of the Specific Relief Act, I should hesitate to hold that the provisions of s. 43 of the Civil Procedure Code applied to it. Whether, however, the former suit be regarded as one for a declaration of a right coming within the meaning of s. 42 of the Specific Relief Act, or as one for consequential relief, s. 43 of the Civil Procedure Code would only apply to bar that part of the claim omitted in the former suit, *i.e.*, the remedy for possession; it would be wrong with reference to s. 43 alone to dismiss the whole claim. But it appears to me that s. 43 is not applicable to the claim for possession, since that remedy is based on a different cause of action to that on which the former suit was based.

In the former suit plaintiffs sued merely to set aside the deed of gift executed by Hiseba Kuar in favor of defendant, which they sought to avoid as clouding their title; the execution of that deed was their cause of action, and it did not entitle them to sue for possession. Now they ask to be put in possession, and allege that the defendant has obstructed them in obtaining possession, by wrongfully preventing their enjoyment of the rents, and these obstructions which plaintiffs now complain of having received at the hands of defendant appear to have arisen subsequently to the institution of the former suit, which was brought immediately after Hiseba Kuar's death, and to be of the nature of a continuing wrong, and afford a fresh cause of action. The claim for possession then is not affected by s. 43, and that for cancelment of the deed of gift could only be barred, if the former decision could be considered as finally deciding it under s. 13 of the Civil Procedure Code, which is not the case. I would reverse the decrees and remand the case for trial on the merits: costs to follow the result. I cannot hold that the decision refusing to determine the claim in

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the former suit on the ground that it was a claim for a declaration of a right, which the Court refused in its discretion to consider, was a final decision of the question of the validity of the deed of gift within the meaning of s. 13 of the Civil Procedure Code.

The plaintiffs, under s. 10 of the Letters Patent, appealed to the Full Court from the judgment of Pearson, J., contending that the suit was not bad for misjoinder, and neither was it barred by the provisions of either s. 13 or s. 43 of the Civil Procedure Code.

The *Senior Government Pleader* (Lala *Juala Prasad*), for the appellants.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the respondent.

The following judgments were delivered by the Full Court:—

STRAIGHT, J.—This is an appeal under s. 10 of the Letters Patent from a decision of Mr. Justice Pearson, lately a Judge of this Court, dated the 2nd February, 1881, dismissing the special appeal of the plaintiffs-appellants on the ground that their suit was barred by s. 13 of the Civil Procedure Code. The following are the only facts necessary to be stated in order to enable us to determine the two questions of law raised by the plea taken in the petition of appeal. In 1879 the appellants brought a suit for a declaration of their right to certain property, and to set aside a deed of gift relating thereto executed by one Hiseba Kuar to the defendant-respondent. The Subordinate Judge before whom the case came, whether rightly or wrongly it is not now necessary to decide, regarding the claim of the appellants as for specific relief under s. 42 of Act I of 1877, and holding that they were in a position to ask for further relief than a mere declaration of title, dismissed the suit on the 30th May, 1879, and no appeal was preferred against his decision. On the 27th November, 1879, the appellants commenced the present suit, which is for a declaration of their right to, and possession of, the property in question, by avoidance of the deed of gift already mentioned. The lower Courts dismissed it, being of opinion that there was a misjoinder of plaintiffs and causes of action, as also that possession, not having been asked by the plaint in the former litigation, could not now be claimed, having regard to the prohibition of s. 43 of the Civil Procedure Code.

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The second appeal to this Court was heard by Pearson and Oldfield, JJ., between whom there was a difference of opinion. Pearson, J., held that, as in the former suit it was found that the plaintiffs were not in possession of the property, but that the defendant was in possession thereof under the deed of gift, the dismissal of that suit precluded them from again suing for the avoidance of that deed. He therefore obviously, though not in explicit terms, held their present claim *res judicata*. Oldfield, J., was of a contrary opinion, and would have remanded the case for disposal on the merits. The plaintiffs now appeal, and their simple contention is that they are not barred either by ss. 13 or 43 of the Civil Procedure Code. I am clearly of opinion that this plea has force and must prevail. Whether the view of the Subordinate Judge as to the former suit was or was not correct is indifferent to our determination of the points before us. Rightly or wrongly he held the then claim of the appellants to amount to nothing more than a prayer for specific relief under s. 42 of the Specific Relief Act. It was solely for the purpose of satisfying himself as to whether the proviso to that section tied his hands that he entered into the question of possession, and his decision upon this point was a purely incidental one for that purpose, and that purpose only. As the law originally stood, the appellants would not have been entitled to a declaratory decree, unless they had possessed an existing right to consequential relief in a Court of Law. Act I of 1877, however, entirely changed the position, and it is now enacted by statute that when a plaintiff can seek further relief than a mere declaration of title, and omits to do so, he shall not be permitted to avail himself of the benefit of the provisions of s. 42 of the Specific Relief Act. The powers thereby given to the Courts are of a purely discretionary character, fettered always by the proviso above mentioned. The determination of a question of possession to enable a Court to decide whether it shall exercise its discretion under that section, or whether the prohibition exists against its doing so, cannot in my opinion be held a final decision of a "matter directly and substantially in issue in a former suit between the same parties." I therefore think that the view of Pearson, J., as to the applicability of s. 13 of the Civil Procedure Code to the present claim of the appellants was an erroneous one and cannot be sustained.

It only remains to be seen whether s. 43 was rightly held by the lower Court to bar the claim. Now it is to be observed that the basis upon which the appellants rested their former prayer for relief was the execution of the deed of gift of the 10th December, 1878, by which they declared their rights had been interfered with. They made no claim for possession of their shares, because at that time no act had been done by the respondent amounting to the assertion of a possession adverse to their title; and, indeed, as will be seen from their plaint, they plainly intimated that, as regards one of the villages in which they claimed a share, it was in the possession of the respondent under a lease, to which they took no objection, and as to the other, that they were in joint possession with him. It is obvious, therefore, that, while at the time of the institution of the former litigation their cause of action was the deed of gift, when the present suit was brought something more had accrued to them by reason of the obstruction offered by the respondent to their exercising the right of proprietorship over their shares. In the one case, no possession having been asserted by the respondent, the appellants were not entitled to sue him for possession; in the other case an additional cause of action had arisen, which gave them the right to the further remedy. Under these circumstances it does not appear to me that the appellants have laid themselves under the prohibition of the third paragraph of s. 43 of the Civil Procedure Code. At the hearing a decision of Stuart, C. J., and Pearson, J., in Special Appeal No. 1050 of 1879 was quoted by Pandit Bishambhar Nath for the respondent, as being a strong authority in favour of his view, and at first sight this would seem to be so. But upon examination of the judgments, they can scarcely be regarded as laying down any general principle, but rather as dealing with the particular circumstances of the individual appeal in which they were delivered. Whether this be the correct view of them or not, there is this broad distinction between that case and the present, namely, that there the plaintiffs were not only out of possession, but had intentionally omitted to sue for it, though they were in a position to do so, while here the cause of action, namely, the respondent's assertion of a proprietary right to the village Bamhanpur had not accrued to the appellants at the time of the institution of the for-

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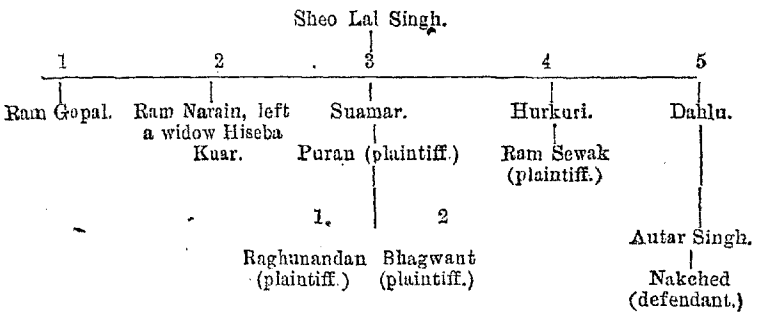
mer suit, so as to impose upon them the obligation to ask possession from him, they then only considering him in possession of that village as a lessee.

The objection on the ground of misjoinder was not seriously pressed by the respondent's pleader, and has obviously no weight.

The appeal must therefore be decreed, and the case remanded to the first Court under s. 562 for disposal on the merits: costs to abide the result.

TYRRELL, J.—The following table exhibits the family relations of the parties to this suit:—



Ram Gopal died without issue, and left no widow. Ram Narain also had no issue; but at his death he left a childless widow, Hiseba Kuar. For many years this lady had possession and enjoyment of the family estate consisting of a four-anna share in two villages. On the 10th December, 1878, Hiseba Kuar affected to convey this estate by gift to her grand-nephew, Nakched, executing a deed of gift in his favour: and she died in January, 1879. The heirs of the other brothers of Hiseba's husband promptly proceeded at law to rid their inheritance of the effects of this transaction; and on the 8th February, 1879, they brought a suit to have the deed of gift in favour of Nakched set aside in respect of their two-thirds share in the estate. The plaintiffs alleged that possession had remained with Hiseba Kuar to the date of her death, and that on her demise her donee, the defendant, had wrongfully assumed joint possession with the plaintiffs in their shares of the estate: but they made no claim for relief with reference to possession. This suit was dismissed on the 30th May, 1879, on the ground that "as the plaintiffs were found not to be in possession of the said two-thirds share, and

as by merely suing for the voidance of the deed of gift, they impliedly sought to obtain a decree declaratory of their proprietary right to the two-thirds share, their suit was opposed to the proviso of s. 42 of Act I of 1877." That proviso is that "no Court shall make any declaration of status or right where the plaintiff being able to seek further relief than a mere declaration of title omits to do so." The further relief which the Court found the plaintiffs to be then able to seek was the possession of their two-thirds of the estate: and that suit as brought for a remedy under the scope of the Specific Relief Act was rightly dismissed. In other words, it was determined that the plaintiffs were not in February, 1879, persons entitled in respect of their claim to a "remedy" by way of a decree declaring the validity of their title and the invalidity of the pretensions of the defendant. The plaintiffs, having brought their suit of February, 1879, on the mistaken notion that they were entitled to a remedy by way of a declaratory decree, were practically taught their error by being non-suited in their action. They lost no time in applying this lesson, and brought their present suit (27th November, 1879,) for the establishment of their right to and for clear possession of their two-thirds shares in the ancestral estate, by annulment of the deed of gift in respect of the said shares made by the widow, having only a life-interest in the same, in favour of her grand-nephew, Nakched, the defendant. This suit also was dismissed because (*a*) the two sets of plaintiffs had each a separate share (one anna four pies) in the four-anna estate, the subject-matter of the suit, and the suit was therefore vitiated by misjoinder; and (*b*) because the plaintiffs were barred by the provisions of s. 43 of the Civil Procedure Code. On the former point the Court found that "in the present case there is not mere misjoinder of plaintiffs, there is also misjoinder of claims or causes of action. That which the plaintiff Ram Sewak claims, *i.e.*, a third share, is quite a separate subject from that which the other three plaintiffs claim, *i.e.*, another third share," in the two villages in suit. "Therefore the suit, being opposed to the proviso of s. 31 (Act X of 1877) in consequence of several plaintiffs being joined in respect of distinct claims and causes of action, cannot be heard." In this finding of law the Court was plainly wrong: and the error is due to the not uncommon confusion of "cause of action" and "subject-matter" of the suit.

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In this suit the plaintiffs had distinct and separate subject-matters of action, to wit their separate shares in the estate possessed for her life by the widow, but their cause of action was one and indivisible, that is to say, the act of the widow in alienating the property to Nakched to the jeopardy of the future rights of the plaintiffs as her reversionary successors to two-thirds of the estate. The plaintiffs therefore, though unconnected and separate in respect to the subject-matters of the suit, were conveniently and rightly joined in vindicating the one interest common to them all, centering in the main issue in the case, which was simply the nature and extent of the widow's dominion over the estate she admittedly possessed.

The Court was equally wrong in its finding on the objection to the suit taken by the defendant under s. 43 of Act X of 1877, the subject of the second issue framed for trial. It was decided on this subject that "in the former suit the plaintiffs omitted to claim possession; they cannot now sue for it": and the suit was accordingly dismissed with costs. Here again the provisions of the Civil Procedure Code were misunderstood and wrongly applied. The rule of s. 43 is the following: "A person entitled to *more* than *one remedy* in respect of the same claim may sue for all or any of his remedies: but if he omits to sue for any of such remedies he shall not afterwards sue for the remedy so omitted."

It is obvious that the test of the applicability of this rule is to ascertain if the person at the time he brought the former suit was in point of fact a person entitled to more than one remedy in respect of his claim. A remedy is a man's legal means of recovering or otherwise asserting a right to which he deems himself entitled, or of obtaining redress for a wrong. In s. 43, the second section of the Chapter on the "Frame of the suit," the word "remedy" is used to denote the decree or decretal order with its proper legal results, which is the successful suitor's warrant for obtaining the relief he has achieved by his suit. In the present case the Court had found when the first suit came before it that the plaintiffs were not persons entitled to the special form of remedy or relief they sought to obtain by that suit in respect of their claim, namely, the remedy by way of declaration of the unlawful character of the invasion of their reversionary rights and interest,

but that under the circumstances disclosed and ascertained in regard to the possession of the parties after the widow's death, the plaintiffs had no such remedy, and that their *only* remedy was by way of a suit for clearance of their title and removal of disturbance to their possession, that is to say, by bringing such a suit as the plaintiffs brought in November, 1879. It is not suggested that the plaintiffs had any other remedy than this, failing the mistaken one for which they were non-suited: and thus the action of the Court itself in the determination of the first suit cleared from the plaintiffs' path the obstruction of this provision of s. 43 of the Civil Procedure Code. It was then determined, and the decision has become final, that the plaintiffs were then "persons entitled in respect of their claim to one remedy only," and that they were mistaken in entertaining the belief to the contrary under which they had been led to bring the bad suit for another supposed remedy which was then dismissed. In this view of the law it was an error to defeat the plaintiffs on the threshold of their present suit with the objection that they were persons who, having been at the time of the first action entitled to more than one remedy in respect of their claim, had elected to sue for one remedy omitting the other remedy which they now seek to obtain in their present suit.

At and after the death of the widow and on the assumption by her donee of her possession the plaintiffs had no other remedy than that which they are now asking by the present suit, and they cannot be barred by a rule prohibiting persons who have in fact alternative remedies, and have elected to sue their adversaries on one of such omitting others, from bringing a suit for the omitted alternative relief. There being one remedy only to which the plaintiffs under the circumstances were entitled in February, 1879, there was no question of electing between alternative remedies, choosing the one and omitting another. The plaintiffs appealed to the district appellate Court against the decree dismissing their suit, and that Court in a short order affirmed the decree of the Court of first instance without assigning reasons for its concurrence.

In second appeal the Judges of the Division Bench differed in opinion, Pearson, J., dismissing the appeal in a *judgment* which took effect, while his colleague, Oldfield, J., would have reversed

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the concurrent decrees below, and remanded the case for trial on the merits. Hence the appeal now before us on the plea that "the suit as brought was neither open to the objection of misjoinder, nor barred by the provisions of ss. 13 and 43 of Act X of 1877."

The judgment impugned (Pearson, J.,) is as follows:—"The finding in the former suit that the plaintiffs were not in possession of the property claimed by them was, I take it, a finding that the defendant was in possession thereof under the deed of gift which they sought to set aside. The dismissal of that suit precludes them, I conceive, from again suing for the avoidance of that deed, and without avoiding it they cannot be entitled to oust the defendant. I am therefore constrained to hold that the present suit is unmaintainable, and dismiss the appeal with costs." The meaning of this judgment appears to be that the appellants' suit is barred as *res judicata* under Chapter I of the Code; and the judgment has been thus interpreted by Oldfield, J., and by the appellants before us.

The position is that the possession of the defendant under this deed of gift having been found as a fact in the first suit, the dismissal of that suit, which was for the avoidance of the deed of gift, makes the whole question of the validity of the defendant's title and of the legality of his possession *res judicata*. The propriety of this view seems to be questionable. The "matter in issue" in the first case was the validity of the defendant's pretensions, and the legality of his possession obtained by such pretensions. The alleged gift by the widow was the matter from which in itself and in connection with other matter, such as the extent and exact nature of her interest in the subject of the gift, the existence, non-existence, nature or extent of certain rights, liabilities, and disabilities asserted and denied in this suit necessarily followed (Evidence Act, s. 3). This matter never came to an issue at all; much less was it "heard and finally determined" in the first suit. The fact of the defendant's possession, which was not matter substantially or otherwise in issue, for it was alleged by both parties, the difference between them being not as to its existence, but as to its legal character and validity, was applied by the Court as the determining condition of the Court's competence to entertain the plain-

tiff's suit for a declaratory decree under Act I. of 1877. And the Court acting under the special and mandatory terms of s. 42 of that Act dismissed the suit by reason only of the fact of the plaintiffs being admittedly out of possession, and competent at the time to ask for possession. It appears to me that this decree can no more be deemed to be an adjudication on the very different matters really in issue in the sense of s. 13 of the Civil Procedure Code, namely, the rights and title to possession of the parties, than a decree would have been by which the suit had been dismissed for want of jurisdiction, supposing the plaintiffs by a misconception in regard of its true valuation had instituted their first suit in a Munsif's Court.

The bare fact of the defendant's possession was summarily found; but the question whether it was possession of inherent right, or as a trust, or by means of wrongful trespass, was no more determined than it would have been if the suit had been rejected under the conditions (*a*) or (*b*) of s. 54 of Act X of 1877. The first suit should indeed have been rejected under condition (*c*) of that section, as being on its face a suit for a declaratory decree barred as such by the positive rule of s. 42 of Act X of 1877 regarding the effect of non-possession, coupled with competence to seek for it, on such suits. And by the express terms of s. 56 of the Civil Procedure Code the rejection of the plaint on any of the grounds mentioned in s. 54 (and other sections) shall not, of its own force, preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. The matters in issue in the suit before us are therefore in no respect *res judicata*, and neither the bar of that rule, nor the objection of misjoinder, was rightly applied to the appellants' suit.

I would therefore set aside the judgment and decree of the Division Bench and those of the Courts below, and affirming that of Oldfield, J., would remand the case to the Court of first instance to be tried on its merits according to law. The costs of this and the previous litigation should abide and follow the result.

STUART, C. J.—In this appeal from a Division Bench (Pearson, J., and Oldfield, J.,) I concur in the opinion of Oldfield, J., and dissent from that of Pearson, J. As one of the Judges who decided Second Appeal No. 1050 of 1879, dated 12th May, 1880, I explained at the hearing the distinction between that case and the

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present, and I entirely concur with my colleagues in what they have recorded on that subject. I may add a remark respecting a distinction which appears to be taken by the Subordinate Judge and the Judge below between misjoinder of plaintiffs and misjoinder of claims. There is really no sense or meaning in such a distinction. A plaintiff as such cannot be separated from his claim, and here the claims supposed to have been misjoined are absolutely identical in law and in fact; and even if we had not s. 31 of the Code of Civil Procedure, which provides that "no suit shall be defeated by reason of misjoinder of parties," no intelligible misjoinder could have been shown in the present case. The appeal from the Division Bench must be allowed, and the case remanded under s. 562 for disposal on the merits; costs will abide the result.

OLDFIELD, J.—I adhere to the view I took in my order dated the 2nd February, 1881.

Cause remanded.

APPELLATE CIVIL.

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February 3.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

NARSINGH SEWAK SINGH (JUDGMENT-DEBTOR) *v.* MADHO DAS AND OTHERS (DECREE-HOLDERS).*

Execution of decree—Act XV. of 1877 (Limitation Act), sch. ii, No. 179 (2)—"Where there has been an appeal."

The words "where there has been an appeal" in cl. 2, No. 179 of sch. ii of Act XV. of 1877, do not contemplate and mean only an appeal from the decree of which execution is sought, but include, where there has been a review of the judgment on which such decree is based, and an appeal from the decree passed on such review, such appeal.

Held, therefore, where there had been a review of judgment, and an appeal from the decree passed on review, and such decree having been set aside by the appellate Court, application was made for execution of the original decree, that time began to run, not from the date of that decree, but from the date of the decree of the appellate Court.

Sheo Prasad v. *Anrudh Singh* (1) distinguished.

IN March 1873 one Harak Chand Sahu sued one Ajudhia Prasad Singh and Rajnit Kuar, as the mother and guardian of her minor son, Rukman Sewak Singh, in the Court of the Subordinate Judge

* First Appeal, No. 123 of 1881, from an order of Babu Ram Kali Chaudhri, Subordinate Judge of Benares, dated the 1st July, 1881.

(1) I. L. R. 2 All. 273.