1881

JUALA SIN v. NARAIN D

The judgment of the Court (PEARSON, J., and OLDFIELD, J.) was delivered by

PEARSON, J.—The present suit was commenced by an application on the part of the plaintiffs under s. 525 of the Civil Procedure Code. The Munsif, misunderstanding the provisions of that section, required them to amend their plaint, and the Judge finds that the amendment was ordered after the first hearing of the case when such an order could not be legally passed. By the amendment the case was taken out of the scope of Chapter XXXVII of the Code. This being so, there can be no doubt that the Judge had jurisdiction to hear the appeal preferred to him from the Munsif's decree. The first ground of the appeal is, therefore, disallowed. There can be no doubt, we think, that the arbitrators exceeded the powers given to them by the agreement of the parties, dated 18th May, 1879, and that their award determined matters not referred to arbitration. S. 526 of the Code enacts that "if no such ground as is mentioned or referred to in s. 520 or s. 521 be shown against the award, the Court shall order it to be filed." In this case one of the grounds mentioned in s. 520 (*a*) was shown against the award, and the lower appellate Court was, therefore, in our opinion, justified in dismissing the plaintiffs' claim that the award should be filed. Accordingly we dismiss the appeal with costs.

Appeal dismissed.

CIVIL JURISDICTION.

1881
March 7

Before Mr. Justice Oldfield and Mr. Justice Straight.

DEBI DIAL SINGH AND OTHERS (PLAINTIFFS) *v.* AJAIB SINGH AND OTHERS (DEFENDANTS).

Act X of 1877 (Civil Procedure Code), s. 43—Relinquishment of part of claim—Mesne profits.

The plaintiffs sued the defendants for possession of the land upon which certain trees stood, and for such trees, stating that on the 19th June, 1879, the defendants had interfered with their possession of such trees, and had wrongfully taken the fruit thereof. The plaintiffs subsequently sued the defendants for the value of the fruit upon such trees, alleging that on the 19th June, 1879, the defendants had wrongfully taken such fruit. *Held* that, as the cause of action, *i. e.*, the taking of such fruit, was in both suits identical, and the plaintiffs not having claimed the value of such fruit as mesne profits in the first suit, the second suit was barred by the provisions of s. 43 of Act X of 1877.

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BRI DIAL SINGH v. AIB SINGH.

THIS was a reference to the High Court by Mirza Abid Ali Beg, Judge of the Court of Small Causes at Jaunpur. The plaintiffs in the suit which gave rise to this reference sued the defendants for Rs. 15, the value of the fruit upon certain mango trees, which they alleged the defendants had wrongfully taken on the 19th June, 1879. The plaintiffs had previously sued the defendants in the Court of the Munsif of Jaunpur for possession of the land upon which such trees stood and for such trees, stating in that suit, in respect to such trees, that on the 19th June, 1879, the defendants had interfered with their possession of such trees, and had wrongfully taken the fruit thereof. The defendants set up as a defence to the present suit that the cause of action in respect of the plaintiffs' claim for possession of such trees and for the value of the fruit thereof was one and the same, and that, as the plaintiffs had omitted in the former suit to claim the value of the fruit of such trees, they could not do so in the present suit, regard being had to the provisions of s. 43 of Act X of 1877. The opinion of the Small Cause Court Judge on the question raised by this defence was that, inasmuch as the taking of the fruit upon such trees was the dispossession of which the plaintiffs had complained in the former suit, the causes of action in the former and present suits were one and the same, and the present suit was barred by the provisions of s. 43 of Act X of 1877, by reason that the plaintiffs had omitted in the former suit to claim the value of the fruit they now claimed. Entertaining, however, some doubt on the question the Judge referred it to the High Court for decision.

Munshis *Hanuman Prasad* and *Sukh Ram*, for the plaintiffs.

The defendants did not appear.

The judgment of the Court (OLDFIELD, J., and STRAIGHT, J.,) was delivered by

STRAIGHT, J.—We are of opinion that the view of the Small Cause Court Judge is correct, and that, the plaintiffs not having sued for the value of the mango fruits, as mesne profits, in the former suit, their present claim is barred by the provisions of s. 43 of the Civil Procedure Code. The cause of action, *i.e.*, the plucking of the fruits on the 19th June, 1879, was in both cases

identical, and it cannot be permitted that the defendants should be subjected to a second litigation, when their whole liability could have been disposed of in the first suit. Our answer to this reference, therefore, is that the Small Cause Court Judge is right in holding the plaintiffs' claim to be barred.

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DEBI DIA SINGH v. AJAIB SING

FULL BENCH.

1881 *March* 9.

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

EMPRESS OF INDIA *v.* MUHAMMAD JAFIR AND OTHERS.

Security for keeping the peace—High Court's powers of revision—Defect in form of summons not prejudicing persons required to show cause—Act X of 1872 (*Criminal Procedure Code*), *ss.* 297, 491, 492.

Certain persons were convicted by a Magistrate of the first class of assault, an offence punishable under s. 352 of Act X of 1877. The case was brought to the knowledge of the High Court by the complainant preferring a petition to it, together with a copy of the Magistrate's order. This petition was laid before Straight, J., who, observing that the case was one in which the Magistrate should have taken security from such persons for keeping the peace, as provided by s. 489 of Act of 1872, directed the Magistrate to summon such persons to show cause why they should not be required, under s. 491 of that Act, to enter into a bond to keep the peace. The Magistrate accordingly summoned such persons as directed, the summonses setting forth that they were issued "under the orders of the High Court." The Magistrate took evidence on behalf of such persons, and eventually made an order requiring such persons to enter into a bond to keep the peace. Such persons were fully aware of the order made by Straight, J. Such persons applied to the High Court to set aside the order requiring them to enter into a bond to keep the peace, on the ground that the Magistrate had not proceeded of his own motion, but under the order of Straight, J., which was made without jurisdiction, and on the ground that the summonses had not set forth the report or information on which they were issued.

Held by STUART, C. J., that, inasmuch as Straight, J., when he made his order, represented the full authority and jurisdiction of the High Court, such order was final, and the application could not be entertained.

Held by PEARSON, J., SPANKIE, J., and OLDFIELD, J., (SPANKIE, J., doubting whether such order could be questioned) that the order of Straight, J., was one which he was competent to make as a Court of Revision under s. 297 of Act X of 1872.

Held by PEARSON, J., and SPANKIE, J., that, inasmuch as such persons had not been in the slightest degree prejudiced by the defect in the summonses which were