

lands in these villages which appertain to estate No. 23. Such a partition could only be carried out by means of a partition between the three shares of the zemindari, viz., $7\frac{1}{2}$ annas, $7\frac{1}{2}$ annas, and 1 anna; and it could not properly be carried out in respect of these three villages only, without taking into consideration the other villages comprised in the zemindari. Moreover, it is possible—and indeed it is in evidence—that there are other *taluks* in these villages that would be affected by such a partition, the holders of which have not been made parties to the suit.

For all these reasons we are of opinion that the decree of the lower Court is correct and that the plaintiffs' suit must fail.

The appeal is dismissed with costs.

C. D. P.

Appeal dismissed.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

ABDUN NASIR AND ANOTHER (PLAINTIFFS) v. RASULAN
(DEPENDANT No. 1).*

1892
August 30.

Relinquishment of or Omission to sue for portion of claim—Cause of action—Joint property, suits for exclusion from, and partition of—Co-sharers—Civil Procedure Code (Act XIV of 1882), section 43.

One co-sharer suing another for exclusion from joint property, and omitting to include in his claim a portion of the property of which he seeks possession, is not debarred by section 43 of the Code of Civil Procedure from suing to have the joint estate partitioned, including the portion omitted from the former suit, the causes of action in the two suits being different.

THE plaintiffs, Hakim Abdun Nasir and Mussamat Bibi Shobratur, his wife, sued for partition of a *lakheraj mehal* called Mansurpore, alleging that the former owners separated 6 bighas 2 cottahs from the lands of the entire *mausa* and made a *hiba* of the same in favour of one Buduruddin Hossein, the plaintiffs' ancestor, and then privately divided the remainder of the *mehal* into three *patis* according to their respective shares. The plaintiffs alleged that they were entitled to certain shares in each of these *patis* and also to a 12-anna share in the plot of 6 bighas

* Appeal from Original Decree No. 109 of 1891, against the decree of Baboo Jogesh Chunder Mitter, Subordinate Judge of Patna, dated the 26th of January 1891.

1892
 ABDUN
 NASIR
 v.
 RASULAN.

2 cottahs, as heirs of Buduruddin, and that the defendant No. 1 was entitled to a 4-anna share in the same plot. The plaintiffs prayed for partition on the ground that the existing division into *patis* was not recognised by the Collector, and that the payment of cesses continued joint.

Mussamut Bibi Rasulan, defendant No. 1, alleged that after the death of Buduruddin plaintiff No. 1, Hakim Abdun Nasir, brought a suit against her to have his right of inheritance declared in respect of a 12 annas share of the properties left by Buduruddin, from which he alleged defendant No. 1 had dispossessed him; that in a schedule attached to the plaint in that suit, all the properties belonging to Buduruddin's estate were set out, but that the plot of 6 bighas 2 cottahs was not therein mentioned or included. Bibi Rasulan therefore contended that plaintiff No. 1 had omitted to make a claim which he was entitled to make in the former suit with reference to this plot of land, and was debarred by the provisions of section 43 of the Code of Civil Procedure from suing in respect of the 6 bighas 2 cottahs. No objection was raised on the part of the defendants as to the partition of each *pati* separately among its co-sharers, excluding the 6 bighas 2 cottahs above mentioned.

The lower Court held that the suit, so far as it related to the last mentioned plot, was barred under section 43 of the Code of Civil Procedure, and gave a decree for the separate partition of the *patis*. From this decision the plaintiffs appealed to the High Court.

Moulvi *Mahomed Yusuf* and Moulvi *Seraj-ul-Islam* appeared for the appellants.

Baboo *Saligram Singh* and Baboo *Surendro Nath Roy* appeared for the respondent, defendant No. 1.

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows :—

This suit was brought to partition property which had belonged to Buduruddin, who died on the 14th of June 1883.

A prior suit had been brought on the 17th of April 1884, by the plaintiff No. 1 against the first defendant to obtain joint possession of the property with her, and that suit was decreed

on the 24th of March 1884. In that suit a schedule of the property, joint possession of which was claimed by him, was filed by the plaintiff, and that schedule did not include, either expressly or by implication, a plot of 6 bighas and 2 cottahs of land which formed part of Buduruddin's estate, and which plot is the subject matter of this appeal.

The Subordinate Judge has decreed the plaintiffs' suit as to the whole of the property left by Buduruddin except the plot in question, and has dismissed the suit so far as it claims a share of that plot by partition, on the ground that, as the plaintiff No. 1 did not claim joint possession of it in the suit which he brought in April 1884, he cannot now include any portion of it in his claim for possession after partition by reason of the provisions of section 43 of the Civil Procedure Code. In this view of the case we are unable to agree. Section 43 provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and that if he omits a portion of his claim, *i.e.*, of his claim in respect of that cause of action, he cannot afterwards sue for it. If a person is excluded from joint possession of joint property by his co-sharer, he has a cause of action against him for such exclusion, and every co-sharer has a right to bring an action against his co-sharer to have the joint estate partitioned, and to obtain possession of his separated share. The rights, to enforce which these actions may be brought, are separate and distinct, and the causes of action in the one case are not the same as in the other, though no doubt a part of the necessary evidence would be common to both suits. No case has been cited before us which goes as far as the Subordinate Judge has gone in this case.

We therefore decree this appeal, set aside the judgment of the lower Court, and remand the case to that Court in order that he may try the question whether the plot of land in question formed part of the estate of Buduruddin and passed to his heirs at his death. If he finds this issue in the affirmative, the plaintiffs would be entitled on the partition to the same share of this plot as of the rest of the property included in the estate. The costs of this appeal will be costs in this cause.

A. A. C.

Appeal decreed and case remanded.

1892

ABDUN
NASIR
v.
RASULAN.