

## APPELLATE CIVIL.

*Before Mr. Justice Pigot and Mr. Justice Rampini.*

1892  
July 19.

MAKSUD ALI (PLAINTIFF) *v.* NARGIS DYE (DEFENDANT).\*

*Relinquishment of or omission to sue for portion of claim—Civil Procedure Code (Act XIV of 1882), s. 43—Cause of action.*

In 1889 the plaintiff sued the defendant for possession of a piece of land which the defendant had included in her homestead by building walls. In that suit the plaintiff alleged that on that land there were two palm-trees which belonged to him, and that the defendant had wrongfully prevented the *pasis* from going to those trees to tap them, but he asked in his plaint in that suit for no relief in respect of the trees, only stating that he would bring a separate suit for them. The Munsif dismissed that suit on the ground that the land was within the defendant's tenure, and his decision was affirmed on appeal. In a suit brought in 1890 against the same defendant for declaration of title to and possession of the two palm trees and for an injunction restraining the defendant from disturbing his possession of them, *Held*, that the claim arose out of the same cause of action as that in the former suit, and that the suit was therefore barred by section 43 of the Code of Civil Procedure.

THIS was a suit brought in 1890 for declaration of title to and possession of two palm-trees, on the allegation that the defendant had wrongfully included them within her compound by building walls, and that the *pasis* always used to go over the lane on which the trees stood for the purpose of tapping them, but the defendant now prevented them from doing so. The plaintiff estimated the damages at Rs. 100.

The plaintiff in 1889 had brought a suit against the same defendant for recovery of possession of the lane on which the trees stood, and had stated in the plaint that he would bring a separate suit for the trees of which he was dispossessed. That suit was dismissed by the Munsif, who held that the land in dispute was within the defendant's tenure. The Munsif's decision in that case was affirmed on appeal.

\* Appeal from Appellate Decree No. 1175 of 1891, against the decree of Baboo Amrita Lal Pal, Subordinate Judge of Patna, dated the 30th of June 1891, affirming the decree of Baboo Prio Lall Pyne, Munsif of Patna, dated the 18th of February 1891.

The main defence in the present suit was that the suit was barred by section 43 of the Code of Civil Procedure.

The Munsif found that the plaintiff's dispossession of the two palm-trees had occurred at the time when he instituted his suit in 1889 for the recovery of the land on which the trees stood, and that he should therefore have included his claim for the trees in his claim for the land sued for. He accordingly dismissed the suit as barred by section 43 of the Code of Civil Procedure.

On appeal the Subordinate Judge affirmed the decision of the Munsif and dismissed the appeal.

The plaintiff appealed to the High Court.

Mr. C. Gregory and Baboo Umakali Mookerjee for the appellant.

Mr. R. E. Twidale and Mr. M. L. Sandal for the respondent.

The judgment of the High Court (PIGOT and RAMPINI, JJ.) was as follows :—

The plaintiff is proprietor of mouzah Dariapur in the district of Patna ; the defendant is his tenant. In 1889 plaintiff brought a suit against the defendant, the effect of which upon the relief claimed in the present suit is the subject-matter of this appeal. In that suit the plaintiff alleged that in his property there was a long existing lane, which he described, and which he said existed for the use of the public, the *pasis*, and others, and that in that lane there were four palm-trees which were in his possession. He alleged that the defendant had no right to the land forming this lane ; that she had wrongfully included it in her homestead ; and that she had no right to the four palm-trees, of which he had all along enjoyed sole or exclusive use and possession. He said the defendant had enclosed the lane by two walls, one to the east with a door in it, and one to the west, and thereby enclosed within her compound two of the juice-producing palm-trees, and thereby caused great inconvenience to the public, the *pasis*, and others in their coming and going. He said that the defendant's tenant had wrongfully prevented the *pasis* from going to the palm-trees to tap them ; and that for this he would bring a separate suit. The prayer was first for a declaration that the plaintiff was sole proprietor of the land in dispute, and also of the defendant's homestead, and that the defendant had no right to raise the wall and fix

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the door which had entirely stopped the passage for the *pasis* and the public. Secondly, for a mandatory injunction for the removal of the walls, and for an award of restoration of possession of the land to the plaintiff.

The Munsif dismissed the suit as to the plaintiff's alleged right to the land in dispute, holding that the land was within the defendant's tenure; and that she had a right, therefore, to build the walls in question. He did not decide whether or not the trees were included in the defendant's tenure, holding that upon that question he was not asked to adjudicate. This decision was affirmed in appeal.

In the present suit the plaintiff again denies the defendant's right to build the walls. He states that in the previous suit the defendant claimed the trees as belonging to her; that she does not allow the *pasis* to approach the trees, and asserts that they belong to her, and he brings this suit, laying it at Rs. 100, being the value of the two palm-trees at Rs. 50 each. He asks, first, for a declaration that the palm-trees belong to him; second, for possession of them; and third, for an injunction restraining the defendant from disturbing his possession of them.

Both the Courts below have held that the suit is barred by section 43 of the Civil Procedure Code.

We took time to consider whether such a construction could properly be given to the plaintiff's claim in this suit, as to render it possible to hold that it arose out of a cause of action other than that on which the former suit was brought.

We think it must be held that the plaintiff's present claim arose, and now arises, out of the same cause of action as that in the former suit. He claims the right in the trees and, by implication at least, a right-of-way to them for the *pasis* to enable them to draw the juice. We think that his cause of action in respect of this arose out of the matters, the subject of the former suit. As a matter of fact the defendant did then claim the trees, both expressly and also by the building of the wall so as to bar the access to them at her pleasure; the plaintiff applied for that reason to have the right to the trees determined in that suit, but this was refused, as he had not asked for relief in respect to them in the suit. It is plain that the matter was then in controversy

between the parties, and that the controversy had arisen because the defendant's then assertion of right involved an interference with that which the plaintiff now claims.

In other words, part of the cause of action which he then had was the interference by the defendant both with the plaintiff's possession of the trees and with the access to them.

He did not then include this claim in his suit; he did not obtain the leave of the Court to omit it: and he is therefore barred by section 43 of the Civil Procedure Code.

The appeal is therefore dismissed with costs.

*Appeal dismissed.*

A. F. M. A. R.

*Before Mr. Justice Pigot and Mr. Justice Rampini.*

RIPOO MURDAN SINGH AND OTHERS (PLAINTIFFS) *v.* RAM REKHA LAL AND OTHERS (DEFENDANTS).\*

1892  
July 26.

*Public Demands Recovery Act (Bengal Act VII of 1880), s. 10—Act XI of 1859, ss. 5, 6, 7, 17—Sale, Notification of—Attachment under Certificate Procedure.*

Where a notice under section 10 of Bengal Act VII of 1880 was served, and a certificate issued by the Collector for default of payment of road cess of a revenue-paying estate, and, the Government revenue being in arrears, no notification under section 5 of Act XI of 1859 was issued, and the estate was subsequently sold for arrears of Government revenue, *held*, that the sale was valid, and sections 5 and 17 of Act XI of 1859 did not apply, the certificate issued by the Collector being not an attachment as contemplated by section 5.

*Ram Narain Koer v. Mahabir Pershad Singh* (1) referred to.

THIS suit was brought to set aside a sale of mauza Deokund, held for arrears of Government revenue, at which the mauza was purchased by the defendant No. 1.

The plaintiffs and the defendants Nos. 2 to 14 were the joint-owners of mauza Deokund, in respect of a portion of which a notice under section 10 of Bengal Act VII of 1880 was served,

\* Appeal from Original Decree No. 35 of 1891 against the decree of Moulvi Syed Fakhruddin Hossain, Subordinate Judge of Gaya, dated the 22nd of September 1890.