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the balance (if any) found due to Rádhábái on such account within six calendar months from such day as the amount of such balance is notified by the Subordinate Judge to the plaintiff, let the said lands be made over to the plaintiff. And in the event of the plaintiff not paying such balance within the said period of six calendar months, let the plaintiff be for ever barred and foreclosed from recovering the said lands from the said Rádhábái, her heirs and representatives.

As Rádhábái did not make the plaintiff a party to her suit against Narmadábái, and thereby caused him to be ousted from the lands without giving him an opportunity of putting forward such defence as he may have had, this Court directs that the parties to the present suit do, respectively, bear their own costs thereof, and of the appeals therein.

The plaintiff being in possession of the house in the plaint mentioned, and the same not being included in Rádhábái's mortgage, any order in respect of that house is unnecessary in this decree.

Decree reversed.

APPELLATE CIVIL.

FULL BENCH.

Before Mr. Justice Melvill, Mr. Justice West, and Mr. Justice Pinhey.

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March 9.

GIRDHAR MANORDA'S AND OTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* DA'YA'BHA'I KA'LA'BHA'I AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Res judicata—First suit of ejectment based on alleged lease—Second suit to eject tenant as trespasser founded on right of ownership.

The present plaintiffs in 1869 sued the present defendants to eject the latter from a certain piece of land, alleging that the defendants held it under certain leases dated July, 1864. The genuineness of the alleged leases was put in issue in that suit and was decided by the Subordinate Judge in favour of the plaintiffs, who accordingly obtained a decree. In appeal the District Judge reversed that decree, being of opinion that the alleged leases were not proved.

* Second Appeal, No. 22 of 1880.

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In 1874 the plaintiffs brought the present suit to eject the defendants. In this suit the plaintiffs sued simply as owners, and alleged that the defendants were in occupation as tenants paying rent to the plaintiffs, and that they (the defendants) had refused to give up possession.

Held (MELVILL, J., *diss.*) that the plaintiffs were not barred by the judgment in the former suit. The fact of both the suits being against the defendants as tenants of the plaintiffs did not imply that the suits were on the same cause of action. The term "tenancy" may be applied to a great many different relations between the occupier and the owner of property, agreeing perhaps only in the single circumstance of a holding by the one of the property of the other. The test in each case is, not whether a tenancy has in both suits been sued on, but whether the particular contract or relation put forward in the first case was the same specific contract sued on in the second. A cause of action reduced to the concrete form in a contest between individuals implies a specific right and a specific infringement of the right; and a judgment that one such specific right has not been made out, is not a trial and determination of a cause of action resting on another specific right. The specific rights on which the plaintiffs relied in the two suits were different, and would have to be proved by different evidence.

THIS was a second appeal from the decision of A. L. P. Larken, Acting Assistant Judge of the District of Ahmedabad, confirming the decree of Ráv Sáheb Motilál Lálbhái, Subordinate Judge of Borsad.

In 1869 the plaintiffs sued to eject the present defendants from a certain piece of land, alleging that the defendants held it under certain leases dated July, 1864. In that suit the genuineness of the alleged leases was put in issue and decided in favour of the plaintiffs who obtained a decree. In appeal the District Judge, being of opinion that the leases were not proved, reversed the decree. In 1874 the plaintiffs brought the present suit to recover the same land from the defendants. In this suit the plaintiffs sued simply as owners, and alleged that the defendants were in occupation as tenants paying rent to the plaintiffs, and that they (the defendants) had refused to give up possession to the plaintiffs.

Nagindás Tulsidás for the appellants (the original defendants).

Nánábhái Haridás, Government Pleader, and *Gokaldás Káhándás Párekh* for the respondents, the original plaintiffs.

The case was first heard by Westropp, C. J., and F. D. Melvill, J., and referred to the Full Bench.

In the course of argument the following cases were referred to by the appellants:—

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Woomatara Debia v. *Unnopoorna Dassee* (1); *Shrimut Rajah Moottoo Vijaya Rayanadha* v. *Katama Natchiar* (2); *Devrávkrishna* v. *Halambhai* (3); *Haji Hasam Ibráhim* v. *Manchárám Káliandás* (4) and *Náro Hari* v. *Anpurnábái* (5).

The following cases were cited by the respondents:—

Bhisto Shankar Patil v. *Rámchandra Raghunáth Jáhagirdár* (6); *Shridhar Vináyak* v. *Náráyan valad Báláji* (7); *Bábu Lakshman* v. *Ganesh Raghunáth* (8); and *Yashvadábái Sáheb Patvardhán Sonikar* v. *Gangádhar* (9).

MELVILL, J.—Suit No. 1146 of 1869 of the file of the Subordinate Judge of Borsad was brought by the present plaintiffs against the present defendants to recover the same land which is the subject-matter of the present suit. The material portion of the plaint in the former suit is as follows:—

"The land was given under written leases, dated 2nd Ashad Shud, Samvat 1920 (6th July, 1864,) to four persons jointly, *viz.*, defendants Nos. 1, 2 and 3, and Mitha Kándás, the deceased father of defendant No. 4. Notwithstanding this in the month of May, 1869, though we asked them to deliver possession, they refused to do so. The cause of action arose on that date. We, therefore, pray that the said land be made over to us."

In their written statement the defendants claimed to be permanent tenants at a fixed rent of an amount much less than would have been payable under the leases set up by the plaintiffs.

The Subordinate Judge framed the following issues:—

1. Whether or not the counterparts of the leases are genuine?

2. If so, whether or not there is sufficient right made out for ousting the defendants, and recovering possession of the land?

The Subordinate Judge found the leases proved, and decreed in favour of the plaintiffs.

(1) 11 Beng. L. R., 158.
(2) 11 Moo. I. A., 50.
(3) I. L. R., 1 Bom., 87.
(4) I. L. R., 3 Bom., 137.
(5) Printed Judgments for 1874, p. 218.
(6) 8 Bom. H. C. Rep., 89, A.C.J.
(7) 11 Bom. H. C. Rep., 224.
(8) Printed Judgments for 1875, p. 159.
(9) Printed Judgments for 1879, p. 442.

In appeal, the District Judge observed that the claim must be regarded with the greatest suspicion. The defendants had held the land for very many years on a yearly rent of Rs. 112, and no reason was shown why they should have suddenly agreed to hold the land at a largely increased rent. The Judge noticed that it was suspicious that the plaintiffs had not proved anything concerning the former tenancy, or the circumstances which led to the fresh leases being executed. He then reviewed the evidence, and found that it was weak and open to grave doubts. For these reasons he was of opinion that the leases set up by the plaintiffs were not proved. He then made the following concluding observation: "It is urged for the plaintiffs that, even supposing the deeds are not proved, still they are entitled to recover possession, inasmuch as the defendants have not proved that they have any better title than a tenancy from year to year. I cannot allow this argument. The plaintiffs have sued to recover on certain leases, and on those their claim must stand or fall. They have failed to prove their plea, and the claim must consequently be thrown out."

In special appeal the plaintiffs urged that the District Judge ought not to have thrown out the plaintiffs' claim merely from the alleged fact of the deeds being not genuine, there being other evidence to prove the defendants' tenancy. The High Court, however, confirmed the decree of the District Judge.

The plaintiffs have now brought the present suit to recover the same land from the same defendants. The material portion of their plaint is as follows:—

"Of the said land, Sambhu Narse, the maternal uncle of the defendant No. 2, now deceased, and, after his death, the defendant No. 2 and the other defendants, Nos. 1, 3, and 4, have been the cultivators. They, therefore, paid assessment to Government on our behalf, and cultivated the land, paying us rent in addition to the assessment. And, although we demanded back the land in the month of May, 1869, they have not made the same over into our possession. We, therefore, pray that the defendants may be ordered to give up their possession, and to make over the said land into our possession. * * * * * * * *. We instituted in

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this Court a suit, being Suit No. 1146 of 1869, with regard to the said land, on the strength of certain leases in writing. But that claim having been finally dismissed by the Appeal Court, the present claim is based on the right of ownership."

The question referred to the Full Bench is whether, under the circumstances of this case, this suit must be considered *res judicata*.

A great number of cases have been cited to us by the pleaders on both sides, but it appears to me that they have no particular bearing upon the present suit. They all relate to the question whether a plaintiff is bound to bring forward all his grounds of action at once, and whether, having failed to recover property on one title, he can bring a fresh suit to recover the same property on another title. That question does not, in my opinion, arise at all in the present suit. The plaintiffs do indeed say in their plaint that their former suit was brought on the strength of certain leases, while the present claim is based on the right of ownership. But this is not really a case in which a plaintiff, who has failed to prove a lease, brings a fresh suit upon his title. It may be, I do not say that it is, competent to a party to come into Court and say: "I have failed to prove that the defendant is my tenant: but I now bring a fresh suit upon my title as owner, and claim to eject the defendant as a trespasser. The plaintiffs in the present suit cannot adopt this course, because the answer to them would be that such a claim is long since barred by limitation. In order to evade the bar, they are obliged to adhere to their original allegation of tenancy. This being so, I must say that I fail to see any difference in the cause of action in this and in the former suit. In both suits I understand the cause of action to be simply this, that in the month of May, 1869, the defendants, being tenants-at-will of the plaintiffs, and having received notice to quit, refused to surrender the land. It is true that in the former suit the plaintiffs put forward written leases, while in the present suit they drop the written leases, and seek to establish the tenancy, *aliunde*: but this constitutes a difference, not in the cause of action, but merely in the evidence by which the cause of action is supported.

But then it is said that in the former suit the District Court only decided that the written leases then relied upon were not

proved, that it positively refused to decide anything else, and, consequently, that the question of the plaintiffs' right to recover, irrespectively of the written leases, has never been heard and determined. But what I understand the District Court in the former suit to have held is this, namely, that the plaintiff was bound to prove tenancy, that he had produced no evidence of tenancy except certain leases, that the only issue in which he had gone to trial was the issue of the genuineness of those leases, and that, consequently, having failed to prove those leases, he had failed to prove the tenancy. It seems to me that the cause of action in the present suit, namely, the breach of an obligation arising out of the relation of landlord and tenant, was fully heard and determined in the former action; and that the present suit cannot be maintained, unless it can be held that a party who has failed in one action can bring another suit to establish the same case by different evidence.

In *Naraineo Dossee* v. *Nurrohurry Mohonto*(1) Peacock, C.J., is reported to have said, and the observation has often been quoted with approval in this Court: "We think that it would not be the exercise of a sound discretion to allow a party, who relies upon a document, to set up a fresh case, where an issue as to the execution of such document is found against him, and there are good grounds for believing the document to be a forgery." It would, as it seems to me, be something more than the exercise of an unsound discretion to allow a party so circumstanced, not to make a fresh case, but to bring another suit, in order to make out the same case by different evidence.

My answer to the reference is that this suit must be considered as *res judicata*.

WEST, J.—The numerous cases cited for the respondent tend generally to this that, where part of a claim urged by a plaintiff has not been adjudicated on, he may bring that part forward again as the ground of a fresh suit. They show also that where there has been a real separateness of the legal relations and of the evidence necessary to establish it in two successive suits between the same parties the second is not barred by the first. The cases

(1) Marsh, 70.

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relied on for the appellant show, on the other hand, that all the grounds relied on by the plaintiff, and so connected together as to be properly the subject of a single investigation ought to be brought forward together. When such a connection does not exist, the doctrine laid down by Lord Westbury in *Hunter* v. *Stewart*(1) has been pretty consistently followed by this Court. In Anpurnábái's case I endeavoured some years ago to state the principles of *res judicata* for purposes of the Courts working under our Indian Codes; but the subject is one of much difficulty, and the determination in each case of whether a cause of action is the same as one previously relied on, or one that ought to have been brought forward and submitted to adjudication along with it, must depend generally on the particular facts of the two cases.

In the present instance the plaintiffs first sued the defendants in ejectment in virtue of the terms of an alleged written lease or *kabuláyat* binding the defendants to quit when desired. In this suit they failed, as the District Judge, differing from the Subordinate Judge, found that the leases relied on were not proved.

The defendants in that suit averred that they were permanent tenants subject to a fixed rent under an agreement with the plaintiff's ancestor and predecessor in title. The plaintiffs desired that the District Judge, taking the view he did of the leases, should award possession to them as owners upon the admitted tenancy of the defendants which, unless proved to amount to some greater interest, must be presumed to be only a tenancy from year to year. The District Judge refused, however, to deal with this claim. The "plaintiffs", he said, "have sued to recover on certain leases, and on those their claim must stand or fall." He rejected it.

The plaintiffs now sue to eject the defendants on the ground that the defendants, being in occupation simply as tenants paying the Government assessment and a further rent to the plaintiffs, refused to go out when desired by the plaintiffs, and have since that notice withheld the rent formerly paid by them.

The suit is in each of the two cases against the defendants as tenants of the plaintiffs; but to say that, is not, I think, to imply that the former suit was on a cause of action identical with the

(1) 31 L. J. Ch. 346.

one now relied on. Things are not necessarily identical because they are of the same description, and the term "tenancy" may be applied to a great many different relations between the occupier and the owner of property, agreeing perhaps only in the single circumstance of a holding by the one of property of the other. What has to be seen in each case is not whether a tenancy has in both suits been sued on, but whether the particular contract or relation put forward in the first case is the same specific contract sued on in the second. If it is, the cause of action is so far identical; if not, it is not identical. A cause of action reduced to the concrete form which it must assume in a contest between individuals implies a specific right and a specific infringement of the right. A judgment that one such specific right has not been made out, is not a trial and determination of a cause of action resting on another specific right, and the former adjudication is not *res judicata* for the purposes of the new suit.

The possession of land unexplained raises a presumption of ownership. An acknowledgment of holding as tenant raises the question of the terms and conditions of the tenancy, and here the plaintiffs first asserted terms embodied in, and constituted by, the leases which they failed to prove. They now allege an entirely different legal relation between them and the defendants, such a relation as is indicated by, or arises out of, a long holding by the defendants of certain lands and a paying of rent for them to the plaintiffs. This the plaintiffs assert is a tenancy, one of the many possible relations of landlord and tenant, and one entitling them when they wish to oust the defendants. In this they may be right or wrong, but the specific legal right on which they rely is obviously quite distinct from the one they relied on before. It has arisen, if it exists, from different circumstances, and would have to be proved by different evidence. Having all the facts within their knowledge the plaintiffs, it might be said, ought in the former suit to have urged all their grounds of attack together, but they succeeded in the first instance on the ground chosen by them; and the District Judge reversing the judgment on that ground would not entertain their claim on any other. If, through the case being one between landlord and tenant, the several grounds were so connected as properly to admit of inves-

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tigation and adjudication together, the District Judge ought to have dealt with them together, and determined whether on any view of the case before him the plaintiffs were entitled to a decree. If they were not so connected, it cannot be said that the former adjudication constitutes a *res judicata* for the purposes of the present case, and in this sense I answer the reference.

PINHEY, J.—I concur with my brother West, and have nothing to add to the reasons which he has given for the conclusion at which he has arrived.

The Court accordingly confirmed the decrees of the lower Courts, which on the merits of the case had directed that the defendants should make over the land in the plaint mentioned to the plaintiffs, and also pay Rs. 450 as damages for loss of profits sustained by the plaintiffs during the time the defendants were in wrongful occupation of it.

Decrees confirmed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Melvill.

1883
January 22,

SANTA'YA MANGARSAYA (ORIGINAL PLAINTIFF), APPELLANT, *v.* NA'RA'YAN AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Registration—Priority—Act No. III of 1877, *Sec.* 47—*Possession—Notice.*

The plaintiff purchased certain land by a deed dated the 8th April, 1879. The deed was registered on the 26th August of the same year. The defendant purchased the same land by a deed dated the 14th June, 1879. It was registered on the same day. That deed recited that the land was in the possession of the plaintiff as tenant. Both the deeds were optionally registrable. The Subordinate Judge rejected the plaintiff's claim, and awarded the land to the defendant. His decree was affirmed, in appeal, by the District Judge on the ground that the defendant's deed was registered before the plaintiff's deed. On appeal to the High Court,

Held that the plaintiff was entitled to the land. Both the deeds having been registered according to law, they operated from their respective dates of execution as provided by section 47 of the Registration Act No. III of 1877.

Held, also, that the defendant had notice of the plaintiff's equitable title to the land.

THIS was a second appeal from the decision of S. Tagore, Judge of the District Court of Kánara, affirming the decree of the Second Class Subordinate Judge of Kumta.

*Second Appeal, No. 612 of 1881.