

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1885.
March 12.

RA'MCHANDRA JIVA'JI TILVE, (ORIGINAL DEFENDANT NO. 2), APPELLANT, *v.* KHATAL MAHOMED GORI, (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code Act XIV of 1882, Sec. 103—Suit by purchaser of mortgaged land against mortgagee for redemption—Subsequent suit by purchaser against vendor and mortgagee for possession—Cause of action.

In 1879 the plaintiff purchased from one Bábáji, (defendant No. 1), the land in question in the suit which was then in the possession of one Rámchandra, (defendant No. 2), as mortgagee. Bábáji undertook to pay off the mortgage, but failed to do so. In 1881 the plaintiff brought a suit for redemption against Rámchandra, (defendant No. 2), which was dismissed for non-appearance of the plaintiff, under section 102 of the Civil Procedure Code (X of 1877). He subsequently filed the present suit against Bábáji and Rámchandra to recover possession of the land. The defendant pleaded that the suit was barred under the provisions of section 103 of the Civil Procedure Code.

Held, that the cause of action in the two suits was different, and that the present suit was not barred.

THIS was an appeal from an order made by C. F. H. Shaw, Judge of Belgaum, reversing the decree of the Subordinate Judge of Belgaum, and remanding the suit for retrial.

The plaintiff sued for possession of certain land which he alleged he had purchased from defendant No. 1, (Bábáji), on the 1st December, 1879, for Rs. 750. He alleged that at the time of his purchase the land was in the possession of defendant No. 2, (Rámchandra), as mortgagee under a mortgage executed to him by Bábáji, dated the 26th March, 1877; that Bábáji at the date of the plaintiff's purchase had undertaken to pay off the said mortgage out of the purchase money; but that he (Bábáji) acting in collusion with Rámchandra had failed to do so. Rámchandra had remained in possession of the land, and was made a defendant to the present suit.

It appeared that in 1881 the plaintiff had brought a suit for redemption (No. 321 of 1881) against the mortgagee Rámchandra, (defendant No. 2), which was dismissed for non-appearance of the plaintiff under section 102 of the Civil Procedure Code (Act X of 1877). Bábáji (defendant No. 1) now pleaded

* Appeal, No. 21 of 1884, from order.

that the present suit was barred under the provisions of section 103 of the Civil Procedure Code; that he had never received any part of the purchase money from the plaintiff; and that he had since sold the land by deed of sale, dated 14th December 1882, to Rámchandra, (defendant No. 2).

Rámchandra, (defendant No. 2), also pleaded that the present suit was barrred by section 103 of the Civil Procedure Code.

The Court of first instance held that the present suit was barred; the Court of appeal held that the cause of action in the present suit and the suit of 1881 were not the same, and remanded the suit for retrial on the merits.

The defendant No. 2 thereupon appealed to the High Court.

Ganashám Nilkanth Nádkarni for the appellant.—Section 103 of the Civil Procedure Code (Act XIV of 1882) forbids the present suit, the causes of action in both the suits being the same. The foundation of both of them is the plaintiff's purchase. The purchase by defendant No. 2 from defendant No. 1 of the equity of redemption gave to the plaintiff no remedy against the former. Suit for specific relief is barred by article 113 of Act XV of 1877, Schedule II. The second suit is a mere renewal of the first.

Mahádev Chimnájí A'pte for the respondent.—The present suit is not a renewal of the former; the causes of action are essentially different. The plaintiff now seeks to compel the vendor to give up possession of the property and to set aside the sale made by defendant No. 1 to defendant No. 2 subsequently to the plaintiff's suit against the latter in 1881. The plaintiff's first suit was as a purchaser of the equity of redemption from defendant No. 1, who had mortgaged the land to defendant No. 2. Defendant No. 1 had not then sold the equity of redemption to defendant No. 2. But, assuming that the question was *res judicata* as regards defendant No. 2, the plaintiff has a cause of action against defendant No. 1, who is bound to perform his contract specifically by completing the sale and putting the plaintiff into possession. The plaintiff has now two causes of action. It is now necessary for him to put an end to the subsequent title of defendant No. 2 under his alleged purchase.

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SARGENT, C. J.—We think that section 103 of the Civil Procedure Code should receive a somewhat strict construction. In the first suit against the second defendant alone, plaintiff alleged that he was the owner of the equity of redemption by purchase from the first defendant, and, as such, was entitled to redeem the second defendant's mortgage. In this suit his case is that he contracted for the purchase of the property from the first defendant, the latter undertaking to clear it of the second defendant's mortgage; that the second defendant has since purchased the equity of redemption from the first defendant, with the full knowledge of the said contract, and he substantially, although not in strict form, seeks that both the defendants may be compelled to specifically perform the contract. Under these circumstances we think that section 103 does not preclude plaintiff from bringing his present suit, and that the District Judge was right in remanding the case for trial on the other issues. Order confirmed. Costs of this appeal to follow the result.

Order accordingly.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1885.
April 8.
DAVIDA'S HARJIVANDA'S, (ORIGINAL PLAINTIFF), APPLICANT, v. TYAB-
ALLY ABDULALLY, (ORIGINAL DEFENDANT), OPPONENT.*

Small Cause Court—Jurisdiction—Question of title—Landlord and tenant—Admission of tenancy—Small Cause Court Act XV of 1882, Sec. 41—Suit in ejectment—Practice.

The plaintiff, alleging that the defendant was his tenant at a monthly rental of Rs. 52, and had refused to deliver up possession to the plaintiff, took out a summons against the defendant under section 41 of the Small Cause Court Act XV of 1882.

The defendant admitted the tenancy, but contended that he held under an unexpired lease for four years. The Judge of the Court of Small Causes was of opinion that a question of title was involved, and he dismissed the case on the ground that he had no jurisdiction to hear it. The plaintiff thereupon applied to the High Court under its extraordinary jurisdiction

Held, that the case was within the jurisdiction of the Small Cause Court.

* Extra Application, No. 10 of 1885.