

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ranade.

TAPIRAM (ORIGINAL PLAINTIFF), APPELLANT, v. SADU
(ORIGINAL DEFENDANT), RESPONDENT.*

Practice—Procedure—Amendment of plaint—Discretion of the Judge—Code of Civil Procedure (Act XIV of 1882), Sec. 53.

The amendment of a plaint under section 53 of the Code of Civil Procedure (Act XIV of 1882) is in the discretion of the Judge, and is not the right of the suitor in all circumstances. It is not enough for a plaintiff to show that the amendment does not alter the character of the suit.

SECOND appeal from the decision of G. C. Whitworth, District Judge of Khandesh.

Certain houses and land belonged to four brothers, *viz.*, Hussain, Ismail, Nasarali and Sarafali, of whom Hussain and Ismail mortgaged them to the defendant Sadu, who entered into possession.

In execution of a money decree afterwards obtained against the other two brothers Nasarali and Sarafali, their right, title and interest in the property were sold and were purchased by the plaintiff Tapiram, who sought to obtain possession and was obstructed by the defendant Sadu. The plaintiff then brought this suit to eject Sadu and to obtain possession of the property.

Subsequently the plaintiff applied to amend his plaint so as to claim only the share of Nasarali and Sarafali, making Hussain and Ismail co-defendants in the suit.

The Subordinate Judge of Yával rejected this application on the ground that it sought to convert a suit for ejectment into one for partition, and he dismissed the suit.

In appeal the District Judge confirmed the decree of the Subordinate Judge.

Plaintiff preferred a second appeal against this decision to the High Court.

Vasudev Gopal Bhandarkar for the appellant (plaintiff):—The suit will lie in its present form. The plaintiff desires to amend the plaint and sue for an undivided moiety by partition and to

* Second Appeal, No. 427 of 1895.

join Ismail and Hussain—*Lakshman Bhisaji v. Hari Dinkar*⁽¹⁾; *Krishnaji v. Sitaram*⁽²⁾; *Ramchandra v. Vasudev*⁽³⁾; *Radanath v. Gisborne*⁽⁴⁾; *Mylapore v. Yeo Kay*⁽⁵⁾; *Syed Mujefur v. Syed Gulam*⁽⁶⁾; *Shekh Ismail v. Raghu*⁽⁷⁾; *Moti Jechand v. Khusal*⁽⁸⁾; *John A. Menesse v. Nasarwanji Pallonji*⁽⁹⁾; *Baburav alias Babaji v. Sitaram*⁽¹⁰⁾; *Ahmedkhan v. Jamiatkhan*⁽¹¹⁾.

Ghanasham Nilkanth for the respondent (defendant) was not called upon.

JARDINE, J. :—We are of opinion that the power to get a plaint amended is subject, under section 53 of the Code of Civil Procedure, to the discretion of the Judge, and is not claimable as a right of the suitor in all circumstances. In *Krishnaji v. Sitaram*⁽²⁾ the amendment was allowed, as the plaintiff had been erroneously advised as to the form of the suit. In *Ramchandra v. Vasudev*⁽³⁾ an opinion was expressed that an amendment ought not to be allowed. It is not enough for a plaintiff to show that the amendment does not convert the character of the suit. In the present case the District Judge has found that the plaintiff acted with his eyes open. We think the suit was rightly dismissed, and confirm the decree with costs.

Decree confirmed.

(1) I. L. R., 4 Bom., 534.

(2) I. L. R., 5 Bom., 496.

(3) I. L. R., 10 Bom., 451.

(4) 14 M. I. A., 1 at p. 7.

(5) L. R., 14 I. A., 168.

(6) P. J., 1881, p. 22.

(7) P. J., 1885, p. 157.

(8) P. J., 1885, p. 176.

(9) P. J., 1888, p. 162.

(10) P. J., 1888, p. 190.

(11) P. J., 1891, p. 7.