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impose a greater servitude upon the owner of the servient tenement." In the present case the defendant has set up a cotton press upon the survey number which before was used for agricultural purposes only, and wishes to employ the previously existing right of way for the purposes of the press. The test to be applied is to see whether any additional burden has or will be imposed on the servient heritage of the plaintiff by the use made or sought to be made of the way by the defendant. There has been no inquiry made upon this point, and an incidental remark only about it is made in the judgment of the lower Court. We ask the Judge of the lower appellate Court to find on the issue embodied in these words after taking evidence, and to certify to this Court his finding thereon within two months.

Issue sent back.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899. *January* 23.

PURUSHOTTAM AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* ATMARAM JANARDAN AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Partition—Two suits for—First suit for partition of family property—Second suit for partition of property held jointly by famil and others—Vritti—Civil Procedure Code (Act XIV of 1882), *Secs.* 13 *and* 43—*Practice.*

A suit brought by some members of a family against the other members of the same family for partition of the joint family property does not preclude a second suit by the same plaintiffs for partition of other property belonging jointly to their family and strangers.

SECOND appeal from the decision of J. B. Alcock, District Judge of Násik.

The plaintiffs and the first six defendants were members of the Parashare family, and as such they were joint owners of a certain *vritti*, called the Parashare *vritti*. They also owned jointly with another family, *viz.*, the Khandve family, a certain other *vritti* called the Khandve-Parashare *vritti*.

* Second Appeal, No. 323 of 1898.

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In 1881 the plaintiffs (as members of the Parashare family) sued (Suit No. 207 of 1881) the first six defendants (also Parashares) for partition of the Parashare *vritti* and other joint family property, obtained a decree, and recovered their share.

The plaintiffs now brought this suit against the other members of their family (defendants Nos. 1 to 6) and the members of the Khandve family (defendants Nos. 7 to 14) for a partition of the Khandve-Parashare *vritti*. The defendants Nos. 1 to 6 contended that as against them the suit was barred by the former suit, inasmuch as the claim now made ought to have been included in it —section 43 of the Civil Procedure Code (Act XIV of 1882).

The Subordinate Judge disallowed the defendants' contention and passed a decree for the plaintiffs.

On appeal by defendants Nos. 1 to 6 the District Judge reversed the decree and dismissed the suit, holding that it was barred by sections 13 and 43 of the Civil Procedure Code (Act XIV of 1882).

The plaintiffs filed a second appeal.

Daji A. Khare for the appellants (plaintiffs).

N. G. Chandavarkar for the respondents (defendants).

PARSONS, J.:—There was a *vritti* owned jointly by the family of the Parashares and there was a *vritti* owned jointly by the families of the Parashares and the Khandves. The plaintiffs are Parashares, and in 1881 they sued the defendants Nos. 1 to 6 (who are also Parashares) for partition of their joint *vritti* and got a decree, and the *vritti* was divided between them. The plaintiffs have now sued the defendants Nos. 1 to 6 and the defendants Nos. 7 to 14 (who are members of the Khandve family) for a partition of their joint *vritti*. The District Judge thinks that the suit is barred by the provisions of sections 13 and 43 of the Civil Procedure Code. We are unable to agree with him. Section 13 cannot apply, for the parties are not the same. Section 43 applies only to claims arising out of the same cause of action. It cannot be said that the claim of the plaintiffs to obtain their share of property owned jointly by them and B is founded on the same cause of action as their claim to obtain the share of property owned jointly by them and B and C. If the cause of action is founded

on a refusal on the part of the defendants to divide, then the refusal in each case is that of different persons owning different rights. If it is founded on the right to claim a partition of what is joint, then the subject-matter is different, for the joint property of A and B is not the joint property of A, B and C. Joint family property is the property owned by one family (*familia*) jointly among its own members, and the decision in *Ukha* v. *Daga*[1] was passed in reference to such property only. Property which is held jointly by several families not the joint family property of each of those families so that it would be compulsory upon each of them, in suing its own member for a partition of their family property, to include it in that suit, or else not be allowed afterwards to sue for its share therein. Section 43 lays down no such rule of law as this. If it did, then this suit would have to include all the joint property of the Khandve family, and if that included property owned by it and other families, the members of those families and all their joint property would also have to be included; the result would be disastrous. We reverse the decree of the lower appellate Court on this preliminary point and remand the appeal for disposal on the merits. Costs to be costs in the cause.

RANADE, J.:—The appellants, original plaintiffs, brought this suit to obtain a partition of their share in a joint *vritti* belonging to the Parashares (represented by the appellants and respondents Nos. 1—6) and the Khandves (represented by the respondents Nos. 7—14). There had been a previous partition suit between the appellants and their bhaubands, the respondents Nos. 1—6, in respect of a division of the joint family property consisting of houses, lands and the Parashare *vritti*, and respondents (defendants) Nos. 1—6 contended that the present suit for a partition of the joint Parashare and Khandve *vritti* was not maintainable under section 43 of the Civil Procedure Code, as the appellants should have included their present claim in the old suit. The other respondents, Nos. 7—14, representing the Khandves did not raise any objection on this ground to the appellants' claim.

The Court of first instance overruled this objection of respondents Nos 1—6, but the lower appellate Court held, chiefly on

(1) (1882) 7 Bom., 182.

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the authority of the ruling in *Ukha* v. *Daga*[1], that the objection was fatal to the appellants' claim under the combined operation of sections 13 (ii) and 43 of the Code. The point for consideration is whether the present claim for the partition of the joint Parashare-Khandve *vritti* was properly rejected by reason of its not having been included in the previous partition suit of the Parashare *vritti*.

It appears to me quite clear that the lower Court of appeal was in error in holding that the precedent in *Ukha* v. *Daga* governed this case. The facts of that case were that the joint family property consisted of lands and debts, and the plaint in the previous suit claimed a division of the debts only, and alleged that the rest of the joint property had been divided. Under these circumstances, it was very properly held that a subsequent suit for the division of the lands could not be maintained under section 43 of the Code. In the present case there was no such allegation. The old suit was confined to the division of the property jointly owned by the Parashare family, including the *vritti* exclusively belonging to the Parashares. The present suit relates to a division of a *vritti* owned in partnership by the Parashares and the Khandves, the latter entire strangers to the Parashares in respect of family relationship. This claim against the Khandves could not have been joined in the old suit for a family partition without infringing the provisions of sections 28, 29 and 44 of the Code about the misjoinder of parties and of subject-matters.

As laid down in *Hari* v. *Ganpatrav*[2], the rule that every partition suit shall embrace all the joint family property is subject to certain exceptions such as (1) where different portions of it are situated in and out of British India—*Ramacharya* v. *Anantacharya*[3]; (2) where a portion of it is not immediately available for partition by reason of its being in the possession of mortgagees, or because it was inám land which required Government permission to give Courts jurisdiction—*Narayan* v. *Pandurang*[4], *Balkrishna* v. *Hari*[5] and *Pattaravy Mudali* v. *Audimula Mudali*[6].

(1) (1882) 7 Bom., 182.
(2) (1883) 7 Bom., 272.
(3) (1893) 18 Bom., 389.
(4) (1875) 12 Bom. H. C. Rep., 148.
(5) (1871) 8 Bom. H. C. Rep., 64.
(6) (1870) 5 Mad. H. C. Rep., 419.

A third class of cases may be similarly excepted from the rule, where, as in the present case, property is held in partnership by the joint family along with strangers, who have no interest in the family partition among the sharers, and who could not, therefore, be made parties in the family partition suit. The case of *Gavrishankar* v. *Atmaram*[1] clearly shows that such cases are possible, and that the mere circumstance that a partition has been effected, does not by itself, in the absence of an agreement to that effect, bar the right for partition of property still undivided, and in respect of which the members retain their status of sharers in an undivided estate. A whole village or a particular community may have joint property in a right of common pasturage or a forest, and such common enjoyment may continue even after there has been a private partition among the members of any one or more of the component families. No intention to relinquish a part of the claim can be inferred by the mere non-inclusion of such a common claim in a family partition suit. The position laid down in *Moonshee Buzloor Ruheen* v. *Shumsoonnissa Begum*[2] has been subsequently explained by their Lordships of the Privy Council in *Pittapur Raja* v. *Suriya Rau*[3]. In the first of these two cases, it had been laid down that the correct test (for the application of section 7 of the old Code, now section 43 of the present Code) was whether the new suit is founded on a cause of action distinct from that which was the foundation of the old suit. This was further explained in the later case. Section 7 does not require that every suit shall include every cause of action, or every claim that a party has, but only that every suit shall include the whole of the cause of action for which the suit was brought—*Mothoor Mohun Mundul* v. *Khemunkuree Dossee*[4]. The cause of action, *i. e.*, the fact or facts which afforded ground for complaint in the family partition suit was plaintiffs' relationship in the family of the Parashares. The cause of action in the present suit was the partnership between the Parashares and Khandves. The causes of action being thus distinct, neither section 13 (ii) nor section 43 can have any operation here. This was the principle on which second suits were held not to be barred by the previous litigation in the following cases—*Maria-*

(1) (1893) 18 Bom., 611.
(2) (1867) 11 Moo. I. A., 553.
(3) (1885) 8 Mad., 520.
(4) (1866) 5 Cal., W. R., 182.

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thodi v. *Appu*[1]; *Pittapur Raja* v. *Suriya Rau*[2]; *Ramhurry Mondul* v. *Mothoor Mohun Mondul*[3].

One rough test to determine whether the cause of action is the same or distinct, is to see if the same evidence supports both claims—*Soorasoondree Dabea* v. *Golam Ali*[4]. It is clear that, judged by this test also, the present suit is not barred by reason of the previous litigation.

For the several reasons set forth above, we hold that the District Judge was in error in dismissing the claim. We reverse his decree and remand the case back to him for disposal on the merits.

Decree reversed and case remanded.

(1) (1892) 15 Mad., 296.
(2) (1885) 8 Mad., 520.
(3) (1873) 20 Cal., W. R., 450.
(4) (1873) 19 Cal., W. R., 141.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

1899. *January* 23.

KOMARGOWDA (ORIGINAL PLAINTIFF), APPELLANT, v. BHIMAJI KESHAV AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Service lands—Mere non-performance of service does not make the holding adverse—Adverse possession—Limitation—Resumption.

Where lands are held as remuneration for services, the fact that no services have been performed does not of itself make the holding adverse. To make the holding adverse there must be a refusal to perform service or a claim to hold the lands free of service.

SECOND appeal from the decision of L. Crump, Assistant Judge of Dhárwár.

Plaintiff was the desái of the Narendra Mahál.

In 1893 he brought this suit to recover possession of certain lands forming part of his *deshgat inám* lands. He alleged that his ancestors had assigned these lands to the ancestors of defendant No. 1 as remuneration for services to be rendered in connection with the office of *mutalik* or deputy of the desái; that up

* Second Appeal, No. 391 of 1898.