Privy Council Appeal No. 12 *of* 1945

Allahabad Appeal Nos. 5 *&* 6 *of* 1942

Mohammad Khalil Khan and others - - - - *Appellants*

v.

Mahbub Ali Mian and others - - - - - *Respondents*

Same - - - - - - - - - - *Appellants*

v.

Mahbub Ali Mian and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST MAY, 1948

Present at the Hearing :

LORD SIMONDS

LORD MORTON OF HENRYTON

SIR MADHAVAN NAIR

[*Delivered by* SIR MADHAVAN NAIR]

This is a consolidated appeal resulting from the consolidation of two appeals, Appeal No. 5 of 1942 and Appeal No. 6 of 1942, from two decrees of the High Court of Judicature at Allahabad dated 28th October, 1941, which affirmed two decrees, one of the Court of the Special Judge first class Shahjahanpur, and one of the Court of the Civil Judge, Shahjahanpur, both dated 14th January, 1939.

Appeal No. 6 of 1942, arises out of a suit (Suit No. 2 of 1938) instituted by Appellant No. 1 and one Fida Ali Khan, on whose death Appellants Nos. 2 to 5 were brought in as his representatives for the recovery of certain property in the Shahjahanpur District. The Respondents Nos. 1 to 4 hereinafter called the Mahbub brothers, and their respective wives Nos. 5 to 8, to whom they had purported to transfer parts of the said property, were the defendants in the said suit. The suit was dismissed by the Civil Judge, Shahjahanpur and the dismissal was confirmed by the High Court on appeal.

Appeal No. 5 of 1942, arises out of an application dated 27th July, 1936, by three of the respondents in the above appeal under Section 4 of the United Provinces Encumbered Estates Act, 1934 (United Provinces Act XXV of 1934). In their statement under Section 8 of the Act, they claimed as their own the property claimed by the appellants in Appeal No. 6. Appellant No. 1 and Fida Ali Khan filed objections under Section 11 of the Act claiming the property as their own. Whilst these proceedings under the Act were pending they filed Suit No. 2 of 1938 above referred to. As that suit was dismissed the Special Judge held in the proceedings under the Encumbered Estates Act that they were not proprietors of the property claimed by them in the said proceedings. An appeal by the appellants to the High Court in these proceedings was dismissed on 28th October, 1941, on the ground that their appeal against the decree in Suit No. 2 of 1938 had been dismissed.

The decision of the Board in Appeal No. 5 of 1942 will depend on its decision in Appeal No. 6 of 1942, which is the main appeal before the Board.

The only question for decision in the main appeal is whether the suit No. 2 of 1938 instituted by Appellant No. 1 and Fida Ali Khan, since deceased, is barred by Order 2, Rule 2, of the Code of Civil Procedure, 1908. Both Courts in India held that it was barred. If the question is decided in favour of the Appellants, the other issues left undecided by the High Court will have to be decided.

Order 2, Rule 2, is as follows:—

(1) Every suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action; but a Plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a Plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

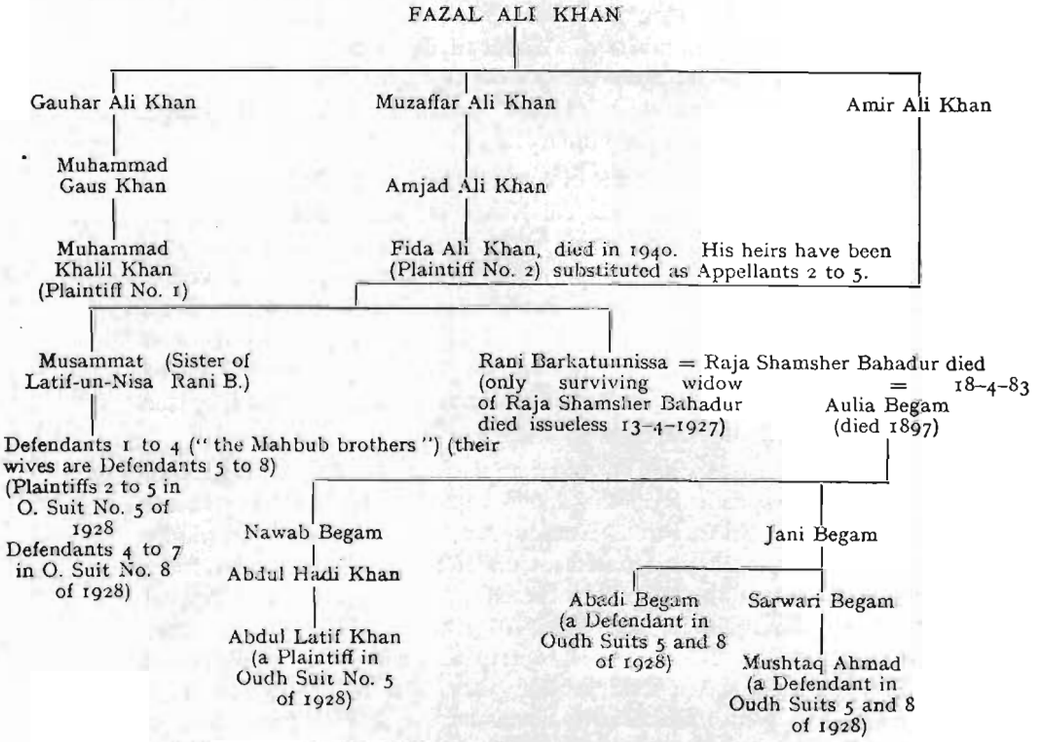
(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

ILLUSTRATION.

A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for rent due for 1906. A shall not afterwards sue B for the rent for 1905 or 1907.

The following pedigree will serve to elucidate the relationship of the parties:—



Rani Barkatunnissa in the above pedigree, a Mohammedan lady of the Sunni sect, died on 13th April, 1927, leaving the land concerned in the appeal situate in the district of Shahjahanpur in the province of Agra, and also land and property in the districts of Sitapur and Hardoi in the province of Oudh. She had obtained lands and property under the will of her late husband Raja Shamsher Bahadur dated 26th March, 1888.

Rani Barkatunnissa was the third wife of her husband. His first wife was Aulia Begam; his second wife died shortly after marriage and is not mentioned in the pedigree.

After the death of Rani Barkatunnissa various relations began to assert claims to her property. The chief claimants were:—

(1) Mohammad Khalil Khan (Appellant No. 1 in Appeal No. 6) and Fida Ali Khan—plaintiffs in Suit No. 2—her cousins on her father's side. Of these, Fida Ali Khan died in 1940, and as already mentioned is now represented by his heirs Appellants Nos. 2 to 5.

(2) Respondents Nos. 1 to 4 in Appeal No. 6 of 1942 (Mahbub brothers) her sister's sons.

(3) Musammat Abadi Begam, Mushtaq Ahmad and Abdul Latif, descendants of Raja Shamsher Bahadur and his first wife.

Following the death of Rani Barkatunnissa, mutation proceedings began in the Revenue Courts in respect of the Shahjahanpur and Oudh properties respectively; and two suits also namely, Suit 5 of 1928 and Suit 8 of 1928, were instituted in respect of the Oudh property in the chief Court of Oudh.

On 12th May, 1928, the Assistant Collector of Shahjahanpur, ordered mutation of names in respect of the Shahjahanpur property to be effected in favour of the applicants Mohammad Khalil and Fida Ali Khan on the ground that Rani Barkatunnissa was a Sunni and under the Sunni law the nephews would exclude the sister's sons, the Mahbub brothers who were the objectors. This Order was reversed in appeal by the Collector of Shahjahanpur on 20th June, 1928, on the ground that the decision in the Revenue Courts should be based on possession, and not on title which should be established in the Civil Court. Accordingly, mutation of names was ordered to be effected in the names of the Mahbub brothers. A second appeal by the applicants from the Collector's Order was dismissed by the Commissioner on 29th October, 1928.

In respect of the Oudh property, after proceedings in the Revenue and Criminal Courts, Abadi Begam succeeded in getting mutation effected in her name by 28th March, 1928, and the whole of that property which had been under attachment was released to her.

On 12th May, 1928, Abdul Latif and the Mahbub brothers instituted Suit No. 5 of 1928, for possession of the Oudh property in the chief Court of Oudh. The defendants to that suit were Abadi Begam; Mushtaq Ahmad; Mohammad Khalil Khan and Fida Ali Khan (Plaintiffs in Suit No. 2 of 1938) and another. Shortly stated Abdul Latif claimed as heir of Raja Shamsher Bahadur under the "Sanad" and Act 1 of 1869; Mahbub brothers claimed as heirs of Rani Barkatunnissa under the Shia law. Abadi Begam and Mustaq Ahmad denied the claim of Abdul Latif and asserted that Abadi Begam was the heir under Act 1 of 1869. Mohammad Khalil Khan and Fida Ali Khan, amongst various grounds, stated that Rani Barkatunnissa was a Sunni, and they were her heirs under the Muhammadan Law.

On 14th September, 1928, Mohammad Khalil Khan and Fida Ali Khan and another filed a suit of their own viz. Suit No. 8 of 1928 in respect of the Oudh property. Their case in that suit was the same as their defence in Suit No. 5. The Defendants to this suit were Abadi Begam (Defendant No. 1) Mustaq Ahmad (Defendant No. 2) Abdul Latif (Defendant No. 3) and Mahbub brothers (Defendants No. 4 to 7) and one Ghulam Jelani.

Two facts may be noticed about Suit No. 8:—(1) It was instituted by Mohammad Khalil Khan and Fida Ali Khan after their claim for mutation in respect of the Shahjahanpur property had been set aside in appeal by the Collector of the Shanjahanpur, but before the decision of the Collector was confirmed on 29th October, 1928, by the Commissioner of the Rohilkand Division. (2) They confined their claim to the Oudh property and did not include in their claim the Shahjahanpur property, although that property also had belonged to Rani Barkatunnissa, and the Collector of Shahjahanpur had already decided against their claim on 20th June, 1928.

Suit No. 5, and Suit No. 8, were tried together by Nanavutty J. The learned Judge on 15th April, 1929, delivered one judgment dismissing the claims of the Plaintiffs in Suit No. 5 and decreeing the claim of Mohammad Khalil Khan and Fida Ali Khan, holding that Rani Barkatunnissa was a Sunni and that they were her heirs under the Muhammadan Sunni Law. This decision was confirmed by the Privy Council on 28th June, 1934, in *Abdul Latif* v. *Abadi Begam* (*connected appeals* (1934) *L.R.* 61. *I.A.* 322).

On 18th February, 1929, after all the evidence in the connected suits had been recorded and after Counsel for the plaintiffs in Suit No. 5, who were defendants Nos. 3 to 7 in Suit No. 8, had finished his arguments in both cases, and whilst Counsel for the plaintiffs in Suit No. 8, who were defendants Nos. 4, 5 and 9 in Suit No. 5, was in the midst of his arguments, the plaintiffs in Suit No. 8 made what the learned Judge called a " belated application " under Order 16, Rule 7, of the Civil Procedure Code to amend the plaint by including in it their claim to the entire immovable property in the District of Shahjahanpur left by Rani Barkatunnissa. The rule empowers the Court to allow either party to alter or amend his pleadings. The petitioners asked that if the application for amendment were to be disallowed, permission be given to them to file a separate suit. The learned Judge rejected both requests by Order dated 21st February, 1929.

On 29th January, 1938, Mohammad Khalil Khan and Fida Ali Khan filed the present suit, Suit No. 2 of 1938, claiming possesion of the property in Shahjahanpur against the Mahbub brothers and their wives to whom they had purported to transfer the property. It will be remembered that Mahbub brothers were Defendants Nos. 4 to 7 in Suit No. 8 of 1928 which had been instituted by the same plaintiffs Mohammad Khalil Khan and Fida Ali Khan, in respect of the Oudh property.

In paragraph 1 the plaintiffs stated as follows:—

> (1) Rani Barkat-un-nisa Begam, deceased, *taluqadar*, who belonged to the Sunni faith, was the owner in possession of the property in district Shahjahanpur, specified as given below in addition to *taluqa* Saadatnagar in district Sitapur and *taluqa* Deoria in district Hardoi. She died on the 13th of April, 1927, leaving behind her nephews, the plaintiffs as her heirs, under the Muhammadan Law. They became the owners of the property, *i.e.*, the estate of Rani Barkat-un-nisa Begam, deceased aforesaid, specified as given below, according to the Hanifi School of Muhammadan Law. Defendants Nos. 1 to 4, who are the sons of the sister of Rani Barkat-un-nisa Begam, deceased, are not her heirs, according to the Muhammadan Law; nor did any right of ownership devolve on them in respect of the property left by her (*i.e.*, Rani Barkat-un-nisa Begam deceased).

Paragraphs 2 to 8 narrate the history of the mutation proceedings in respect of Shahjahanpur and Oudh properties, and also of Suit Nos. 5 to 8.

Paragraph 8 of the plaint sets out the reasons for not including the Shahjahanpur property in Suit No. 8, with a view no doubt to meet objections from the Mahbub brothers. Attention may be drawn to clauses (*c*), (*d*), (*e*), (*f*) of this paragraph as they contain most of the arguments advanced before the Board on behalf of the appellants.

> (*c*) " Abadi Begam and Mirza Mushtaq Ahmad were in exclusive possession of the property in the districts of Sitapur and Hardoi. They were the principal defendants and reliefs for possession were actually sought against them in Suits Nos. 5 of 1928 and 8 of 1928. As the parties were different and different reliefs were sought against them, the property in district Shahjahanpur could not be included in Suit No. 8 of 1928, according to law.
>
> (*d*) Separate causes of action accrued in respect of the property in districts Sitapur and Hardoi on the 28th of March, 1928, and separate causes of action accrued in respect of the property in district Shahjahanpur on the 29th of October, 1928. As the parties were also different, both the properties could not be included in one suit, otherwise the suit would have become bad for ' multifariousness.'

(*e*) At the time of the institution of Suit No. 8 of 1928, the second appeal, preferred by the plaintiffs against the Collector's order dated the 20th of June, 1928, was pending in the Commissioner's Court and had not been decided. It was struck off after the institution of Suit No. 8 of 1928. The cause of action for this suit accrued subsequently when the defendants took possession of the property in question.

(*f*) The right to sue in respect of the property in districts Sitapur and Hardoi was based on other facts while the right to sue in respect of the property in question situate in district Shahjahanpur, is based on different facts."

Paragraph 12 stated the cause of action for the suit as follows:—

12. " The cause of action for this suit accrued on the 29th of October, 1928, when the appeal was struck off by the Commissioner's Court, and on or about the 1st of January, 1938, when the defendants finally refused (to do the needful), at Shahjahanpur within the local limits of the jurisdiction of this court. The suit is cognizable by this court."

Paragraph 13, stated the reliefs claimed by the plaintiffs. Relief (*a*) ran as follows:—

" on declaration of the proprietary title of the plaintiffs to the property specified as given below, and dispossession and removal of interference on the part of the defendants, the plaintiffs may be awarded proprietary possession over the same."

The other reliefs (*b*) and (*c*) related to mesne profits and costs.

Before proceeding further, it may be mentioned that the facts stated in paragraph 1 of the present plaint, *i.e.*, plaint in Suit No. 2, which explain how the plaintiffs became entitled to the property in suit, had been mentioned by them succinctly in paragraphs 13 and 17 of the plaint in their earlier Suit No. 8. Paragraph 22 of the plaint in that suit stated the reasons why the Mahbub brothers had been added as parties to that suit. It stated " . . .

22. That the defendant No. 2 has been impleaded as he was also a claimant in the mutation court and defendants 3 to 7 are the plaintiffs in Original Suit No 5 of 1928 claiming the property in suit and hence have been parties to this suit also."

Defendant No. 3 was Abdul Latif, and Defendants 4 to 7 were Mahbub brothers.

Paragraph 23 stated the dates when the cause of action for the suit arose as follows:—

23. " That the cause of action for the present suit arose within the jurisdiction of this Honourable Court on 13th April, 1927, the date of Rani Barkatunnissa's death and on 28th March, 1928, the date of the order of the Commissioner, Lucknow Division in the mutation case."

It may be observed that one of the dates mentioned in the above statement is 13th April, 1927, when Rani Barkatunnissa died.

Amongst the reliefs claimed in paragraph 25 of the plaint in Suit No. 8 were included reliefs against the Mahbub brothers also. Clauses (*a*), (*d*) and (*e*) of the paragraph ran as follows:—

" (*a*) It be declared that the plaintiffs Nos. 1 to 3 are the owners of the property detailed in Schedules ' A ' to ' D ' attached to the plaint. (This relief was obviously claimed against all the defendants including Mahbub brothers.)

(*d*) A decree for the recovery of the moveables detailed in Schedule ' C ' attached to the plaint be passed against the defendants Nos. 1, 2 and 4 to 7 (defendants 4 to 7 are Mahbub brothers).

(*e*) A decree for the recovery of cash and corn detailed in Schedule ' D ' attached to the plaint be passed against defendants Nos. 1, 2 and 4 to 7 in favour of plaintiffs Nos. 1 and 2 (defendants 4 to 7 are Mahbub brothers)."

A comparison of the reliefs claimed in Suits Nos. 8 and 2 shows that reliefs in the form of declaration and possession were claimed against Mahbub brothers in both suits.

It will be observed that the plaintiffs in the two suits claimed the properties, the Oudh property in Suit No. 8, and the Shahjahanpur property in the present suit, as heirs to Rani Barkatunnissa, who belonged to the Sunni sect, and died on 13th April, 1927, though they described the cause of action, the nature of which their Lordships have to decide, as having arisen on different dates, viz., on 29th October, 1928, and 1st January, 1938, in Suit No. 2, and on 28th March, 1928, in Suit No. 8, adding to it 13th April, 1927, also. It will also be observed that relief was claimed against the Mahbub brothers who were also defendants in the Oudh suit in respect of several items of property covered by that suit.

To resume the narrative, the present suit was contested on many grounds only one of which is now relevant as already stated, that being that the suit is barred by Order 2, Rule 2, Civil Procedure Code as the property in the suit viz.: the Shahjahanpur property was not included by the plaintiffs in their previous Suit No. 8 of 1928. Attention has already been drawn to the terms of Order 2, Rule 2, C.P.C.

The question to be decided is covered by issue No. 1:—

> Is the suit barred by Order 2, Rule 2, as this property was not included in Suit No. 8 of 1928 in the Oudh Chief Court?

The Courts in India answered the question against the present appellants, who will sometimes be referred to as the plaintiffs on the ground that their right i.e. cause of action to recover both Oudh and Shahjahanpur properties came into existence as soon as Rani Barkatunnissa died on 13th April, 1927, that they were entitled to claim the Shahjahanpur property also in Suit No. 8 to which the Mahbub brothers were parties; and as they omitted to do so, confining their claim solely to Oudh property, they were precluded by Order 2, Rule 2, from bringing the present suit to recover the Shahjahanpur property. The Courts also held that the respondents were not precluded from taking advantage of Order 2, Rule 2, because they had opposed the application of the plaintiffs for including the Shahjahanpur property in Suit No. 8.

The learned Judges of the High Court first pointed out that on 14th September, 1928, when Suit No. 8 was instituted, all the parties concerned were aware that a definite dispute existed as regards the right to succeed to properties left by Rani Barkatunnissa, implying thereby that the plaintiffs should have included the Shahjahanpur property in the earlier suit, and then they proceeded to deal with the question what is the cause of action in the present suit. That there was a definite dispute between the parties as regards the Shahjahanpur property when Suit No. 8 was instituted is not now disputed by Counsel for the appellants, his argument being that though there was a dispute no infringement of the plaintiffs' right to the property had occurred earlier than 29th October, 1928, and that the cause of action to recover the property commences only from that date.

After discussing the meaning of the expression " cause of action " as explained in various leading cases the learned Judges expressed their opinion as regards the cause of action in the two suits as follows:—

> " The cause of action in the Oudh suit and in the present suit consisted of the facts that Rani Barkatunnissa was the owner of the disputed properties, that she died on the 13th of April, 1927, that she was a Sunni by faith (the defendants alleging in both cases that she was a Shia by faith), that the plaintiffs were the heirs of Rani Barkatunnissa and entitled to inherit, that in the Oudh case the defendants had denied the title of the plaintiffs and in the other case the defendants in pursuance of the denial of title had obtained possession of the property. Mutation of names had already been obtained by the defendants over the Shahjahanpur property by reason of the order of the Collector, dated the 20th June, 1928, when the Oudh suit was filed on the 14th September, 1928, and the plaintiffs were entitled to make a claim in respect of the Shahjahanpur property when they filed Suit No. 8 of 1928 in the Oudh Chief Court.

The plaintiffs themselves realised this and attempted to get an amendment of the plaint from the Chief Court, but they were opposed by the defendants and their application was dismissed. This also shows that the cause of action for the Oudh properties and the Shahjahanpur properties was the same."

After holding that the cause of action to recover the Oudh property and the Shahjahanpur property was the same and that the plaintiffs' suit would be barred by Order 2, Rule 2, C.P.C., the learned Judges dealt with the question whether the respondents should not be permitted to raise the plea based on Order 2, Rule 2, C.P.C., because of the plaintiffs' application under Order 6, Rule 17. They held that they could raise the plea.

The arguments ably urged by Mr. Jopling, the learned Counsel for the appellants, ranged over a wide ground, but the main arguments may be arranged under the following heads:—

It was urged:—

(1) that the plaintiffs could not commence an action in respect of the Shahjahanpur property while the right to mutation in the Revenue register was the subject of appeal to the Commissioner, which was only decided on 29th October, 1928, i.e. after the Suit No. 8 had been instituted by them.

(2) that the right and its infringement, and not the ground or origin of the right and its infringement, constitute the cause of action, that the cause of action for the Oudh suit (No. 8 of 1928) so far as the Mahbub brothers are concerned was only a denial of title by them as that suit was mainly against Abadi Begam for possession of the Oudh property; whilst in the present suit the cause of action was wrongful possession by the Mahbub brothers of the Shahjahanpur property, and that the two causes of action were thus different.

(3) that having opposed the application of the plaintiffs for the inclusion of the Shahjahanpur property in Suit No. 8, the respondents should not now be allowed to say that the present claim of the plaintiffs is barred. In other words, as stated by Counsel, the respondents should not be allowed to " approbate or reprobate " in connection with the same transaction by raising their present plea.

Controverting the above points, Mr. Dingle Foot, the learned Counsel for the respondents, argued that the cause of action in Suit No. 8 and in Suit No. 2 was the same, that it was the plaintiffs' title to recover the properties which was the same in respect of both properties, that it consisted of facts which proved that the plaintiffs were the heirs of Rani Barkatunnissa under the Hanafi Law she being a Sunni by faith and that it originated on her death on 13th February, 1927. He also contended that the respondents were not precluded from raising the plea that the suit was barred under Order 2, Rule 2, C.P.C.

Their Lordships are satisfied that there is no force in the contention that the plaintiffs in the present suit could not reasonably commence an action in respect of the Shahjahanpur property, while their right to mutation in the Revenue registers was the subject of an appeal to the Commissioner which had not been decided, or in other words, that it was not open to them to sue the defendants in respect of the Shahjahanpur property at a date earlier than the 29th October, 1928, and to include the Shahjahanpur property in the earlier Suit No. 8 instituted on 14th September, 1928. This contention is not supported either by fact or law. Though the plaintiffs had secured an order as to mutation in their favour from the Assistant Collector of Shahjahanpur, that Order was set aside on 20th June. All the parties who are claimants to the properties left by Rani Barkatunnissa were well aware in the course of the mutation proceedings of the controversy that prevailed amongst them about their respective titles to the properties and the question regarding titles had been raised in the earlier suit. Prior to the institution of that suit, on 20th June, 1928, the adverse Order regarding Shahjahanpur property had been passed against the present plaintiffs. They could well have

included the Shahjahanpur property also in that suit unless as they allege the cause of action respecting it is different from the one in the other suit. It is idle to contend that there was a possibility of securing success before the Commissioner, and that they therefore waited to know the result of the Appeal before instituting the present suit. In this connection it is relevant to point out that a party to mutation proceedings is not prohibited from instituting a suit in a Civil Court to establish his right to the property. After stating in Cl. 1 that:—" all disputes regarding entries in the annual registers shall be decided on the basis of possession " Section 40 Cl. 3 of the United Provinces Land Revenue Act (Act III of 1901) which applies to the Shahjahanpur property states that:—" No order as to possession based on this Section shall debar any person from establishing his right to the property in any Civil or Revenue Court having jurisdiction."

Sections 41 and 42 of the said Act deal with the settlement of boundary disputes and the determination of class of tenants.

Section 44 so far as is material to the point under consideration runs as follows:—

> ". . . subject to the provision of subsection 3 of Section 40 all decisions under Sections 40, 41 and 42 shall be binding on all Revenue Courts in respect of the subject matter of the suit, but no such entry or decision shall affect the right of any person to claim and establish in the Civil Court any interest in land which requires to be recorded in the registers prescribed by (*a*) to (*d*) of Section 32. . . ."

It is thus clear that though mutation proceedings in respect of Shajahanpur property had not ended in the Revenue Court, inasmuch as their claim to mutation was rejected by the Collector's order of 20th June, the plaintiffs were entitled to make a claim with respect to Shajahanpur property when the suit for the Oudh property was filed by them on 14th September, 1928, unless the causes of action respecting the two properties were different. Their Lordships are of opinion, as will presently appear, that they were the same.

Shortly stated Order 2, Rule 2, C.P.C. enacts that if a plaintiff fails to sue for the whole of the claim which he is entitled to make in respect of a cause of action in the first suit, then he is precluded from suing in a second suit in respect of the portion so omitted. To apply the rule to the facts of the case their Lordships will have to consider what was the cause of action in Suit No. 8, on which the plaintiffs founded their claim, and whether they included all the claims which they were entitled to make in respect of that cause of action in that suit. For, if they failed to include all the claims, then by force of Order 2, Rule 2, they are precluded from including the claim omitted in the present Suit No. 2. As pointed out in *Moonshee Buzloor Ruheem* v. *Shumsunnissa Begum* (1867) 11 M.I.A. 551 at p. 605, " The correct test in all cases of this kind is, whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit. . . ." The object of the rule is clearly to avoid splitting up of claims and to prevent multiplicity of suits.

The phrase " cause of action " has not been defined in any enactment, but the meaning of it has been judicially considered in various decisions. In *Read* v. *Brown* (1889, L.R. 22 Q.B.D. p. 128) Lord Esher, M.R., accepted the definition given in *Cook* v. *Gill* (Law Rep. 8 C.P. 107) that it meant " every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved." Fry, L.J., agreed and said, " Everything which, if not proved, gives the defendant an immediate right to judgment, must be part of the cause of action ". Lopes, L.J., said, " I agree with the definition given by the Master of Rolls of a cause of action, and that it includes every fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to maintain his action ". This decision has been followed in India. The term has been considered also by the Board. In *Mussammat Chand Kour* v. *Partab*

Singh (1887-1888, 15 L.R. I.A. page 156) Lord Watson delivering the judgment of the Board observed as follows:—" Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set out in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour ".

Before considering the nature of the cause of action in Suit No. 8 and in the present suit—Suit No. 2—and whether the causes of action in the two suits are different or the same, it will be convenient to deal preliminarily with certain points which are closely connected with that main question.

Their Lordships think that the two suits should be considered as suits between the same persons for the purpose of the present appeal. Admittedly, the plaintiffs are the same in both suits. It is true that all the defendants in Suit No. 8 are not defendants in Suit No. 2, but Mahbub brothers who are the principal defendants in Suit No. 2, were also defendants in the earlier suit and reliefs as already pointed out were also claimed against them.

In their Lordships' view the Plaintiffs' title to recover the properties cannot be affected by the different defences set up by the different sets of defendants. If the plaintiffs' title to recover the properties depends on their heirship to Rani Barkatunnissa as contended for by the respondents, then that right cannot be affected by the consideration whether Abadi Begam was defending the plaintiffs' suit on the basis of the Taluqdari Law, while Mahbub brothers were resisting it on the strength of Shiah Law; the plaintiffs are bound to succeed irrespective of the defences set up by the different sets of defendants. Whether the cause of action is one or the same in a suit for ejectment does not depend on the different answers to the claim which may be set up by different defendants. The different titles set up by them cannot split up the cause of action of the plaintiffs into distinct causes of action. It was urged by Mr. Jopling that Rani Barkatunnissa's title to Shahjahanpur property was different from her title to the Oudh property, and this would make the cause of action in Suit No. 2 different from the cause of action in Suit No. 8. By whatever title Rani Barkatunnissa happened to obtain the properties, their Lordships think that the plaintiffs' title to recover them being based on their heirship to Rani Barkatunnissa, that title cannot be affected by the fact that Rani Barkatunnissa got the two properties by different titles.

As stated before, the real question to be considered is what is the true nature of the plaintiffs' cause of action? If it is the same the present suit is barred by Order 2, Rule 2, C.P.C.

The main argument which Mr. Jopling pressed with great force was that the cause of action is the plaintiff's right in law and the facts by which he must prove that right, plus the infringement of that right. According to the learned Counsel, the right and its infringement, and not the ground or origin of the right and its infringement constitute the cause of action. In support of the main proposition, much reliance was placed on the decision in *Brunsden* v. *Humphrey* (1884 14 Q.B.D. 141). In that case the plaintiff brought an action in a County Court for damage to his cab occasioned by the negligence of the defendant's servant, and, having recovered the amount claimed, afterwards brought an action in the High Court of Justice against the defendant, claiming damages for personal injury sustained by the plaintiff through the same negligence:—*Held* by Brett, M.R. and Bowen, L.J., Lord Coleridge, C.J., dissenting, that damages to goods and injury to person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; and therefore the recovery in an action of compensation for the damage to the goods is no bar to an action subsequently commenced for the injury to the person. In their Lordships' view, this decision does not lay down any new principle. What would constitute the cause of action in a suit must always depend on the particular facts of the case. It was laid down in *Brunsden* v. *Humphrey* (*supra*)

that where the question is whether the cause of action in two suits is the same or not, one of the tests that is applied is whether the same evidence would support the claims in both suits; if the evidence required to support the claims is different, then the causes of action are also different. This appears to be clear from the judgments of both Brett, M.R., and Bowen, L.J. Brett, M.R., observed as follows:—

> " . . . Different tests have been applied for the purpose of ascertaining whether the judgment recovered in one action is a bar to subsequent action. I do not decide this case on the ground of any test which may be considered applicable to it; but I may mention one of them; it is whether the same sort of evidence would prove the plaintiff's case in the two actions. Apply that test to the present case. . . ."

Bowen, L.J., quoted the following words of De Grey, L.J., in *Kitchen* v. *Campbell* (1771) 2 W. Bl. 827:—

> " . . . The principal consideration . . . is whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case. And one great criterion of this identity, is that the same evidence will maintain both actions. . . ."

And applying the test mentioned above the learned L.JJ. came to the conclusion in the case before the court that the causes of action as to damage done to the plaintiff's cab, and to the injury occasioned to the plaintiff's person are distinct; in other words, the cause of action on which the first suit was founded was distinct from the cause of action in the second suit which was founded on different facts.

It is important to note that in the course of his judgment Bowen, L.J. also pointed out that in considering whether the causes of action in the two suits are the same, it would be enough if the causes of action in the two suits are in substance proved to be identical. After stating that it is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all, the learned L.J. observed as follows:—

> " The difficulty in each instance arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit." (See page 147.)

At the end of the paragraph, at page 148, occurs the following observation:—

> " It is evident therefore that the application of the rule depends, not upon any technical consideration of the identity of forms of action, but upon matter of substance.

Further on, the learned Lord Justice observed,

> " . . . the point I now have to determine, whether the cause of action arising from damage to the plaintiff's cab is in substance identical with that which accrues in consequence of the damage caused to his person . . ."

These observations show that in considering whether the cause of action in the subsequent suit is the same or not as the cause of action in the previous suit, the test to be applied is, are the causes of action in the two suits in substance—not technically—identical? Applying this test the Learned Judges came to the conclusion that the causes of action in the two suits in *Brunsden* v. *Humphrey* (*supra*) were distinct.

Observations to the same effect appear in certain decisions of this Board. In *Soorjomonee Dayee* v. *Suddanund* (1873, 12 Beng. L.R. 304 at page 315) their Lordships stated as follows:—

> " . . . their Lordships are of opinion that the term " cause of action " is to be construed with reference rather to the substance than to the form of action . . ."

In *Krishna Behari Roy* v. *Brojeswari Chowdranee* (1875) L.R. 2 I.A. 283 at page 285 Sir Montague Smith in delivering the judgment of the Board observed:—

> " . . . their Lordships are of opinion that the expression cause of action cannot be taken in its literal and most restricted sense. But however that may be. . ."

The decision in the *Rajah of Pittapur* v. *Sri Rajah Venkata Mahapathi Surya* (1884-1885) L.R. 12 I.A. 116 does not advance the case of the appellants. In that case the plaintiff sued to recover immoveable property in consequence of having been improperly turned out of possession and afterwards sued to recover from the same defendant moveable property in consequence of its wrongful detention. Their title to the said estate as well as to the half share of the personalty now sued for was under a will of one *Bharayamma*. On the facts, their Lordships held that the causes of action in the two suits were distinct. They held that:—

> " The claim in respect of the personalty was not a claim arising out of the cause of action which existed in consequence of the defendants having improperly turned the plaintiffs out of possession of *Viravaram* (Zemindari property). It was a distinct cause of action altogether and did not arise at all out of the other."

Referring to the above case, Lord Buckmaster stated the true principle concisely as follows in *Muhammad Hafiz* v. *Muhammad Zakariya* (1921-22) L.R. 49 I.A. 9:—

> " . . . the cause of action is the cause of action which gives occasion for and forms the foundation of the suit, and if that cause enables a man to ask for larger and wider relief than that to which he limits his claim he cannot afterwards seek to recover the balance by independent proceedings."

In similar language what was decided in *Brunsden* v. *Humphrey* (*supra*) may be stated as follows, namely that the cause of action which gave occasion for and formed the foundation for the first suit in that case was different from the cause of action which gave occasion for and formed the foundation for the second suit.

The principles laid down in the cases thus far discussed may be thus summarised:—

(1) The correct test in cases falling under Order 2, Rule 2, is " whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit." (*Moonshee Buzloor Ruheem* v. *Shumsunnissa Begum, supra.*)

(2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. (*Read v. Brown, supra.*)

(3) If the evidence to support the two claims is different, then the causes of action are also different. (*Brunsden v. Humphrey, supra.*)

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical. (*Brunsden* v. *Humphrey, supra.*)

(5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers . . . to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. (*Muss. Chandkour* v. *Partab Singh, supra*). This observation was made by Lord Watson in a case under S. 43 of the Act of 1882 (corresponding to Order 2, Rule 2), where plaintiff made various claims in the same suit.

Applying the above principles their Lordships have to decide what is the plaintiffs' cause of action to recover the Shahjahanpur and Oudh properties; is it the same or distinct?

The plaintiffs' cause of action to recover the properties consists of those facts which would entitle them to establish their title to the properties. These facts are the same with respect to both properties, these being,

that Rani Barkatunnissa was the owner of the properties; that she died on 13th February 1927, that she was a Sunni by faith and that they are her heirs under the Muhammadan law. It is undisputed that if they prove these facts they will have established their right to both properties. A comparison of paragraph 1 of the plaint in Suit No. 2 (Shahjahanpur suit) with paragraphs 13 and 17 of the plaint in Suit No. 8 (Oudh suit) will show that substantially the same set of facts is alleged in those paragraphs as constituting their title to the properties. The other paragraphs of the plaint give information about the history of the case and connected matters, but the essence of the claim to the properties is what is contained in the paragraphs already mentioned, and it is the same in both suits. In this connection it is necessary to notice the argument that so far as Mahbub brothers are concerned the cause of action in the Oudh suit which is said to be their denial of the plaintiffs' title, is distinct from the one in the present suit (Shahjahanpur suit) which is said to be their wrongful possession of the Shahjahanpur property. It is true that Mahbub brothers had not obtained possession of the Oudh property but had obtained possession of the Shahjahanpur property. In considering this question it must be remembered that on the death of Rani Barkatunnissa disputes had arisen regarding succession to both the properties at the same time; and each claimant was denying the title of the other on various grounds. Their Lordships have given a summary of their contentions in a previous paragraph; the details of their contentions are fully set out in the judgment of Nanavutty, J. in Suits Nos. 5 and 8. Having regard to the conduct of the parties their Lordships take the view that the course of dealing by the parties in respect of both properties was the same and the denial of the plaintiffs' title to the Oudh property and the possession of the Shahjahanpur property by the defendants obtained as a result of that denial formed part of the same transaction. On this question, the Learned Judges of the High Court have expressed their opinion in two places in their judgment as follows:

> " In the case before us the trespass on title or slander of title in the case so far as the Oudh suit was concerned was not distinct and different either in point of time or in point of character from the trespass on possession in the case of the Shahjahanpur property. . ." (See page 72.)

Again they state as follows:—

> " Here in the present case we find that the two trespasses, one on the Shahjahanpur property and the other on the Oudh property were similar in character and formed part of the same transaction and the evidence to prove the facts which it was necessary for the plaintiffs to prove . . . was the same and the bundle of essential facts was also the same." (Page 73).

Their Lordships are prepared to accept the above view.

The appellants' argument may be met by another reply also. In an earlier portion of the judgment their Lordships have shown that reliefs by way of declaration and possession were asked against Mahbub brothers in the Oudh suit, and the same reliefs have been asked against them in the present suit also against Shahjahanpur properties. Both suits have been treated substantially alike by the plaintiffs and claims in respect of both properties could well have been included in the earlier suit.

It was next argued that having regard to the fact that the plaintiffs made an attempt—though unsuccessful it proved to be—to get the Shahjahanpur property included in Suit No. 8 by their application for amendment of the plaint made on 18th February, 1929, already referred to, it cannot be said that they " omitted to sue " in respect of any portion of their claim within the meaning of Order 2, Rule 2, C.P.C. It is impossible to accept this argument. The fact cannot be denied that Shahjahanpur property was not included in the plaint in Suit No. 8, and it was because it was omitted to be included, that the application for amendment was made to include it in the plaint. Their Lordships are unable to hold that,

because the plaintiffs attempted to get it included in the plaint, but were not allowed to do so by Court's order, they did not " omit to sue " in respect of it. No authority was cited in support of the contention.

For the above reasons, their Lordships hold that the plaintiffs are barred by reason of Order 2, Rule 2, C.P.C., from maintaining the present Suit having regard to Suit No. 8, in which they omitted to claim the Shahjahanpur property. It is to be regretted that as a result of this omission, they would lose this property, but as observed by Lord Buckmaster in connection with the application of the rule in *Kishan Narain* v. *Pala Mal* (1922-23) L.R. 50 I.A., page 115, at page 120, " . . . It is the duty of the Courts to interpret and carry into effect those rules uninfluenced by the consideration of the individual loss that may be occasioned by disobedience of the provisions."

The last argument advanced was that the respondents, inasmuch as they opposed the application for the inclusion of the Shahjahanpur property in Suit No. 8, should not now be allowed to say that the plaintiff's claim is barred. It was urged that they should not be allowed to approbate and reprobate with reference to the same transaction; but their Lordships cannot see how the maxim can be applied to the facts of the present case. Nanavutty, J., dismissed the application for amendment on various grounds. He held that it was a " belated " application, that it would be convenient for the rival claimants to this property to have their claims tried in the Court of the Subordinate Judge of Shahjahanpur to avoid multifariousness, and that the causes of action to recover the two properties were different. In the course of his order, the learned Judge also said, " If and when the Suit in respect of the Shahjahanpur property is filed by Khalil Khan and Fida Ali Khan, as threatened by them, it will no doubt be time enough for Mahbub Ali and his three brothers to take any plea under Order 2, Rule 2, of the Code of Civil Procedure such as they may be advised to take by their eminent Counsel who is now appearing for them." The correctness or otherwise of the reasoning of the Learned Judge's order has no bearing on the question which their Lordships have to decide. What is relevant is to find out what was the precise nature of the objection that the respondents urged for disallowing the plaintiffs' application, or did they in any manner suggest that the petition should be dismissed as it would be open to the plaintiffs to file a separate suit in respect of the Shahjahanpur property? A perusal of the learned Judge's order does not show the nature of the objections raised by the respondents. It does not appear that they filed any written objections. It is no doubt true that a party should not be allowed to approbate and reprobate, but before deciding that the respondents' conduct falls within the rule the Court should have sufficient materials to arrive at a definite conclusion as regards what they did, which their Lordships have not in this case.

Before parting with the case their Lordships desire to express their indebtedness to the able and lucid arguments advanced by the learned Counsel on both sides.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

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