

(1892) 08 CAL CK 0021
In the Calcutta High Court

Abdun Nasir and Another

APPELLANT

Vs

Rasulan

RESPONDENT

Date of Decision : 30-08-1892

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 43

Citation : (1893) ILR (Cal) 385

Hon'ble Judges : W. Comer Petheram, C.J.;Beverley, J

Bench : Division Bench

Judgement

W. Comer Petheram, C.J. and Beverley, J.—This suit was brought to partition property which had belonged to Budur-uddin, who died on the 14th of June 1883.

2. A prior suit had been brought on the 17th of April 1884, by the plaintiff No. 1 against the first defendant to obtain joint possession of the property with her, and that suit was decreed on the 24th of March 1884. In that suit a schedule of the property, joint possession of which was claimed by him, was filed by the plaintiff, and that schedule did not include, either expressly or by implication, a plot of 6 bighas and 2 cottahs of land which formed part of Buduruddin's estate, and which plot is the subject matter of this appeal.

3. The Subordinate Judge has decreed the plaintiffs' suit as to the whole of the property left by Buduruddin except the plot in question, and has dismissed the suit so far as it claims a share of that plot by partition, on the ground that, as the plaintiff No. 1 did not claim joint possession of it in the suit which he brought in April 1884, he cannot now include any portion of it in his claim for possession after partition by reason of the provisions of Section 43 of the Civil Procedure Code. In this view of the case we are unable to agree. Section 43 provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and that if he omits a portion of his claim, i.e., of his claim in respect of that cause of action, he cannot afterwards sue for it. If a person is excluded from joint possession of joint property by his co-sharer, he has a cause of action against him for such exclusion, and every co-charer has

a right to bring an action against his co-sharer to have the joint estate partitioned and to obtain possession of his separated share. The rights, to enforce which these actions may be brought, are separate and distinct, and the causes of action in the one case are not the same as in the other, though no doubt a part of the necessary evidence would be common to both suits. No case has been cited before us which goes as far as the Subordinate Judge has gone in this case.

4. We therefore decree this appeal, set aside the judgment of the lower Court, and remand the case to that Court in order that he may try the question whether the plot of land in question formed part of the estate of Buduruddin and passed to his heirs at his death. If he finds this issue in the affirmative, the plaintiffs would be entitled on the partition to the same share of this plot as of the rest of the property included in the estate. The costs of this appeal will be costs in this cause.