In considering the matter I prefer to follow *C. H. Crowdy* v. *L. O. Reilly* (1). If so, I repel the contention that in suit for malicious prosecution there is no cause of action when proceedings were taken against the plaintiff by the defendant under section 107 of the Code.

In the result, Civil Revision No. 12 of 1954 fails and is dismissed.

Parties are left to bear their own costs in this Court.

APPELLATE CIVIL.

Before Kapur, J.

BAKHSHI AND ANOTHER,—*Plaintiffs-Appellants*

versus

DASAUNDA SINGH AND NINE OTHERS,—*Defendants-Respondents.*

Regular Second Appeal No. 585 of 1949.

Code of Civil Procedure (V of 1908), Order 2, Rule 2—"Cause of action," meaning of—Evidence not same to maintain both actions, second suit whether barred under Order 2, Rule 2.

On 25th August, 1943, plaintiffs sued for declaration regarding half portion of a vacant site claiming to be heirs of B. Suit dismissed on the ground that property did not belong to B. Appeal against this decree also rejected. On 22nd February, 1947, Plaintiffs filed the second suit with regard to the other half of the vacant site on the ground that they were entitled to it as the grandsons of K.S. The defence was that the suit was barred under order 2, rule 2, Civil Procedure Code and also under the Limitation Act. Trial Court decreed the suit and on appeal the District Judge reversed the decision of the Trial Court and held the suit to be barred under order 2, rule 2, Civil Procedure Code. On Second Appeal to the High Court

Held, that the second suit was not barred under order 2, rule 2, Civil Procedure Code. The expression "cause of action" has been defined to mean every fact which it

(1) 18 I.C. 737

would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of the Court. It has no relation whatever to the defence nor does it depend upon the character of the relief. It refers entirely to the grounds set forth 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.

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.

Second Appeal from the decree of Shri *M. R. Bhatia, District Judge, Ludhiana, dated the 18th April, 1949, reversing that of* Shri *Jasmer Singh, Sub-Judge, Ist Class, Jagraon, dated the 23rd August, 1948, and dismissing the suit and leaving the parties to bear their own costs throughout.*

N. L. WADEHRA, for Appellants.

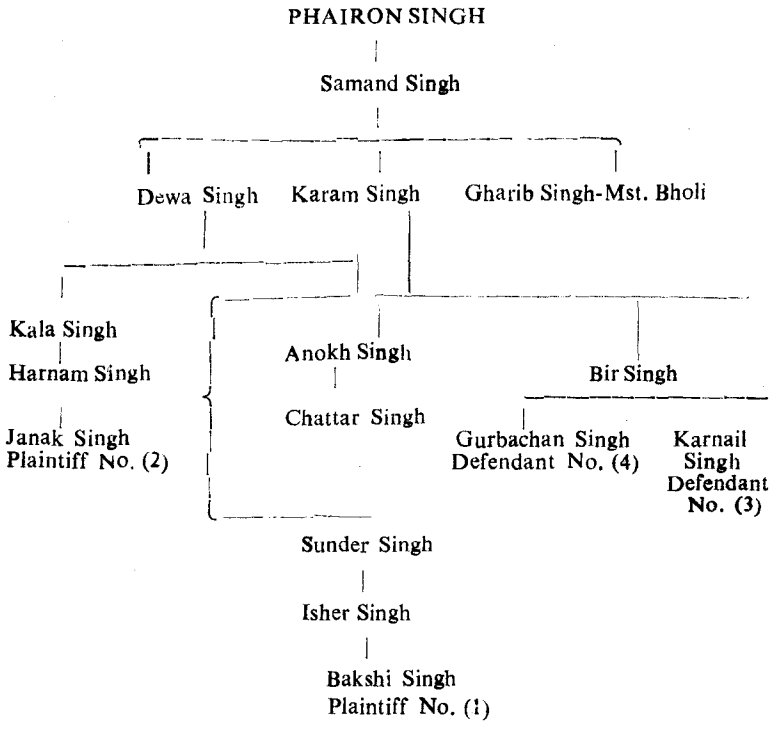
M. R. AGGARWAL, for Respondents.

JUDGMENT

Kapur, J.

KAPUR J.—This is a plaintiffs' appeal against an appellate decree of District Judge, Bhatia, dated the 18th of April, 1949, reversing the decree passed by Mr. Jasmer Singh, Sub-Judge, Jagraon, and thus dismissing the plaintiffs' suit for possession. In the trial Court there was also a claim for the price of manure which both the Courts below negatived and is not the subject-matter of this appeal.

In order to understand the facts of this case it is necessary to give the following pedigree-table :—



On the 25th of August, 1953, the present plaintiffs brought a suit for declaration in regard to half portion of a vacant site shown as *Be* in the heading *Jim* of that plaint which is Exhibit P. 1 in this record alleging that they were in possession as heirs to *Mst.* Bholi who had inherited the property from Gharib Singh, one of their collaterals. This suit was dismissed on the ground that the property did not belong to Bholi and she was not in possession. An appeal against this decree was also dismissed.

On the 22nd February, 1947, those very plaintiffs brought a suit for possession with regard to the other half of the same vacant land on the ground that they were entitled to it as the

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grandsons of Kala Singh and Sunder Singh, sons of Dewa Singh. They alleged that previous to the decision of the suit already mentioned they used to keep their manure heap in this portion of the land and that after the decision of that suit, i.e., the 8th of March, 1945, the defendants had illegally taken possession of the entire site shown red in the plan and had constructed walls round the entire piece of vacant land. They also alleged that they are the owners of this half on account of inheritance and that *Mst.* Bholi was the owner of the other half and that their suit had been dismissed on the ground that they had not produced any evidence in regard to that half portion and that they had since been able to get hold of a document to support their previous claim also. The defendants pleaded that the suit was barred by time and it was barred by the provisions of Order 2, rule 2, and section 11 of the Code of Civil Procedure. The trial Court negatived the plea of the defendants and decreed the plaintiffs' suit as regards the half portion of the land but on appeal the District Judge held that Order 2, rule 2, applied and dismissed the plaintiffs' suit.

The questions for decision in the present case are two, firstly whether Order 2, rule 2, applies and secondly whether on the pleading Article 142 or Article 144 is applicable.

With regard to the first question I am of the opinion that Order 2, rule 2, is not applicable and that the judgment of the trial Court on this point was correct. Order 2, rule 2, provides —

> "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."

The expression "cause of action" has been defined to mean 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 has no relation whatever to the defence nor does it depend upon the character of the relief. It refers entirely to the grounds set forth 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 (*Sheokumar Singh* v. *Bechan Singh* (1), and *Mohammad Khalil Khan* v. *Mahbub Ali Mian* (2). In *Sonu Valad Khushal* v. *Bahinibai*, (3), it was held that two successive suits to set aside two separate sale deeds executed by a Hindu widow were maintainable as the causes of action based on the two deeds are separate. At page 355 a test approved of by Lord Justice Bowen in *Brunsden* v. *Humphrey* (4), was quoted. This test is—

> "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."

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(1) I.L.R. 18 Pat. 789
(2) I.L.R. 1948 All. 571 P.C.
(3) I.L.R. 40 Bom. 351.
(4) (1884) 14 Q.B.D. 141 at p 147

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If this test is applied, it is obvious that it is not the same evidence which will maintain both the actions. In the former suit the claim of the plaintiffs was that the other half of the property belonged to Bholi on whose death they were owners of the property. In the present case the plaintiffs are not claiming through Bholi but through their respective grandfathers who are the sons of Dewa Singh who was a brother of Gharib Singh. I may also quote here a passage from *Rajah of Pittarpur* v. *Sri Raja Vankata Mahipativirya* (1), where the Privy Council observed—

> "That section (now Order II, rule 2), does not say that every suit shall include every cause of action or every claim which the party has, but 'every suit shall include the whole of the claim arising out of the cause of action'—meaning the cause of action for which the suit was brought."

Applying this test it cannot be said that the claim in the present suit arose out of the cause of action on which the previous suit was brought.

For the defendants reliance was placed on *Murti* v. *Bhola Ram* (2), but what was held there was that Order 2, rule 2, has nothing to do with the evidence which may be necessary or may be produced to support or defend a cause of action. This may be in conflict with the opinion of Lord Justice Bowen, but it cannot be said that this case supports the case of the respondents because of the definition of "cause of action" which has been given above. I may here point out that in the Privy Council case relied upon by the respondents,

(1) I.L.R. 8 Mad 580.
(2) I.L.R. 16 All. 165

Mohammad Khalil Khan v. *Mahbub Ali Mian* (1), the test laid down by Lord Justice Bowen was accepted. In this Privy Council case the correct test laid down is whether the claim in a new suit is in fact founded upon a cause of action distinct from that which was the foundation of the former suit. (*See* also *Moonshee Buzloor Ruheem* v. *Shumsocnnissa Begum* (2). In *Mohammad Khalil's* case a claim was made to the estate of Barkatunnissa Begum in regard to a set of property in Oudh which was successful. In the second suit a claim was with regard to property in Shahjahanpur also by the heirs of the same Rani and this was held to be barred by Order 2, rule 2. The facts of this case are quite distinct from the facts of the present case. I am of the opinion, therefore, that the causes of action in the two suits are distinct and the present suit is not barred under Order 2, rule 2, of the Code of Civil Procedure because of the previous suit.

The next question which arises is that the present suit is brought on an allegation of possession and dispossession, the dispossession being alleged on the 8th of March, 1945. Therefore, Article 142 would be applicable. The plaintiffs allege that they were dispossessed on the 8th of March, 1945, and as it is a vacant site and possession follows title they would be in possession and on these allegations the plaintiffs will be taken to have been in possession on the date when they were dispossessed. No doubt the onus is on them to prove that they were in possession within twelve years but the presumption of law will apply to them and they would be taken to be in possession on the date when they allege they were dispossessed. There is nothing on the record to show anything to the contrary.

(1) I.L.R. 1948 All. 571 (P.C.)
(2) 11 I.A. 551 at p. 605

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The question of limitation does not seem to have been raised in the Court of the District Judge and he seems to have been under an erroneous impression that the plaintiffs were claiming the same property which they had claimed as heirs of Bholi and it is for that reason that the learned Judge fell into an error. As the claim of the plaintiffs is in regard to a different piece of property which they claimed as heirs of somebody else and they were in possession within twelve years they are entitled to succeed to that portion which they inherited from their greatgrandfather.

I would, therefore, allow the appeal, set aside the decree of the appellate Court and restore that of the trial Court. As the case was not free from doubt, I leave the parties to bear their own costs throughout.

APPELLATE CIVIL

Before Harnam Singh and Kapur, JJ.

GANGA RAM,—Appellant.

versus

RADHA KISHAN,—*Respondent.*

First Appeal from Order No. 2 of 1952.

1954

June, 23rd

Arbitration Act (X of 1940), Section 38 and rule 10 framed under section 44 by the High Court—Rule 10 whether ultra vires*—Indian Limitation Act (IX of 1908), Article 178—Whether governs applications under section 17 of the Indian Arbitration Act for the enforcement of the award—Limitation for such applications whether prescribed.*

On 20th January 1943, G.R. and R.K. referred their dispute to the arbitration of G.L. by a written agreement On 21st January, 1943, G.L. gave his award which was signed both by G.R. and R.K. and was presented for registration. R.K. paid Rs 250 to G.R. in the office of the Sub-Registrar as directed by the award. On 23rd June, 1944, R.K. instituted a suit for declaration that under the award he had become owner of the property subject to