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at different times,—a procedure which would be likely greatly to reduce the selling price, and be certain to multiply the law costs.

The effect of s. 20 of Act XVII of 1879 must be taken to be an enlargement of the indulgence granted by s. 210 of Act X of 1877, but only in those cases to which the latter section applies. By s. 210 of the Code the Court may, after the passing of a decree in money suits, order that the amount be paid by instalments, provided that the decree-holder consent. By s. 20 of Act XVII of 1879 the Court may in the same suits make the same order *without the consent* of the decree-holder.

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Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.

R. AND N. MODHE, *Paintiffs v.* S. DONGRE, *Defendant.**
[2nd August, 1881.]

Civil Procedure Code (Act X of 1877), ss. 32, 34 and 53—First hearing—Plaint—Practice—Amendment of plaint—Issues.

The words in paragraph 1 of s. 53 of the Code of Civil Procedure (Act X of 1877) "at or before the first hearing" are merely directory and not mandatory, and, therefore, a plaintiff may, subsequently to the "first hearing," amend his plaint, provided such amendment does not alter the original character of his suit.

The plaintiffs (mortgagors) in a suit against their mortgagees sought only for production of the mortgage-deed or for an account, although the averments in the plaint warranted a prayer for redemption. Subsequently to the first hearing of the suit they applied to be allowed to amend the plaint by adding a prayer for redemption. *Held* that the provisions of s. 53 of the Civil Procedure Code (Act X of 1877) did not preclude the Court from permitting the amendment to be made.

It is competent to a Court, at any time before passing a decree, to frame an additional issue embracing a matter not included in the plaint (provided it be not inconsistent with it), or in the written statement, but which may appear upon the allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties or persons.

Section 34 of the Civil Procedure Code (Act X of 1877) limits the time within which a defendant may object for want of parties, but it does not so limit the right of the plaintiff to add parties. In some cases s. 34 would not prevent even a defendant from objecting to the want of a proper party *after the first hearing, e.g.*, where after the first hearing and before decree a co-parcener or remainderman or reversioner is born, or where a woman (who is a party) is married to a man who is not a party to the suit. The objection did not exist at or before the first hearing, and, therefore, could not have been made or waived by the defendant; and if he made it at the earliest opportunity after it came into existence, he would have satisfied the spirit of s. 34.

[Diss., 7 A. 79 (97—101); R., 7 B. 155 (161); 13 B. 664; 14 B. 31 (39); 22 A.W.N. 35; 4 Ind. Cas. 488 (489); 110 P.R. (1882); 159 P.R. (1889).]

THIS was a reference from Rao Saheb V. V. Wagle, Subordinate Judge, at Shevgaon in the Ahmednagar District, under s. 617 of Act X of 1877.

The suit was under s. 16 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The plaintiffs alleged that in the year 1869 or 1870 they passed to the defendant a deed of mortgage for Rs. 100, and made over possession of two fields as security, the profits of which he was to enjoy for five years; that this period had elapsed, but the defendant

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would not restore the [610] fields; and they prayed for the production of the alleged deed of mortgage and for an account. The defendant denied the mortgage, and set up an absolute conveyance.

During the pendency of this suit the High Court in *Shankarapa Dargo Patel* v. *Danapa* (1) held that, in the case of a debt secured by a mortgage, the remedy of an agriculturist lay, not in a suit for an account, but in a suit for redemption under s. 3, cl. (*z*) of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The plaintiffs in consequence, on the suggestion of the Special Judge, Dr. Pollen, moved the Subordinate Judge to permit him to amend the plaint and add a prayer for redemption of the fields from the mortgage. To this the defendant objected that, under s. 53 of the Civil Procedure Code, the amendment could only be made "at or before the first hearing," and that the "first hearing" had already taken place. The Subordinate Judge deeming the point important and applicable to a majority of the suits in his Court, and having regard to the fact that his decision was not appealable, made this reference to the High Court. Upon a consideration of the rulings on s. 29 of Act VIII of 1859, which corresponds with s. 53 of Act X of 1877, the Subordinate Judge held that the amendment was permissible, and that it did not alter the character of the plaintiff's original suit.

The parties did not appear in the High Court.

JUDGMENT.

The judgment of the Court was delivered by

WESTROPP, C. J.—The question, whether the plaint may be amended after the first hearing, is not altogether free from difficulty. The relief sought by the plaint, as at present constituted, is the production of the alleged mortgage and an account of what, if anything, is due to the defendant upon that mortgage. The amendment suggested by Dr. Pollen, and which the plaintiffs have expressed their readiness to make (adding the necessary stamps to their plaint accordingly) is a prayer for redemption of the land from the mortgage. The averments, already contained in the plaint, would warrant such a prayer for additional relief. The defendant has denied the existence of the mortgage. Whether [611] such a mortgage was executed must be determined in the suit. The defendant also contends that the first hearing having passed, s. 53 of Act X of 1877 precludes the making of the proposed amendment. That section says: "The plaint *may*, at the discretion of the Court, and *at or before the first hearing*, be rejected, returned for amendment within a time to be fixed by the Court, or amended then and there, upon such terms as to the payment of costs occasioned by the amendment as the Court thinks fit, '(*a*) if it does not state correctly and without prolixity the several particulars hereinbefore required (2) to be specified therein; or' under the other circumstances mentioned in cls. (*b*), (*c*), (*d*), (*e*) and (*f*)." The words "and at or before the first hearing," the defendant contends, imply that an amendment, after the first hearing, in any of the particulars referred to or mentioned in s. 53, cannot be permitted. It must, however, be observed that there are not any negative words in that section prohibiting an amendment at any time subsequently to the first hearing, and there is this further and stronger reason for not implying such a prohibition from the words "at or before the first

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(2) *Vide* ss. 42, 43, 50, &c.

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hearing," that, by making such an implication, we should bring cl. (*f*) of the 53rd section into direct conflict with the second passage of s. 32. So far as s. 53 *per se* is concerned, the words "at or before the first hearing," whatever their respective value may be, apparently regulate cl. (*f*) of that section to the same extent as those words regulate any other portion of s. 53. Clause (*f*) is that which allows amendments "if it (the plaint) is wrongly framed by reason of *non-joinder* or *misjoinder of parties*, or because the plaintiff has joined causes of action which ought not to be joined in the same suit." If the words "at or before the first hearing" be construed so to govern this cl. (*f*) as to prohibit by implication an amendment by way of *adding parties*, such a construction by implication would be in direct contravention of the express provision in the second passage in s. 32, which runs thus: "And the Court may *at any time*, either upon or without such application, and on such terms as the Court thinks just, order that any plaintiff be made a defendant or that any defendant be made a plaintiff, *and that the name* [612] *of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit be added.*" It may be said that this passage might be rendered consistent with the construction of s. 53 contended for by the defendant, by confining the words "at any time" to any time before the hearing, but such a limitation of the words "at any time" is absolutely precluded by the fact that those words "at any time" employed as they are in the second passage of s. 32 in relation to the making of new parties, are used in direct antithesis to the words "on or before the first hearing," employed with reference to the misjoinder of parties in the first passage of s. 32.

As to s. 34, which enacts that "all objections for want of parties or for joinder of parties who have no interest in the suit, or for misjoinder as co-plaintiffs or co-defendants, shall be taken at the earliest possible opportunity, *and in all cases before the first hearing*; and any such objection not so taken shall be deemed to have been waived by the defendant;" it limits in point of time the right of the defendant to object for want of parties, but it does not so limit the right of the plaintiff to add parties. Often a defendant may be indifferent to the absence of persons who ought to be parties; but it, nevertheless, may be most important for the plaintiff to add them in order that they may be bound by the decree in the cause. The plaintiff may not, until an advanced stage in a cause, become aware that persons ought to be made parties who have not been so made. The defendant may be well aware that those persons ought to be made parties, but purposely lets the first hearing pass without objecting to their absence from the suit, and thus, so far as he is concerned, waives the right to object. But his waiver of that objection would not affect the absent parties, and a decree made in their absence would not bind them. Hence it is that, although s. 34 limits the defendant's right to object, the second passage of s. 32 leaves it open to the plaintiff "at any time" before decree to obtain permission to make new parties. Cases might occur in which s. 34 would not prevent even the [613] defendant from objecting to the want of a proper party after the first hearing, *viz.*, where after the first hearing and before decree a co-parcener or remainderman or reversioner is born, or where a woman (who is a party) is married to a man who is not a party to the suit. The objection did not exist at or before the first hearing, and, therefore, could

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not have been made or waived by the defendant, and, if he made it at the earliest opportunity after it came into existence, he would have satisfied the spirit of s. 34.

The only part of s. 53 which contains an express negative enactment is the proviso near its end, "that a plaint cannot be altered so as to convert a suit of one character into a suit of another and inconsistent character;" but this is restrictive as to the nature only of the amendment, and not as to the time within which it may be made. There not being in s. 53 any positive prohibition of the amendment of the plaint at any time before decree, and the result of holding that the words "at or before the hearing" constitute an implied prohibition of an amendment after the hearing, being to create a conflict between cl. (*f*) of s. 53 and the second passage in s. 32, which it is not to be supposed that the Legislature intended, and the Legislature having used negative words where it resolved to prevent amendments wholly inconsistent with the case originally made in the plaint, we incline strongly to the opinion that the words "at or before the hearing" are merely directory and not mandatory, and, therefore, that the amendment, whereby the plaintiffs would seek redemption of the mortgage, may be made, although the first hearing of the suit has passed. We can well understand why the Indian Legislature should not imperatively limit the power of amendment when we have regard to the many infirmities in pleading which present themselves especially in the Mofussil Courts. It is a matter of familiar experience to us that when a party has launched his case in an inappropriate or erroneous manner, he would, if not permitted to amend after the first hearing, and if compelled to bring a fresh suit, find such new suit barred by the Law of Limitation. To prevent such a hardship, the Privy Council has, when a cause was in its most advanced stage, permitted an amendment of the plaint: *Mahomed* [614] *Zahoor Ali Khan* v. *Mussamat Thakooranee Rutakoer* (1). It is also unjust to a plaintiff to put him to the great expense of fresh Court-fees for a new suit when a reasonable amendment, not inconsistent with his case as it originally stood, might equally well answer his purpose as the new suit.

Even if the plaintiffs be not, as we think they are, entitled to amend their plaint by praying that they may be at liberty to redeem the mortgage, it is competent for the Subordinate Judge under s. 149 of the Civil Procedure Code, "at any time before passing a decree," to frame an additional issue. The sources whence an issue may be framed are stated in ss. 146 and 147. An issue as to whether a plaintiff is entitled to redeem a mortgage on which his suit is founded, and in respect of which his plaint prays an account, is not inconsistent with his case as launched. The Court, it will be seen upon reference to those sections, is not confined to the written pleadings, *viz.*, the plaint and written statements (2). Allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties or persons, afford proper materials.

The Subordinate Judge should permit the plaintiffs to amend their plaint by adding a prayer for redemption of the lands from the mortgage in the plaint mentioned, and should also frame an issue as to whether the plaintiffs are entitled to redeem that mortgage, and such other issues as may be necessary for the proper determination of the cause.

(1) 11 M.I.A. 468 (487).
(2) *Vide Apaya* v. *Rama*, Printed Judgments of 1879, p. 297 (*a*).