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EMPRESS v. BHAGVANTA RAVJI.

There was no appearance on either side in the High Court.

KEMBALL, J.—The District Magistrate is, in the opinion of the Court, right. The powers conferred originally on Rav Saheb Moro Raghunath Bivalkar were those of a 2nd Class Magistrate. Since the passing of the new Code those powers, whatever they may be, must be taken, by virtue of section 2 of the new Code, to have been conferred by the new Code. This was obviously enacted to avoid the inconvenience of re-appointing officers on the repeal of the old Code; but the provisions of section 2 were not intended to continue to 2nd Class Magistrates a jurisdiction which the new law expressly says they shall not exercise except they are specially empowerd so to do.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

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June 15.

RUTTONSEY LALJI AND OTHERS, PLAINTIFFS, *v.* POORIBAI AND OTHERS DEFENDANTS.*

Practice—Agreement of compromise of the suit—Subsequent disagreement—Application for decree in terms of agreement—Procedure—Civil Procedure Code (Act XIV of 1882), *Sec.* 375.

After the hearing of the suit had begun, the plaintiffs and defendants came to an agreement by which they settled all the matters in dispute between them in the suit. The agreement was in writing, and dealt in one clause with the dispute, the subject-matter of the suit, and in a second clause, with another dispute of long standing between the parties, with which the suit had nothing to do. The plaintiffs subsequently objecting to consent to a decree being taken in terms of the first clause of the agreement, the defendants took out a rule *nisi*, calling on the plaintiffs to show cause why the agreement should not be recorded in Court, and why the Court should not pass a decree in accordance therewith, under the provisions of section 375 of the Civil Procedure Code (Act XIV of 1882). The rule was argued on affidavits on either side, the plaintiffs objecting that the above section did not apply to such a case as this, and that, in any case, the matter could not be decided on affidavits, but evidence must be gone into.

Held that section 375 gave the Court the power to deal with such a case as this in the manner required, and that this was a proper case in which exercise such a power; and that, in the circumstances of this case, no definite procedure having been enjoined by the Code, the matter might properly be decided on affidavits.

Rule made absolute accordingly.

* Suit No. 104 of 1882.

ARGUMENT of a rule taken out on the 2nd April, 1883, by the defendants, calling on the plaintiffs to show cause why an agreement of compromise of the suit, entered into between the first defendant and the first plaintiff, should not be recorded in Court, and a decree be passed in accordance with the same, under the provisions of section 375(1) of the Civil Procedure Code (Act XIV of 1882).

The second defendant was the husband of the first defendant, and merely a formal party; the second plaintiff was the son of the first and joint with him, the first plaintiff being the manager of the family.

The suit was brought to restrain the dafendants from building a projected house in such a way as to interfere with the plaintiff's enjoyment of light and air. On the 6th March the suit was called on for hearing, and issues raised; then adjourned for a fortnight at the request of the parties. In the interval, in consequence of the intervention of two mutual friends, the parties endeavoured to come to a settlement of the matters in dispute in the suit, and a written agreement was drawn up, the material portions of which were as follows :—

"I.—I, Pooribai, am not to make my house higher than it was originally; and as to the litigation relative thereto that is going on in the High Court, that litigation is immediately to be got stopped by you and by me; and with regard to that litigation, as to whatever costs you may have incurred in respect of your solicitor and barrister, and may have been incurred by you personally, or such as may hereafter be incurred, I have agreed to pay on that account net Rs. 1,000, namely, one thousand, in the lump; and a settlement of all the costs of your solicitor, &c., you yourself are to make; and all the costs of my solicitor, &c., I myself am to pay.

(1) Section 375.—If a suit be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise, or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final, so far as it relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise, or satisfaction.

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"II.—With respect to the narrow passage or gully which there is between your house and my house, having formerly litigated by means of a suit filed in the Court, you established your right to it; so you state.

"Therefore by means of your litigation in the Court, if the right to the said narrow passage is established as yours, and by the document (judgment or decree) of the Court such right should appear to be established, and if it be proved that I have no right to let water run into the said narrow passage, and that it was not customary for water to run into the passage formerly, and that I have newly caused water to run into it, then, with regard to that, I am to make and deliver to you a writing (to the effect) that you have full power at any time to stop my water from running into the passage in the event of any disagreement occurring between you and me; such is the writing which I am duly to make and deliver to you.

"According to the particulars written above, all your and my dispute has been settled of your and my free will and pleasure. That is agreed to and approved by you and by me, and by your and my heirs and representatives."

The agreement was signed by the first plaintiff and the first defendant. Subsequently, when it was proposed to take a decree in this suit in terms of the first part of the above agreement, the plaintiff objected, on the ground, as he alleged, that the first part of the agreement was not absolute, but conditional on the defendant admitting her title to the gully, which she had not yet done. The plaintiff also alleged that the agreement was not intended to be final; another and more formal document, which should embrace both the matters in dispute, being all along contemplated. The first defendant denied both allegations, and took out the above mentioned rule to enforce the recognition of the agreement by the plaintiff.

June 14.—The rule now came on for argument. The material allegations made by the affidavits on either side sufficiently appear in the decision of the learned Judge.

Inverarity, for the defendant Pooribai, supported the rule.

Jardine, for the plaintiff, showed cause against it.—The agreement was not signed by all the parties to the suit. It is not

confined, moreover, to the subject-matter of the suit, but deals with the gully as well. The two parts of the agreement are not separable, the first part being conditional on the observance of the second. The affidavits of the plaintiff sufficiently show that. In any case, this is not the right way in which to enforce the agreement. Section 375 was not meant to apply to such a case as this, when the parties have ceased to be in agreement, if they ever were agreed. The right and only course for the defendant to follow is to bring a suit for specific performance of the agreement (Fry on Specific Performance, p. 653). If section 375 had been meant to apply to such a case as this, some definite procedure would have been provided. The true nature of the agreement cannot be tried in this way merely on affidavits. The plaintiff, in any case, must be allowed to call evidence. We have no objection to a supplementary issue being raised in the suit, as to the nature and binding effect of this agreement, and having that tried first, before the case is gone into on the merits.

Inverarity, contra.—The second plaintiff is the son of the first; they are joint, and the father is the manager of the family. It is enough that he signed the agreement. The second defendant is merely a formal party, and his signature was not necessary. There is no authority on the application of this section; but a similar course to the one now taken has frequently been taken under section 523, which is in many respects analogous to section 375. The very object of section 375 is to afford a less cumbersome and expensive remedy in a case of this sort, than that by an action for specific performance. If it were not so, the section would be superfluous. Section 375 is analogous to section 24, sub-section 7, of the Judicature Act of 1873(1).

(1) Section 24, Sub-section 7.—The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act, in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

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SCOTT, J.—I am asked to give effect to the 375th section of the Civil Procedure Code (Act XIV of 1882), and to record an agreement by which this suit has been adjusted between the parties. I cannot find in the Reports any instances of the application of this section, but two instances of the application of an analogous section, section 523, have been brought to my notice.

It has been argued that section 375 only applies where the parties are in agreement at the moment of moving the Court; and that, if they are not then in accord, the only remedy on the agreement sought to be enforced is by suit for specific performance. Such a reading of the clause would deprive it of all utility, as parties in agreement can, apart from this section, either come into Court with a consent decree, or put in force section 152 of the Code. To give the section substantive effect I must interpret it more largely than the plaintiff desires. I think the Legislature introduced this rule to meet the case where parties, having agreed together, subsequently fall out. It was devised as an alternative and more expeditious course than a separate suit for specific performance, which remedy still remains open to the parties. I prefer, therefore, to follow the analogy of the decisions on section 523, and to hold that this section is intended to enforce agreements unconditionally made, even though one of the agreeing parties should wish to withdraw his consent.

I have examined the English authorities on this subject, and I find my view is in accordance with the most recent decisions. The outcome of the various cases I have consulted is that "a simple agreement between the parties for the compromise of the suit can be enforced by interlocutory application in the existing cause; but when the agreement goes beyond the subject-matter of the suit the remedy is by bill for the specific performance." See *Pryer* v. *Gribble*(1); *Scully* v. *Lord Dundonald*(2). See also Judicature Act, 1873, section 24 sub-section 7(3). This rule is somewhat extended by the Indian law, for section 375 of the Civil Procedure Code says "the Court shall pass a decree in accordance with the agreement so far as it relates to the suit."

(1) L. R., 10 Ch. Ap., 534. (2) L. R., 8 Ch. Div., 658.

(3) *Vide* note, *ante*, p. 307.

It was further contended that the agreement in question was conditional, and not absolute. It is, however, absolute in its written terms; and to admit any oral agreement in contradiction would be against section 92 of the Evidence Act (I of 1872).

Moreover, the alleged conditional character of the document is denied, not only by the defendant, but also by the two persons who were called in as friends of the respective parties to arrange all matters in dispute.

It is also argued that such a matter should not be settled on affidavit, but as a special issue on oral evidence. I can conceive cases where such a course might be advantageous, and as no procedure is prescribed, I presume the Court could order it. But I do not think it is necessary in the present case. The procedure followed by the defendant, though not prescribed by section 375, is the one adopted in England in similar circumstances, and is analogous to that laid down in section 523 and in section 258 of our Code. I hold it sufficient in the circumstances of the case.

It is worth noticing on this point that by the agreement the defendant concedes all that the plaintiffs asked for in their plaint. She says in so many words "I am not to make my house higher than it was originally."

The agreement contains two undertakings, only one of which relates to the subject of this suit. But the two matters are quite distinct, and the performance of the one is not dependent on the performance of the other. Section 375 only enables me to enforce that which relates to the subject-matter of the suit. I, therefore, order that the agreement be recorded, and that a decree issue in accordance with it, so far as it relates to the subject-matter and the settlement of this suit, excluding the arrangement as regards the gully. Costs to be borne by the plaintiffs.

Rule made absolute.

Attorneys for the plaintiffs.—Messrs. *Shapurjee and Thakurdass.*

Attorneys for the defendants.—Messrs. *Tyabjee and Dayabhai.*