

1887
Nov. 24.

APPEL-
LATE
CIVIL.

12 B. 235.

Chund (1). The decree-holder testifies to the payment, and his receipt, supported by his personal acknowledgment, can be proved "as a fact": see *Haji Abdul Rahiman v. Khoja Khaki Aruth* (2).

[237] *Goverdhanram Madhavaram*, for the defendant, relied on *Haji Abdul Rahiman v. Khoja Khaki Aruth* (2), and contended that the payment could not be recognized.

OPINION.

NANABHAI HARIDAS, J.—We are of opinion that the Subordinate Judge is right in holding that the last clause of s. 258 of the Civil Procedure Code (Act XIV of 1882) does not apply to this case. The payment of Rs. 38 by Balaji to Ganpatsing can be proved as a fact by the evidence of Ganpatsing supported by his receipt (Ex. 3) for such payment. See *Haji Abdul Rahiman v. Khoja Khaki Aruth* (3). The Subordinate Judge to be informed accordingly.

12 B. 237.

ADMIRALTY JURISDICTION.

Before Mr. Justice Farran.

THE BOMBAY AND PERSIA STEAM NAVIGATION COMPANY, LIMITED
(Plaintiffs) v. MESSRS. SHEPHERD AND HAJI ISMAIL HOSSEIN,
(Defendants).* [1st February, 1887.]

Practice—Parties—Suit originally against owners—Amendment of plaint—Ship added as party defendant.

In a suit for collision originally filed against the owners of a ship,
Held, that the plaintiffs might amend the plaint by adding the ship as a party defendant.

APPLICATION in Chambers.—The plaintiffs sued the defendants to recover Rs. 50,000 as damages for loss sustained by them by reason of a collision which took place on the 18th December, 1886, between the plaintiffs' steamship "King Arthur" and the defendants' steamship "Zuari." The plaintiffs alleged that the collision was caused solely by the fault of the "Zuari" and those on board of her, and was not occasioned by the fault of the "King Arthur." The defendants' ship the "Zuari" was sunk by the collision. This suit was filed against her owners on the 21st December, 1886.

The "Zuari" was subsequently floated, and on the 25th January, 1887, the plaintiffs applied for leave to amend the plaint by adding the ship "Zuari" as a joint-defendant in the suit.

[238] *Chalk*, for the defendants, objected.—The plaintiffs filed their suit three days after the collision, and elected to proceed *in personam* against the owners, and not against the ship. They now seek to change the nature of this suit by making it an action *in rem*. The written statement of the defendants has been prepared. The plaint cannot now be amended. He referred to Coote's Admiralty Practice, p. 23 (2nd ed.).

Inverarity, contra:—He cited *The Zephyr* (4).

* Admiralty Suit No. 7 of 1886.

(1) 14 C. 376.

(3) 11 B. 13, 15, 19, 23, 36.

(2) 11 B. 26.

(4) 11 Law Times, N.S. 351.

JUDGMENT.

1st February, 1887. FARRAN, J.—This is an application to amend the proceedings by adding the steamp-ship "Zurai" as an additional defendant. The defendants upon the record are her owners. I have already intimated my opinion that I ought to allow the amendment if I have power to do so. Should judgment be recovered by the plaintiffs, and should they fail to obtain satisfaction from the defendants personally, they would be entitled to take proceedings *in rem* against the ship to enforce their maritime lien—*The "Orient"* (1). Concurrent proceeding *in rem* and *in personam* could also be adopted by the plaintiffs: see *The Mali Ivo* (2), where the earlier authorities are referred to; but, if such proceedings were taken in different Courts, the Court, in which the later proceedings were taken, would have jurisdiction in its discretion to stay them until the termination of the earlier proceedings—*The Peshawur* (3). If the proceedings were taken in the same Court I presume that discretion would, as a rule, be exercised by amalgamating the two actions.

The foregoing remarks are made without reference to the provisions of the Civil Procedure Code. If without hardship upon the defendants the two proceedings can be included in the same action, it is obviously for the benefit of all parties that it should be done, rather than that the plaintiffs should be left to adopt separate proceedings. The plaintiffs did not, in the first instance, make the defendants' ship a defendant, (if I may use the expression) as she was then submerged in the harbour, which may be accepted as a fair reason for the course they have adopted. [239] She has since been raised. The only suggested hardship occasioned to the defendants, which would not equally have been occasioned to them had the plaint been framed in the first instance in the manner now proposed, is that instructions for the drafting of a written statement have been prepared for counsel. It seems unlikely that these will require, except perhaps in the heading, any modification if the proposed amendment be allowed. At any rate, the matter is too puerile to stand in the way of the Court making the order asked for, if for other reasons it be expedient to make it. It was argued that the plaintiff had deliberately elected his remedy, and that having done so, he should not be allowed to change his mind. The above quoted authorities show that the question of election does not arise, as the remedies *in rem* and *in personam* are cumulative.

The main argument of the solicitor for the defendants was, however, based upon a passage in Cooke's Admiralty Practice (2nd ed.), p. 23; where citing *The Hope* (4) and *The Volant* (5), it is laid down that it is not competent for the Court to engraft proceedings *in personam* upon proceedings *in rem*. In those cases after judgment the proceeds of the vessel had proved insufficient to meet the damages awarded, and it was sought to supplement them by means of a motion against the master personally who had entered an appearance, and the Court held that the initial proceedings regulated the relief which it was competent for the Court to afford; and that the master's entering an appearance did not enlarge the scope of the proceedings *in rem* already adopted. A contrary decision had been arrived at in the case of *The Triune* (6). The later decisions, however, afford no ground for the contention that at an early stage and in a proper case the initial proceedings cannot be amended so

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(1) L. R. 3 P.C. 696.

(2) L.R. 2 Ad. & E. 356.

(3) 8 Prob. Div. 321.

(4) 1 W. Rob. 154: (158.).

(5) 1 W. Rob. 393.

(6) 3 Hag. 114.

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as to bring them into the form which they would have assumed in the first instance, but for the ship not being, or not being supposed to be, amenable to the process of the Court.

The objection, that the claim against the ship and the claim against the owners of the ship are of such a distinct nature and [240] enforceable by such different processes that the one cannot be engrafted upon the other, applies equally to commencing a composite suit in which such claims are united, and to adding the one claim to the other by amendment after the suit has been initiated. In principle, I am unable to see any reason why they should not be united. It is much the same as suing upon the covenant in a mortgage, and to enforce a lien upon the mortgaged property in the same suit, though in form the mortgaged property is not made, as it were, a defendant.

Is such a proceeding allowable according to the practice and procedure of the High Court? I am not aware that it could have been resorted to in the Court of Admiralty in England prior to the Judicature Acts. No case has been brought to my notice in which this has been done; and Mr. Inverarity, who argued the case for the plaintiff, stated that, on looking through the forms adopted by that Court and the headings of a large number of cases reported from it, he could find no instance in which a ship and its owners, or masters have been jointly sued. The practice in the High Court of Bombay has been different, at any rate of late years, and it is usual here to make the ship and her owners defendants in cases of damage arising out of a collision: see *The Augusta* (1). In the cross suit brought by the defendants in the present case against the plaintiffs' vessel the plaintiffs, as her owners, have been made defendants jointly with their vessel, and that course is within my experience the usual one adopted. The question is, can it be sustained? If it can, principle and convenience alike, I think, demand its retention.

The rules regulating Admiralty practice provide that a suit shall be commenced by a plaint according to the provisions of the Code of Civil Procedure. They were framed when the Code of 1859 was in force, and when the power of the Court to regulate its procedure was more extended than it is at present. The rules subsequent to the one above referred to, provide for the taking out of a warrant of arrest when the suit is *in rem*, and make no special provision when the suit is *in personam*; but Rule 54 directs that proceedings not provided for by the rules [241] shall be regulated by the rules and practice of the High Court in suits brought in it in the exercise of its ordinary original civil jurisdiction. Though these rules do not apparently contemplate a suit *in rem* and *in personam* being combined, they do not expressly or by necessary implication forbid it. The Code of Civil Procedure of 1882 applies to proceedings on the Admiralty side of the High Court; s. 645 A shows that this is so.

Section 28 provides that "all persons may be joined as defendants against whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." If the section applies in cases where a vessel is defendant, the question before me is solved. "Person" includes any company or association or body of individuals, whether incorporated or not: see Act I of 1868, s. 2. Can it be held to apply to a vessel? I think it can. Section 48 provides that every suit shall be

(1) 10 B.H.C.R. 110.

instituted by presenting a plaint. By s. 50 the plaint must contain (c) the name and description of the defendant. Unless a vessel be included in the term "defendant" it follows that no suit in which relief is sought against a vessel can be instituted under the Code. I conclude, therefore, that the expression "defendant," used in s. 28, includes a vessel, which for this purpose is invested with a *persona*, and I shall allow the amendment asked for. Adding a new defendant does not alter the cause of action, and the objection founded on s. 53 is without foundation. The plaintiffs must bear their own costs of, and incidental to, the actual amendment and to the obtaining of an order for that purpose. The costs incurred by both parties in arguing the question of the power of the Court to amend, must be made costs in the cause.

Attorneys for the plaintiffs:—Messrs. *Winter and Burder*.

Attorneys for the defendants:—Messrs. *Chalk, Walker, and Smetham*.

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[242] ORIGINAL CIVIL.

Before Mr. Justice Farran.

DATUBHAI EBRAHIM (*Plaintiff*) v. ABUBAKER MOLEDINA
(*Defendant*). * [3rd September, 1887.]

Damages—Agreement to lend money—Damages recoverable by lender for breach of such agreement—Contract Act IX of 1872, ss. 73 and 74.

The plaintiff, a money-lender, by a written agreement agreed to lend the defendant the sum of Rs. 20,000 at $7\frac{1}{2}$ per cent. *per annum* for three years on the security of certain lands. From the evidence it appeared that the loan was to have been advanced on the 1st March, 1887, and that the plaintiff's attorneys had prepared the necessary deeds, which were ready on that day for execution by the defendant. The plaintiff had on that day withdrawn Rs. 20,000 from his bankers, where it had been lying in deposit, bearing interest at 6 per cent. *per annum*, and his *munim* took it to the attorneys' office for payment to the defendant. The defendant, however, did not attend, and on the following day the money was paid in again to the plaintiff's bankers at the same rate of interest as before. The defendant failed to take the loan, and the plaintiff sued him for breach of the agreement. He claimed, as damages, interest on the Rs. 20,000 at $1\frac{1}{2}$ per cent. *per annum* for the three years for which under the agreement the loan was to be made.

Held, that he was not entitled to interest for three years, but only to interest for such period as might reasonably be required to find another borrower of the Rs. 20,000 at the rate of interest agreed upon between him and the defendant. The Court accordingly awarded him interest at $1\frac{1}{2}$ per cent. *per annum*, (*i.e.*, the difference between the bankers' rate of interest and the contract rate), on Rs. 20,000 for four months, together with the expense of preparing the deeds required for the purpose of the loan.

[R., 17 B. 457 (461); U.B.R. (1909) 2nd. Qr. Contract Act, s. 74, p. 17.]

THE plaintiff, who was a money-lender, agreed to lend the defendant the sum of Rs. 20,000, at $7\frac{1}{2}$ per cent. *per annum* interest for three years to be secured on certain landed property belonging to the defendant. The defendant failed to take the loan and carry out the agreement. The plaintiff brought this suit for specific performance of the agreement, or for damages.

* Suit No. 184 of 1887.