

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 The plaintiff had on that day withdrawn Rs. 20,000 from his bankers, where it had been lying in deposit, bearing interest at 6 per cent.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.

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The agreement sued on was dated the 22nd December, 1886, and was as follows:—

“ To Khoja Datubhai Ebrahim.

“ Written by Memon Abubaker Moledina.

“ To wit: I have given in writing to you as follows:—As to my one house bearing No. 413, which is situated, &c. On the [243] security of) the said house I have this day agreed to borrow Rs. 20,000. The particulars thereof (are as mentioned) below. The arrangement (as) written below (is) agreed to.

“ The amount, as mentioned above, is to be borrowed. The time for repayment is fixed at three years. If I should repay the amount within the three years, I am duly to pay interest for the year or years or months remaining unexpired.

“ 2. The interest on the above-mentioned amount is fixed at 10 annas *per cent. per mensem*. I am duly to pay the interest every three months.

“ 3. On having got a formal mortgage-deed prepared and registered, I am to receive the money at the time of its execution.

“ 4. I am to get for you insurance on the above-mentioned house effected for Rs. 20,000. I am duly to fix its period at three years.

“ 5. In respect of the above-mentioned mortgage, as to the aggregate costs of the mortgage-deed and registration, &c., which may be incurred, I am to pay the same. And I am duly to get the deed, &c., prepared through your solicitor. As to your solicitor's costs which may be incurred for preparing the deed of mortgage and for examining the vouchers, all those costs I am to pay. The vouchers show a good title to the property. Should there be any manner of objection in regard to those vouchers, I am to clear it all at my cost in such manner as your solicitor may desire.

“ 6. The above-mentioned agreement has this day been entered into through the broker Khan Mahammadbhai Dharmasi. I (*i.e.*, the broker) am not to charge any sort of brokerage to Datubhai. I (*i.e.*, the broker, will charge brokerage to the mortgagee at the rate of 2 *per cent*.

“ 7. I am to borrow the above-mentioned amount within a period of two months from this day. Subsequently thereto should I make any manner of delay I am duly to pay interest on the above amount at the rate aforesaid from that date. The 22nd of December, 1886.”

[244] At the time of the agreement the property of the defendant which by the agreement was to be mortgaged to the plaintiff as security, was mortgaged to one Haji Eliaz Ali, and the defendant caused the said mortgagee to produce the title-deeds of the said property in the office of the plaintiff's attorneys who prepared deeds of reconveyance and of mortgage for the purpose of carrying out the agreement. The expenses incurred were proved to amount to Rs. 200. The defendant, however, although called upon to execute the said deeds and to receive the money from the plaintiff, failed to do so. The plaintiff thereupon filed the suit, and prayed specific performance, or Rs. 4,700 damages.

The defendant admitted the agreement; and the only point raised at the hearing was as to the amount of damages. It appeared that the sum of Rs. 20,000, which the plaintiff proposed to lend to the defendant, had been lying at his banker's, who allowed him interest upon it at the rate of 6 *per cent. per annum*. It was withdrawn on the 1st March, 1887, which was the day fixed by the parties for the completion of the agreement, and

was taken to the office of the plaintiff's attorneys, where the mortgage-deed was to be signed, for the purpose of being handed over to the defendant. The defendant, however, did not attend, and the money was returned to the plaintiff's bankers the next day, since which day it had remained there bearing interest at 6 per cent. as formerly. Evidence was also given as to the plaintiff's business, and it appeared that the loans made by him subsequently to the agreement were as follows, *viz.*, on the 8th April, 1887, a loan of Rs. 6,000 at $7\frac{1}{2}$ per cent.; on the 20th July, 1887, a loan of Rs. 7,500 at $7\frac{1}{2}$ per cent.; and on 2nd September, 1887, a loan of Rs. 20,000 at $8\frac{1}{2}$ and 9 per cent.

Macpherson (Acting Advocate-General) and *Telang*, for the plaintiff, contended that he was entitled to $1\frac{1}{2}$ per cent. interest on the Rs. 20,000 for the whole period of three years as damages. They cited Contract Act IX of 1872, ss. 73 and 74.

Lang and *Jardine*, for the defendant, contended that the plaintiff was not entitled to any damages. The money might have been lent next day to another borrower, and ought not to [246] have been left at his bankers. They cited Coote on Mortgage, p. 211 (5th ed., 1884); *Holborrow v. Lloyd* (1); *Duckworth v. Ewart* (2).

JUDGMENT.

FARRAN, J.—In this case there is really no dispute about the facts. The defendant in December of last year agreed to borrow from the plaintiff a sum of Rs. 20,000 for three years at $7\frac{1}{2}$ per cent. *per annum*. The agreement was as follows:—(His Lordship read the agreement). It is clear that the plaintiff cannot get specific performance of that agreement. The only question is with respect to damages. Now, the effect of the first and last clauses of that agreement would seem to be that the defendant stipulates to pay interest on the whole amount if he does not borrow the money; that is, that, in the event of a breach of the agreement the amount thus ascertained is to be paid by him to the plaintiff. The case is, therefore, one to which s. 74 of the Contract Act is to be applied. (His Lordship read the section.) By that section, then, the Court is bound to give to the plaintiff the damages which he can prove to have been sustained by him. I, therefore, have to inquire what damages have been really sustained by the plaintiff in this case; and the principles by which we are to be guided in ascertaining those damages are laid down in s. 73 (His Lordship read the section).

Now, this is not the case of a breach of a contract of sale. The contract is one of loan, or for the hire of money; and the question is, what damages are recoverable if the loan is not taken up on a particular day? It appears that the parties agreed that the money should be advanced on the 1st March, 1887.

The land of the defendant, which was to be mortgaged as security to the plaintiff, was already in mortgage to another person. It was to be reconveyed by the mortgagee to the defendant and again mortgaged to the plaintiff, and for this purpose the necessary deeds were prepared by the plaintiff's attorneys, and were ready for execution on the 1st March, 1887. The plaintiff's *munim* attended on that day at the office of the plaintiff's attorneys with the Rs. 20,000 ready to be handed over to the defendant. That money had been withdrawn by the plaintiff [246] from his bankers, where it was bearing interest at 6 per cent. The defendant,

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(1) 5 Jur. N.S., pt. 1, p. 114.

(2) 10 Jur. N.S., pt. 1, p. 214.

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however, did not attend to receive the money, and in fact the loan has never been advanced. The money was next day paid in again to the plaintiff's bankers, where it has ever since been bearing interest at the rate of 6 *per cent.*

Under these circumstances to what damages is the plaintiff entitled? He is clearly entitled to recover the expenses which he has incurred in preparing the necessary deeds. These expenses are proved to have amounted to Rs. 200. But he claims, in addition, one and a half *per cent. per annum* on the Rs. 20,000 for the period of three years for which the loan was to be made. That is the difference between the rate agreed upon in the contract and the rate which is allowed by his bankers, with whom the money lies deposited. I do not think he is entitled to interest for three years. I think he is only entitled to interest for the time required to find another borrower of his Rs. 20,000 at the same rate which the defendant agreed to pay. There is some difficulty, of course, in fixing the time necessary for this. It must be to a certain extent a matter of conjecture. The amount to be lent must be taken into consideration; for it is clear that the larger the sum offered, the longer the time that would be required to find a borrower. It would, no doubt, be easier to find a borrower of Rs. 20,000 than to find a borrower of two lakhs. The plaintiff appears to have lent Rs. 6,000 in April, Rs. 7,500 in July, and Rs. 20,000 yesterday. I think four months in this case would be a reasonable time. I have no doubt that the plaintiff with the assistance of a broker could within that period have found a person willing to take his Rs. 20,000 on loan at 7½ *per cent.* interest. I think that, under s. 74 of the Contract Act, I have a discretion in awarding damages, and I accordingly award him Rs. 100, which is 1½ *per cent.* on Rs. 20,000 for four months, together with the sum of Rs. 200, which is the amount of expenses which he has incurred.

Attorneys for the plaintiff.—Messrs. *Thakurdas and Dharamsi.*

Attorneys for the defendant.—Messrs. *Bomanji and Hormasji.*

12 B. 247=12 Ind. Jur. 387.

[247] APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

MANOHAR GANESH TAMBEKAR AND OTHERS (*Original Plaintiffs*),
Appellants v. LAKHMIRAM GOVINDRAM AND OTHERS (*Original*
Defendants), Respondents.* [3rd May, 1887.]

Charity—Public charity—Trust—Public charitable or religious trust—Offerings made to an idol—Liability of persons in possession of an idol's property—Account—Jurisdiction of Civil Courts in cases relating to public charities—Right to sue—Civil Procedure Code (Act X of 1877), s. 539—"Direct interest", meaning of—Practice—Application to put in evidence in appeal which applicant refused to produce at first hearing.

1. A trust for a Hindu idol and temple is to be regarded in India as one created "for public charitable purposes," within the meaning of s. 539 of the Code of Civil Procedure (Act X of 1877).

2. The Hindu law recognizes not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations. A Hindu who wishes to establish a religious, or charitable institution may, according to his law, express his purpose

* Appeal No. 19 of 1883.