

Cases as to minors—*Vijkor v. Jijibhai* (1) and *In re Motiram Rupachand* (2) and *Babaji v. Maruti* (3)—have been cited by the pleader for appellant. But we fail to see that the reasoning applies to this case: and, with references to those judgments, we notice that Act XXXV of 1858 contains no provision by which suits can be brought on behalf of a lunatic by a next friend, similar to the proviso about suits for small amounts in s. 2 of Act XX of 1864, or the provision of a summary jurisdiction in like cases, without inquisition, in 25 and 26 Vic., cap. 86, ss. 12 to 15. The Legislature has not made the provision. See *Ex parte Cohen* (4), where it was held that a liquidation petition cannot be signed by a next friend on behalf of a "lunatic not so found by inquisition."

It is also well known that while the fact of minority is often patent, the question of unsoundness of mind is often complex, as shown in *the matter of Cowasji Beramji* (5) and the cases there [664] mentioned. Moreover, the adjudication of the District Court deals with the state of mind at the time, and does not relate to times past. Thus as the circumstances vary, so do the principles which the Courts apply to infants and to lunatics: the restrictions in s. 463 of the Civil Procedure Code we find to be in accordance with the practice of the Courts in England, and so are the interpretations of that section by the High Courts in India.

For the reasons we have given we are of opinion that the Assistant Judge was right in dismissing the suit brought by Bhikaji.

The present appeal was filed by Bhikaji. After his death Ganu bin Raghaji Savant got his name inserted on the record, by order of this Court, as new next friend of Tukaram in place of Bhikaji. Ganu has not obtained any appointment under Act XXXV of 1858. The reasons on which we have found that Bhikaji had no right to file the suit apply to Ganu's authority to appear as appellant, and we hold that he has none, and that a future appointment to be manager of the estate under Act XXXV of 1858 will not cure the want of *locus standi*. We, therefore, confirm the decree of the Assistant Judge, and direct the appellant Ganu personally to pay the costs of this appeal.

Decree confirmed.

13 B. 664.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Candy.

NARAYAN GANESH (*Original Plaintiff*), Appellant v.
HARI GANESH (*Original Defendant*), Respondent.*

[21st January, 1889.]

Issues—Civil Procedure Code (Act XIV of 1882) s. 149—Court's authority to frame new issues—Amendment of plaint.

A Court is not authorized by s. 149 of the Code of Civil Procedure (Act XIV of 1882) to frame new issues which have the effect of altering the nature of the suit.

A Court's power of raising additional issues is co-extensive with its power of amending plaints, and is subject to the same restrictions.

* Second Appeal, No. 657 of 1885.

(1) 9 B.H.C.R., 310.

(2) 11 B.H.C.R. 21.

(3) 11 B.H.C.R. 182.

(4) L.R. 10 Cn. D. 183.

(5) 7 B. 15.

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The plaintiff originally sued the defendant as a trespasser, claiming damages for wrongful occupation and for injury done to the land in dispute.

[665] Some time after the issues had been framed, the plaintiff applied for an amendment of the plaint, and sought to recover rent for the land in suit, on the basis of a subsisting tenancy.

The Subordinate Judge, without making the amendment, framed two additional issues, *viz.*, (1) whether the suit was based on the relation of landlord and tenant, and (2) whether the *thikans* in dispute were let to the defendant, and what rent the plaintiff was entitled to recover in respect of the same.

The Subordinate Judge was found on these issues that the tenancy was still subsisting, and passed a decree for the rent claimed.

Held, that the Subordinate Judge had no authority, under s. 149 of the Code of Civil Procedure (Act XIV of 1882), to frame the new issues.

SECOND appeal from the decree of G. McCorkell, Assistant Judge of Ratnagiri, in cross appeals Nos. 55 and 88 of 1885 of the District File.

The plaintiff sued to recover Rs. 500 as profits in respect of the property set out in the plaint, alleging that the defendant had passed a *khand chitti*, or rent-note, for the same on 29th July, 1880, whereby he agreed to pay $1\frac{1}{2}$ *khandis* of paddy for the rainy season of that year. The plaintiff further alleged that, on failure of the defendant to pay the stipulated rent, he had brought a suit, No. 1054 of 1880, and obtained a decree for the rent; that the defendant then continued to take the profits without right, and had also cut down trees. Hence the present suit.

The defendant pleaded that he had not executed the rent-note referred to in the plaint; that the decree had been obtained *ex parte*; that the land in suit was joint-family property; and that the plaintiff ought to sue for partition.

On the 20th August, 1884, the Subordinate Judge framed ten issues.

On the 31st October, 1884, the plaintiff applied to the Court for leave to amend his plaint. By this application he sought to recover from the defendant *khand*, or rent, for the *thikans* in dispute, in accordance with the rent-note, at the rate of $1\frac{1}{2}$ *khandis* of paddy for each rainy season and 1 *khandi* and 3 maunds for each hot season crop.

The Subordinate Judge did not think it necessary to amend the plaint, on the ground that all the facts appeared in the plaint as originally framed, but raised the following additional issues:—

[666] “ 11th. Whether this suit is based on the relation of landlord and tenant between the plaintiff and defendant ?

“ 12th. What *thikans* were let to the defendant, and what rent is the plaintiff entitled to recover in respect of the same ?

He found, on these issues, that the relation of landlord and tenant did not determine after the expiration of the time fixed in the rent-note, that the suit was brought on the basis of a subsisting tenancy, that all the *thikans* in suit were let to the defendant under the rent-note, and that the plaintiff was entitled to recover $106\frac{1}{2}$ maunds of paddy as rent.

He passed a decree, accordingly, in plaintiff's favour.

On appeal, this decree was reversed by the Assistant Judge, for the reason stated in the following extract from his judgment:—

“ The original plaint was a claim for damages for wrongful occupation and for injury done to the property. The suit would have been in the nature of a suit by a landlord against a tenant for holding over. In the suit, as originally framed, no reliance was placed on the contract of July, 1880; it appears to be only incidentally introduced into the plaint.

In the amended suit, the *khand chitti*, or rent-note, was the all in all. In the original suit, the plaintiff contends that the defendant has wrongfully dispossessed him; in the amended suit he argues 'the defendant is my tenant who won't pay his rent, and I must, therefore, sue him for it.' The nature or character of the original suit is so totally contrary to, and at variance with, the amended suit that I am surprised that the Subordinate Judge did not perceive this and refuse the prayer of the plaintiff, instead of passing the order which he did. It was, therefore, in my opinion, incompetent for the Subordinate Judge to have amended the plaint as prayed; and as the subject-matter of that prayer could not be brought on to the pleadings, the Subordinate Judge was not authorized, under s. 149 of the Civil Procedure Code (Act XIV of 1882), to add issues raising questions which do not appear in the pleadings. In *Baboo Lall v. Ram Narain Ram* (1) it is [667] and a settlement of issues, the Court will not exercise its discretionary power to raise a new issue, except on clear proof of inadvertence, or mistake, or the discovery of new matter affecting the merits, and that such matter was not within the knowledge of the parties at the time of the settlement of issues. In the present suit none of these redeeming circumstances arise. It was, therefore, not competent for the Subordinate Judge to frame fresh issues outside the original pleadings. I feel that I am supported in my opinion by *Nehora Roy v. Radha Pershad* (2). The Subordinate Judge ought, therefore, to have refused the application for amendment, and omitted to frame the fresh issues. For these reasons, the decree of the Subordinate Judge is bad."

Against this decision the plaintiff preferred a second appeal to the High Court.

Telang (with him *Daji Abaji Khare*), for appellant.

Mahadev C. Apte, for respondent.

JUDGMENT.

The judgment of the Court was delivered by

JARDINE, J.—On a careful consideration of the pleadings and the issues originally framed, we are of opinion that the claim stated in the plaint is for the profits of certain lands, which, the plaint says, the defendant had taken "without right," and "wrongfully." The same view has been taken by both the Courts below. The Subordinate Judge remarks that "plaintiff claimed the profits as damages, treating defendant as a trespasser." The Assistant Judge considered the original plaint to be a "claim for damages for wrongful occupation, and for injury done to the property."

Afterwards, the plaintiff applied for amendment, electing to treat the defendant as his tenant, and confining his claim to the profits of certain lands, which are specified in a rent-note, of which he had filed copy with his plaint. The Subordinate Judge, without making an amendment, framed two new issues in regard to the relation of landlord and tenant, on the footing of the rent-note. The Assistant Judge was of opinion that, like as the amendment if allowed would have converted the original suit into a suit of [668] another and inconsistent character, so the Subordinate Judge had exceeded the limits of s. 149 of the Civil Procedure Code, the additional issues not being necessary for determining the controversy

(1) Coryton, 8.

(2) 5 C. 64.

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between the parties. It is admitted that the result was to treat the suit as one brought by a landlord against a tenant for holding over.

The first question to be determined is, whether the Subordinate Judge exercised a proper discretion in allowing the additional issues to be framed. The subject is discussed in *Nehora Roy Radha Pershad* (1), to which the Assistant Judge refers as authority; as also in *Damodar Madhowji v. Purmanandas Jeewandas* (2), where most of the cases are collected by Mr. Justice Scott in his judgment. It is urged in this appeal that the mention in the plaint of the rent-note and the decree obtained thereon in a previous suit, and the answers given to the Court by plaintiff's vakil, did sufficiently raise a claim on the contract of landlord and tenant. We agree, however, with the Assistant Judge, that this contract was only incidentally introduced into the plaint: as already pointed out, the Subordinate Judge took the same view of the plaint. Plaintiff is a pleader, and if he had wished to sue defendant as his tenant it would readily have occurred to him to use clear and appropriate language. We must follow the rule deducible from the cases and thus stated in *R. and N. Modhe v. S. Dongre* (3), which also was applied in *Damodar Madhowji v. Purmanandas Jeewandas* (2)—“A reasonable amendment not inconsistent with the case as it originally stood can be allowed.” Now, in *Newby v. Sharpe* (4), an amendment converting a claim on the footing of a subsisting lease into a claim on the footing of eviction was held to be an alteration of the nature of the suit. The present is somewhat the converse of that case, and in the absence of authority to the contrary, we hold that the alteration made has an equal effect, and was not authorized by s. 149. We are also of opinion that under the circumstances of this case, the vagueness of the claim and the nature of the defence, the lower [669] Court of appeal was justified in overruling the discretion of the Subordinate Judge—*Laird v. Briggs* (5).

For these reasons, we confirm the decree, with costs on appellant.

Decree confirmed.

13 B. 669.

APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice,
Mr. Justice Nanabhai Haridas and Mr. Justice Jardine.*

DHONDBHAT NARHARBHAT (Plaintiff) v. ATMARAM MORESHWAR
(Defendant).* [23th February, 1889.]

*Stamp—Document proposing to borrow on certain conditions—Promissory note—Proposal
—Contract Act, IX of 1872, s. 4.*

A letter containing a request to borrow a certain sum of money, promising that the same should be repaid with interest on a certain day, is not liable to stamp duty. It is not a promissory note, but a mere proposal under s. 4 of the Indian Contract Act IX of 1872.

[F., 23 M. 156 = 7 M.L.J. 220; 27 M. 1 = 14 M.L.J. 65 (66); D., 16 M. 283.]

THIS was a reference from Ray Saheb Sakharam Mahadev Karandikar, Subordinate Judge of Devgad, under s. 49 of the Stamp Act I of 1879.

* Civil Reference, No. 18 of 1888.

(1) 5 C. 64.

(2) 7 B. 155.

(3) 5 B. 609 (614).

(4) L.R. 8 Ch. D. 39.

(5) L.R. 19 Ch. D. 22 (28).