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on the 15th April, 1890, by the Court in execution of a decree passed against the defendant in suit No. 790 of 1889. The defendant pleaded that the suit was barred by ss. 13 and 43 of the Civil Procedure Code. The Joint Subordinate Judge held that it was not barred. The lower appeal Court held that it was barred under s. 43.

The previous suit, No. 790 of 1889, was one by the plaintiff for specific performance of an alleged contract of sale to him by defendant, by which the plaintiff was to pay Rs. 1,550, and the defendant undertook to execute a deed of conveyance to him. It was contended by Mr. Apte, for the respondent, that the plaintiff's present claim to be put into possession was part of the entire claim, which the plaintiff was then entitled to make in respect of the cause of action, *viz.*, the defendant's default in performing his contract. In that suit, the plaintiff alleged that he had paid the purchase-money and had been put into possession; but the Court found that he had paid the purchase-money but had never had possession, and Mr. Apte argued that s. 43 [542] must be applied as if the facts had been as found by the Court, and not as alleged in the plaint in that suit, and in that case he urged that the plaintiff's claim would have included not only this right to have a deed of sale executed, but also to be put into possession, and that the plaintiff, therefore, cannot now sue in respect of the latter portion of the claim. We think this contention is a valid one, so far as the claim to possession is based on the contract; but it does not dispose of the question as to the applicability of s. 43 to the present suit, where the alleged cause of action is not the breach of the contract, but a new and distinct one arising from the deed of sale itself, which the defendant had contracted to pass. It was also argued by Mr. Apte that s. 13, exp. II, applied to the present suit, but the object of that explanation would seem to be to compel the plaintiff to rely on all the grounds which were open to him in support of the claim made by his plaint, which in the first suit was confined to obtaining a regular deed of sale.

For the above reasons, we reverse the decree of the Court below and restore that of the Subordinate Judge, with costs on the respondent here and in the lower Court of appeal.

*Decree reversed.*

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### APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.*

SHIVLAL KALIDAS AND OTHERS (*Original Plaintiffs*), *Applicants v.*  
JUMAKLAL NATHIJI DESAI, DECEASED, BY HIS HEIRS, HIS SONS  
MITHLAL AND ANOTHER (*Original Defendants*), *Opponents.\**

[26th September, 1893.]

*Decree—Amendment of decree—Civil Procedure Code (Act XIV of 1882), s. 206—Practice—Appeal.*

In the lower appeal Court the plaintiff obtained a decree which directed parties to bear their own costs in proportion in both the Courts, while the judgment directed that the parties should bear each other's costs in proportion in both the Courts. The decree was confirmed by the High Court in cross second

\* Civil Application No. 552 of 1892.

appeals without writing a judgment. There was no point taken in either of the appeals as to costs. The plaintiff subsequently applied to the High Court for the amendment of the decree under s. 206 of the Civil Procedure Code (Act XIV of 1882). It was contended for the defendant, that the application should have been made to the lower appeal Court.

*Held*, that the only decree which existed for the purposes of execution after the High Court confirmed the decree of the Court below was the decree of the High Court into [548] which that of the lower Court became incorporated. The application was, therefore, properly made to the High Court.

*Held*, further, that that being so, and there having been no appeal by either party against the order as to costs, the Court might properly look at the judgment of the Court below with a view to making the decree as to costs agree with it.

[F., 11 C.L.J. 155 (157)=5 Ind. Cas. 723; R., 6 C.L.J. 542 5(543); 9 C.W.N. 605 (607); P.L. R. (1900), p. 529; 134 P.L.R. 1904.]

THIS was an application under s. 206 of the Civil Procedure Code (Act XIV of 1882) to amend the decree of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Ahmedabad with appellate powers.

The plaintiffs sued the defendants in the Court of the Subordinate Judge of Dohad and obtained a decree for Rs. 3,070-6-1 with costs and interest.

On appeal by the defendants, the First Class Subordinate Judge varied the decree by reducing the amount to Rs. 2,055-4-3 (Shiashi currency), and in the judgment directed the parties to bear *each other's* costs in proportion in both the Courts. But in the decree there was a discrepancy with respect to the order as to costs, the decretal order being "parties to bear *their own* costs in proportion in both the Courts."

Both plaintiffs and defendants preferred cross second appeals (No. 617 of 1890 and No. 15 of 1891) to the High Court, which confirmed the decree with costs. There was no point taken in either of the appeals with respect to the order as to costs.

The discrepancy between the judgment and the decree of the First Class Subordinate Judge with respect to costs having come to the notice of the plaintiffs, they now applied, under s. 206† [544] of the Civil Procedure Code (Act XIV of 1882) to amend the order in the decree, and obtained a *rule nisi* calling upon the defendants to show cause why the amendment should not be made.

*Nagindas Tulsidas Marphatia*, for the opponents (defendants), showed cause against the rule:—The application ought to have been made to the First Class Subordinate Judge. The High Court merely confirmed his decree. It is, therefore, the decree of the Subordinate Judge that requires the amendment, and he had jurisdiction to entertain the application—*Sundara v. Subbanna* (1); *Ram Saran v. Persidhar Rai* (2); see also

† Section 206 of the Civil Procedure Code (Act XIV of 1882):—

206. *Contents of decree.*—The decree must agree with the judgment: it shall contain the number of the suit, the names and description of the parties, and particulars of the claims as stated in the register, and shall specify clearly the relief granted or other determination of the suit.

The decree shall also state the amount of costs incurred in the suit, and by what parties, and in what proportions such costs are to be paid.

*Power to amend decree.*—If the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the Court shall, of its own motion or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment, or to correct such error:

Provided that reasonable notice has been given to the parties or their pleaders of the proposed amendment.

(1) 9 M. 354.

(2) 10 A. 51.

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remarks of Mahmood, J., in *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (1).

*Goverdhanram M. Tripathi*, for the applicant in support of the rule.—When the High Court confirmed the decree of the Subordinate Judge, the decree became the decree of the High Court. The only decree in existence being that of the High Court, we could not make our application to any other Court—*Sakkhalchand v. Velchand* (2); *Bhanushankar v. Raghunathram* (3).

#### JUDGMENT.

SARGENT, C. J.—This is an application under s. 206 of the Civil Procedure Code to amend the decree of the Subordinate Judge with appellate powers directing that the parties are to bear their own costs in proportion in both the Courts as to make it agree with the judgment of that Court, which, it is said, directed that the parties should bear each other's costs in proportion in both the Courts. A preliminary objection has been taken that this application should have been made to the lower appeal Court. Such, no doubt, is the view taken by the Madras High Court in *Sundara v. Subbanna* (4) and by Mahmood, J., dissenting from Sir J. Edge, C. J. and Straight, J., in *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (1). This Court, however, has always held that the only decree which exists for the purpose of execution after the High Court has confirmed the decree of [545] the Court below is the decree of this Court into which that of the lower Court becomes incorporated—*Sakkhalchand Rikhawdas v. Velchand Ganesh Gujar* (2)—and if that be so, it is difficult to understand how, consistently with that ruling, the lower Court can have the power to amend the decree even under s. 206. To allow that Court to bring the decree into conformity with what it may consider to be its judgment, might lead, as pointed out by Sir J. Edge, C. J., in *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (1), to its being essentially a different decree from that which the High Court intended to confirm. We think, therefore, that the application was properly made to this Court.

That being so, and there having been no appeal by either party against the order as to costs, this Court may properly look at the judgment of the Court below with a view to making the decree as to costs agree with it. The judgment directed that the parties should bear each other's costs in proportion. The decree directs that costs of the parties should be borne in proportion; but if that be understood as meaning by one another, which it may well be, then there is no disagreement between it and the order in the judgment. To make it, however, quite clear, and to avoid any question in execution, it would be right under s. 206, Civil Procedure Code, to substitute the words in Gujarati "*be koratan ek bijane sir*" (on each other in both Courts) for the words "*temne potpotane sir*" (on their own selves) after the words "*kharach pramanaman*" (costs in proportion) in the vernacular decree of the First Class Subordinate Judge, A. P., in appeal No. 149 of 1888, and that the costs be calculated accordingly in execution, and we accordingly direct this is to be done. Parties to pay their own costs of this application.

*Decree amended.*

(1) 11 A. 267 (274).

(3) 2 B.H.C.R.A.C.J. 101.

(2) P. J. (1893), p. 79.

(4) 9 M. 354.