1894.

NATHUBHA'I MULCHAND v. NA'NA BA'BU.

Náráyán V. Gokhale appeared for the opponent to show cause:—The plaintiff applied for execution against the wrong person and we intervened in order to save further litigation.

Even if the present order is wrong, still as the Court had jurisdiction to pass it, it cannot be interfered with by the High Court in its extraordinary jurisdiction under section 622 of the Civil Procedure Code (Act XIV of 1882)—*Amir Hassan Khán* v. *Sheo Baksh Singh*(1); *Krishna Mohini Dossee* v. *Kedarnáth Chuckerbutty*(2).

BAYLEY, C. J.(Acting):—Without prejudice to the rights of Laxmibái (if any) to apply to raise any attachment which may be obtained by the judgment-creditor, we think that the deceased Bápu not being a party to Suit No. 507 of 1888 was not entitled to object to the issue of an order for execution of the decree, and that in omitting to make such order the Subordinate Court failed to exercise a jurisdiction vested in it by law.

We, therefore, discharge the orders of the Courts below dismissing the application for execution, and direct that the Subordinate Court do proceed with execution according to law. The opponents must pay all costs throughout.

Order discharged.

(1) I. L. R., 11 Calc., 6. (2) I. L. R., 15 Calc., 446.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

1894. *July* 9.

HARI RAGHUNA'TH JOSHI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* KRISHNA'JI A'NANT JOSHI (ORIGINAL DEFENDANT), RESPONDENT.*

Decree—Compromise of decree—Effect of compromise—Mode of enforcing agreement of compromise—Contract—Reciprocal promises—Right to sue—Decree for performance of whole contract—Contract Act (IX of 1872), Sec. 51.

A decree for partition having been compromised by an agreement, made by the parties, and communicated to the Court which passed the decree,

* Second Appeal, No. 770 of 1892.

1894.

HARI RAGHUNA'TH v. KRISHNA'JI A'NANJ.

Held that the effect of the decree was extinguished by the agreement, which could only be enforced by a fresh suit, and not by an application for execution of the former decree.

An agreement consisting of reciprocal promises to be performed by the plaintiffs and the defendant can be sued upon by the plaintiffs when they have not refused to carry out their promises, though they may not have put an allegation in the plaint saying that they are ready and willing to do so, section 51 of the Indian Contract Act being no bar to such a suit.

When the plaintiffs are entitled to ask for the performance of the part of the contract in which they are interested and the defendant claims execution of the whole to which the plaintiffs do not object, the Court ought to pass a decree directing execution of the whole contract, instead of rejecting the claim.

THIS was a second appeal from the decision of T. Hamilton, District Judge of Thána, confirming the decree of Ráo Sáheb Moreshvar N. Ovalekar, Subordinate Judge of Pen.

The plaintiff obtained a decree in Suit No. 787 of 1883 for partition of certain family property. The defendants applied for execution, but the decree was subsequently compromised by an agreement which provided that a certain quantity of the land should be given to each of the parties. The Court was duly informed of this agreement by the parties, who by a joint petition applied to the Court to strike off the execution proceedings.

The plaintiff subsequently brought this suit to recover so much of certain specified land as would make up the quantity allotted to them by the agreement.

The defendants pleaded that the agreement contained promises on the part of the plaintiffs to perform certain acts, and that not having performed them they were not entitled to sue for the land.

The Subordinate Judge rejected the claim, holding that the compromise contained reciprocal promises, that under section 51 of the Contract Act (IX of 1872) unless the plaintiffs were ready and willing to perform their promises they could not ask the defendant to perform his promises, and that there being no allegation in the plaint that they were ready and willing to give effect to their promises, they were not entitled to institute the suit.

1894.

HARI RAGHUNA'TH v. KRISHNA'JI A'NANT.

On appeal by the plaintiffs the Judge held that the plaintiffs ought to have sought relief in the execution of the decree in the terms of the agreement, and that no separate suit would lie. He, therefore, confirmed the decree. The following is an extract from his judgment :—

(After stating the facts of the case). "Now there is no provision in the Code of Civil Procedure for striking off a darkhást in this way. Such an order appears to be no bar to a revival of execution-proceedings. There is no endorsement of satisfaction—11 Cal. L. R., 17; I. L. R., 10 Calc., 416.

"The proper course for plaintiffs to pursue in the event of the agreement not being carried into effect would be to apply to the Court to execute the decree in terms of that agreement. I am of opinion that no separate suit will lie.

"However in the present case the plaintiff has not stated how much land, if any, is required by him to make up his 6½ *pands;* he does not specifically state how much he lost by erasion. The agreement was not absolutely that defendant should give up 3½ *pands,* but so much, not exceeding 3½ *pands,* as was required to compensate plaintiff for the loss by erasion, so as to give each party 6½ *pands.* Again, there are clear acts as stated in clause 7 of the notice, Exhibit 18, which plaintiff was to perform on his part."

The plaintiffs preferred a second appeal.

Vásudeo G. Bhándárkar for the appellants (plaintiffs) :—The objection that we ought to have taken steps to execute the decree and that our present suit cannot lie was not taken in the written statement nor in the first Court. It was urged for the first time by way of cross-objection in appeal in the District Court. Admitting for the sake of argument that we could have got relief by executing the former decree, still the execution proceeding would have been taken cognisance of by the same Subordinate Judge who tried the present suit. The filing of the present suit was, therefore, merely an irregularity which did not affect the jurisdiction of the Court, and an objection to such an irregularity, which is merely a mistake in procedure, cannot be taken for the first time in appeal.

Further, our present suit is based upon the agreement. The agreement gave a distinct cause of action, and the relief which we claim in this suit could not have been obtained in the execution of the former decree, because the present suit relates to land which was not included in the former suit—*Debi Rái* v. *Gokal*

Prasád[1], *Rámlakhan Rái* v. *Bakhtaur Rái* [2]. In this suit we really seek for specific performance of a part of the agreement; and if it be held that such a suit cannot lie, we should be allowed to amend the plaint and to sue for specific performance of the whole agreement, or we should be allowed to withdraw the suit with liberty to bring a fresh one, so that the bar of section 43 of the Civil Procedure Code (Act XIV of 1882) may not arise. The agreement contains reciprocal promises, and unless the defendant was ready and willing to give effect to his promises, we could not do anything to carry out our promises. Even the written statement does not allege that the defendant was ready and willing to act up to the agreement.

Ghanashám N. Nádkarni for the respondent (defendant) :—The suit is barred under section 244 of the Civil Procedure Code (Act XIV of 1882). The plaintiffs' remedy lay in the execution of the former decree. Further, the plaintiffs are not entitled to bring the present suit, because they have not performed nor offered to perform their part of the agreement. If the suit be considered as one for specific performance of the agreement, then it is barred under article 113, Schedule II of the Limitation Act (XV of 1877). The suit ought to have been filed within three years of the date of the agreement which must be considered to be the date on which we refused to give effect to the agreement, as according to the plaintiffs' allegation we were never ready and willing to carry out our agreement.

FULTON, J. :—We are unable to concur with the District Judge in thinking that the plaintiffs should have proceeded by application for execution of the former decree instead of by separate suit. The effect of the decree in the former suit was extinguished by the compromise contained in Exhibits 15, 18 and 19, which was communicated to the Court by the joint petition of the parties embodied in Exhibit 15. This compromise formed a fresh agreement which could only be enforced by a fresh suit.

We are also unable to concur with the Courts below that the plaintiffs are precluded from recovering possession of the land secured to them by the 7th clause of Exhibit 18, because they

(1) I. L. R., 3 All., 585. (2) I. L. R., 6 All., 623.

1894.

HARI RAGHUNA'TH v. KRISHNA'JI A'NANT.

have not put an allegation in the plaint that they are willing and ready to give effect to their promises. The agreement to measure the rest of the village and to divide equally certain other lands imposed no special obligation on the plaintiffs for its execution. Both parties were equally bound to give effect to it, and without the defendant's concurrence the plaintiffs could not act upon it. It is not suggested in the written statement that the defendant had ever asked the plaintiffs to carry out the partition and had been refused, and in the examination of the plaintiff Hari Raghunáth Joshi (Exhibit 24) he distinctly states that he is ready to abide by the statements contained in Exhibits 15, 18 and 19. Under these circumstances section 51 of the Contract Act is no bar to this suit which has been brought in the proper form. The plaintiffs were entitled to ask for the performance of the part of the contract in which they were interested, and on the defendant claiming execution of the whole, and the plaintiffs raising no objection, the Courts below ought to have passed a decree directing execution of the whole contract, instead of rejecting the claim.

In argument reference was made to article 113 of Schedule II of the Limitation Act, but as it is not suggested that three years had elapsed between the first refusal of the defendant to perform his part of the agreement and the institution of the suit, it is clear that no question of limitation arises.

We now reverse the decrees of the Courts below, and remand the case to the Court of first instance, which, after examining the parties or their pleaders and any witnesses they may wish to produce, and ascertaining in detail which of the terms of the agreement embodied in Exhibits 15, 18 and 19 have not yet been carried out, will pass a decree directing the performance of all such terms (which should be clearly specified in the decree) and providing that on the application of either party execution of the whole decree shall be granted by the Court. The defendants must pay all costs in both Courts of appeal. The costs of the Court of first instance will be awarded by that Court when passing its final decree.

Decree reversed and case remanded.