## APPELLATE CIVIL.

---

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Crowe.*

GOVIND HARI DEV (ORIGINAL PLAINTIFF), APPELLANT, *v.* PARASHRAM MAHADEV JOSHI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1900. *August* 15.

*Civil Procedure Code (Act XIV of 1882), Sec. 43—Transfer of Property Act (IV of 1882), Sec. 99—Agreement to pay a debt partly in cash and to secure balance by mortgage, or, in default, to execute mortgage for whole amount—Failure to pay part in cash—Decree for such part—Second suit to enforce giving of mortgage for balance barred.*

On a settlement of account between plaintiff and defendant No. 1 it was found that Rs. 15,505 were due by the first defendant to the plaintiff, and an agreement was made between them that Rs. 4,000 of this debt was to be paid off by the first defendant before the 18th September, 1895, and that a mortgage on certain specified immoveable property was to be given for the balance; but, in the event of his failing to pay the Rs. 4,000 within the stipulated period, the mortgage was to be for the full amount. The agreement was dated 15th June, 1895, was put into writing, and was duly registered. The first defendant failed to pay the Rs. 4,000 as agreed or to execute the mortgage, and the plaintiff on the 16th September, 1899, brought a suit against him to recover the Rs. 4,000 with interest thereon, and obtained a decree on the 29th September, 1899. On the 30th September the plaintiff commenced the present suit against defendant No. 1 and against defendant No. 2, who as judgment-creditor of defendant No. 1 had attached the property specified in the agreement, praying that either the first defendant should be ordered to pass to the plaintiff a mortgage-bond for the balance due, or that a decree should be passed for the recovery of the said balance by sale of the said property and from the first defendant, and that the property be declared liable for the amount claimed.

*Held*, that the suit was barred under section 43 of the Civil Procedure Code (Act XIV of 1882).

APPEAL from the decision of Ráo Bahádur N. N. Nanavati, First Class Subordinate Judge at Thána, in Suit No. 206 of 1899.

The defendant was indebted to the plaintiff in the sum of Rs. 15,505. On the 15th June, 1895, it was agreed that the Rs. 4,000 of this sum should be paid to the plaintiff before the 18th September, 1895 and a mortgage given to him of certain specified property for the balance (Rs. 11,505) remaining due. If the defendant failed to pay the Rs. 4,000 by the above date the

* Appeal, No. 59 of 1900.

1900.

GOVIND v. PARASHRAM.

mortgage was to be for the whole amount. The agreement was put into writing and registered. It was as follows:—

"I (defendant 1) am indebted to you (plaintiff) upon a *khâta*. Upon an adjustment of the account of this *khâta* this day, Rs. 15,505 are found due to you; out of this sum, I shall pay you Rs. 4,000 before Bhadrapad Vadya 30th (18th September, 1895) of the current year. I shall pass to you a mortgage bond for the balance that will remain due to you before Bhadrapad Vadya 30th (18th September, 1895). If I fail to pay you Rs. 4,000 as agreed above, I shall pass to you a mortgage-bond for the whole amount. At present the rate of interest in the *khâta* is one rupee, but in the document I shall state it to be ten annas (per cent. per month) * * (Description of the properties to be mortgaged) * * If I fail to pass a mortgage-bond as agreed above within the stipulated period, and if you file a suit against me for the same, I shall pay you the costs of the suit with interest. As written above I shall pay you Rs. 4,000 before Bhadrapad Shudh 15th (4th September, 1895) and I shall afterwards pass to you a mortgage-bond in respect of the above property before Bhadrapad Vadya 30th (18th September, 1895) for such balance as may be found due with interest."

The Rs. 4,000 were not paid and no mortgage was ever executed.

On the 16th September, 1899, the plaintiff sued the defendant for the Rs. 4,000, and on the 29th September, 1899, obtained a decree. On the 30th September, 1899, the plaintiff filed the present suit against the first defendant (the debtor) and against the second defendant, a creditor, who had attached the immoveable property specified in the agreement. He alleged that the original balance of Rs. 11,505 had now increased with interest to Rs. 17,442-7-9, and he prayed that either the first defendant should be ordered to pass a mortgage-bond for that amount, or that a decree should be passed for the recovery of that sum by sale of the property agreed to be mortgaged in the document of the 15th June, 1895, and from the first defendant, and that the property be declared liable for that amount.

The first defendant did not appear.

Defendant No. 2 appeared and contested the plaintiff's claim.

The Subordinate Judge held (1) that the suit was barred by section 43 of the Civil Procedure Code (Act XIV of 1882); (2) that the claim for specific performance of the agreement was barred by limitation; (3) that the agreement was fraudulent; and he dismissed the suit.

The plaintiff appealed.

*Lang* (Advocate General) with *Ramdatt V. Desai,* for the appellant (plaintiff):—There is no evidence to support the allegation of fraud against the plaintiff. The debt due to him is not denied. It is not alleged that he was aware of the dealings between his debtor (defendant No. 1) and defendant No. 2. There was nothing fraudulent, therefore, in his obtaining security for the large amount due to him.

The suit is not barred by section 43 of the Civil Procedure Code. The agreement contained two separate and distinct provisions. The first was that Rs. 4,000 were to be paid in cash on or before the 18th September, 1895, and that for the balance of about Rs. 11,505 the debtor was to pass a mortgage-bond to the plaintiff after that date. At the end of the document there is an important clause changing the date of payment of the Rs. 4,000 in cash from the 18th September to the 4th September, 1895. There were thus two distinct dates specified for the performance of the two obligations. No doubt when the suit for Rs. 4,000 was filed, the debtor had failed to meet both his obligations and the whole amount of Rs. 15,000 had then become payable. But the plaintiff did not thereby lose his right to recover the Rs. 4,000 in cash if he chose to do so, still reserving his right to obtain the remedy of a mortgage for the balance. Section 43 refers to the same cause of action. In the present instance there were two different causes of action, and the plaintiff by suing first on one is not precluded from suing afterwards on the other.

But, further, there is a distinct charge created on the property by the agreement, and a suit for the specific performance of that agreement to obtain a mortgage-deed is needless. This charge would bind not only the debtor, but also his judgment-creditor (defendant No. 2), who attached the property after that charge was created. He could only attach the interest of his judgment-debtor as it stood on the date of the attachment.

It may be contended on the other side that by the last clause of section 43 the plaintiff ought to have included both his claims in the first suit. But under section 99 of the Transfer of Property Act (IV of 1882) he has a right to sue notwithstanding the provisions of section 43 of the Civil Procedure Code.

1900.

GOVIND v. PARASHRAM.

*Scott* with *Narayan G. Chandavarkar*, for the respondent (defendant No. 2):—We do not object to a personal decree against the first defendant. But the claim for specific performance is time-barred under article 113, Schedule II, of the Limitation Act. There was really one contract and not two. The cause of action was also one after the 18th September, 1895. The agreement provides that if default be made in payment of Rs. 4,000 in cash, a mortgage-bond should be passed for the whole amount that may be then found due, that is, including the Rs. 4,000. The first suit, therefore, split up the plaintiff's cause of action, and section 43 of the Civil Procedure Code is a bar to the present suit. Section 99 of the Transfer of Property Act and section 43 of the Code must be read together.

JENKINS, C. J.:—On a settlement of accounts it was found that there was due from the first defendant to the plaintiff Rs. 15,505, and in reference to this indebtedness the arrangement was made, which is contained in a document dated the 15th June, 1895, Exhibit 15 in the case. The leading idea of this document was, that Rs. 4,000 of this debt was to be paid off before the 18th of September, and that a mortgage on the specified property was to be given for the balance. But, in the event of the first defendant's failing to pay the Rs. 4,000 within the stipulated period, the mortgage was to be for the full amount. That, we think, is the true effect of the document, notwithstanding the argument advanced by the Advocate General in reliance on its last clause. Exhibit 15 was duly registered. The Rs. 4,000 was not paid as provided, nor has a mortgage been executed.

On the 16th September, 1899, the plaintiff commenced a suit in the Pen Second Class Subordinate Court to recover the Rs. 4,000 with Rs. 1,916 for interest thereon, but in order that the suit might come within the jurisdiction of that Court Rs. 917 were remitted. On the 29th of September, 1899, a decree was passed in the plaintiff's favour. On the 30th September, 1899, the plaintiff commenced the present suit against the first defendant, his debtor, and against the second defendant, who as a judgment-creditor of the first defendant has attached the property comprised in the mortgage. In it the plaintiff prays that either defendant No. 1 be ordered to pass to the plaintiff a mortgage-bond for

Rs. 17,442-7-9, or that a decree be passed for the recovery of the said amount by sale of the property agreed to be mortgaged and from defendant No. 1, and that the property be declared liable for the amount claimed.

The case was heard by the First Class Subordinate Judge of Thána, who held (1) that the suit was barred by section 43 of the Civil Procedure Code, (2) that the claim for specific performance is barred, and (3) that the agreement was fraudulent, and as a consequence he dismissed the suit. From this decree of dismissal the present appeal is preferred by the plaintiff, who has maintained that on each of these points the lower Court erred.

Mr. Scott has not attempted on behalf of the second defendant to support the finding of fraud, nor do we think there is anything on the record to justify the Judge's conclusion on this point. To this extent, therefore, we think he is wrong. This brings us to the points which have been argued before us.

Section 43 of the Code of Civil Procedure is in these terms:—

"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

"If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

"A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but, if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

"For the purpose of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action."

The contention founded on this section is, that the Rs. 4,000 sued for in the Pen Court was but a part of the Rs. 15,505 and interest, and inasmuch as the plaintiff omitted to sue then for the balance, he cannot now sue in respect of it. To escape from this the argument advanced by the Advocate General is, that the present is a different cause of action: in the former suit the plaintiff sued for non-payment of the Rs. 4,000, while in this suit

he sues for damages for breach of the agreement to execute a mortgage. We think this argument cannot prevail: as a matter of fact the Rs. 4,000 and the Rs. 15,505 were portions of one total indebtedness, and though there was the agreement for payment of the Rs. 4,000, to which we have already alluded, when the Pen suit was commenced, the whole amount was equally payable and in respect of every part of that amount the first defendant had failed to perform his obligation to execute the mortgage. In whichever way, therefore, the position be regarded, there was one cause of action; and, so far as the argument to which we have referred goes, it appears to us that section 43 affords a conclusive answer.

There is, however, another way of approaching the case that presents a certain amount of difficulty, and with this we will now deal.

Did the plaintiff by virtue of the agreement actually obtain a charge on the property for the whole amount of the debt, and if so, is he in a better position so far as the plea of *res judicata* goes? Now it is clear that so far as the plaintiff requires a decree for specific performance in his favour, he is out of Court; because article 113 in the Schedule to the Limitation Act would apply. But in our opinion he is under no obligation to seek specific performance; the existing indebtedness constituted a valuable consideration, and it follows that even without the execution of the contemplated mortgage a good charge was created in the plaintiff's favour, which would prevail, not only against the first defendant, but also against the second defendant, who as a judgment-creditor could not have a greater interest than his debtor. But does this better the plaintiff's position? The last clause in section 43 of the Code of Civil Procedure provides that for the purposes of the section an obligation and a collateral security shall be deemed to constitute but one cause of action: so that, if matters rested there, the plaintiff by suing for the Rs. 4,000 would have precluded himself from suing on his collateral security. We have stated this position hypothetically, because the Advocate General maintains that, so far as mortgage securities go, this provision is nullified by section 99 of the Transfer of Property Act. Now that section is as follows:—

"Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43."

When the Transfer of Property Act was passed, the Civil Procedure Code then in existence was not the present Code, Act XIV of 1882; but by section 3 of the present Code it is provided that "when in any Act * * * passed * * * prior to the day on which this Code comes into force reference is made to * * * the Code of Civil Procedure * * * such reference shall, so far as may be practicable, be read as applying to this Code or the corresponding part thereof." Conceding, then, that section 43 of the Civil Procedure Code must be read in subordination to section 99 of the Transfer of Property Act, what is the result? If we accept the Advocate-General's argument, we have to exclude mortgages from the operation of the last clause of section 43, though they would certainly seem to be the collateral securities directly aimed at: we should, in effect, be imputing to the Legislature the error of repugnancy. It is, therefore, necessary to see whether the two sections are not reasonably capable of a construction which will avoid that result.

Now it is clear that section 43 is directed against two evils: the splitting of claims and the splitting of remedies. If a man omits from his suit a portion of his claim, he shall not afterwards sue in respect of it: if he omits one of his remedies, he cannot afterwards pursue it, so that if a mortgagee sues on his personal security alone he cannot afterwards sue on his real security. That we take to be the effect of section 43 standing by itself.

Section 99 of the Transfer of Property Act is aimed at another and distinct evil: the hardship inflicted on mortgagors by mortgagees proceeding to realize their claim by execution of money decrees passed in respect of the mortgagor's personal liability. Consequently, that section provides, that mortgaged property shall not be sold in execution of a decree otherwise than by an ordinary mortgagee's suit. It will be seen, therefore, that the primary purpose of section 99 is not to increase, but to curtail a mortgagee's powers; and to secure that end, and for that purpose

1900.

GOVIND v. PARASHRAM.

alone, the bar imposed by section 43 of the Code of Civil Procedure has to be relaxed.

Then comes the question how far does this relaxation extend? Does it nullify the whole of that section, and remove the restriction both on the splitting of claims and the splitting of remedies? We think not; its only purpose is, in our opinion, to relieve a mortgagee from the restriction placed on the splitting of his remedies. The rest of the restriction is unimpaired, and inasmuch as the plaintiff in this case has omitted in his former suit to sue in respect of the Rs. 11,505, which was a portion of his claim, he cannot now sue in respect of the portion omitted.

For these reasons we think that section 43 of the Code of Civil Procedure is a bar: the decree of the lower Court must be confirmed and this appeal dismissed with costs.

*Decree confirmed.*

---

## APPELLATE CRIMINAL.

*Before Mr. Justice Fulton and Mr. Justice Batty.*

QUEEN-EMPRESS v. BASVANTA AND OTHERS.*

1900. *August* 20.

*Evidence—Confession—Retracted confession—Evidence Act (I of 1872), Secs. 24, 30 and 33—Deposition of a deceased witness—Admissibility of such deposition in subsequent proceedings.*

A confession duly recorded and certified under section 164 of the Criminal Procedure Code (Act V of 1898) is admissible in evidence against the person making it unless shut out by the provisions of section 24 of the Indian Evidence Act (I of 1872).

A mere subsequent retractation of a confession which is duly recorded and certified by a Magistrate is not enough in all cases to make it appear to have been unlawfully induced.

The law in India is not identical with the law in England on the relevancy and admissibility of confessions.

*Imperatrix* v. *Balya Dagdu*(1) dissented from.

*Reg.* v. *Balvant*(2) followed.

Where a witness for the prosecution was examined before a committing Magistrate, but was not cross-examined, and then died before the case came

* Ciminal Appeals, Nos. 350 to 352 of 1900.

(1) Cr. Rul. No. 3 of 1898. (2) (1874) 11 Bom. H. C. R., 137.