1900.

IN RE HIMAT PROVIDENT SOCIETY.

registered as that of the person to whom the amount due under the rules of this society after your death should be paid.

Dated Nadiád___.

Compared by Karkun___.

___Director.

___Secretary and Manager.

N.B.—The certificate should be preserved as it should accompany death certificate.

The reference came on for argument before Ranade, Crowe, and Whitworth, JJ.

Ráo Bahádur *V. J. Kirtikar*, Government Pleader, against the reference.

Per Curiam :—We are of opinion that the certificate in question does not come under article 19, but falls under article 47 (*d*) of Act II of 1899, and is liable to pay *ad valorem* duty.

ORIGINAL CIVIL.

Before Mr. Justice Crowe.

1901. *March* 11.

DICK AND OTHERS, PLAINTIFFS, *v.* DHUNJI JAITHA AND LUDHOO PREMJI, DEFENDANTS.*

Civil Procedure Code (XIV of 1882), section 153—Joint debtors—Suit against several joint debtors—Judgment against one joint debtor who admits claim does not bar suit against others—Contract Act (IX of 1872), section 43—Partners—Practice—Procedure.

In an action against two alleged partners, which came on as a short cause, one of the defendants admitted the claim and judgment was therefore passed against him for the amount claimed. The second defendant denied his partnership with the first defendant and his liability to the plaintiffs, and on his application the case as against him was transferred to the list of long causes and postponed. He then filed a supplemental written statement in which he pleaded that the cause of action alleged in the plaint was joint; that it had become merged in the judgment recovered against the first defendant and that further proceedings in the suit were therefore barred. A preliminary issue on this point was raised and argued.

Held, that the suit should proceed. In an action commenced against several

* Suit No. 14 of 1901.

joint debtors judgment recovered against one of them who admits the claim does not bar the further prosecution of the suit against the others.

HEARING on preliminary issues.

Suit against the defendants Dhunji Jaitha and Ludhoo Premji for the sum of Rs. 7,931, being the price of iron sold and delivered to them as partners.

On the 29th January, 1901, the case came on for hearing as a short cause. The first defendant (Dhunji Jaitha) appeared and admitted the claim and a decree was then passed against him for the full amount.

The second defendant filed a written statement denying that he was a partner with the first defendant (Dhunji Jaitha) and denying his liability to the plaintiffs. As against him the suit was on his application transferred to the list of long causes and postponed. He afterwards filed a supplemental written statement as follows:—

"This defendant without prejudice to the defence set forth in his original written statement says that the cause of action alleged in the plaint against the defendants was joint and one capable of being merged in a judgment recovered against one of the defendants, and that on the 29th of January, 1901, the plaintiff recovered judgment against the first defendant for the sum claimed in this suit in respect of such cause of action. This defendant therefore submits that the said judgment is a bar to further proceedings against this defendant in respect of such cause of action and that this suit should be dismissed as against him with costs."

It was subsequently ordered that the following issues should be tried as preliminary issues:

(1) Whether the judgment recovered in this suit on the 29th January, 1901, against the first defendant is not a bar to further proceedings against the second defendant.

(2) Whether the suit should not be dismissed with costs against the second defendant.

These issues now came on for trial.

Inverarity (with *Scott*, Acting Advocate General,) for defendant.

The suit cannot be continued against the second defendant. Judgment has already been passed against his partner, the first defendant. The joint debt has therefore become merged in the

1901.

DICK v. DHUNJI JAITHA.

judgment and the suit is at an end. *King* v. *Hoare*(1); *Kendall* v. *Hamilton*(2); *In Re Hodgson*(3); *McLeod* v. *Power*(4); *Hemendro Coomar* v. *Rajendrolall*(5); *Nuthoo Lall* v. *Shoukee Lall*(6); *Brinsmead* v. *Harrison*(7); *Gurusami* v. *Samurti*(8); *Rahmubhoy* v. *C. A. Turner*.(9) The latest case on the point is *Muhammad Askari* v. *Radhe Ram Singh*(10) in which it was held that the doctrine of *King* v. *Hoare* is not applicable in India, at all events in the mofussil. That decision is wrong and it is not binding on this Court.

Lowndes (with *Raikes*) for plaintiff.

In order to decide whether the rule in *King* v. *Hoare*(11) applies, it is necessary to ascertain whether it is a rule of law, or merely a rule of procedure. We say it is a rule of procedure. If so, we must take our procedure in India from the Civil Procedure Code (Act XIV of 1882), and section 153 of that Code is decisive on these preliminary issues. The procedure in England may be different, but in India we are bound by that section. Is this rule then a rule of procedure? In *Kendall* v. *Hamilton*(12) it is so called by Lord Penzance (pages 525 and 530 of the report) and by Lord O'Hagan (page 534). The case of *McLeod* v. *Power*(13) confirms the view that the rule is a mere rule of procedure. Reference is there made to two of the English rules of procedure, *viz.* order XIII. rule 4, and order XIV. rule 5, which (it was said) created certain exceptions to the rule laid down in *King* v. *Hoare*. It was held that *McLeod* v. *Power* did not fall within these exceptions: that these special rules did not apply, and that therefore the general rule of *King* v. *Hoare* applied. We contend that if the rule in *King* v. *Hoare* is the general rule in India, then section 153 of the Civil Procedure Code (like the English rules just mentioned) creates exceptions to it, and that this case falls within that section and is an exception. See also

(1) (1844) 13 M. & W. 490.
(2) (1879) 4 Ap. Ca. 504.
(3) (1885) 31 Ch. D. 177.
(4) (1898) 2 Ch. 295.
(5) (1878) 3 Cal. 353.
(6) (1872) 10 Beng. L. R. 200; 18 Cal. W. R. 458.
(7) (1872) L. R. 7 C. P. 547.
(8) (1881) 5 Mad. 37.
(9) (1890) 14 Bom. 408.
(10) (1900) 22 All. 307.
(11) (1844) 13 M. & W. 490.
(12) (1879) 4 Ap. Ca. 504.
(13) (1898) 2 Ch. 295.

Weall v. *James*.[1] All the Indian cases cited are cases in which there were two separate suits, so that the present question is not covered by Indian authority. The case of *Hemendro Coomar* v. *Rajendrolall*[2] was decided upon the supposition that the rule in *King* v. *Hoare* was a rule of law, and not a rule of procedure. But *Kendall* v. *Hamilton*[3] in which Lords Penzance and O'Hagan expressed their views had not then been decided.

Our first point thus is that the rule in *King* v. *Hoare* is in India excluded by section 153 of the Civil Procedure Code and does not apply.

Next we say that having regard to section 43 of the Contract Act (IX of 1872) that rule does not apply. The basis of the rule in *King* v. *Hoare* is that the liability of partners is joint. That is the law in England. By English law, if one of two joint contractors was sued he might plead in abatement and the suit abated, but the right to sue remained, and a fresh suit might be brought. But if judgment was obtained against one of two joint contractors the cause of action was exhausted.

But where liability is joint and several, separate suits will lie against the debtors and judgment against one cannot effect the right to sue another. Section 43 of the Contract Act has made the liability of partners in India joint and several. *Motilal* v. *Ghellabhai*[4]; *Lukmidas Khimji* v. *Purshotam*[5]; *Muhammad* v. *Radhe Ram*.[6]

Lastly we ask that, if the Court should be against us on the two points we have raised, the proceedings in this case against the first defendant and the judgment against him should be set aside, and that we be allowed now to proceed against both defendants. *Munster's Case*.[7]

Inverarity in reply.

The judgment and proceedings against the first defendant cannot now be set aside. An application might have been made to do this before the order for a hearing on the preliminary issues

(1) (1893) 68 L. T. 54.
(2) (1878) 3 Cal. 353.
(3) (1879) 4 Ap. Ca. 504.
(4) (1892) 17 Bom. 6.
(5) (1882) 6 Bom. 700.
(6) (1900) 22 All. 307.
(7) (1885) 10 Ap. Ca. 680 at p. 689.

1901.

DICK v. DHUNJI JAITHA.

was asked for and obtained. The order cannot be made now. The first defendant is not here and has had no notice of this application. But in any event the application would be useless. *Hammond* v. *Schofield*.(1) A right cannot be resuscitated.(2) To set aside the judgment would be to revive a right that is gone.

The rule in *King* v. *Hoare* is not a rule of procedure. See Lord Blackburn's judgment in *Kendall* v. *Hamilton*.(3) Section 153 of the Civil Procedure Code does not prevent the second defendant from raising the point on which he now relies. All the cases are in his favour except *Muhammad* v. *Radhe Ram*,(4) which is wrong. In England one joint contractor may be sued alone, but he can apply to have his co-contractor joined with him. Order XVI. rule 11, and Civil Procedure Code, section 32. The law is the same in England and India. *Lakshmishankar* v. *Vishnuram*,(5) *Robinson* v. *Geisel*.(6)

CROWE, J.:—The preliminary issues raised in this suit are—

(1) Whether the judgment recorded against first defendant in this suit on 29th January, 1901, is not a bar to further proceedings against second defendant.

(2) Whether the suit should not be dismissed against the second defendant with costs.

This is a suit against Marathi merchants for the price of certain iron sold and delivered to the defendants jointly who are alleged to have traded in partnership. On the 29th January, 1901, the defendants appeared and the first defendant admitted the claim. The second defendant applied for an adjournment, which was granted on certain terms and judgment was passed against the first defendant. It is now contended on behalf of the second defendant that it being a joint cause of action the debt has become merged in the judgment according to the maxim *Transiunt in rem judicatam* and that the rule laid down in *King* v. *Hoare*(7) and enunciated more clearly in the House of Lords' case (*Kendall* v.

(1) (1891) 1 Q. B. 453.
(2) *Odell* v. *Cormack* (1887) 19 Q. B. D. 223 at p. 228.
(3) (1879) 4 Ap. Ca. 504.
(4) (1900) 22 All. 307.
(5) (1899) 24 Bom. 77.
(6) (1894) 2 Q. B. 685 at p. 687.
(7) (1844) 13 M. & W. 494.

Hamilton(1)) and followed in number of subsequent cases applies to the present case. The judgment in *Kendall* v. *Hamilton* is a most instructive one on the point, not only because of the high authority from which it proceeded, but from the fact that the subject was treated in lengthy judgments by six of the Judges who heard the appeal, and that one Judge, Lord Penzance, dissented from the opinion of the majority.

It has been contended that their Lordships' ruling has been consistently followed in a number of Indian cases, among the most important of which are *Hemendro Coomar* v. *Rajendro Lall*,(2) *Gurusami* v. *Samurti Chinna*,(3) *Lukmidas Khimji* v. *Purshotam*(4); and that the case of *McLeod* v. *Power*(5) is exactly on all fours with the present case. In the Calcutta case, Markby, J., remarked, after holding that the doctrine laid down in *King* v. *Hoare* was binding on the Courts in India: "If I am at liberty to enter upon the general question of convenience, I should hesitate much before applying to this country without any qualification the rule laid down in *King* v. *Hoare*."

It has been contended by Mr. Lowndes for the plaintiff, first, that the rule in *King* v. *Hoare* is a rule of procedure (and for that proposition he relies on the judgment of Lord Penzance and Lord O'Hagan in the case of *Kendall* v. *Hamilton* above referred to), and that being so the provisions of section 153, Civil Procedure Code, apply to the case and that the law as laid down in the Civil Procedure Code must be observed here in India. Secondly, he has argued that the rule in *King* v. *Hoare* was founded on the principle that a contract by a partnership in England was a joint contract, and not a joint and several contract,—that in India since the passing of the Contract Act, 1872, the effect of section 43 of that Act is to convert such a joint contract into a joint and several one, and he relies further on the judgment of Strachey, C.J., in *Muhammad Askari* v. *Radhe Ram Singh*.(6) Their Lordships there held that the effect of section 43 of the Indian Contract Act, 1872, being to exclude the right of a joint contractor to be sued along with his co-contractors, the rule laid

(1) (1879) 4 Ap. Ca. 504.
(2) (1878) 3 Cal. 353.
(3) (1881) 5 Mad. 37.
(4) (1882) 6 Bom. 700.
(5) (1898) 2 Ch. 295.
(6) (1900) 22 All. 307.

1901.

DICK v. DHANJI JAITHA.

down in *King* v. *Hoare* and *Kendall* v. *Hamilton* is no longer applicable to cases arising in India (at all events in the mofussil) since the passing of the Act, and that a judgment, obtained against some only of the joint contractors and remaining unsatisfied, is no bar to a second suit on the contract against the other joint contractors. He further relies on an *obiter dictum* of the late Farran, C.J., in *Motilal* v. *Ghellabhai*,[1] who held in reference to section 43 of the Contract Act that "as far as the liability under a contract is concerned, it appears to make all joint contracts joint and several."

Now it is necessary to ascertain, as far as possible, the grounds on which the rule in *King* v. *Hoare* was arrived at. In *Kendall* v. *Hamilton* the reason for the rule was stated by Earl Cairns, L.C., to be (page 515) "the right of persons jointly liable to pay a debt to insist on being sued together." So also Lord Hatherley observed (page 522)—"Each of the co-contractors has a right to be sued and to have the matter settled at once, instead of its being settled piecemeal." So also in *In re Hodgson*,[2] Lord Bowen in considering the question, what was actually decided in *King* v. *Hoare* and *Kendall* v. *Hamilton*, explained the grounds of the rule as follows (page 188):—"It is based, rightly or wrongly, on the idea that a joint-debtor has a right to demand, if he pleases, that he shall be sued at one and the same time with all his co-debtors. To enforce this right, he is only entitled to plead in abatement, but the right is one of considerable business value, and is so recognised by the law."

Now that being, by the clearly expressed opinion of one of the authorities, the basis of the doctrine, and in the present case the plaintiff having conformed to the view of the law on which the rule is based, and having brought his suit against both the joint co-contractors in one suit, the question arises, whether I am justified in extending the basis of the rule. Mr. Inverarity, who appeared for the defendants, says that I am, and he grounds his contention on the judgment of Byrne, J., in the case of *McLeod* v. *Power*.[3] There one joint-debtor had consented to judgment and it was held that the rule in *King* v. *Hoare* applied, where both

(1) (1892) 17 Bom. 6. (2) (1885) 31 Ch. D. 177.
(3) (1898) 2 Ch. 295.

joint-debtors were originally made defendants to and had entered appearance in the same action and judgment by consent had been obtained against one of them in that action. There can be no doubt that the decision in that case has extended the operation of the rule. Proceedings had been already taken against the other defendant in the same action. In *Weall* v. *James*[1] it was held that where joint contractors were sued and one only obtained leave to defend, the other submitting to judgment, the plaintiff could go on with the action against the former, effect being given to order XIV. rule 5. With the exception of these two cases, in all the cases cited both from the English and Indian authorities, a second action had been brought. Byrne, J., apparently bases his judgment on the fact that there is nothing in the rules which will enable him to draw a distinction between the case of separate actions being brought against the joint contractors and one single action being brought against them, and he treats the question as one of procedure; remarking that the rules do provide two cases for, what he terms, the non-observance of the rule. Those cases are where one of the co-defendants only had leave to defend and where plaintiff has obtained judgment by reason of default on the part of one of the defendants. If, therefore, I felt inclined to follow the authority of *McLeod* v. *Power*, I should have to follow it consistently throughout, and should apply the provisions of section 153 of the Civil Procedure Code, by which we are governed in India, which lays down as a matter of procedure that where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or fact, the Court may at once pronounce judgment for or against such defendant, and the suit shall proceed only against the other defendants. Mr. Justice Byrne referred to the possibility of its being a *casus omissus* in the English rule of procedure which it might be necessary to remedy hereafter, but in India fortunately the Legislature has not left the point unprovided for.

I prefer, however, to base my judgment in this case on the ground that the rule in *King* v. *Hoare* strictly construed does not

(1) (1893) 68 L. T. 54.

1901.

DICK v. DHUNJI JAITHA.

cover the facts of the present case. The principle that a judgment recovered against a joint-debtor is a bar to a further action to be prosecuted against another joint-debtor does not, in my opinion, bar the prosecution of an action already commenced against the co-debtors jointly against the second of such joint-debtors from the fact that one joint-debtor has admitted judgment.

With regard to the argument based on the provisions of section 43 of the Contract Act, it seems to me that that section merely takes away the right of a joint-debtor to be sued jointly and to plead in abatement a right which was abolished in England by the Judicature Acts. It is still open to a defendant to apply to the Court for joinder of a person who ought to have been included in the action and, to use the words of Earl Cairns, L.C., in *Kendall* v. *Hamilton*,[1] "the application to have a person so omitted included as a defendant ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed." Section 32 of the Civil Procedure Code gives the Court absolute discretion, either on application or *suo motu*, to dismiss or add parties.

It is not necessary to consider the question raised in the third portion of Mr. Lowndes' argument, whether the Court, as suggested by Blackburn, J., in *Munster* v. *Cox*,[2] would be justified in setting aside all proceedings after appearance in order to nullify the operation of the judgment against one defendant as a defence. But looking to the circumstances of this case I may say that if the necessity had arisen, I should have been tempted if such were possible to consider any application directed to that end.

For these reasons I hold that the judgment recorded against the first defendant in this suit on the 29th January, 1901, is not a bar to further proceedings in this suit against the second defendant, and that the suit should not be dismissed against the second defendant with costs. Costs of this preliminary issue to be borne by defendant 2.

Attorneys for plaintiffs:—*Messrs. Little & Co.*

Attorneys for defendants:—*Messrs. Virji and Madhavji.*

(1) (1879) 4 Ap. Ca. 504. (2) (1885) 10 Ap. Ca. 680.