

## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.*

HANSRAJ LAKHMIDAS (ORIGINAL PLAINTIFF), APPELLANT, v.

LALJI ANANDJI (ORIGINAL DEFENDANT), RESPONDENT.\*

1904.

March 16.

*Civil Procedure Code (Act XIV of 1882), section 43—Earlier suit on an adjusted account—Subsequent suit on a mortgage—Distinct causes of action—Relief not claimed in the earlier suit.*

A plaintiff omitted to claim relief in a suit on an adjusted account which he subsequently claimed in a suit based upon a mortgage.

*Held*, that the causes of action for the two suits being distinct, the omission to claim the relief in the earlier suit did not operate as a bar to the subsequent suit under section 43 of the Civil Procedure Code (Act XIV of 1882).

APPEAL from the decision of R. B. P. Cator, Judge of Her Britannic Majesty's Court for Zanzibar, in Civil Case No. 196 of 1899.

The plaintiff and one Khimji Jairam, both of whom were trading at Zanzibar, had extensive dealings with each other. Khimji's affairs having subsequently become much involved, certain persons in German territory obtained against him a decree whilst he was in Cutch in India, and sought to enforce it by the sale of some of his shops in Dar-es-Salaam at Zanzibar. Under these circumstances the defendant, who was Khimji's *Munim* (manager) at Zanzibar, applied to the plaintiff for assistance to pay the decretal debt and to rescue the shops. This was done upon certain conditions by which the defendant pledged his own credit for payment of the debt in case Khimji failed to pay. The transaction was carried through by means of two documents, one of which was a mortgage by Khimji to the defendant and the other a sub-mortgage by the defendant to the plaintiff. In the sub-mortgage the defendant undertook to collect and to hold the rents of the shops for the plaintiff. In the year 1899 the plaintiff brought two suits, namely, (1) No. 193 of 1899 and (2) No. 196 of 1899, against the defendant in Her Britannic Majesty's Court at Zanzibar. In Suit No. 193 the plaintiff sought to recover a certain sum from the defendant on the basis of an account of the rents and profits of the shops rendered by the defendant up to

\* Appeal No. 22 of 1903.

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Kartak Sud 2nd, Samvat 1951 (1894-95 A. D.), reserving his right to claim further account for the rents and profits subsequent to the date aforesaid. In Suit No. 196 which was brought upon the sub-mortgage the plaintiff prayed that the defendant might be called upon to account to the plaintiff for the rents and profits of the shops from Kartak Sud 2nd, Samvat 1951, up to the date of the institution of the suit and further rent till date of decree. The Judge gave to the plaintiff a decree in the first suit, but he dismissed the second suit on the following grounds :—

I am afraid there can be no doubt that I must decide this case against the plaintiff upon the technical ground that he is debarred from bringing this action by section 43 of the Civil Procedure Code.

The plaintiff's claim is for an account and payment of rents and profits of shops at Dar-es-Salaam which may have come to his hands, but in Suit No. 193 of 1899 in which I have just given judgment the plaintiff has already sued for rents accruing from the same shops. The only distinction that he can draw between the one claim and the other is that the first was for a part of the rents which had been included in the parties' books and, according to the plaintiff, had been entered as part of a settled account. It appears to me that, if true, this would make no difference because both claims spring from the same cause of action, namely, a declaration by the defendant that he would hold such rents on behalf of the plaintiff, but I am not satisfied that the first sum had ever become part of a settled account. The plaintiff won his first case upon the ground that the defendant had made himself a trustee of these rents for the plaintiff and according to the same principle the plaintiff would succeed in this one, but as he has severed his claim I feel bound to dismiss the action but make no order as to costs.

The plaintiff preferred an appeal.

*Scott* (Advocate General) with *H. C. Coyaji*, for the appellant (plaintiff).

*Setalvad* (with *Payne and Company*), for the respondent (defendant).

JENKINS, C. J.:—This is an appeal from the Court of Zanzibar by which the plaintiff's Suit No. 196 of 1899 has been dismissed on the ground that the plaintiff is barred by section 43 of the Civil Procedure Code. The circumstances out of which the suit arises are shortly these: One Khimji Jairam of Cutch traded at Zanzibar through his Munim Lalji Anandji, the present defendant. The plaintiff Lakhmidas Ludha also traded there. To

enable Lalji Anandji on behalf of his principal to obtain a release from attachment of five shops within the German jurisdiction, a sum of Rs. 7,000 was lent by Lakhmidas Ludha to Lalji Anandji, who applied the sum of Rs. 5,869 in discharge of what was due on the attachment and of legal expenses directed by the German Court to be paid. The balance was returned by Lalji Anandji to Lakhmidas Ludha. It became necessary, however, in the opinion of Lakhmidas Ludha to obtain security for repayment of the Rs. 5,869, and accordingly Lalji Anandji became personally responsible for that amount, and as part of the same transaction he got a mortgage in his own favour from Khimji Jairam of the five shops and in turn sub-mortgaged them to Lakhmidas. The result was that there was debited to Lalji Anandji in Exhibit No. 50, the sum of \$2,753. That account was a general one in the name of Lalji Anandji. There being due to the plaintiff Lakhmidas Ludha a considerable balance in this general account, he brought to recover it Suit No. 193 of 1899 against Lalji Anandji, and a few days later he brought the present Suit No. 196 of 1899 for the purpose of enforcing certain rights, which he alleged were vested in him by virtue of the sub-mortgage, Exhibit 38.

In the Suit No. 193 of 1899, the Acting Judge of the Court of Zanzibar passed a decree in the plaintiff's favour. But in the present suit he declined to pass a decree on the ground that section 43 of the Civil Procedure Code stood in his way.

The reasoning of the learned Judge is, shortly this. That inasmuch as it was open to the plaintiff to include his claim for rent (as it is called) in the first suit, therefore he had no right to bring in respect of it a second suit. And it is suggested that this becomes apparent from the fact that in the earlier suit is included a sum of Rs. 101 as being an amount due in respect of rent.

Now section 43 is very clear. It says that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action"; and "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." It seems to have been the opinion of the learned Judge that the Suit No. 193, so far as it included that

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item of Rs. 101, was in respect of the same cause of action as Suit No. 196. But there is an obvious fallacy underlying this reasoning. The item of Rs. 101, it is true, arises out of the mortgage transaction which is the subject-matter and the basis of the Suit No. 196, but the real cause of action alleged in the earlier suit is an adjusted account, and the earlier suit, even so far as it related to the item of Rs. 101, was a suit on an account stated. It is well established that an account stated respecting a debt constitutes a new and distinct cause of action, the consideration being the ascertaining of the previously uncertain state of the transaction between the parties, while a promise to pay is implied by the admission of the balance. So that it is clear the claim in respect of the Rs. 101 was not on the mortgage, but on an account stated in respect of the transaction arising out of the mortgage.

In Suit No. 196 the mortgage constitutes a cause of action in itself, and we fail to see how it can be said that a suit for items wholly unconnected with that mortgage (except so far as they may have formed the basis of a claim in respect of the Rs. 101) can in any sense be treated as a suit on the same cause of action.

For these reasons we think that the learned Judge was in error.

But, then, it has been argued by Mr. Setalvad that he is entitled to support the decree on other grounds, and he has accordingly urged that though there was in Exhibit 28 a liability to render an account, there was no liability to pay over what should appear on that account.

Now what are the words of the mortgage? They are these: "I, *i.e.*, the mortgagor, should manage to keep the account of income and expenses thereof, *i.e.*, of the shops, and then furnish the said account to you, and whatever balance there may be, you should credit the same on account of principal and interest." So it is manifest, first, that the mortgagor was under an obligation to keep accounts of the income and expenses; secondly, that he was to furnish the account to the mortgagee; and, thirdly, the mortgagee was to give the mortgagor credit for the balance shown on these accounts; and we are asked to hold that he is to give credit for that balance without receiving it.

It seems to us that the suggestion cannot be entertained for a moment. Though the document is not expressed with precision.

this clause imposes an obligation upon the mortgagor to pay over to the mortgagee the balance in reduction of principal and interest.

We, therefore, think that the decree of the lower Court cannot be sustained, that it must be reversed and the case sent back for decision on the merits.

The appellants to get his costs of the appeal.

*Decree reversed.*

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## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.*

SAKUBAI, WIDOW OF VINAYAK RAMKRISHNA (ORIGINAL PLAINTIFF),  
APPELLANT, v. GANPAT RAMKRISHNA (ORIGINAL DEFENDANT),  
RESPONDENT.\*

1904.

March 30.

*Civil Procedure Code (Act XIV of 1882), section 592, proviso—Pauper appeal—Leave—Reasons for granting leave to be recorded.*

In granting leave to appeal as pauper the Court should be careful to see that the proviso to section 592 of the Civil Procedure Code (Act XIV of 1882) is satisfied.

The Judge or Bench admitting a pauper appeal should express and record very briefly the reasons for granting leave so that the Bench before whom the appeal ultimately comes may have an assurance that the leave was properly given.

APPEAL against the decision of A. G. Bhawe, First Class Subordinate Judge of Poona, in Original Suit No. 242 of 1901.

Admission of appeal *in forma pauperis*.

The plaintiff sued the defendant, who was the brother of her deceased husband, to recover various sums on account of her maintenance, the value of her *stridhan* ornaments, which, she alleged, were in defendant's possession, expenses of pilgrimage and house accommodation. The claim was valued at Rs. 16,800 and there was a prayer in the plaint that the plaintiff's maintenance should be made a charge on the family estate in the defendant's possession.

\* Appeal No. 123 of 1903.