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Had the Legislature intended clause (*b*) to apply to land used both for agricultural and other purposes, it would have used apt language to convey its meaning. It would have referred to the land in clause (*b*) as land appropriated for purposes of agriculture and other purposes except building sites. This is a taxing enactment, and must be construed strictly in favour of the subject.

The decree appealed from must, therefore, be confirmed with costs.

Decree confirmed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Chaubal.

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BAYABAI, WIDOW, AND OTHERS, APPELLANTS AND DEFENDANTS 2, 3, 4, *v.* HAJI NOOR MAHOMED CASSAM, RESPONDENT AND PLAINTIFF, AND N. C. MACLEOD, RESPONDENT AND 1ST DEFENDANT.*

Practice—Suit against defendant on ground which failed not to be decreed on another ground—Application for leave to amend plaint after arguments heard in appeal disallowed—Res judicata.

A suit brought against the defendants on one ground which fails should not be decreed against them on another ground which they had no opportunity of meeting.

After arguments in appeal have been heard the Court will not allow an amendment of the plaint so as to convert a suit of one character into a suit of a substantially different character.

H. filed a suit in 1904 against A. and J. the drawer and indorser respectively of two hundies. At the time of filing the suit J. was dead.

H. obtained a decree against both defendants, which decree remained unsatisfied.

In 1905 H. filed a suit against the heirs of J. on the same two hundies.

Held, the earlier suit having been filed against the firm of J. and not against J. personally was a bar to the later suit.

THIS was a suit filed by Haji Noor Mahomed Cassam against the defendants as the heirs and legal representatives of one

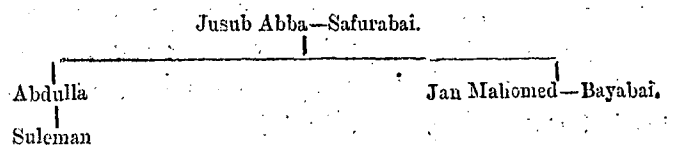
* Appeal No. 1477, Suit No. 611 of 1905.

Jusub Abba, deceased, for the recovery of a sum of Rs. 1,800 with interest alleged to be due to the plaintiff upon certain hundies, dated the 5th and 8th days of September 1904, passed by one Abdoor Rehman Noor Mahomed and endorsed by the first defendant in the name of his deceased father Jusub Abba. The defendants 2, 3, 4 pleaded that the suit was barred as being *res judicata*, the plaintiff having sued to judgment these parties in another suit. Russell, J., passed a decree in favour of the plaintiff for the amount claimed with costs. Against this decree the defendants 2, 3, 4 appealed.

Robertson (with *Davar*) for the appellants.

Setalvad (with *Mirza*) for the respondents.

BATCHELOR, J.:—The following tree shows the relation between the various defendants-appellants :—



Abdulla is an insolvent, and the Official Assignee is the first defendant in his place. Jan Mahomed died intestate in 1906, leaving his widow his only heir. The parties are Cutchi Memons, and the plaintiff is by profession a money-lender.

The suit out of which this appeal arises is based on two *hundies* drawn by one Abdul Rehman in September 1904 in favour of Jusub Abba, and endorsed in the name of Jusub Abba by Abdulla to the plaintiff. Upon these same *hundies* the plaintiff brought an earlier Suit No. 863 of 1904 against Abdul Rehman, the drawer, and Jusub Abba, the indorser, and in that suit obtained a decree against both the then defendants. That decree has remained unsatisfied, and it is common ground that Jusub Abba died in February 1902 or over two years before the institution of this Suit No. 863. The suit underlying the present appeal is No. 611 of 1905, and in it the plaintiff seeks to enforce liability for the two *hundies* against the defendants as the representatives of the deceased Jusub Abba. The learned Judge below has decreed the claim, and against that decree

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the present appeal is preferred by the defendants Bayabai, Safurabai and Suleman.

The stress of the argument in this appeal has fallen upon the question as to the exact character of Suit No. 863, and Mr. Robertson has contended that that suit is a bar to the present claim. The contention is put in the alternative, and it is urged that the second defendant in Suit No. 863 was either the firm of Jusub Abba or was the individual Abdulla Jusub: in either of these cases it is said that the present claim is unsustainable. I will deal with the argument that the second defendant in the earlier suit was the firm of Jusub Abba, and not the individual of that name. It will not be necessary to consider the alternative suggestion. Turning, first, to the title of the suit, we find that the second defendant is there described as "Jusub Abba also of Bombay Mahomedan inhabitant doing business at Esplanade Road opposite to Watson's Hotel within the fort." I must accept the argument that that is *primâ facie* the description of an individual person, but I cannot accept the view that that is an end of the matter. For, having regard to the practice of these Courts, the description is conceivably applicable to the firm Jusub Abba, and I think we must look to the evidence to see what precisely the description meant. We need not look beyond the evidence of the plaintiff himself. In the course of execution proceedings under the earlier decree, notice was issued on Safurabai, who on 16th June 1905 made the affidavit exhibit 21 pointing out that Jusub Abba had died more than two years before the suit was filed. Plaintiff's reply is his affidavit exhibit 1 of 12th January 1906, in which he not merely admits, but emphatically contends, that his suit of 1904 was brought against the firm of Jusub Abba, which through its manager, Abdulla Jusub, had endorsed the *hundies* to him. In his deposition in the present suit the plaintiff does indeed make a half hearted attempt to resile from this position, but on his attention being drawn to his affidavit he abandons the attempt and says, "I say now I sued the firm of Jusub Abba. By firm I mean shop. I sued the owner of the shop." There the matter rests, except that this view is amply corroborated by the form in which the *hundies* are drawn and by the general

tenour of the plaintiff's deposition. For it appears that the plaintiff had no knowledge of the man Jusub Abba; he never saw him, he says, or tried to see him. Asked how he knew the name of Jusub Abba, he says "I know the name of Jusub Abba in connection with this business. Jusub Abba was the name of the firm—the firm of Jusub Abba, his own business." And further on he says that what he thought he was getting by the suit was a decree against the firm. And here, I think, may be found the answer to the question put by the plaintiff's counsel in the lower Court, namely, why should the plaintiff have brought a suit against a dead man? It may be that the plaintiff when he filed the suit was not aware of Jusub's death, though his own evidence on the subject is plainly untrustworthy; but the real explanation is, I conceive, that it mattered nothing to the plaintiff whether the man Jusub Abba was alive or dead; his suit was a suit against the firm. So the writ was served on Abdulla as manager of the firm—see section 74, Civil Procedure Code—and that is the position assigned to Abdulla throughout the proceedings. No doubt the question is not, whom did the plaintiff intend to sue, but whom did he in fact sue? The distinction, however, cannot, in my opinion, avail the plaintiff here; for under the practice and rules of this Court—see especially Rule 375 of the High Court Rules—a suit framed within the meaning and in the form of Suit No. 863 would be a good suit against the firm. In other words the plaintiff in the earlier suit did intend to sue the firm of Jusub Abba and did give sufficient effect to that intention. In the same way the plaintiff filed Suit No. 16788 of 1904 on the Small Cause Court against "Jusub Abba" (exhibit B), and, as he admits, under the decree made, he levied an attachment on the shop and the money was paid.

Thus upon a consideration of all the evidence and the circumstances connected with Suit No. 863 I come to the conclusion that that suit was brought against the firm of Jusub Abba. That being so, the present suit admittedly will not lie against the defendant-appellants as partners; and it is in that view of their position that the learned Judge has decreed against them, and upon that footing only has the plaintiff sought to uphold the decree.

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Upon this finding the question arises why the plaintiff did not rest content with the decree which he obtained and which as he understood it bound the firm, especially as there has been no determination in execution proceedings or otherwise that the decree does not bind the firm. Mr. Robertson's answer to this question is that the plaintiff, having discovered that the assets of the firm of Jusub Abba are exhausted, is now anxious to come upon certain immoveable properties which would not be liable under the terms of the decree in Suit No. 863 construed as a decree against the firm. It seems to me that this is the real explanation of the origin of the present suit, and upon this point reference may be made to the plaintiff's application exhibit 2 of 5th May 1905. That was the first step taken in execution of the decree, and the disingenuous passage in paragraph 2 of the application as to the second defendant being "now" dead is very significant. I have no doubt that the plaintiff had long been aware that Jusub Abba's death had occurred long before the decree, and when he was challenged upon this point by Safurabai in her affidavit of 16th June 1905, he falls back upon the other position that the second defendant in his suit was the firm of Jusub Abba: see his affidavit exhibit 1. Finally on 20th January 1906 he abandons the notice against Safurabai (exhibit A 20), the present suit having been instituted on 11th August 1905. It is not, as Mr. Setalvad has suggested, that the plaintiff was forced by Safurabai's contentions to abandon execution: it was his business to go on with it and obtain the adjudication of the Court, and I cannot doubt that that is the course which he would have pursued if he had thought that his decree was sufficient for his purposes. But for reasons which are no longer obscure he elected to give the go-by to the decree which he had, and endeavoured to convert that decree into one of a different character. There can be no doubt of the nature of the suit he then filed. The only prayer in the plaint—other than the formal prayer for further and other relief—is a prayer "that the defendants as the representatives of the deceased Jusub Abba" may be decreed liable to discharge the debt out of the estate of Jusub Abba. Before us it was conceded that no liability could be attached to the defendant-appellants

upon this footing, and indeed it is plain that as representatives of Jusub Abba they cannot be held responsible for a debt contracted two years after Jusub Abba's death. The learned Judge below was, I gather, of the same opinion, and he has decreed against the appellants, not as representatives of Jusub Abba, but as partners, or rather as *quasi*-partners, in a firm. But they were not sued in this latter capacity, and no question of their liability in that capacity is raised either in the pleadings or in the issues on which the parties went to trial. In my opinion, therefore, the appellants upon this ground alone are entitled to succeed, and to claim that a suit brought against them on one ground, which failed, should not be decreed against them on another ground which they had no opportunity of meeting. The only plain issue as to the appellant's liability is issue No. 13 which contemplates merely their liability as representatives of Jusub Abba, and Mr. Robertson, who appeared for the appellants below, was taken by surprise when the ground assigned for the liability was shifted as the trial proceeded; and no attempt was made to obtain the Judge's permission to amend the plaint or frame further issues.

In my opinion, then, the appeal must be allowed both because the suit against the appellants was barred by Suit No. 863 of 1904, and, because it was not competent to the Court in this suit to make a decree against the appellants on the footing of their being partners or *quasi*-partners in the firm.

After the arguments in this appeal had been completely heard Mr. Setalvad applied for leave, if necessary, to amend the plaint; but it is plain that at that stage we ought not to allow a suit of one character to be converted into a suit of a substantially different character.

The judgment of the lower Court must be reversed and the suit must be dismissed as against the appellants with costs throughout.

CHAUBAL, J.—I concur.

Decree reversed.

Attorneys for appellants.—*Messrs. Unvalla and Phirozshaw.*

Attorneys for respondents.—*Messrs. Mirza and Mirza.*

B. N. L.