

February 1907. That is the only evidence of the contract, and, as it requires registration, a contract of mortgage cannot be proved. Plaintiff therefore must fail.

1913.

BEHRAM
RASHID
v.
SORABJI
RUSTOMJI.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

TULJARAM HARICHAND GUJAR (ORIGINAL PLAINTIFF), APPELLANT, v.
SITARAM NARAYAN KUSAR AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS.*

1913.

October 31.

*Civil Procedure Code (Act V of 1908), Order V, Rule 5—Suit on mortgage—
First summons to be for settlement of issues and not for final disposal—
Practice and Procedure.*

In 1910 a mortgage suit was filed. The plaintiff having died, the name of his son was substituted in place of his name on the 13th April 1912. On the same day, the Court issued summons for the first time to the defendants, for final disposal. On the day fixed for hearing, the Court raised issues, and as neither party had witnesses ready, the Court found the claim not proved in absence of evidence. The plaintiff having appealed :—

Held, reversing the decree, that there was a miscarriage of justice in the way the case had been disposed of. The scheme of the Civil Procedure Code required, in cases like the present, that the parties should have the opportunity to produce evidence relevant to issues framed after ascertaining matters as to which the parties were in dispute.

Held, further, that the summons to the defendants should have been for settlement of issues and not for final disposal.

SECOND appeal from the decision of W. T. W. Baker, Acting District Judge of Satara, confirming the decree passed by V. R. Kulkarni, Subordinate Judge at Rahimatpur.

Suit on mortgage.

* Second Appeal No. 810 of 1913.

1913.

TULJARAM
HARICHAND
v.
SITARAM
NARAYAN.

The suit was filed in 1910 by one Harichand. He died in April 1912. The name of his son Tuljaram was substituted in place of his name on the 13th April 1912. On the same day, the Court fixed the day of hearing for the 1st June 1913 and ordered summons to issue to the defendants, for final disposal. On the day of hearing, both parties were present, but none had brought any witnesses. The Court raised one issue: Is the bond proved; and finding it not proved in absence of evidence dismissed the suit.

On appeal, the District Judge summarily rejected the appeal.

The plaintiff appealed to the High Court.

D. G. Dalvi, for the appellant.

A. V. Lele, for respondent No. 1.

HEATON, J.:—In this case my opinion is that there has been a miscarriage of justice owing to a want of understanding of the intention of the Procedure Code.

A suit No. 685 was filed in 1910. Up to the 13th of April 1912 a summons had not been served on the defendant. On that date the present plaintiff applied to have his name entered in the place of his deceased father who was the original plaintiff. That application was granted, and the 1st of June was fixed for the final disposal of the suit. A notice was issued to the defendant to appear on that day with his witnesses. On the 1st of June the plaintiff appeared and the defendant also appeared and put in a written statement, but neither party produced any witnesses. The suit was a mortgage suit, and in his written statement the defendant denied that he had executed the mortgage-deed or had incurred the debt sued for. This, therefore, was eminently a case in which all the issues arising out of the contentions should have been framed and moreover one in which it was very desirable to examine

the parties before framing issues ; and yet the case was disposed of as it had been correctly fixed for final disposal at the first hearing ; and as if it could be properly disposed of at once ; although the contentions of the parties were as I have mentioned ; and although the scheme of the Code requires, in cases of such a nature, that the parties should have the opportunity to produce evidence relevant to issues which are framed after ascertaining exactly those matters as to which the parties were in dispute. In disposing of the suit in the way which was adopted, I think, as I have said at first, that there was a miscarriage of justice, and a miscarriage of justice due to an absolute misappreciation of the meaning and intention of the Code of Civil Procedure. I would invite the attention of the Subordinate Judge and the District Judge to paragraph 5 of the introduction to the Manual of Circulars of this Court and also to Rule 5 of Order V of the Code of Civil Procedure. It is for the Court to determine at the time of issuing the summons whether it should be for the settlement of issues only or for the final disposal of the suit. And if our Courts are in the habit of issuing summonses for final disposal in mortgage suits, they make a mistake at the very beginning. And if they further proceed to treat these suits as if the summons for final disposal were properly issued, then they must in many cases, as in this, encourage not the doing but the failure of justice. For these reasons I consider that the order in appeal and the order of the first Court are alike wrong, that the case has been wrongly decided without a fair trial, and I would direct that the case should be remanded to the first Court for the framing of issues and a trial according to law.

I would add this : This suit of 1910 which was set down for final disposal was an old suit and it is of undoubted importance that suits should not be allowed

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to remain undisposed of for long periods ; but although the fact that a suit is one of long standing is an excellent reason for fixing an early date for its disposal, it is no reason at all why it should be disposed of in a manner not contemplated by our Code.

The order is that the decrees of both the Courts are set aside and the case is remanded for proper issues to be framed and to be tried in accordance with law.

Costs to abide the result.

SHAH, J. :—I am of the same opinion. Having regard to the nature of the suit, the summons, in my opinion, under Rule 5, Order V, should have been only for the settlement of issues and not for the final disposal of the suit. But when the written statement was filed in this case on the 1st of June and several contentions were raised by the defendant, the trial Court should have under Order XV, Rule 4, after framing and recording issues, adjourned the suit for the production of such evidence as may be necessary for the decision upon such issues. I agree generally with the observations of my learned brother as regards the desirability of issuing summonses for final disposal of suits only in simple cases. In a case in which the summons may have issued for final disposal, if, after the written statement is filed, the suit is found to involve issues of a less simple character than might have been anticipated at the outset, it is desirable in the interests of justice that the discretion given to the Court under Rule 4, Order XV, should be so exercised as to ensure a fair trial and not to deny in effect the trial to the parties.

Decree reversed.

R. R.
