

follow, whether to direct that the parties entitled to partition should get the sale proceeds into Court and divide them, which would of course be the simplest way of settling the matter, or to relegate the parties to separate suits. However, we are not concerned with this question at present. All that we are concerned with is that the Court executing the decree must proceed with the execution.

SHAH, J. :—I agree.

*Appeal dismissed.*

R. R.

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## APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.*

MAHOMEDBHAÏ HUSENBHAI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS v. ADAMJI HALIMBHAÏ AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS\*.

*Civil Procedure Code (Act V of 1908), section 20, Order II, Rule 2, Order VII, Rule 10—Some of defendants residing outside jurisdiction—Leave of the Court refused—Cause of action, splitting up of—Return of plaint.*

Two persons Husenbhai and Sulemanji owned a house in the Portuguese possession of Delagoa Bay. On Husenbhai's return to India, Sulemanji realized the rent of the house and tendered account till Husenbhai's death in 1897. Sulemanji died in 1902. In 1907 Husenbhai's heirs sued the executor of Sulemanji's will to recover their share of the rent of the house in the British Indian Court at Bulsar. The will of Sulemanji having been set aside by the Delagoa Bay Court pending the suit, the heirs of Sulemanji were made party defendants, and the Court passed a decree for accounts of rents up to the death of Sulemanji. Subsequently Husenbhai's heirs came to know that Sulemanji had during his life time mortgaged the house to a Bank and under the terms of the deed the Bank had taken possession of the house and sold it

\* Appeal from Order No. 4 of 1919.

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in 1907. They therefore brought the present suit in the Court at Surat to have the account taken of the management which Sulemanji or his successors might have made in respect of Husenbhai's share in the house and in the sale proceeds thereof after the sale by the Bank. Of the six heirs of Sulemanji, defendants Nos. 2, 3 and 5 resided at Delagoa Bay. The lower Court was asked to grant leave to sue them as defendants under section 20 of the Civil Procedure Code but leave was refused. These defendants did not appear nor did they acquiesce in the institution of the suit :

*Held*, (1) that the plaint should be rejected, because the provisions of section 20 of the Civil Procedure Code had not been complied with and the suit could not go on with the defendants Nos. 2, 3 and 5 still on record ;

(2) that the claim for rent was barred under Order II, Rule 2, of the Civil Procedure Code, since in the suit of 1907 for an account of rents after the house had got into the possession of the Bank, the plaintiff should have sued for an account of rent received up to the date of the suit ;

(3) that, as regards the accounts of sale proceeds, the plaintiffs not having alleged facts on which the cause of action could be founded, viz., the existence of a surplus after payment of the mortgage debt, the plaint should be rejected as not disclosing a cause of action ;

(4) that Order VII, Rule 10 of the Civil Procedure Code, had no application, for it applied only where the suit was instituted in a wrong Court.

APPEAL against the order passed by M. H. Wagle, First Class, Subordinate Judge at Surat.

Suit for an account.

Two persons Husenbhai and Sulemanji who were residents of Bulsar, traded in partnership in Delagoa Bay in Portuguese South Africa. From the partnership money they purchased a house called "A New House" and they had each a half share in it. Husenbhai withdrew from the partnership and gave the whole concern to Sulemanji in or about 1890 and came back to his native place Bulsar. As the original sale-deed of the house was in Husenbhai's name he before returning to India executed a deed of transfer in favour of Sulemanji, but by mistake of the writer the whole house instead of half only, was mentioned

in the deed. Sulemanji, however, admitted Hussenbhai's right to the half share and there was thus a resulting trust in his favour. Sulemanji realized the rent of the house and sent some amounts to Husenbhai till his death in 1897 and then to plaintiff No. 1. Sulemanji continued to manage the house till his death in July 1902. Under a will made by Sulemanji one Ismail Haji Halimbhai (defendant No. 7) was appointed an executor. He took possession of the property and managed it till 1903, when Sulemanji's heirs, Mohamed Sulemanji, Abderehman Sulemanji and Bai Hava, having instituted proceedings in the Delagoa Bay Court to get the will set aside, succeeded in obtaining possession of the house.

During his life-time Sulemanji had mortgaged the house with the Bank National Ultra Merino and that Bank under the powers given to it by the mortgage deed took possession of the house in 1906 and sold it in 1907.

In October 1907 the plaintiffs brought a suit for account against defendant No. 7 in the Bulsar Court (Suit No. 385 of 1907). They claimed an account of the rent realised by the deceased Sulemanji and after his death by defendant No. 7. Defendant No. 7 denied his liability and pleaded that the heirs of Sulemanji had taken possession of the property from him. Those heirs were thereupon made parties. The Bulsar Court found that defendant No. 7 had realised and paid rent after Sulemanji's death and it passed a decree for the amount realised by Sulemanji against his estate. After the decision in Suit No. 385 of 1907, the plaintiffs filed the present suit in Bulsar Court alleging that during the pendency of Suit No. 385 of 1907 they came to know of the sale of the house by the Bank under the terms of the mortgage deed passed by Sulemanji and sought to

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make the defendants liable to account to them as trustees. The Bulsar Court found that it had no jurisdiction to try the suit and therefore the plaint was presented in the Court at Surat.

The plaintiffs then applied for leave of the Court under section 20 (b) of the Civil Procedure Code, 1908, to proceed against defendants Nos. 2, 3 and 5 who had been living in Delagoa Bay. The leave was refused.

Defendants Nos. 1 to 3 and 5 did not appear.

Defendants Nos. 4, 6 and 7 contended *inter alia* that the Court had no jurisdiction; that a suit of account against the heirs of Sulemanji was not maintainable; and that the suit was barred under Order II, Rule 2, Civil Procedure Code, 1908.

The Subordinate Judge held that the Court had no jurisdiction to try the suit; that the claim for account of the rent could and should have been joined in the Suit No. 385 of 1907 and was therefore barred under Order II, Rule 2; that it was not incumbent on the plaintiffs to join the claim for account of the mortgage and sale proceeds in that suit and thus the claim was not barred under Order II, Rule 2.

The plaintiffs appealed to the High Court.

*G. N. Thakor*, for the appellants.

*K. N. Koyaiee*, for respondents Nos. 2 to 4, 7 and 9.

MACLEOD, C. J.:—This was a suit originally instituted in the Bulsar Court by the plaintiffs who are the heirs of one Husenbhai Abderhman, deceased, for an account of the management which his co-sharer and trustee deceased Sulemanji and his successors the defendants, or any of them, might have made of the share of the said Husenbhai in the plaint house, and of the amount which the deceased Sulemanji or the defendants or any of them might have received by

mortgaging and selling that share, and for recovering the amount that might be found due, with costs. The Bulsar Court decided that it had no jurisdiction, and accordingly the plaint was presented thereafter in the Court of the First Class Subordinate Judge at Surat.

The facts are that Husenbhai and Sulemanji were paternal cousins, originally residents of Bulsar, who traded in partnership in Delagoa Bay in Portuguese South Africa and from the partnership money they purchased a house called "the new house." Husenbhai withdrew from the partnership in or about 1890 and came back to Bulsar. As the original sale-deed of the house was in Husenbhai's name he, before returning to India, executed a deed of transfer in favour of Sulemanji, but by the mistake of the writer the whole house instead of half only was mentioned in the deed. Sulemanji, however, admitted Husenbhai's right to the half share and there was thus a resulting trust in his favour. Sulemanji realized the rent of the house and sent some amount to Husenbhai till his death in 1897 and then to plaintiff No. 1. Sulemanji died in July 1902 after making a will. One Ismail Haji Halimbhai was appointed executor by that will, and in that capacity he took charge of the "new house" along with the other property of Sulemanji and continued to manage it until January or February 1903. Then Mahomed Sulemanji, Abderehman Sulemanji and Bai Hava, widow of Sulemanji, got the will of Sulemanji set aside by the Court of Delagoa Bay and obtained possession of the property of Sulemanji including the "new house." Mahomed Sulemanji thenceforward realized the rent, but did not give anything to the plaintiffs, nor did he render any account of their share. The plaintiffs alleged that they did not know that Sulemanji's will had been set aside and that possession of his property had been given to Mahomed Sulemanji.

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Suit No. 385 of 1907 was brought in the Bulsar Court against Ismail Haji Halimbhai for account, and having then been informed that the wil had been set aside, they made Sulemanji's heirs parties to the suit and a decree for account of the property up to the death of Sulemanji was eventually passed in their favour on the 23rd July 1912.

They alleged in their plaint in this suit that during the pendency of that suit they came to know that Sulemanji had mortgaged the house to a Bank, that under the terms of the deed the Bank had taken possession of it in 1906 and had got it sold for its debt in 1907 or 1908. They claim, therefore, that the defendants are liable to account to the plaintiffs as trustees.

Defendants Nos. 2, 3 and 5 were residing at Delagoa Bay, and it appears that, under section 20 of the Civil Procedure Code, the Court was asked to grant leave to sue them as defendants. That leave was refused, and there is nothing in the case to show that these defendants acquiesced in the institution of the suit. They never entered an appearance. Now the plaintiffs' claim falls under two heads, first, an account of the management of the house until it had got into the possession of the mortgagees; and, secondly, an account of the sale proceeds after the mortgage property was sold by the mortgagees. On the first question the issue framed was, whether the Court had jurisdiction to entertain and try the suit. Under section 20, Civil Procedure Code, the Surat Court had jurisdiction to try the suit and could have continued with the hearing if all the defendants resided within the local limits of the jurisdiction, or, if any of the defendants did not so reside, either when the Court had given leave, or, in the alternative, if no leave was granted, if those defendants

residing outside the local limits had acquiesced in the institution. But the Court having refused to grant leave as against the defendants outside the local limits, unless the plaintiffs could get those defendants to acquiesce in the institution of the suit at Surat, clearly the suit could not go on. The suit was against all the defendants for an account, and, if the plaintiffs had struck out the defendants who were residing outside the jurisdiction, possibly they would have got a decree in the Surat Court against those defendants who resided in the local limits. But that is not what they have attempted to do. They have continued fighting a suit which in its inception was bad.

With regard to the first head as to the account of the management of the house, clearly they could not get an account of the rents from parties who never had been in Delagoa Bay, and further as their suit for an account of the rents had been filed in 1907, after the house had got into the possession of the Bank, they should have sued in that suit for an account of the rents which had been received up to the date of the suit. They have failed to do that, and so under Order II, Rule 2, they are barred from suing for an account of those rents in another suit.

Then as regards the account of the sale proceeds, they never alleged facts on which the cause of action could be founded. What happened when the property came into the hands of the mortgagees is wrapt in obscurity. Ordinarily a mortgagor or those responsible for the mortgagor's estate will not be liable to account to the beneficiaries unless it can be shown that the sale had realised sufficient to pay off the mortgage, and left a surplus, and that the surplus was in the hands of the person from whom an account was claimed. But the plaintiffs are not in a position to

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allege anything of the sort. Therefore, they have not alleged any of the things which would have to be proved before the Court could pass a decree. Therefore, the plaint might well have been rejected as not disclosing a cause of action.

Apart from that, clearly the Court was right in deciding that the provisions of section 20, Civil Procedure Code, had not been complied with, and the suit could not go on with the defendants Nos. 2, 3 and 5 still on the record. The proper course really then for the Court to have followed was to reject the plaint. But it is suggested that the Court was wrong in dismissing the suit when it ought to have returned the plaint on the ground that it had no jurisdiction to try the suit. But I think there is some confusion in this argument. Under Order VII, Rule 10, it is no doubt obligatory that the plaint, if instituted in the wrong Court, shall at any stage of the suit be returned to be presented to a Court in which the suit should have been instituted. But it is only in a case where the suit is instituted in a wrong Court that the plaint must be returned. There was nothing to prevent the suit being instituted in the Surat Court, if the proper procedure had been followed. If leave had been obtained, or if these Delagoa Bay defendants had entered an appearance, then the suit would have proceeded and it would have been heard on its merits. This was not a case in which the Court ought to have returned the plaint because it ought to have been instituted in another Court. Therefore the only course for the Court was to dismiss the suit. If from the allegations in the plaint it appeared that there was no cause of action, then the proper course to adopt was to reject the plaint. But the plaintiffs did claim an account of the rents of the house, and that, as I have shown, is barred under Order II, Rule 2, so that part of the plaint could not

have been rejected as not disclosing any cause of action. The only course now, I think, is to dismiss the appeal with costs. Costs to be taxed taking the appeal as from a decree, not from an order.

SHAH, J. :—I agree. The only question on this appeal is whether the lower Court had jurisdiction to deal with the suit in the absence of certain defendants who did not reside in the jurisdiction of the Court, but resided in Delagoa Bay in Portuguese territory. The cause of action is not stated in the plaint clearly. It is clear, however, that so far as the principal cause of action is concerned, namely, the receipt of the sale proceeds of the house in Delagoa Bay sold in satisfaction of a mortgage on that house, and the liability of the defendants to account for the same, it arose outside the jurisdiction of the Court; and it is not suggested before us that the case falls under clause (c) of section 20 of the Code of Civil Procedure. The only ground upon which the jurisdiction is claimed is that some of the defendants resided within the jurisdiction of the Court. It is true that some of the defendants did reside within the jurisdiction of the Court; but it is also clear that some did not reside within the jurisdiction of the Court; and though an attempt has been made during the course of the argument to show that they must be taken to be residing for the purposes of the suit at Bulsar within the jurisdiction of the Court, in spite of the fact that they lived in Delagoa Bay for the purposes of their business, it is clear that the case must be decided on the footing that those defendants really resided outside the jurisdiction of the Court. The argument that they resided at the time of the suit at Bulsar cannot be accepted. That being so, it is clear that as the leave to allow the suit to proceed against those defendants was refused under clause (b) of section 20 of the Code, the Court had no jurisdiction

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to proceed with the suit at least as regards those defendants.

It is contended, however, on behalf the plaintiffs here that the suit should have been proceeded with as regards the other defendants who resided in fact at the date of the suit in the jurisdiction of the Court. It is clear from the nature of the cause of action as stated in the plaint that the suit could proceed, if at all, against all the defendants as there is no allegation against a particular defendant residing within the jurisdiction of the Court that he received any amount of the sale proceeds in respect of which the suit is brought. That being so, the suit could be proceeded with only if all the defendants in the present action were properly before the Court. As some of the defendants who resided outside the jurisdiction of the Court were not before the Court, it follows that the whole suit must be dismissed for want of jurisdiction.

As regards the form of the order, I entirely agree that under the circumstances the only proper order that could be made is to dismiss the suit. The first order that was made by the Bulsar Court returning the plaint to be presented to the proper Court, that is to the Court of the First Class Subordinate Judge at Surat was a proper order. The suggestion that a similar order should be made in the suit a second time seems to me to be outside the spirit and the letter of the rule on which the plaintiffs have relied.

*Decree confirmed.*

J. G. R.