APPELLATE CIVIL.

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

1921.

November 29.

DOLA KHETAJI (ORIGINAL DEFENDANT), APPELLANT *v.* BALYA KANOO PATEL (ORIGINAL PLAINTIFF), RESPONDENT *.

Res Judicata—*First suit for redemption on ground that transaction was a mortgage—Second suit for specific performance of an agreement to re-sell—Second suit not barred—Civil Procedure Code (Act V of 1908) section 11, Explanation IV.*

The plaintiff sold the property in suit to the defendant on the 16th March 1906. On the 13th August 1906, the defendant executed a Satekhat to the plaintiff agreeing to re-sell the property to him on receipt of Rs. 395 from him any time within 12 years. In 1911 the plaintiff filed a suit claiming to redeem the property on the ground that the document of the 16th March was a mortgage transaction. The suit was dismissed. The plaintiff, thereupon, sued for specific performance of the Satekhat. It was contended that the claim was *res judicata* inasmuch as the plaintiff might have sued in the suit of 1911 for specific performance of the Satekhat,

Held, that the suit was not barred as the two suits were mutually inconsistent and if the plaintiff failed in proving the mortgage, he still had a number of years within which he could have sued to get back the property on payment of the consideration mentioned in the Satekhat.

SECOND appeal against the decision of P. J. Taleyarkhan, District Judge, Thana, reversing the decree passed by M. B. Pradhan, Subordinate Judge of Alibag.

Suit for specific performance.

On the 16th March 1906 plaintiff executed a sale deed of the property in suit to the defendant for Rs. 400, but continued in possession as the defendant's tenant by passing a rent note to him.

On the 13th August 1906 the defendant passed an agreement (Satekhat) to the plaintiff agreeing to re-sell the property to him on receipt of Rs. 395 from him any time within 12 years, and acknowledging receipt of Rs. 5 as earnest money.

* Second Appeal No. 248 of 1921

1921.

DOLA KHETAJI v. BALYA KANOO.

In 1910, the defendant recovered possession of the property from the plaintiff.

In 1911 the plaintiff brought a suit (No. 189 of 1911) to redeem and recover possession of the property, allegin that the transaction between the parties was in reality a mortgage, and relied upon the rent note and Satekhat in support of the allegation. The suit was brought under the provisions of the Dekkhan Agriculturists' Relief Act. It was dismissed, the Court holding that the transaction was an out and out sale and not a mortgage.

In 1918 the present suit (No. 220 of 1918) was instituted by the plaintiff to enforce specific performance of the Satekhat made by the defendant to sell the plaint property to the plaintiff and to recover possession and damages.

The Subordinate Judge held that the plaintiff ought to have made it a ground of attack in Suit No. 189 o 1911, that is, that in case he failed to prove his mortgage, he should be allowed to enforce the agreement (Satekhat) specifically, and, as he had failed to do so, the present suit (No. 220 of 1918) was barred as *res judicata*: *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (1892) 20 Cal. 79 ; *Moosa Goolam Ariff* v. *Ebrahim Goolam Ariff* (1912) 40 Cal. 1 ; *Guddappa* v. *Tirkappa* (1900) 25 Bom. 189.

On appeal the District Judge held that the suit was not thus barred. His reasons were as follows :—

The trial Court has held that the decision in the previous suit operates as *res judicata* against the plaintiff under Explanation IV to section 11 of the Civil Procedure Code. This view is in my opinion erroneous. The plaintiff is not now litigating under the same "title" as in the former suit. In that suit he was claiming to redeem the property as owner. In the present suit on the other hand, he admits that the property belonged to the defendant and sues to enforce the agreement which the latter had made as such owner

to re-sell the property on receipt of certain amount within a certain time. The right claimed in the former suit was the right to redeem the property on payment of the amount, if any, that may be found due on taking accounts under the provisions of the Dekkhan Agriculturists' Relief Act. Whereas the right claimed in this suit is the right to repurchase the property on payment of Rs. 395. The two rights are quite distinct and mutually inconsistent.

The present suit is based upon the transaction evidenced by the Satekhat, treating the previous sale transaction as independent and distinct as was found in previous suit. In I. L. R. 7 Mad. 264, it was held that "Explanation 2 to section 13 of the Civil Procedure Code (old Code) refers to the title litigated in the former suit as distinguished from the relief claimed. Where several independent grounds of action are available, a party is not bound to unite them all in one suit, though he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action." This exposition of the explanation was approved in I. L. R. 26 Mad. 760. According to it a case will not fall under the explanation unless there was identity of title in both the suits. In I. L. R. 31 Mad. 385 the explanation is held to mean that "Every ground which could and ought to have been urged in support of the claim actually made in the suit shall be deemed to have been adjudicated upon therein whether it was actually urged or not." Now the claim actually made in the former suit was the claim to redeem. It is however obvious that the plaintiff could not have urged in support of that claim, that under the Satekhat he was entitled to repurchase the property. If he had urged any such ground it would have been destructive of the claim to redeem. Further unless the plaintiff had Rs. 395 with him when he brought the former suit the decree of specific performance of the agreement that he might have then obtained by praying for that relief in the alternative would have been perfectly useless to him. Such an alternative claim might also have prejudiced him in his contention that the Satekhat was really *potchitti* or under note and was to be read with the ostensible sale deed. In these circumstances it would be unreasonable to hold that the plaintiff ought to have claimed specific performance of the agreement as an alternative relief in the former suit (see the remarks of Wallis J. in I. L. R. 31 Mad. 385 at page 396 and I. L. R. 5 Bom. 589).

The defendant appealed to the High Court.

G. S. Rao, for the appellant.

W. B. Pradhan, for the respondent.

MACLEOD, C. J.:—The plaintiff sold the suit property to the defendant on the 16th March 1906, continuing to remain in possession as tenant. On the 13th August

1921.

DOLA KHETAJI v. BALYA KANOO.

1906, the defendant executed in his favour a *satekhat* to sell the property to him at any time within 12 years for Rs. 395, Rs. 5 being paid as earnest money. The plaintiff filed a suit in 1911 claiming to redeem the property on the ground that the document of the 16th March was a mortgage, seeking the protection afforded by section 10 A of the Dekkhan Agriculturists' Relief Act. That suit was dismissed. Before 12 years had expired the plaintiff sued again to recover the property on payment of Rs. 395. It was contended that that question was *res judicata* as the plaintiff might in his original suit of 1911 have sued in the alternative for specific performance of the *satekhat*. Whether he could have sued in the alternative for specific performance in his redemption suit need not be determined. It certainly cannot be said that he ought to have done so. The two suits were mutually inconsistent and if the plaintiff failed in proving the mortgage, he still had a number of years left under the *satekhat* within which he could have sued to get back the property on payment of the consideration mentioned in the *satekhat*. We think, therefore, the decision of the lower appellate Court is right and the appeal must be dismissed with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

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

1921.

December 21.

CHUNILAL DAYABHAI & COMPANY (ORIGINAL PLAINTIFFS), APPELLANTS *v.* THE AHMEDABAD FINE SPINNING AND WEAVING COMPANY, LIMITED (ORIGINAL DEFENDANTS), RESPONDENTS*.

Contract—Breach of contract—Damages—Power reserved to the contractor to resile from the contract without incurring liability to pay damages—Refusal to perform—Reasonableness of refusal.

*First Appeal No. 216 of 1920.