## SMALL CAUSE COURT REFERENCE.

*Before Jenkins C.J., and Woodroffe J.*

# MANDAL & Co.
*v.*
# FAZUL ELLAHIE.*

1914
*Feb. 3.*

*Cause of Action—Separate Cause of Action—Contract—Intention—Civil Procedure Code (Act V of 1908), O. II, r. 2, scope of—Presidency Small Cause Courts Act (XV of 1882) s. 69—Damage, suit for.*

A contract by indent provided for the supply of goods by two monthly shipments, clause 13 of the contract being as follows: "this indent is to be deemed and construed as a separate contract in respect of each item and instalment of goods and your rights and liabilities and ours respectively shall be the same as though a separate indent has been made out and signed in respect of each instalment." The purchaser having failed to take delivery or pay for the goods in respect of the two shipments, the vendor brought two separate suits in the Calcutta Small Cause Court for re-sale damages, one in respect of each shipment :—

*Held*, that in view of the intention expressed in clause 13, the plaintiff was entitled to bring a separate suit for damages in respect of each shipment.

*Volkart* v. *Sabju Saheb*(1) followed.

*Sesha Ayyar* v. *Krishna Ayyangar* (2), *Yashvant* v. *Vithal* (3), *Umed Dholchand* v. *Pir Saheb Jiva Miya* (4), *Pramada Dasi* v. *Lakhinarain Mitter* (5) referred to.

*Anderson Wright & Co.* v. *Kalagarla Surjinarain* (6), and *Duncan Brothers & Co.* v. *Jeetmull Greedharee Lall* (7) distinguished.

REFERENCE to the High Court under section 69 of the Presidency Small Cause Courts Act made by Dr. T. Thornhill, Chief Judge of the Court of Small

* Small Cause Court Reference No. 2 of 1912.

(1) (1896) I.L.R. 19 Mad. 304.
(2) (1900) I.L.R. 24 Mad. 96.
(3) (1895) I.L.R. 21 Bom. 267.
(4) (1883) I.L.R. 7 Bom. 134.
(5) (1885) I.L.R. 12 Calc. 60.
(6) (1885) I.L.R. 12 Calc. 339.
(7) (1892) I.L.R. 19 Calc. 372.

1914

MANDAL & Co. v. FAZUL ELLAHIE.

Causes of Calcutta. The following case was stated for the opinion of the High Court, on the 10th December, 1912:—

Under contract dated 10th June 1908 the defendant instructed the plaintiff to purchase and bring out for him to Calcutta 25 cases of candles as therein mentioned of which 17 cases were to be shipped in July 1908 and 8 cases in August 1908.

In this suit the plaintiff claims Rs. 1,417-15-9 as re-sale damages in respect of the 17 cases forming the subject of the July shipment. The suit was instituted on the 10th April 1912. At the same time the plaintiff instituted another suit in this court for re-sale damages in respect of the August shipment and obtained a decree therein prior to the hearing of the present suit. A copy of the original contract is hereto attached, the original itself being part of a record now in the High Court in connection with an unsuccessful application by the defendant to disturb the decree obtained by the plaintiff in respect of the August shipment. The last paragraph of clause 13 of the contract reads as follows:—

"Except as above stated this indent is to be deemed and construed as a separate contract in respect of each item and instalment of goods and your rights and liabilities and ours respectively shall be the same as though a separate indent had been made out and signed in respect of each instalment."

At the time this suit was instituted there had also accrued to the plaintiff the cause of action in respect of the August shipment. Following one of my own judgments I held that the present suit was not maintainable as contravening Order II, rule 2, of the Code of Civil Procedure, 1908, but inasmuch as since giving that judgment, considerable doubt has arisen in my mind as to its correctness, I dismiss the suit subject to the opinion of the High Court on the following question:—

"Whether or not the plaintiff is debarred from bringing two suits against the defendant on a contract containing the above clause, both clauses of action having accrued at the time of the institution of the suits."

The answer to the question appears to me to turn on the construction that will be given to the words "cause of action" mentioned in Order II Rule 2 (3) and the words "successive claims arising under the same obligation." contained in the explanation to that Order. I think it is clear the plaintiff must fail unless he can succeed by virtue of clause 13 of the contract. "Obligation", as the word implies, means "a binding" which to my mind conveys the idea of a single act, such as signing the contract. It is argued the plaintiff might just as easily have had two separate contracts executed relating respectively to the July and August shipments;

Such agreements, no doubt, do not require to be stamped. This argument, however, would hardly be regarded as satisfactory in the case of brokers' bought and sold notes, which frequently contain a clause similar to the last paragraph in clause 13 of this contract, and which do require to be stamped under article 43, Stamp Act.

The cases dealing with the subject "cause of action" are reviewed in Hukm Chand's Civil Procedure Code, pp. 536, 537 and in Woodroffe and Ameer Ali's Civil Procedure Code, pp. 568—571. The decisions in *Anderson, Wright & Co.* v. *Kalagarla Surjinarain* (1) and *Duncan Brothers* v. *Jeetmull Greedharee Lall* (2) show that all existing breaches of the same contract must be joined in the same suit although they may have arisen at different times. Of these cases Farran, C.J., remarked in *Yashvant* v. *Vithal* (3), that they did not apply to the case then before him "as here there are two separate contracts contained in the same instrument." In *Volkart* v. *Sabju Sahib* (4), the contract provided that each shipment was to be treated as a separate contract, and the Court held that the plaintiff was entitled to bring two suits one in respect of each shipment.

These cases, however, were decided when section 43 of the Civil Procedure Code of 1882 was in operation, and one has to consider how far the newly introduced words "successive claims arising under the same obligation" curtail the number of suits. At p. 561, Woodroffe and Ameer Ali's Civil Procedure Code it is pointed out that the wider the meaning which is attached to the term "cause of action," the more restricted is the operation of the section; and again at page 571 "The scope of the identity of the cause of action has been considerably extended by the addition of the explanation of the rule which supersedes those cases in which it was held "that a suit on a collateral security given for a debt would not bar a suit for the debt itself."

The plaintiff has proved his claim and will be entitled to a decree should the above question be answered in the negative. He has given security for the costs of this reference.

*Mr. Sircar* (with him *Mr. Surita*), for the plaintiffs. The question put to the High Court should be answered in the negative. The question involves the construction to be placed on rule 2 of Order II of the Code (Act V of 1908). The history of the section is shortly as follows: It was decided under Act VIII of 1859 in

(1) (1885) I. L. R. 12 Calc. 339.
(2) (1892) I. L. R. 19 Calc. 372.
(3) (1895) I. L. R. 21 Bom. 267.
(4) (1896) I. L. R. 19 Mad. 304.

1914

MANDAL & Co. v. FAZUL ELLAHIE.

*Raja Sutto Churn Ghosal* v. *Obhoy Nund Dass* (1) that "arrears of rent for successive years are several and distinct causes of action in respect of which a plaintiff may institute separate suits." This decision was followed in *Ram Soonder Sein* v. *Krishno Chunder Gooptoo* (2), *Kristo Kinkur Puramanick* v. *Ram Dhun Chettangia* (3). "Section 43 of Act X of 1877, with the illustration thereto was a direct legislative reversal of those decisions": *Taruck Chunder Mookerjee* v. *Panchu Mohini Debya* (4).

The illustration was reproduced in Act XIV of 1882, and was altered in Act V of 1908; but without any alteration in the law. The plea under rule 2 does not involve a question of jurisdiction: it has been introduced simply for the benefit of the defendant to prevent him being harassed by numerous suits: Woodroffe's Code of Civil Procedure, p. 552. That being so, and the provision not being based on grounds of public policy, it can be waived: *Asutosh Sikdar* v. *Behari Lal Kirtunia* (5). By clause 13 of the indent the parties agreed that each instalment should be deemed a separate contract: in view of that clause, there was no longer one obligation, but two distinct obligations, although of a similar nature: *Yashvant* v. *Vithal* (6). The decision in *Volkart* v. *Sabju Saheb* (7) is exactly in point. It follows that the plaintiff is not debarred from bringing two suits, and is entitled to a decree in this suit. The decisions in *Anderson, Wright & Co.* v. *Kalagarla Surjinarain* (8), and *Duncan Brothers & Co.* v. *Jeetmull Greedharee Lall* (9) are to be distinguished on the ground that those were cases of breaches under one contract.

(1) (1865) 2 W.R. Act X, 31.
(2) (1872) 17 W.R. 380.
(3) (1875) 24 W.R. 326.
(4) (1881) I. L. R. 6 Calc. 791, 793.
(5) (1907) 6 C.L.J. 320, 335.
(6) (1895) I.L.R. 21 Bom. 267, 271.
(7) (1896) I.L.R. 19 Mad. 304.
(8) (1885) I.L.R. 12 Calc. 339.
(9) (1892) I.L.R 19 Calc. 372.

1914

MANDAL & CO. *v.* FAZUL ELLAHIE.

*Mr. S. P. Sinha* (with him *Mr. A. K. Sinha*), for the defendants. The object of Order II, rule 2, is to prevent multiplicity of suits, and the rule is grounded on public policy. But for clause 13 of the indent it is clear the rule would have applied and the present suit would not be maintainable. The only question is whether clause 13 of the indent avoids the operation of Order II, rule 2. It is submitted that notwithstanding clause 13, the indent constitutes *one* contract, and the failure to deliver the two several instalments would amount to two breaches of and under one and the same contract. The cause of action remains one, whether or not for certain purposes the indent may be regarded as constituting two contracts. The real test as to whether Order II, rule 2, applies or not is not whether there is one contract or more than one, but whether the several claims are of the *same nature* and form part of the same or a continuous course of dealing and form part of one transaction. If they are, "they must be considered as one cause of action and must be joined in one suit, though they may have arisen out of several contracts": *Anderson, Wright & Co.* v. *Kalagarla Surjinarain* (1), *In re Aykroyd* (2). Where the goods dealt in are of the same generic description, the course of dealing would be considered the same and continuous: *see* Hukm Chand's Code of Civil Procedure, p. 544, for the American authorities. Clause 13 of the indent does not relate to the remedy or relief available; there is no intention to regulate the procedure. If such intention existed, it would be void and inoperative. Order II, rule 2, is a rule of procedure imperative on the parties irrespective of any agreement between them. It will be urged that the operation of the clause depends on the intention of the parties. There is nothing in the indent to

(1) (1885) I.L.R. 12 Calc. 339, 344, 347. (2) (1848) 1 Exch. 479.

1914

MANDAL & CO. v. FAZUL ELLAHIE.

show that the parties intended the contracts to be two separate distinct claims. The purport of clause 13 was that breach with regard to one instalment will not be deemed to be breach of the entire contract, so as to bar remedy as regards the other instalment. In the result the plaintiff must be taken to have relinquished his claim as regards the July shipment. *Volkart* v. *Sabju Saheb* (1) is distinguishable. *Yashvant* v. *Vithal* (2), a suit on a mortgage, has no application.

*Mr. Sircar*, in reply, Whatever the inference may be from a course of dealings between two parties in the absence of any express agreement, where there is such an agreement, it will be given effect to. Where the parties agree that there should be two instruments and two obligations, the Court is not justified in saying there is only one obligation: *Sesha Ayyar* v. *Krishna Ayyangar* (3), *Umed Dholchand* v. *Pir Saheb Jiva Miya* (4). The latter authority is also of importance in that Sargent, C.J. points out that the language in the code is very different from that of section 34 of the Presidency Small Cause Courts Act of 1850. This section is founded on the County Courts Act under which *In re Aykroyd*(5) was decided. The *dictum* in *Anderson Wright & Co.* v. *Kalagarla Surjinarain* (6) is *obiter*, as in that case there was only one contract.

*Cur. adv. vult.*

WOODROFFE, J. Under O. II, r. 2, that which is required to be included in the suit is the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; that is one and the same

(1) (1896) I. L. R. 19 Mad. 304.
(2) (1895) I. L. R. 21 Bom. 267.
(3) (1900) I. L. R. 24 Mad. 96, 109.
(4) (1883) I. L. R. 7 Bom. 134.
(5) (1848) 1 Exch. 479.
(6) (1885) I. L. R. 12 Calc. 339, 344

cause of action. The rule is framed to avoid the splitting of claims and remedies and does not apply where there are several causes of action. The object of the rule is to protect the defendant from being twice vexed for one and the same cause. But the parties themselves by the form of their convention determine whether the rule is applicable to them. The rule may operate to defeat a plaintiff with whom, as in the present case, the merits have been held to rest. I agree therefore with what Garth, C.J., said that care must be taken to give the section no wider construction than it would reasonably bear : *Pramada Dasi* v. *Lakhi Narain Mitter* (1). The words of the section are easier to understand than some of the cases decided under it. We need not, however, enquire into them as each case must depend on its own facts, and the reasons which Judges have assigned for their opinions have not the same degree of authority as the decisions themselves: *Caledonian Railway Co.* v. *Walker's Trustees* (2). I make these preliminary observations for I do not regard any of the decisions cited as binding on us except in a case involving the same set of facts. The old section 43 as incorporated in O. II, r. 2, of the Code has been amended so as to include in the explanation the following words italicised "For the purposes of this rule *successive claims arising under the same obligation* shall be deemed to constitute but one cause of action." Whatever meaning therefore may be given to the latter term (and on this matter varying views have been taken) the section expressly provides that the circumstances italicised shall be deemed to be but one cause of action, whatever might be the case in the absence of such enactment. Now if we exclude clause 13 of the contract to which I next refer there

(1) (1885) I.L.R. 12 Calc. 60, 63. (2) (1882) L.R. 7 A. C. 259.

1914

MANDAL & Co. v. FAZUL ELLAHIE.

WOODROFFE J.

can, I think, be no question that the case would fall within the words of the section quoted for the case is then merely one of several instalments under one and the same contract without anything else to indicate that the rule should not apply. It is argued, however, that there were in fact in this case two contracts by virtue of the provisions of clause 13 of the contract which ran as follows:—"Except as above stated this indent is to be deemed and construed as a separate indent in respect of each item and instalment of goods and your rights and liabilities and ours respectively shall be the same as though a separate indent had been made out and signed in respect of each instalment." The learned Chief Judge in a former case held that this clause did not bring the case within the operation of the section, but being, he says, in considerable doubt whether his decision was correct he has made the present reference. It may be assumed to be a general rule that parties cannot by consent abrogate what is the law but what however they can do is to indicate their intention and it is on this that the law operates variously according as that intention may be expressed. In such case it is not the law which is directly affected but the materials on which it operates.

The parties may express their intention as they choose, and if they express it in such a way that the effect is that two contracts are made where otherwise there would have been one the Court should give effect thereto. In *Sesha Ayyar* v. *Krishna Ayyangar*(1), the learned Judges say—"We do not think that when parties for whatever reason choose to agree that there should be two instruments and two obligations the Court is justified in saying that there is only one obligation." Then what is the effect of the words

(1) (1900) I. L. R. 24 Mad. 96, 109.

1914

MANDAL & CO. v. FAZUL ELLAHIE.

WOODROFFE J.

of clause 13? It is argued that they are inserted not for the purpose of creating two contracts but to declare that the breach of one part of a single contract is not to be deemed a breach of the entire contract. But I see nothing which warrants us in so restricting the sense of words which naturally bear a wider meaning. It seems to me that by these words the parties say in effect as follows:—"Here is what, but for our statement, would be regarded as one contract with successive claims thereunder. We desire to say that as regards each instalment we are contracting by separate contracts and in lieu of actually signing separate contracts we agree by this clause that each instalment shall be treated as such." The result of this is, in my opinion, that there are separate contracts in respect of the July and August shipments. But then it is said that even if that is the effect of the clause and even if two separate contracts had been in fact passed, still the Order is a bar as it has been held in *Anderson, Wright & Co.* v. *Kalagarla Surjinarain* (1) that even where there are different contracts yet if they form part of one transaction (whatever that may be) a breach of all of such contracts is only one cause of action. This was held in reliance upon the English cases establishing that a cause of action was not limited to claims arising upon one contract but might include claims upon several contracts provided they formed a part of a continuous course of dealing. This has been held broadly in some cases but as was argued before us this is now only so (according to the cases) where there is nothing to shew that the transactions were intended to be kept distinct. The clause in question appears to me to evidence such an intention. Moreover, apart from the question whether the English

(1) (1885) I. L. R. 12 Calc 339.

1914

MANDAL & CO. v. FAZUL ELLAHIE.

WOODROFFE J.

decisions are appropriate authorities upon the construction of the section before us or not it is to be noted that the case *Anderson, Wright & Co.* v. *Kalagarla Surjinarain* (1) was a case of several breaches under one contract and the question of several contracts as part of one continuous transaction was not in issue. So also, *Duncan Brothers & Co.* v. *Jeetmull Greedharee Lall* (2) was a case of breach of one and the same contract. In *Yashvant* v. *Vithal* (3), Farran C.J. pointed out that these two cases which showed that all existing breaches of the same contract must be joined in the same suit, although they may have arisen at different times did not apply to the case before him as there were there two separate contracts contained in the same instrument. As regards separate contracts *Umed Dholchand* v. *Pir Saheb Jiva Miya* (4) may be referred to. In *Volkart* v. *Sabju Saheb* (5), the contract did expressly provide that each monthly shipment and item was to be treated as a separate contract and it was held that the terms of the contract being clear the plaintiff was entitled to bring separate suits for damages. This case seems to me in point.

The learned Chief Judge appears, however, to have doubted whether they established the plaintiff's contention having regard to the explanation appended to the rule. It is true that the scope of the identity of the cause of action has been extended by the addition of this explanation but only in so far as it supersedes those cases in which it was held that a suit on a collateral security given for a debt would not bar a suit for the debt itself. This is generally not the case now. The added words to the explanation

(1) (1885) I. L. R. 12 Calc. 339.
(2) (1892) I. L. R. 19 Calc. 372.
(3) (1895) I. L. R. 21 Bom. 267, 271.
(4) (1883) I. L. R. 7 Bom. 134.
(5) (1896) I. L. R. 19 Mad. 304.

do not affect the case before us or alter the law from what it was, as appears from the illustration which is (subject to verbal alterations), the same now as it was under the Code of 1882. The added words only give express recognition to the law as it previously was.

I would, therefore, answer the question put to us in the negative and would hold that the plaintiff is not, under the circumstances stated, debarred from bringing two suits. The result, in my opinion, is that the plaintiff is entitled to a decree and should be awarded the costs of this reference.

JENKINS C.J. Uniformity on questions of procedure under the Code is of such importance that I think I ought to follow the decision in the Madras High Court in *Volkart* v. *Sabju Saheb* (1), and more especially as it meets with the approval of my learned colleague. In deference, therefore, to that authority I agree with Woodroffe J. as to the answer that should be returned to the reference.

Attorneys for the plaintiffs : *Fox & Mandal*.

Attorneys for the defendants : *Alum & Nun*.

J. C.

(1) (1896) I.L.R. 19 Mad. 304.