APPELLATE CIVIL.

Before Mr. Justice Brandt and Mr. Justice Parker.

APPASÁMI (DEFENDANT No. 1), APPELLANT,

and

RÁMASÁMI (PLAINTIFF), RESPONDENT.*

1885. March 8.

Civil Procedure Code, s. 43.

Upon a settlement of accounts between plaintiff and defendants, Rs. 3,985-6-9 was found due by the defendants, who agreed to pay the same. They gave to plaintiff an order on their agents to pay Rs. 2,500 from the profits of certain land, and promised to pay the balance within a month. Plaintiff filed two suits, one for Rs. 2,500 and the other for the balance of the debt.

Defendants pleaded that both suits should be dismissed, as brought in contravention of the requirements of s. 43 of the Code of Civil Procedure.

The Lower Courts held that there were two distinct causes of action, and decreed both claims.

Held, on second appeal, that plaintiff had only one cause of action, and that the decree in one of the suits must be reversed.

APPEALS against the decrees of T. Weir, Acting District Judge of Madura, confirming the decrees of S. Krishnasámi Ayyar, District Múnsif of Dindigul, in suits Nos. 640 and 642 of 1883.

The facts necessary for the purpose of this report are set out in the judgment of the Court (Brandt and Parker, JJ.).

Bháshyam Ayyangár and *Kaliánarámáyyar* for appellant.

Hon. *Subramanya Ayyar* for respondent.

JUDGMENT.—The only ground on which exception is taken in second appeal to the decrees of the Lower Appellate Court is the technical ground that the claims in these two suits represent in fact only one claim which the plaintiff is entitled to make in respect of one and the same cause of action, and that both cases ought to have been, and ought now to be, dismissed as brought in contravention of the requirements of s. 43 of the Civil Procedure Code, in which case the plaintiff can, if so advised, and must, in order to obtain decree for the whole amount sued for, bring a fresh suit in a Court having pecuniary jurisdiction.

The facts are that on a settlement of accounts between plaintiff and defendants a sum of Rs. 3,985-6-9 was found due by the latter to the former, and the debtors on the 16th August 1883

* Second Appeals 755 and 756 of 1885.

APPASÁMI v. RÁMASÁMI.

agreed to pay the amount found due, giving on that day an order on their officers or servants to pay the sum of Rs. 2,500 from the income received from two villages named for faslis 1291-92, and promising to pay the balance, Rs. 1,485-6-9, in a month.

The respondent (plaintiff) filed one of the two suits now before us for recovery of the sum of Rs. 2,500, and the other for the remainder, claiming also interest.

The appellant took in both of the Courts below the objection which we have now to consider.

The District Múnsif held that there are two distinct and separate causes of action by reason of the promise to pay at once part of the sum admitted to be due and the balance in a month; and that even if the two claims do arise out of one and the same cause of action, s. 43 is no bar, provided the suits be brought simultaneously, in support of which proposition he refers to *Kaleshar Prasad* v. *Jagan Nath*.(1)

The District Judge in confirming the decrees also expresses an opinion that the causes of action in the two suits are entirely distinct by reason of there being two distinct and separate contracts to pay.

We are compelled to differ from the Courts below and to allow the objection taken by the appellant; but it is evident that in no cases need both suits be dismissed: the decree in either may stand, provided the decree in the other be reversed, in which case it will not be open to the plaintiff to sue in respect of the sum claimed in such suit.

Two weeks' time was allowed to the plaintiff to decide what course he would adopt.

We proceeded to give our reasons for holding that it was not open to plaintiff, having regard to the provisions of s. 43 of the Code, to bring these two separate suits.

The two claims, or rather the claim in respect of which two separate suits have been brought, in our opinion arise out of one and the same cause of action, namely, an obligation on the part of the debtors to pay and a right in favour of the creditor to sue for payment of the sum which the debtors admitted as due on settlement of accounts and which they thereon promised to pay; and the fact that the debtors undertook to pay part of such sum at

(1) I.L.R., 1 All., 650.

once and part after expiry of a fixed time which had elapsed when these suits were brought cannot enable the creditor to split an entire demand in a manner which s. 43 was intended to prohibit.

One of the reasons for such prohibition is "that the defendant be not put to unnecessary vexation," and one test is whether the same evidence and the same arguments apply in the two cases: that this is so here appears from the fact that the evidence was by consent taken in one case only and held applicable for decision in the two.

The District Múnsif is not correct in saying that a different cause of action arises on each occasion when, in respect of a debt secured by an instrument providing for payment by instalments, there is failure to pay an instalment; under the terms of the agreement there accrues due to the creditor a part of his debt in respect of which he can sue, but the cause of action out of which the claim arises is the same, and the creditor is bound to include in his suit all that is then due in respect of his claim.

The case referred to by the District Múnsif was decided with reference to the provisions of s. 7 of Act VIII of 1859, and, moreover, one of the grounds on which the Appellate Court based its decision was that it was not clear that the same cause of action was disclosed in both cases. In the cases before us we have no doubt that the cause of action is the same. Nor is the present case the same as *Umed Dholchand* v. *Pir Sáheb Jivá Miyá*,(1) in which two separate bonds were given. It was contended that the giving of the order on the officers in charge of their treasury by the defendants, and its acceptance by the creditor, alters the case in respect of the claim for the Rs. 2,500, but the persons to whom the order was given were merely the servants of the debtors, and the payment not having been made, it is the debtors who have made default, and the creditor is in our opinion at liberty to sue for the whole amount agreed to be paid, and must sue in one and the same suit for the whole claim arising out of the cause of action which, as we hold, is one and indivisible.

At the request of the learned vakíl for the appellant the appeal is now allowed with costs in second appeal 756 and the original suit dismissed; and second appeal 755 is dismissed with costs.

(1) I.L.R., 7 Bom., 134.