

1879

DHUNPUT
SING
v.
SHAM
SOONDER
MITTAR.

against one of the promisors *without satisfaction* is no bar to a suit against another.

In this case, the relative position of the principal defendant, Sham Soonder, to the defendants whose interest he has purchased, does not resemble that which exists between joint contractors, but rather resembles that which exists between persons who have made themselves severally liable to perform a particular contract.

If Sham Soonder had been sued along with his predecessors in title in the suit No. 8 of 1877, the plaintiff could not have obtained a joint decree against them all. The zemindar has the right either to sue the registered talukdar, or the purchaser of it, but he cannot make them jointly liable. That being so, we are of opinion that the present suit is not barred by reason of the decree passed in the suit No. 8 of 1877, provided that the claim be not fully satisfied under that decree. It will be for the Court to take care that the plaintiff be not allowed to realize the same amount under two decrees. We, therefore, reverse the decision of the lower Appellate Court, and remand the case to that Court for the trial of the remaining issues. Costs to abide the results.

Case remanded.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice White.

1879
July '11.

MOONSHI GOLAM ARAB (PLAINTIFF) v. CURREEMBUX SHAIKJEE
(DEFENDANT).

Suit on Decree of Small Cause Court—Small Cause Court Act (IX of 1850)—Stat. 9 and 10 Vict., cap. 95.

No suit will lie in the High Court on a decree of the Small Cause Court.

Berkley v. Elderkin (1) and *Austin v. Mills* (2) followed.

Mohendronath Ash v. Baerobodun Dutt (3), *Madan Mohan Bose v. Lawrence* (4) and *Khobalal Buboo v. Ram Chunder Bose* (5) overruled.

(1) 1 Q. B., 805.

(3) 1 Ind. Jur., N. S., 220.

(2) 9 Ex., 288.

(4) 1 B. L. R., O. C., 66.

(5) I. L. R., 2 Cal., 434.

THIS suit was brought in the High Court to recover Rs. 214-9-0 upon a judgment of the Calcutta Court of Small Causes.

1879
MOONSHI
GOLAM ARAB
v.
CURREMBUX
SHAIKJEE.

The learned Judge in the Court below (Mr. Justice Pontifex) dismissed the suit, upon the ground that the defendant had already been imprisoned under the Small Cause Court judgment, and that it would be contrary to the spirit and intention of the Small Cause Court Act to allow this suit to proceed, and so to subject the defendant to be taken in execution again for the same debt under process of this Court.

The plaintiff appealed.

Mr. *Trevelyan* and Mr. *Andrews* for the appellant referred to *Mohendronath Ash v. Beedobodun Dutt* (1), *Madan Mohan Bose v. Lawrence* (2), *Khobllal Baboo v. Ram Chunder Bose* (3).

No one appeared for the respondent.

GARTH, C. J. (after stating the facts of the case as above continued).—It seems that since the year 1850, when the Small Cause Court Act IX of 1850 was passed, a number of suits of this nature have been brought from time to time in the High Court, and judgments have been obtained in them without objection. None of them were defended, and the question seems never to have been seriously raised, until about a year ago, whether such suits would lie. So that we have now to decide that question in an Appellate Bench of this Court for the first time.

The particular point upon which Mr. Justice Pontifex dismissed the suit appears to us to be only one of several considerations, which ought to be enquired into, for the purpose of ascertaining whether it was the intention of the legislature, that judgments in the Small Cause Courts should be enforced by suits in this Court. We must see how far such suits are consistent with the provisions of Act IX of 1850; and on the other hand, how far such suits are calculated to defeat the intentions of that Act.

(1) 1 Ind. Jur., N. S., 220.

(2) 1 B. L. R., O. C., 66.

(3) 1 L. R., 2 Calc., 484.

1879

MOONSHI
GOLAM AHAB
v.
CURRUMEBUX
SHAIKJIB.

The same question arose in England, after the passing of the first County Court Act there. That Act was the 9 and 10 Vict., cap. 95, and its provisions were in many respects very similar to those of the Indian Act of 1850, which was passed a few years later.

The case in which the subject was first discussed was *Berkley v. Elderkin* (1). The point was there raised for the first time in the Court of Queen's Bench, whether an action would lie in a Superior Court upon a judgment of the County Court; and Lord Campbell in his judgment says this:—

“*Prima facie*, an action lies on the judgment of every Court of competent jurisdiction; but I think it quite clear, when we look at the provisions of the 9 and 10 Vict., cap. 95, that the intention of the legislature was to confine the remedy on the judgments of Courts constituted under that Act to the remedies specifically provided by the Act.”

“The policy of the Act was to give a cheap and easy remedy for the recovery of small debts. The intention of the legislature will be entirely defeated, if the creditor is at liberty to adopt this course.”

“The Act provides special remedies for enforcing the judgment.”

His Lordship then goes to point out particular provisions in the County Court Act, which were inconsistent with suits being brought upon County Court judgments, and which would tend to defeat the objects of the Act itself.

Thus, by s. 96, the wearing-apparel and bedding of the execution-debtor, and the tools and implements of his trade to the value of £.5, were to be protected from execution.

“That protection,” says His Lordship, “would be entirely lost, if this action were maintainable, for, on a judgment of the Superior Court, a *fi fa* might be issued under which the debtor's tools in trade might be taken and sold by the Sheriff.”

So, again, as to the debtor's person.—He could be imprisoned under the Act for only forty days; and, then, not by way of execution, but as a punishment for contempt of Court. But if an action in the Superior Court lay upon the judgment, the debtor

(1) 1 Q. B., 805.

would be subject to the ordinary process of execution in the latter Court over and above what he might have undergone in the County Court.

Then, again, by s. 100 of the County Court Act, the Judge of the County Court had a right to rescind or alter any order that might have been made against any defendant for the payment by instalments or otherwise of any debt or damages recovered, and to make any other order, either for the payment of the whole of such debt or damages, or by instalments, or otherwise, as to the Judge might seem just. "This shows" says Lord Campbell, "that there is nothing in the nature of a final judgment in the County Court."

"The Judge has still jurisdiction over this very judgment on which this action is brought. He might now rescind or alter it and make a new order to pay by instalments, or at some other time. That power given to the Judge would be defeated if this action lay."

This last point was also especially relied upon by Mr. Justice Wightman; and the Court unanimously decided that the action would not lie.

This case was followed by the Court of Exchequer in the case of *Austin v. Mills* (1), and it has since been the undoubted law of Westminster Hall.

The only reported case in which, so far as we can find, the question has been at all discussed here, is that of *Khoblall Baboo v. Ram Chunder Bose* (2).

Some doubt having been expressed at that time by one of the Judges of this Court, as to whether a suit of this kind was maintainable, Mr. Justice Kennedy proposed to refer the question to a Full Bench; but as his Lordship's own opinion was in favor of the practice which had prevailed, of allowing such suits, it was considered that the case was not one for a Full Bench; and, after hearing an *ex parte* argument from Mr. Bounerjee, Mr. Justice Kennedy decided in accordance with the existing practice.

The ground of the learned Judge's decision appears to have been, that the particular provisions in the County Court Act

(1) 9 Ex., 288.

(2) I. L. R., 2 Calc., 434.

1879

MOONSHI
GOLAM ARAH

v.
CURRIBIBUX
SHAIKJEE.

1879
 MOONSHI
 GOLAM AHAB
 v.
 CURRUMBUK
 SHAIKJEE.

in England, which influenced the Courts there in deciding that such suits would not lie, were not to be found in Act IX of 1850; but it is much to be regretted that the case was not argued on the part of the defendant, because his Lordship's attention does not appear to have been called to certain provisions of Act XI of 1850, which seem to us to render the arguments and reasons, used by the Court in *Berkley v. Elderkin* (1), directly applicable to suits like the present.

Thus, by ss. 58—60, 61 and 68 of the Act IX of 1850, a debtor may be taken in execution for non-payment of a sum which he has been ordered to pay, but his imprisonment is not to operate as a satisfaction of the debts, and is not to continue for more than six calendar months; and when the debtor has once been taken in execution, he cannot be imprisoned again upon the same judgment.

But if the judgment-creditor can bring a suit upon the judgment in the High Court, he would, of course, have the usual remedies for enforcing the judgment which he obtains there; and one of those remedies would be, that he might imprison the execution-debtor again, notwithstanding the provisions of s. 61 of the Act of 1850.

This would obviously be in direct contravention of the intention of the latter Act; and this is the point upon which the judgment of Mr. Justice Pontifex proceeded in the Court below.

Again, by s. 69 of the same Act, certain goods of the judgment-debtor are exempted from execution, precisely as they are by the County Court Act in England, namely, the wearing-apparel and bedding of himself and his family, and the tools and implements of his trade.

But if the judgment-creditor can sue in this Court on the Small Cause Court judgment, he may, under the process of this Court, execute his decree against all the properties of the debtor including that which is protected by the Act of 1850.

Then again, under s. 71 of the Act of 1850, the Small Cause Court has power, in case of the sickness of the debtor or his inability to pay, to suspend or stay any judgment or order

(1) 1 Q. B., 805.

which may have been pronounced against him in any action, for such time and on such terms as it shall think fit, and so from time to time to suspend "or stay such judgment or order, until the defendant's disability shall have ceased."

1879
 MOONSHI
 GOLAM ARAB
 v.
 CURRUMBUK
 SHAIKJEE.

This is a very similar provision to that of the English County Court Act; and the effect of it, as pointed out by the Court of Queen's Bench, is to make the judgment of the Small Cause Court not final. The Judge has power to suspend or stay a judgment, or give the defendant further time to pay it.

It is clear, that this provision would be entirely defeated, if the judgment-creditor could bring a suit upon his judgment and enforce it at once in this Court. It would be absurd to allow a judgment-debtor to be sued upon a judgment in the High Court, while the Small Cause Court Judge might be staying that judgment in the Court below, or giving the debtor further time to pay it.

The provisions, which we have pointed out in the Act of 1850, seem precisely analogous to those of the County Court Act, which induced the Courts in England to decide, that a suit does not lie upon a County Court judgment, and we think that the arguments of the Judges in the case of *Berkley v. Elderton* (1) are directly applicable to the present case. The Act of 1850 provided new rights for creditors with special and appropriate remedies; and if the ordinary remedies in the High Court were superadded to these, not only would the objects of the Act be defeated, but it might become, in the hands of creditors, an instrument of injustice and oppression.

We may observe that this point was decided many years ago in the Supreme Court of Bombay, in accordance with the view, which we now take of it, and that the decision has since been considered as the law of the Bombay High Court.

The appeal is dismissed without costs. Costs to be taxed on scale 2.

WHITE, J.—I quite concur in the judgment of the Chief Justice. The case referred to by my Lord was determined in the late Supreme Court of Bombay about twenty years ago. It

(1) 1 Q. B., 805.

1879
 MOONSHI
 GOLAM ARAB
 v.
 CURRUMBUK
 SHAIKJEE.

was determined on the authority of *Berkley v. Elderkin* (1) and *Austin v. Mills* (2); the learned Judges who decided the case holding that the reasons for the decisions of the Court of the Queen's Bench and the Court of Exchequer applied to a judgment of the Small Cause Court of the Presidency-towns of India equally as well as to a judgment of the County Court in England. The case is not reported because at that time there were no reports of the Supreme Court at Bombay in existence, but I was counsel in the case which arose upon demurrer, filed to an action on a judgment of the Small Cause Court at Bombay. I argued the demurrer, and the demurrer was allowed.

Since that date, as far as my experience goes, it has always been considered to be the law in Bombay that no action will lie on the judgment of a Small Cause Court.

Appeal dismissed.

Attorney for the appellant: *N. C. Bural.*

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice McDonell.

1879
 May 28.

DAIMODDEE PAIK (PLAINTIFF) v. KAIM TARIDAR AND ANOTHER
 (DEFENDANTS).*

Parol Evidence to vary Deed—Evidence of Conduct of Parties—Oral Stipulation at variance with a Written Document—Evidence Act (Act I of 1872), s. 92—Registration Act (Act III of 1877)—Construction of Acts.

Evidence cannot be admitted to prove a contemporaneous oral stipulation varying, adding to, or subtracting from the terms of a written contract. Evidence of the acts and conduct of the parties to a written contract is not admissible if tendered solely in support of an oral stipulation varying its terms.

THE plaintiff in this case claimed khas possession of certain lands, which he alleged to have been absolutely sold to him by

* Appeal from Appellate Decree, No. 2436 of 1878, against the decree of J. O'Kinealy, Esq., Judge of the 24-Parganas, dated the 19th of September 1878, reversing the decree of Baboo Moty Lall Singha, Second Munsif of Diamond Harbour, dated the 7th December 1877.

(1) 1 Q. B., 805.

(2) 9 Ex., 286.