

DOORASWAMI
PILLAI
v.
THUNGA-
SAMI
PILLAI.

defendant having promised to give to the plaintiff his share after the suit was withdrawn. The Subordinate Judge does not discuss the evidence bearing on this question. Under section 462, Civil Procedure Code, a withdrawal of the suit by the next friend in pursuance of an agreement or compromise entered into with the defendant, without the leave of the Court, will be voidable at the instance of the minor (*Karmali Rahimbhoy v. Rahimbhoy Habbibbhoy*(1)). In rejecting the application for review the Subordinate Judge has evidently overlooked the provisions of section 462. It is, however, unnecessary to call for a finding on this point. For the reasons already stated in connection with the unconditional withdrawal of the suit on the 28th July 1902, I set aside his order under section 622, Civil Procedure Code, following the decision of the Calcutta High Court in *Ram Surup Lal v. Shah Latafat Hossein*(2) and direct that the suit be restored to file and proceeded with and disposed of according to law.

The respondents must pay the costs of the petitioner both here and in the application for review in the Court below.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice.

PARANGODAN NAIR (PLAINTIFF), PETITIONER,

v.

PERUMTODUKA ILLOT CHATA AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 43—Suit for money paid on a contract—Breach of contract and failure of consideration—Previous suit for specific performance dismissed—Maintainability of present suit.

Plaintiff had paid the defendants a sum of money on a contract under which defendants undertook to renew a kanon, and had previously sued the defendants unsuccessfully for specific performance of that contract. Plaintiff now sued to recover the money. On its being contended that the suit was barred by section 43 of the Code of Civil Procedure:

(1) I.L.R., 13 Bom., 137.

(2) I.L.R., 20 Calc., 735.

* Civil Revision Petition No. 328 of 1903, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of J. C. Fernandez, Subordinate Judge of South Malabar, in Small Cause Suit No. 56 of 1903.

Held, that the suit was one for money paid on an existing consideration which had since failed; that this right of action was different from the right on which the suit for specific performance had been brought, and that section 43 did not apply.

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SUIT for Rs. 60 paid on a consideration which failed. The present plaintiff had sued, in Original Suit No. 650 of 1898, on the file of the District Munsif of Betutnad, for specific performance of an alleged contract to renew a kanom which he held from the defendants, and on which, as he alleged, he had paid the defendant Rs. 60. That suit was unsuccessful. Plaintiff now sued to recover the Rs. 60 so paid. The Acting Subordinate Judge found that plaintiff had paid the Rs. 60 as alleged, on the consideration which had failed, but he also held that plaintiff could have claimed the amount in the previous suit, as compensation for the breach of contract, and that the present suit was, in consequence, barred by section 43 of the Code of Civil Procedure.

Plaintiff preferred this civil revision petition.

K. R. Subrahmania Sastri for petitioner.

V. Ryrn Nambiar for respondents.

JUDGMENT.—The present suit is for the return of the money paid on account of renewal fees under the agreement which was held to be unenforceable in Original Suit No. 650 of 1898 and consequently for money paid on an existing consideration which has since failed. This right of action is clearly different from the right on which the suit for specific performance was brought. Section 43 of the Civil Procedure Code does not therefore apply (*Pachiakutti Udaiyan v. Panchanada Patten*(1)). The view taken in *Muthu Narayana Reddi v. Rayalu Reddi*(2) relied on on behalf of the respondent is in conflict with the current of decisions in this Court as well as the decisions of the Judicial Committee as will be seen from the judgment in *Ramaswami Ayyar v. Vythinatha Ayyar*(3), in which the whole subject has been recently examined at length. Section 29 of the Specific Relief Act also has no application, the present claim not being one for compensation for breach of the agreement to grant a renewal. The suit is in time since it was brought within three years from the decision in the suit

(1) S.A. No. 283 of 1899 (unreported).

(2) S.A. No. 181 of 1895 (unreported).

(3) I.L.R., 28 Mad., 760.

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for specific performance (*Venkata Narasimhulu v. Peramma*(1), *Venkatarama Ayyar v. Venkatasubramanian*(2) and *Sriramulu v. Chinna Venkatasami*(3)). The decree of the lower Court is reversed and there will be a decree in favour of the plaintiff for Rs. 60 with interest at six per cent. (per annum) from the 21st March 1902 to date of payment and costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Russell.

1903.
October
7, 8, 14.

VYTHINATHA AYYAR AND OTHERS (DEFENDANTS Nos. 4 to 6, 8, 9
AND 11), APPELLANTS,

v.

YEGGIA NARAYANA AYYAR (PLAINTIFF),
RESPONDENT.*

Hindu law—Suit for partition of property come to plaintiff's father from the father of his adoptive mother—Nature of property so devolved—Plaintiff joint owner with his father.

In a suit for partition brought by plaintiff against his father, as first defendant, and others, plaintiff sought to recover a share of property which had come to first defendant from the father of the first defendant's adoptive mother.

Held, that plaintiff was a joint owner with first defendant in the property, and was entitled to partition of it.

Venkayamma Garu v. Venkataramanayamma Bahadur Garu, (I.L.R., 25 Mad., 687) and *Karuppai Nachiar v. Sankaranarayanan Chetty*, (I.L.R.; 27 Mad., 300), followed.

SUIT for partition. The relationship of the parties was as follows: Plaintiff was the son of first defendant; defendants Nos. 2 and 3 were plaintiff's brothers; defendants Nos. 4 to 10 were first defendant's brothers and their sons. The remaining defendants were impleaded as persons in possession of portions of the property in question. The property in which plaintiff sued for a share had come to the first defendant (plaintiff's father) from the father of first defendant's adoptive mother. The

(1) I.L.R., 18 Mad., 173.

(2) I.L.R., 24 Mad., 27.

(3) I.L.R., 25 Mad., 396.

* Civil Miscellaneous Appeal No. 31 of 1903 presented against the order of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 109 of 1902, presented against the decree of A. Ramalingam Pillai, District Munsif of Tiruvadi, in Original Suit No. 522 of 1900.