previous voidable contract, but see *Edwards* v. *Carter*(1). The English Law therefore does not help us to a decision of the question of the validity of a sale in India.

The conclusion already expressed as to the invalidity of the sale in question remains unaffected. The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Krishnaswami Ayyar.

RAMANJULU NAIDU, RECEIVER AND MANAGER, PALACE ESTATE, TANJORE (PLAINTIFF), APPELLANT.

v.

ARAVAMUDU AIYANGAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1909. October 27, 28. November 18.

Civil Procedure Code, Act XIV of 1882, *s.* 43—*Indian Contract Act IX of* 1872, *s.* 43—*Omission of part of cause of action in a suit against a joint promisor—Effect of such omission in subsequent suit against other promisors.*

The omission in a previous suit against one of several joint promisors of a part of the cause of action is no bar under section 43 of the Civil Procedure Code to a subsequent suit against another joint promisor for the portion so omitted.

The subsequent suit will not be barred by the rule laid down in *King* v. *Hoare* (13 M. & W., 494), as that rule is based on the merger of the cause of action in the judgment. There can be no such merger when the cause of action has not been sued upon.

The effect of section 43 of the Indian Contract Act on the rule laid down in *King* v. *Hoare*, that a judgment against one of several joint promisors is a bar to a suit against the others, considered.

SECOND APPEAL against the decree of T. T. Rangachariar, Subordinate Judge of Kumbakónam in Appeal Suit No. 97 of 1908, presented against the decree of N. Sundara Ayyar, District Munsif of Tiruvadi, in Original Suit No. 19 of 1907.

The facts for the purpose of this case are fully set out in the judgment.

T. R. Venkatarama Sastri for appellant.

T. V. Muthukrishna Ayyar for respondents.

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(1) (1893) A.C., 360.

* Second Appeal No. 1746 of 1908.

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JUDGMENT (KRISHNASWAMI AYYAR, J.).—The plaintiff is the receiver of the Tanjore Palace estate. Ramu Aiyangar and Srinivasaranga Aiyangar executed muchilikas each for a separate moiety of certain lands in favour of the previous receiver promising to pay rent. The first and second defendants purchased the interests of the said two persons *in respect of each moiety* under a separate sale-deed executed by each. The present suit is instituted for the recovery of rent for six faslis from 1310 to 1315. The District Munsif dismissed the suit. The Subordinate Judge, on appeal, has passed a decree for a moiety of the rent due for fasli 1311, holding the claim as regards faslis 1310 and 1311 in relation to the s are which had belonged originally to Srinivasaranga Aiyangar and likewise the claim for rent up to the 15th of December 1901 as regards the moiety that was originally owned by Ramu Aiyangar barred under section 43 of the Civil Procedure Code, Act XIV of 1882. The plaintiff had instituted two Small Cause Suits Nos. 15 of 1902 and 598 of 1903, in respect of each moiety against the first defendant and recovered judgment. At the time of the institution of Small Cause Suit No. 598 of 1903, the claim for rent for faslis 1310 and 1311 as to Srinivasaranga Aiyangar's moiety had accrued but was not included in the suit. At the time of the institution of Small Cause Suit No. 15 of 1902 the claim for rent up to the 15th December 1901 as to Ramu Aiyangar's moiety had also accrued, but was omitted to be included in the suit. There can be no doubt that, under Section 43 of the Civil Procedure Code, the liability of the first defendant for the rent omitted to be claimed in the former suits must be deemed to be at an end, for that section provides that the plaintiff shall not afterwards sue in respect of the portion omitted. The decree therefore as against the first defendant is right. But the question is raised that the second defendant ought to have been made liable for the rent of faslis 1310 and 1311 in respect of both the moieties.

It is true that section 43 of the Civil Procedure Code does not bar the claim against the second defendant. It was assumed in the argument addressed to us on both sides that the second defendant was a member of a joint family along with the first defendant and liable with him to pay the rent. It was however argued firstly, that the rule in *King* v. *Hoare*(1), according to which a

(1) (1844) 13 M. & W., 494.

joint promisor is not liable in a subsequent suit when judgment had been previously recovered against the co-promisor is not applicable to the moffusil in India; secondly, that, even if it is, the liability of the first and second defendants was joint and several and therefore the rule itself had no bearing; thirdly, that the Small Cause Suits not having had any reference to the rents of the faslis 1310 and 1311, the cause of action for those rents had not merged into the judgments so as to operate as a bar to the present suit against the second defendant.

As regards the first and second contentions, the argument is based on section 43 of the Indian Contract Act, IX of 1872, which makes the liability of joint promisors joint and several. Although an action upon a joint promise against one only of the joint promisors was met by a plea in abatement before the judicature acts and that plea has been abolished by order XXI, rule 20, the rule of non-liability of the joint promisor in the second suit is still retained as a rule of substantive law and not as a rule of procedure (see *Kendall* v. *Hamilton*(1), *In re Hodgson Beckett* v. *Ramsdale*(2), *Hammond* v. *Schofield*(3), *Hoare* v. *Niblett*(4)). But it is clear law in England that the foundation of the rule is that the liability of the joint promisors is joint and that the cause of action, which is one and indivisible, *transit in rem judicatam* and is therefore not available for a subsequent suit against a co-promisor. The question arises whether section 43 of the Indian Contract Act lays down a mere rule of procedure or makes the liability of each co-promisor joint and several. Sir Frederick Pollock observes in his notes to section 43 of the Indian Contract Act "as far as the liability under a contract is concerned it appears to make all joint contracts joint and several" (see Pollock and Mulla on the "Indian Contract Act, 1905," page 185). And after referring to the difference of opinion among the Indian High Courts as to the effect of the judgment against one of the joint promisors, as regards the others he adds "We think it the better opinion that the enactment should be carried out to its natural consequences, and that, notwithstanding the English authorities founded on a different substantive rule, such a judgment, remaining unsatisfied, ought not in British India, to be

(1) (1879) 4 A.C., 504.
(2) (1885) 31 Ch.D., 177.
(3) (1891) 1 Q.B., 453.
(4) (1891) 1 Q.B., 781.

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held a bar to a subsequent action against the other promisor or promisors" (page 186).

In *Muhammad Askari* v. *Radhe Ramsingh*(1), upon a full review of all the Indian cases, Chief Justice Strachey and Banerji, J., have taken the same view. Also section 44 of the Indian Contract Act departing from the English law lays down an analogous principle that the release of a joint debtor does not operate as a discharge of the co-promisors. It must however be admitted as pointed out by Strachey, C.J., himself in *Muhammad Askari* v. *Radhe Ramsingh*(1), that the contrary opinion has been expressed in many cases and often assumed in others. So far as this Presidency is concerned we may refer to the following cases *Gurusami* v. *Chinna Mannar* and *Gurusami* v. *Sadasiva*(2), *Chockalinga* v. *Subbaraya*(3), *Umamaheswara* v. *Singaperumal*(4), *Narayana Chetti* v. *Lakshmana Chetti*(5), and *Chinnappa Rowthan* v. *Robert Fischer*(6). The first of these cases came up from the Original Side of the Court to which rules of the English law were deemed applicable. The second case was a decision with reference to the moffusil but has itself been overruled in *Ramakrishna* v. *Namasivaya*(7) on the ground that the liability of the sons was not joint with that of the father under the Hindu law but several. The other cases simply refer to the rule in *King* v. *Hoare*(8) with apparent assent and do not involve a decision of the question whether it applies to the moffusil in India in the face of section 43 of the Indian Contract Act. It must also be pointed out that Mr. Justice Muthusami Aiyar gave his assent to the applicability of the rule in a hesitating manner (see *Gurusami* v. *Chinna Mannar* and *Gurusami* v. *Sadasiva*(2), and that Mr. Justice Markby in *Hemendro Coomar Mullick* v. *Rajendrolall Moonshee*(9) which was followed in *Gurusami* v. *Chinna Mannar* and *Gurusami* v. *Sadasiva*(2) expressed himself in somewhat doubtful language as regards the extension of *King* v. *Hoare*(8) to India. The rule itself has been modified in England to some extent by the statutes 19 and 20 Vict., chapter 97, section 11, which enacts that a

(1) (1900) I.L.R., 22 All., 307 at p. 310.
(2) (1882) I.L.R., 5 Mad., 37 at pp. 45, 46.
(3) (1882) I.L.R., 5 Mad., 133.
(4) (1885) I.L.R., 8 Mad., 376.
(5) (1898) I.L.R., 21 Mad., 259.
(6) (1907) I.L.R., 30 Mad., 495.
(7) (1884) I.L.R., 7 Mad., 295.
(8) (1844) 13 M. & W., 494.
(9) (1878) I.L.R., 3 Calc., 353 at pp. 361, 362.

creditor shall not be barred in a subsequent suit against certain of the joint promisors who were beyond the seas at the time of the former suit against the co-promisors (see Hukum Chand's 'Civil Procedure Code,' page 554). Again, a plaintiff who obtains judgment under order XIV or enters judgment in default of appearance against one of two joint defendants does not abandon his right to proceed to judgment against the other defendant (*McLeod* v. *Power*(1)). It was also pointed out by Mr. Justice Muthusami Aiyar and by Mr. Justice Markby in the cases already referred to that a rule similar to that in *King* v. *Hoare*(2) which obtained originally under the Roman law was afterwards abolished (see Sandars' 'Institutes of Justinian,' 11th edition, page 338). Says Hunter, in his 'Roman Law, 2nd Edition, page 560: "The liability "of a correal or joint obligation to be extinguished by *litis contestatio* "is, like *acceptilatio*, an incident of *stipulatio*, and not of correa- "lity. Even in the case of *stipulatio*, the contract might be so "framed as to avoid that inconvenient result. Finally Justinian "enacted that even in the case of *stipulatio*, a *litis contestatio* "should have no effect upon the obligation" (see also page 562, Hunter's 'Roman Law,' 2nd edition). It is true there is a general consensus of opinion in favour of the rule in *King* v *Hoare*(2) in the States of America. But the various devices adopted by means of special statutes and otherwise, to relax the severity of the rule, are a clear indication of the inconvenience felt in a strict adherence to it. See Black on 'Judgments,' sections 770 to 772. Although, therefore, there is much to be said against the extension of the rule in *King* v. *Hoare*(2) to India, I do not feel justified in rejecting it without a reference to the Full Bench. And it is not necessary to express a final opinion on the question in this case.

It was argued that the rents for faslis 1310 and 1311 were not the subject of the former actions, and, therefore, the cause of action with respect to them had not merged into the judgments in the small cause suits so as to open the door for the rule in *King* v. *Hoare*(2). This involves the consideration of the question of the foundation of that rule. Baron Parke in *King* v. *Hoare*(2) and the majority of the Lords in *Kendall* v. *Hamilton*(3) state

(1) (1898) 2 Ch., 295 at p. 300. (2) (1844) 13 M. & W., 494,
(3) (1879) 4 A.C., 504.

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it to be the merger of the cause of action in the judgment. There can be no such merger where the rents had not been sued for at all. Although, under section 43 of the Civil Procedure Code, a subsequent suit against the same defendant is barred for rents which had accrued due,' it is by the force of a special rule that relief not claimed in respect of a cause of action shall not be claimed in a subsequent action and not on the principle of merger in a judgment recovered. Section 43 of the Civil Procedure Code operates to bar the second suit even where the first was dismissed and not decreed, for its applicability depends upon the frame of the suit instituted and not upon the result. See Hukum Chand's 'Civil Procedure Code,' page 557, and the observations of Shepherd, J., in *Ittappan* v. *Manavikrama*(1). It seems therefore to follow, there being no merger of the claim for the rents of faslis 1310 and 1311 in the judgments in the small cause suits and the bar under section 43 of the Civil Procedure Code only applying to the present claim against the first defendant, the action in so far as it relates to the recovery of the rents of those faslis from the second defendant is not open to exception.

In modification of the decree of the lower Appellate Court, I would direct the second defendant to pay to the plaintiff the sum of Rs. 314-7-6, being the amount claimed for faslis 1310 and 1311 with further interest at 6 per cent. per annum from the date of this decree.

BENSON, J.—I concur in the conclusion of my learned brother and in the modification of the Subordinate Judge's decree which he proposes.

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(1) (1898) I.L.R., 21 Mad., 153 at p. 157.