

APPELLATE CIVIL.

Before Mr. Justice Subrahmanya Ayyer and Mr. Justice Benson.

AKAYI KUNHI (PLAINTIFF), APPELLANT,

v.

AYISSA BI (DEFENDANT), RESPONDENT.*

1903.
March 3.

Civil Procedure Code—Act XIV of 1882, s. 13, expl. II—Matter which might and ought to have been made ground of attack in former suit.

On a sale of land by plaintiff to defendant, part of the purchase money was paid and a mortgage was given by the defendant in plaintiff's favour for the balance of the purchase money, which balance amounted to Rs. 100. Plaintiff sued on his mortgage, but that suit was dismissed by reason of its being unregistered. Plaintiff now brought the present suit for the amount, framing his claim as for the enforcement of a lien for unpaid purchase money :

Held, that the suit was barred by explanation II of section 13 of the Code of Civil Procedure. Plaintiff might have sued, in his former suit, on the basis of his lien for balance of unpaid purchase money, and he ought to have done so to avoid the necessity for a second suit in the event of the mortgage being held invalid for want of registration.

Kameswar Pershad v. Rajkumari Ruttan Koer, (I.L.R., 20 Cal., 85), followed.

SUIT for balance of purchase money. The plaintiff had purchased certain property at an execution sale and had assigned his right to the defendant for Rs. 500, Rs. 400 of which had been paid. Plaintiff alleged that the defendant agreed to pay the balance of Rs. 100 in two months and in default to pay two per cent. interest per mensem, and that defendant had executed a panayom deed containing the above stipulations. His plaint recited that he had brought a suit on the panayom deed, which was dismissed on the ground that the deed had not been registered. He now claimed to have a charge on the property for the balance of purchase money and sought to recover it by sale of the property. Amongst other defences it was pleaded that the suit was barred by sections 13 and 43 of the Code of Civil Procedure. The additional District Munsif held that plaintiff (by section 55, sub-section (4), clause (b) of the Transfer of Property Act) had a lien on the property for the balance of the purchase money and that the plaintiff's suit

* Second Appeal No. 1462 of 1901, presented against the decree of K. Krishna Rau, Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 955 of 1900, presented against the decree of P. P. Ramn Menon, Additional District Munsif of Calicut, in Original Suit No. 279 of 1900.

ARAYI KUNHI was not barred by sections 13 and 14 of the Code of Civil Procedure.
v.
AYISSA BE.

On appeal, the Sub-Judge of South Malabar held that, as the panayom deed was unregistered, the plaintiff had no lien over the property for the balance of the purchase money and that the plaintiff's suit was barred by sections 13 and 43 of the Code of Civil Procedure. He reversed the decree of the lower Court.

Plaintiff preferred this second appeal.

P. R. Sundara Ayyar for appellant.

J. L. Rosario for respondent.

JUDGMENT.-- We think that the case is one to which section 13, explanation II, Civil Procedure Code, as interpreted by the Privy Council in *Kameswar Pershad v. Rajkumari Kuttan Koer*(1), clearly applies. It is not suggested that the plaintiff might not have sued for the money in the former suit on the basis of his lien for balance of unpaid purchase money under the general law; and there is no reason why he should not have done so. He "ought" therefore to have then based the suit on this ground as well as on the mortgage sued on, so as to avoid the necessity for a second suit in the event of the mortgage being held invalid for want of registration as the plaintiff ought to have known that it would be.

The facts to be proved in the present suit were among facts which had necessarily to be proved in the former suit.

The second appeal fails and is dismissed with costs.

(1) I.L.R., 20 Cal., 79 at p. 85.