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before us is immaterial. We would only refer to the matter to point out to the Subordinate Judge the almost certain consequence of his mistaken action.

As the sale had already taken place and been confirmed, the Sub-Judge would have exercised a better discretion if he had refused to re-sell, and had sent for the assets for distribution in his Court.

We are unable to hold that the sale by the Munsiff was null and void, as it was perfectly regular so far as the facts were known to the parties concerned and the Munsiff himself. The existence of an attachment by the Subordinate Judge would not in itself invalidate these proceedings. We accordingly adopt the view taken in the case cited above and dismiss this appeal with costs.

T. A. P. *Appeal dismissed.*

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson.

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ANDERSON, WRIGHT AND CO. (PLAINTIFFS) *v.* KALAGARLA SURJINARAIN (DEFENDANT.)*

Civil Procedure Code, Act XIV of 1882, *s.* 43—*Breaches of one term in a contract, how sued upon—Cause of action—Contract.*

Per GARTH, C.J.—A claim for the price of goods sold is a cause of action of a different nature from a claim for damages for non-acceptance of goods pursuant to a contract.

Such claims, therefore, although arising under one and the same contract, may be sued upon separately, s. 43 of the Code of Civil Procedure notwithstanding.

Per WILSON, J.—Where there is one contract for the purchase of goods, and the purchaser takes some of the goods, but breaks his contract, in part by not paying for the goods he takes, and in part by not taking and paying for the remainder, and both breaches occur before any suit is brought, the claim of the person suing is one arising out of one cause of action; and the whole claim must be included in one suit.

THIS was a reference from the Court of Small Causes.

* Small Cause Court Reference No. 3 of 1884, made by H. Millet, Esq., First Judge of the Calcutta Court of Small Causes.

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The defendant on the 8th December 1882 entered into a contract with the plaintiffs for the purchase of 10 bales of Turkey red yarn. In accordance with this contract the defendant in February 1883 took delivery and paid for three of these bales; and on 21st June 1883 the plaintiffs delivered to the defendant four other bales. On the 14th August 1883, the plaintiffs sued the defendant in the Small Cause Court to recover Rs. 166-10-3 as damages by reason of the failure of the defendant to take delivery of three bales under the contract, and on the 9th January 1884 obtained a decree for this sum. On the 11th January 1884, the plaintiffs brought the present suit against the defendant to recover payment for the sum due for the four bales delivered to the defendant on the 1st June 1883 and which remained unpaid for.

The defendant contested the suit on the merits, and also contended that the plaint was bad, inasmuch as it made no mention of the three bales sued for on the 14th August 1883; and that under s. 43 of the Code of Civil Procedure, the suit was not maintainable inasmuch as the plaintiffs should have included in their former suit the claim now made in the present suit.

The learned Judge of the Small Cause Court decided that the legal defences raised by the defendant could not be supported, and that the case ought to proceed on the merits; but inasmuch as both parties were desirous, whatever the effect of the learned Judge's decision might be, to have the legal questions referred to the High Court, he refrained from giving a decision on the merits and referred the following questions to the High Court:—

(1) Whether the plaint is bad and ought to be rejected, in so far as it makes no reference to the three bales, the balance of the ten bales under the contract sued upon?

(2) Whether having reference to s. 43 of the Code of Civil Procedure, and the fact that the plaintiffs had already obtained a decree in respect of some of the goods sold, under the same contract as that now sued on, the present suit is maintainable?

Mr. *Henderson* who appeared for the plaintiffs on the reference, contended that the claim in the two suits was of a totally different character although arising out of the same contract, and that this latter fact did not make them one and the same cause of

action, and cited *Grimbly* v. *Aykroyd* (1) and *Wickham* v. *Lee* (2). The first question referred was abandoned.

Mr. *Gasper* for the defendant cited *Taruck Chunder Mookerjee* v. *Panchu Mohini Debya* (3), *Debi Dial Singh* v. *Ajaib Singh* (4), *Sheo Sunkur Sahoy* v. *Hridoy Narain* (5), and *Shafkatunissa* v. *Shib Sahai* (6).

The opinions of the Court were as follows :—

GARTH, C.J.—The question referred to us in this case is, whether having regard to s. 43 of the Code this suit is maintainable. The facts are these :

On the 8th of December 1882 the defendant contracted with the plaintiffs to purchase from them 10 bales of Turkey red yarn at a certain price.

In February 1883 three of these bales were delivered and paid for.

On the 21st of June 1883 the plaintiffs say that they delivered four more bales, and this action is brought for Rs. 1,633-8-0 being the contract price of those bales.

On the 14th of August 1883 the plaintiffs sued the defendant to recover Rs. 166-10-3 as damages for the non-acceptance by the defendant of the remaining three bales, and on the 9th of January 1884, they obtained a decree for that sum.

On the 11th of January 1884 the present suit was brought.

A preliminary objection was taken, that the Court had no right to entertain the suit, inasmuch as the plaintiffs' present claim, and the claim in their former suit constituted the same cause of action.

The learned Judge in the Court below was of opinion that the objection was not valid, but he referred the question to this Court before trying the case upon its merits.

I think that the learned Judge is right.

I have always considered that a claim for the price of goods sold, which is essentially a claim for a debt, is a cause of action of a different nature from a claim for compensation for not accepting goods pursuant to contract, which is essentially a claim for

(1) 1 Exch., 479 ; 17 L. J. N. S. Ex. 157.
(2) 12 Q. B., 521.
(3) I. L. R., 6 Calc., 791.
(4) I. L. R., 3 All., 543.
(5) I. L. R., 9 Calc., 143.
(6) I. L. R., 4 All., 171.

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damages. The two claims appear to me to be of a totally different nature, and the fact of their arising under the same contract does not change their nature, or make them one and the same cause of action.

Claims by a shipowner for freight, and for not loading a ship pursuant to contract, constantly arise under the same charter party, but it could hardly be contended that the two claims would therefore constitute one cause of action.

No doubt claims under the same contract *for several instalments of the same rent, or for several instalments of the same promissory note* have been held over and over again (under s. 43) to be claims for the same cause of action (see the cases of *Taruck Chunder Mookerjee* v. *Panchu Mohini Debya* (1), *Sheo Sunkur Sahoy* v. *Hridoy Narain* (2) and *Mackintosh* v. *Gill* (3).

The claims in these cases are not only of the same nature but are virtually for instalments of the same debt or obligation; and the illustration given in s. 43 seems to me to show that these are the sort of cases to which the section is intended to apply.

Under s. 63 of the English County Court Act (9 & 10 Vict. c. 95) the Courts have gone further and have held that several debts of the same nature, though strictly speaking arising out of several contracts, form part of the same cause of action when they are *of the same nature*, and arise out of the same course of dealing, as for instance, claims upon a tradesman's bill where although each item of the account may have accrued due at a different time the whole bill has been treated by the parties as one entire claim [See *Grimbly* v. *Aykroyd* (4)]

But where the several debts included in the account are not of the same nature, as for instance, where one item of an account is for the price of a horse and another is for rent, and another for goods sold, there it has been held that several suits may be brought in the County Court, although the claims might in the superior Court have all been included in an *indebitatus* count. (See *Neale* v. *Ellis* (5), and *Kimpton* v. *Willey* (6).

(1) I. L. R., 6 Calc., 791. (2) I. L. R., 9 Calc., 143. (3) 12 B. L. R., 37.
(4) 1 Exch., 479; 17 L. J. N. S. Ex. 157.
(5) 1 D. & L., 163.
(6) 1 L. M. & P., 280; 19 L. J. C. P. 269.

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The case of *Brunskill* v. *Powell* (1) is a very remarkable illustration of this distinction. There the plaintiff, a publican, had been in the habit of supplying the defendant from time to time with liquors, and also with small sums of money as he required them, and he had sent in to the defendant one entire account showing what sums were due for liquors, and what for money lent. As the defendant did not pay, the plaintiff sued him in the County Court, first in one suit for the liquors, and afterwards in another suit for the money lent. It was held by the Court of Exchequer that the claims for liquors and for money lent, although, undoubtedly, they might, in the superior Court, have been included under one count, did not constitute one cause of action, and that the plaintiff was at liberty to bring separate suits.

I have looked very carefully through the English authorities, but in vain, for any case, which would, either directly or indirectly, favor the defendant's view of this question.

In the case of *Grimbly* v. *Aykroyd* above cited, Chief Baron *Pollock* takes some pains to point out the inconvenience on the one hand of construing the words "cause of action" to mean "*cause of action on one separate contract*," and on the other hand of construing them so as to include "all contracts executed" which could be sued for in one *indebitatus* count. But it never has been suggested in England, so far as I am aware, that a claim upon an executed contract, such as a debt, is the same cause of action as a claim upon an executory contract for damages.

The Court of Exchequer accordingly held in the case I have just mentioned that s. 63 of the Act did apply to the cases of tradesman's bills (such as that with which they were then dealing) "in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid shall be united to another and form one entire demand.

I quite admit that in actions founded on contract the most diverse causes of action might, under the English system of pleading, have formed the subject of one and the same special count; but it was never suggested on that account, that these

(1) 1 L. M. & P., 550; 19 L. J. Ex. 363.

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diverse claims could be considered in any sense the same cause of action.

Thus in an action upon a lease, claims might have been made in the same count,

1*st*, for rent; 2*nd*, for not repairing the demised premises; 3*rd*, for not paying rates and taxes; 4*th*, for not insuring the premises from fire; and 5*th*, for improperly cutting down trees.

But no one ever heard, so far as I am aware, of any two of these claims being considered as one cause of action.

I have looked through all the reported cases that I could find and all the English as well as Indian Digests, for any authority that a *claim for debt* and a *claim for damages*, though arising out of the same contract, has ever been considered as the same cause of action, but I have found none; and I believe that this is the first occasion on which such a proposition has ever been suggested.

The real principle, as it seems to me, which runs through all cases is that, if the several items which make up the claim are of the *same nature* and form part of the same course of dealing, *so as to pass under the same description* and *form part of one transaction* they must be considered as one cause of action and must be joined in one suit though they may have arisen out of several contracts.

But claims which are diverse in character, which do not answer the same description, and which would require a different class of evidence to support them, may be made the subject of different suits though they may arise out of the same contract.

And I feel very strongly that the introduction of any new principle upon this subject, which has never been recognised by the Courts, may place numbers of suitors in a very unjust position. The present case, in my opinion, forms a very forcible illustration of the extreme injustice which might be done by interpreting the rule contained in s. 43 so as to compel a plaintiff to include in one suit a claim for debt, and a claim for damages.

The first suit, brought by the plaintiff for damages for not accepting the three last bales, depended upon different considerations, and required different evidence to support it from that which would be necessary to support the present claim.

In the former case he could only recover by way of damages the difference between the contract price of the bales and their market price at the time when the contract was broken; and the sum which he actually recovered as damages in that suit was Rs. 166-10-3.

In the present case he would only have to prove the fact of the delivery of the four bales. Their price Rs. 1,633-8-0 would be ascertained by the contract and if the objection now taken were to be allowed, the defendant would get the four bales for nothing, and the plaintiffs, although guilty of no fraud, and having acted in bringing this suit entirely within the principle that has hitherto been recognised by the Courts, would be losers of no less a sum than Rs. 1,633-8-0.

The object of these technical rules, as I consider, is to prevent unnecessary litigation, by obliging parties, so far as may be consistent with justice and convenience, to include all their claims of one nature in one suit. In order to effect this good object, suitors are deprived of rights, to which they would otherwise be entitled under the general law; and I think we should be very careful, in carrying out such rules to confine their scope and construction within certain recognised limits and principles so as not to take suitors unfairly by surprise, and to do as little injustice as possible in individual cases.

It seems to me that if we were to allow the present objection to prevail, we should be acting without precedent, and we should be transgressing limits and principles which are now tolerably well known, and by which Courts of law have hitherto during a period of some 25 or 30 years been guided. If in this or any other case a Court of law may consider that a plaintiff has been guilty of improper conduct in bringing two suits instead of one, (although his doing so may not amount to a breach of the rule laid down in s. 43), the Court would, in my opinion, act quite rightly in showing its sense of such impropriety by depriving the plaintiff of the whole or a portion of his costs.

But to extend the application of s. 43 beyond what has hitherto been recognised as its legitimate scope, would not only in my opinion do a grievous wrong to the plaintiffs in the present instance but would be productive of serious uncertainty in the future.

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WILSON, J.—The facts upon which the questions referred to us in this case arise are very short.

On the 8th December 1882 a contract was entered into whereby the plaintiffs agreed to sell and the defendant agreed to buy ten bales of Turkey red yarn at a certain price. It is not stated in the case when the price was payable, but during the argument the contract was referred to, and counsel on both sides agreed that it was forty-five days after delivery.

In February 1883 the defendant took delivery of three bales and paid for them. The plaintiffs allege in the present suit that on the 21st June the defendant took delivery of four bales more, but has not paid for them. The remaining three bales the defendant did not take, and on the 14th August 1883 the plaintiffs sued the defendant in the Small Cause Court for damages for not taking them. On the 9th January 1884 the plaintiffs recovered a decree for damages in that suit.

The defendant applied for a new trial, but his application on the 9th February was dismissed for default.

On the 11th January 1884 the plaintiffs commenced this suit in which they claim the price of the four bales said to have been delivered on the 21st June 1883.

The main question referred to us is whether, having regard to s. 43 of the Code of Civil Procedure, this suit is maintainable. That section says: "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. If a plaintiff omit to sue in respect of any portion of his claim he shall not afterwards sue in respect of the portion so omitted," and the question we have to answer may be shortly stated thus:—Where there is one contract for the purchase of goods, and the purchaser takes some of the goods, but breaks his contract, in part by not paying for the goods he takes, and in part by not taking and paying for the remainder, and both breaches occur before any suit is brought, is his claim a claim in respect of one cause of action, so that he must include the whole in one suit, or may he at his pleasure bring two separate suits?

I think the whole claim arises out of one cause of action within the meaning of s. 43 and that only one suit will lie

The expression "cause of action" is one frequently used in legislation and not always with the same exact meaning. In one sense every breach of a contract is a separate cause of action. But the illustration to s. 43 shows that the framers have not here used the expression in this sense. That illustration is: "*A* lets a house to *B* at a yearly rent of Rs. 1,200. The rent for the whole of the years 1881 and 1882 is due and unpaid. *A* sues *B* only for the rent due for 1882; *A* shall not afterwards sue *B* for the rent due for 1881"; and following the principle embodied in that illustration it was held in *Taruck Chunder Mookerjee* v. *Panchu Mohini Debya* (1); that where two years' rent are due and the landlord sues for the first year's rent, he cannot afterwards sue for the second. In *Sheo Sunkur Sahoy* v. *Hridoy Narain* (2), this case was approved and followed.

In *Mackintosh* v. *Gill* (3), a note was made payable by instalments, and two instalments being due, it was held under s. 34 of Act IX of 1850 (the terms of which so far as material were substantially the same as those of the section before us), that two actions could not be brought. In the course of the argument Couch, C.J., is reported to have stated the rule thus:—

"When, as in this case, there is a single contract and several breaches, all the breaches must be included in one action."

The same expression "cause of action" has been used in the successive Acts relating to the jurisdiction of County Courts in England in the sections forbidding the splitting of claims so as to bring them within the inferior jurisdiction, or multiply suits. Under these sections it has several times been held that "cause of action" is not limited even to claims arising upon one contract, but may include claims upon several contracts, provided they form part of a continuous course of dealing, as in the case of goods supplied from time to time by a tradesman to a customer, though not otherwise—*Grimbly* v. *Aykroyd* (4); *Kimpton* v. *Willey* (5); *Bruns-*

(1) I. L. R., 6 Calc., 791. (2) I. L. R., 9 Calc., 143.
(3) 12 B. L. R., 37.
(4) 17 L. J. N. S. Ex. 157; 1 Exch. 479.
(5) 19 L. J. N. S. C. P. 269; 1 L. M. & P., 280.

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kill v. *Powell* (1); and a like construction was put upon the same words in another but somewhat analogous section in *Wood* v. *Perry* (2); and *Bonsey* v. *Wordsworth* (3).

I wish to guard against expressing any opinion wider than is necessary for the purposes of this case. It is enough to say that, in my opinion, where there are two breaches of one term in one contract, and both occur before any suit is brought, the cause of action within the meaning of s. 43 is the non-performance of the promise, and only one suit will lie. In this case I think the cause of action is that the defendant contracted to take and pay for ten bales of yarn and failed to do so. I should therefore answer the second question in the negative.

The point raised by the first question was abandoned on the argument before us. That question should be answered in the negative.

T. A. P.

Attorneys for plaintiffs: Messrs. *Morgan & Co.*

Attorney for defendant: Baboo *N. C. Bose.*

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

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BACHHA JHA AND ANOTHER (TWO OF THE DEFENDANTS) *v.* JUGMON JHA AND OTHERS (PLAINTIFFS) AND OTHERS (DEFENDANTS.)*

Hindu Law—Stridhan—Mithila Law—Succession.

The *stridhan* property of a widow, governed by the Mithila law and married in one of the approved forms of marriage, goes to her husband's brother's son in preference to her sister's son.

IN this case the plaintiffs sought to obtain possession of certain property left by one Choona Ojhain, deceased, which they alleged had formed portion of the estate of her late husband, and which had been taken possession of by the defendants.

* Appeal from Original Decree No. 202 of 1884, against the decree of J. Pratt, Esq., District Judge of Purneah, dated the 23rd of April 1884.

(1) 19 L. J. N. S., Ex., 363; 1 L. M. & P., 550.

(2) 18 L. J. N. S. Ex. 161; 6 D. & L. 194; 3 Exch. 442.

(3) 25 L. J. N. S. C. P., 205.