decree of the lower Court, dismiss the suit with costs in both the Courts.

STRAIGHT, J.—I am entirely of the same mind.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

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KIAM-UD-DIN AND ANOTHER (PLAINTIFFS), *v.* RAJJO AND ANOTHER (DEFENDANTS). *

Account stated—Hypothecation-bond for the amount due—Obligor preventing registration of bond by denying execution—Suit on account stated—Civil Procedure Code, s. 586—Small Cause Court suit.

For the purpose of determining whether a second appeal lies or is prohibited by s. 586 of the Civil Procedure Code, what must be looked at is not the shape in which the case comes up to the High Court, but the shape in which the suit was originally instituted in the Court of first instance.

The plaintiff sued (i) for registration of a hypothecation-bond executed by the defendant, (ii) in the alternative for recovery of the amount of the bond upon an account stated. The defendant denied execution of the bond, and that she had had any dealings or stated any account with the plaintiff. The Courts below disallowed the first claim as barred by limitation, and disallowed the second on the ground that the bond had effected a novation of the contract implied by the statement of accounts.

Held that under the circumstances of the case the plaintiff was entitled to resort to the account stated and sue thereon. *Sirdar Kuar* v. *Chandrawati* (1) distinguished.

Where two parties enter into a contract of which registration is necessary, it is essential that each should do for the other all that is requisite towards such registration.

The facts of this case are sufficiently stated in the judgment of Straight, J.

Mr. *Hamidullah*, for the appellants.

Munshi *Madho Prasad*, for the respondents.

STRAIGHT, J.—This was a suit brought by the plaintiffs for two reliefs; the first was for the registration of a bond, purporting to be a hypothecation bond executed by Musammat Rajjo Bibi, defendant, for the sum of Rs. 247-8-6; the second relief asked was,

* Second Appeal, No. 504 of 1887, from a decree of Munshi Monmohan Lal, Subordinate Judge of Azamgarh, dated the 17th December, 1886, confirming a decree of Maulvi Muhammad Amin-ud-din, Munsif of Muhammadabad, dated the 27th August, 1886.

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in the event of the registration of that document being refused, for the recovery of that amount of money upon an account stated. The first Court dismissed the plaintiff's claim upon the ground that, as to the registration, the suit was barred by limitation; and upon the authority of the case of *Sirdar Kuar* v. *Chandrawati* (1) further held that the plaintiffs could not recover upon the account stated, because there had been a novation of contract by the execution of the bond with a fresh promise to pay; and the plaintiff not being able to produce the bond or to maintain a suit upon it by reason of its being unregistered, and the registration having been refused, the claim upon the account stated failed.

The plaintiffs appealed to the Subordinate Judge solely in regard to the view expressed by the first Court upon this latter point; and the Subordinate Judge in regard to it adopted a similar view to that expressed by the Munsif.

From that decision of the Subordinate Judge the second appeal before us is preferred to this Court, and a preliminary objection is taken by Mr. *Madho Prasad* on the part of the respondent, that the suit being in the nature of a Small Cause Court suit, no second appeal lay from the decision of the Subordinate Judge. I overrule that contention of Mr. *Madho Prasad*. In my opinion, for the purpose of determining whether a second appeal lies or is prohibited by s. 586, what must be looked at is not the shape in which the case comes up in appeal to this Court, but the shape in which the suit was originally instituted in the Court of first instance.

It was then contended on behalf of the appellants that the decision of the Subordinate Judge affirming that of the Munsif is wrong; and I am clearly of opinion that this is so. The ruling relied on by him is wholly inapplicable to this case, and both the lower Courts have proceeded upon a misapprehension of the scope and meaning of that ruling. In that case it was admitted on both sides that there was a bond hypothecating immoveable property as collateral security for the account stated. Therefore, there was a clear and specific contract admitted between the parties which superseded altogether

(1) I. L. R., 4 All. 330.

any contract or obligation that might be assumed from the mere statement of accounts between them. But in the present case the fact is wholly different; because here the defendant denied not only the execution of the bond, but that there had been any dealings between herself and the plaintiff or that any account had been stated. As I pointed out in the course of the argument, if such a contention as that which is now put forward upon the other side in support of the judgments of the lower Courts, were to be allowed, these plaintiffs would be absolutely without remedy, because assuming there to have been a contract, then the plaintiffs would have been defeated by the action of the defendant in denying the execution of the bond and so preventing registration, and if there was an account stated, then the plaintiffs could not sue upon it, because the existence of the bond would prevent them from doing so. But we cannot allow the defendant to take advantage of her own fraudulent conduct in preventing registration of the bond and to say that in that bond was represented the contract which superseded that which is to be inferred from the statement of accounts. In my opinion where two parties enter into a contract of which it is an essential incident that, in order to give legal effect to that contract and to enable the one party to enforce it against the other, the registration of the instrument embodying such contract is necessary, it is essential that each should do for the other all that is necessary towards securing the registration of the instrument which the law requires. Therefore I am of opinion that the plaintiffs are entitled to resort to their second relief and to bring their claim against the defendants upon the account stated. That being so, this appeal is decreed, the decision of the lower appellate Court being reversed the case will be returned to that Court for restoration to the file of pending appeals and disposal according to law. In dealing with the appeal it will be for the Subordinate Judge to determine whether there is evidence sufficient upon the record to enable him to deal with the question between the plaintiffs and the defendants with regard to the account stated. If there is evidence, he must deal with the case himself; if there is no evidence, or if there is no sufficient

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evidence, then he must pursue the procedure laid down for his guidance in the Civil Procedure Code. Costs of this appeal will be costs in the cause.

BRODHURST, J.—I concur.

Cause remanded.

FULL BENCH.

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Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Tyrrell.

KULWANTA (DECREE-HOLDER), *v.* MAHABIR PRASAD AND ANOTHER (JUDGMENT-DEBTOR).

Stamp—Court-fee—Security-bond for costs of appeal—Act I of 1879 *(Stamp Act), sch. i, No.* 13*—Act VII of* 1870 *(Court-fees Act), sch. ii, No.* 6.

Held by the Full Bench that where a bond is given under the orders of a Court as security by one party for the costs of another, it is subject to two duties—(*a*) an *ad valorem* stamp under the Stamp Act, art. 13, sch. i, (*b*) a court-fee of eight annas under the Court-fees Act, art. 6, sch. ii.

IN this case, Straight, J., made the following reference to a Division Bench :—

"This is a question of stamp reported to the Court by the Registrar under the following circumstances :—Musammat Kulwanta, the appellant in this Court, was required by an order to find security for the costs of the respondent in the event of her appeal failing, and, in pursuance of that order, she has filed two security-bonds, one for Rs. 433-5-4, and the other for Rs. 866-10-8, and they are severally stamped with the court-fee stamp of eight annas. The Registrar's attention being called to the instrument, and the stamps affixed upon them, has reported the matter to the Court in terms of his order of the 8th of the present month, and the matter has come before me for disposal. The Registrar has referred to an opinion expressed by this Court in the year 1881, which was given by four of the then Judges of the Court, expressing certain views with regard to art. 13, sch. ii. of the Stamp Act, and to art. 6 of the second schedule of the Court-fees Act. In that opinion it would appear that a view expressed by Jackson, J., in *Soonjharee Koonwur* v. *Ramessur Pandey* (1) was adopted; and

(1) 5 W. R. Misc. 47.