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SHANKAR DIAL v. MUHAMMAD MUJTABA KHAN.

We allow the objection under section 561 of the Code of Civil Procedure and set aside so much of the decree of the Court below as decrees to the plaintiff, Rs. 5,000 on account of the dower debt. The result is that the appeal, which relates only to the dower debt, must fail and it is hereby dismissed with costs. The objections under section 561 are allowed to the extent indicated above and *quoad ultra* they are dismissed. The respondents will pay and receive costs proportionate to their failure and success.

Appeal dismissed.

1896
May 28.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blennerhassett.

SHEO PRASAD AND ANOTHER (PLAINTIFFS) *v.* LALIT KUAR (DEFENDANT).*

Cause of action—Plaintiff confined to cause of action set out in his plaint—Burden of proof—Civil Procedure Code, section 50—Plaint, contents of.

A plaintiff is only entitled to succeed upon the cause of action alleged by him in his plaint. So where plaintiffs came into Court alleging a mortgage of the year 1854 made by their predecessor in title in favour of the defendant and seeking to redeem the mortgage of 1854, and it was found that the plaintiffs had failed to prove the mortgage of 1854, it was *held* that the plaintiffs were not entitled in that suit to a decree for redemption of other mortgages which might be found to subsist between the parties, but which formed no part of the cause of action upon which the plaintiffs came into Court. *Read* v. *Brown* (1), *Murti* v. *Bhola Ram* (2), *Salima Bibi* v. *Sheikh Muhammad* (3), *Ratan Kuar* v. *Jiwan Singh* (4), *Parmanand Misr* v. *Sahib Ali* (5), *Zingari Singh* v. *Bhagwan Singh* (6), *Krishna Pillai* v. *Rangasami Pillai* (7), *Govindrav Deshmukh* v. *Ragho Deshmukh* (8) and *Eshenchunder Singh* v. *Shamachurn Bhutto* (9) referred to. *Lakshman Bhisaji Sirsekar* v. *Hari Dinkar Desai* (10), and *Chimnaji* v. *Sakharam* (11) disented from.

THE facts of this case sufficiently appear from the judgment of Edge, C. J.

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* Second Appeal No. 380 of 1894, from a decree of Maulvi Muhammad Ismail Khan, Subordinate Judge of Ghâzipur, dated the 23rd January 1894, confirming a decree of Maulvi Syed Abbas Ali, Additional Munsif of Koraotadih, dated the 11th October 1893.

(1) L. R., 22 Q. B. D., 128.
(2) I. L. R., 16 All., 165.
(3) I. L. R., 18 All., 131.
(4) I. L. R., 1 All., 194.
(5) I. L. R., 11 All., 438.
(6) Weekly Notes, 1889, p. 187.
(7) I. L. R., 18 Mad. 462.
(8) I. L. R., 8 Bom., 543.
(9) 11 Moo. I. A., 7.
(10) I. L. R., 4 Bom., 584.
(11) I. L. R., 17 Bom., 365.

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SHEO PRASAD v. LALIT KUAR.

Mr. *G. E. Foy* for the appellants.

Mr. *Amir-ud-din* for the respondent.

EDGE, C. J.—This was a suit in which the plaintiffs, alleging a mortgage of 1854, claimed the relief of redeeming that mortgage. The defendant denied by his pleadings that there was any mortgage of 1854, and alleged that the plaintiffs held three mortgages over the lands, the first of which was made in 1859. The first Court was of opinion that there probably had been a mortgage of 1854, and that the money due under that mortgage was part of the consideration of the mortgage of 1859, and dismissed the suit. If that finding is correct, it is needless to observe that the suit was properly dismissed. If the mortgage of 1859 was in substitution of the mortgage of 1854, part of the consideration being a fresh advance, as was found, and part of the consideration being, as thought by the Munsif, the money due under the mortgage of 1854, the mortgage of 1854 ceased to have any effect in law or in equity except that the defendant, and not the plaintiffs, could, if necessary, rely on it as a shield. If the Munsif's finding was correct, the plaintiff's claim was a fraudulent one. They were endeavouring to get possession from a usufructuary mortgagee on payment or redemption of the mortgage which had ceased to exist and which had merged in a mortgage for a larger amount. However, this being a second appeal, it is not the finding of the first Court on questions of fact to which we have to attend and which is binding on us; it is the finding of the Court of first appeal, which according to law and according to the Code of Civil Procedure, is the finding of fact behind which we cannot go in second appeal. Where the finding of the first appellate Court is one of fact and not dependent on the construction of a document or of documents, we have a decision of the Privy Council to bind us, and that decision tells us that a High Court in such circumstances in second appeal must accept, and is bound by, the findings of fact of the lower appellate Court. Now when I come to the finding of fact of the lower appellate Court, it is this, that the plaintiffs have failed to prove any mortgage of 1854. The lower appellate Court rightly apply-

ing the law to that finding dismissed the plaintiffs' appeal which was before it. The plaintiffs have appealed here.

It has been contended by Mr. *Foy* that, notwithstanding that his clients the plaintiffs failed to prove their cause of action, I use the term advisedly, which they alleged in their plaint, namely, a cause of action, one essential ingredient of which was the proof of the mortgage alleged by them of 1854, they are entitled to a decree o redeem something. They cannot be entitled to a decree to edeem a mortgage which they had failed to prove. It was not heir case that there was any other mortgage than the mortgage of 854. I have said that I use the term "cause of action" advised-, and I do. No lawyer in England is under any misapprehension ince the ruling of the Court of Appeal in *Read* v. *Brown* (1) as what the meaning of "cause of action" is. The Full Bench f this Court in 1894 had to consider what was the meaning of the erm "cause of action" in the case of *Murti* v. *Bhola Ram* (2). ive Judges of this Court adopted the view expressed by the Court f Appeal in England in *Read* v. *Brown*. One Judge of this urt took a slightly different view. In the case of *Salima Bibi* *Sheikh Muhammad* (3) the meaning of the term "cause of tion," as employed in the Code of Civil Procedure, was considered a Division Bench of this Court, which followed the view taken the majority of the Court in *Murti* v. *Bhola Ram* and by the ourt of Appeal in England in *Read* v. *Brown*.

The Legislature, conceiving, and I think rightly, that there ght to be some kind of procedure which plaintiffs and defendants uld be bound to follow in suits in Civil Courts in India, by a riety of Regulations and Acts attempted to provide from time to ime a Code of Civil Procedure. The present Code of Civil Procedure is known as Act No. XIV of 1882. In section 50 of that ode the Legislature imperatively directed that plaints should con- in certain particulars. The Legislature used the word "must," nd, as has been pointed out by a judgment of this Court, which

(1) L. R., 22 Q. B. D., 128. (2) I. L. R., 16 All., 165.
(3) I. L. R., 18 All., 131.

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we presume is known in these Provinces, when the Legislature uses "must" instead of "shall," it uses a word which is most strongly imperative. Amongst the particulars which the Legislature has enacted that the plaint must contain is "a plain concise statement of the circumstances constituting the cause of action and where and when it arose." Applying the decision in *Read* v. *Brown* and the decision of the Full Bench in *Murti* v. *Bhola Ram* to this case, one essential particular of the plaintiffs' cause of action in this case was the mortgage of 1854. In the cause of action alleged in the plaint or as forming part of it there was absolutely no suggestion of any mortgage other than the mortgage of 1854. That mortgage has been found by the lower appellate Court not to be proved. I do not suppose that any one would suggest that when a plaintiff brings his suit for redemption of a mortgage and the fact is denied that that mortgage ever was made, the *onus* of proof is on the defendant. Any such suggestion as that would be to revolutionize all the principles upon which the rules of evidence have been based for centuries. It is not and never was any part of a defendant's duty to make out a case for the plaintiff either by evidence or admission.

Now it was held by the majority of a Full Bench of this Court in 1876, in the case of *Ratan Kuar* v. *Jiwan Singh* (1), that plaintiffs who failed to prove the averments upon which their suit was based were not entitled to relief in respect of a portion of the property in suit of which the defendants admitted that they were mortgagees. That was a case in which the plaintiffs alleged a mortgage of 1842 for a certain amount. The defendants denied that mortgage and put it in issue, and on their side alleged a mortgage of the same year of different parcels of land and for a different amount. In *Parmanand Misr* v. *Sahib Ali* (2) three Judges of this Court agreed in a judgment in which I endeavoured to point out where lay the *onus* of proof in a suit on a mortgage, and that if the plaintiff in a suit on a mortgage failed to prove the mortgage upon which he relied and which he alleged in his plaint,

(1) I. L. R., 1 All., 194. (2) I. L. R., 11 All., 438.

he could not succeed upon the mere fact that the defendant admitted that he was a mortgagee of the land. I also endeavoured to point out that that was the necessary corollary from a decision of the House of Lords in England, and that it was necessary for a plaintiff suing upon a mortgage to prove, if not admitted, that he had, when he brought his suit, a subsisting cause of action. In *Zingar Singh* v. *Bhagwan Singh* (1) a Division Bench of this Court held in a suit which was for redemption of a mortgage that a plaintiff in such a suit is not entitled to succeed merely because the defendant fails to prove the case he sets up, unless the defendant's pleadings show that on failure to prove a particular defence the plaintiff must be entitled to a decree. The right claimed there was redemption, and part of the cause of action was a mortgage alleged of 1852. On this point Straight, J., said:—"If he (the plaintiff) failed to establish that mortgage, which he as the party seeking relief was bound to do and was the most competent person to do, then his suit must fail."

Although the judgments of this Court upon these points are binding upon this Bench, it is just as well that in this case I should refer to one or two judgments of other Courts to show that the views which have been expressed and maintained of recent years by most of the Judges of this Court are not absurd views to the minds of others and are not views which are peculiar to the Judges of the High Court at Allahabad. In *Krishna Pillai* v. *Rangasami Pillai* (2) a Division Bench of the Madras High Court said:—"We agree with West, J., in *Govindro Deshmukh* v. *Ragho Deshmukh* in holding that the plaintiff failing to establish the mortgage upon which the suit was based should not be allowed to fall back on some other, as to which admissions may have been made by the defendants in other proceedings." The case which was referred to is reported in I. L. R. 8 Bom., 543. In that case West and Nanabhai Haridas, JJ., held that "where a particular instrument is sued upon as the basis of a right, it is incumbent on a plaintiff to establish his case on that particular cause of action, and not on a

(1) Weekly Notes, 1889, p. 187. (2) I. L. R., 18 Mad., 462.

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cause of action merely bearing the same name or of the same description and so included in the same class." That, in my opinion, is good law, and sound common sense and sound justice. If it were otherwise, a plaintiff might come into Court and seek to redeem a fictitious mortgage, and he might succeed on some other mortgage which was not in suit at all in the particular case. The object of section 50 of the Code of Civil Procedure is to give information to the defendant as to the case which he has got to meet. In order to provide as far as possible that that information shall be truthfully given, the Legislature has enacted that the plaint must be signed and must be verified by some one possessing a knowledge of the facts. The Legislature had some object in so enacting. Their Lordships of the Privy Council as far back as 1866 in *Eshenchunder Singh* v. *Shama Churn Bhutto* (1) at p. 24 said:—"Their Lordships are obliged to disapprove of the decision come to by the High Court. They desire to have the rule observed that the state of facts and the equities and ground of relief originally alleged and pleaded by the plaintiff shall not be departed from." The state of facts alleged by the plaintiffs in this case was a mortgage to the defendant made in 1854. The equities alleged were that the time had arrived for redemption of that mortgage and that the plaintiffs were entitled to redeem. The ground of relief was the right to redeem a mortgage of 1854, and no other mortgage. Applying that ruling of the Privy Council to this case, we should not be at liberty, even if we were not bound by the rulings of our own Court, to give the plaintiffs redemption of a mortgage which they had not asked to redeem, and to decree a suit in which all the facts going to the plaintiffs' alleged cause of action had been found against them.

Mr. *Foy* relied upon two cases to be found in the Bombay Reports. The first of those cases was that of *Lakshman Bhisaji Sirsekar* v. *Hari Dinkar Desai* (2) in which the Bombay High Court, of course not having before them the guidance of the decision in *Read* v. *Brown* in the Court of Appeal in England, apparently

(1) 11 Moo. I. A., 7. (2) I. L. R., 4 Bom., 584.

held that it was immaterial to a plaintiff's cause of action on a mortgage that he failed to prove the mortgage which he alleged. I cannot help thinking that if the learned Judges who decided that case had had an opportunity of considering the judgments of the present Master of the Rolls and of Fry and Lopez, L JJ. as to what constituted a cause of action, they never could have come to the decision at which they arrived. The other Bombay case was *Chimanji* v. *Sakharam* (1). In that case a Division Bench of the Bombay High Court, without considering what was the cause of action on which the plaintiffs came into Court and whether they had proved that cause of action, apparently followed the decision in *Lakshman Bhisaji Sirsekar* v. *Hari Dinkar Desai* (2). So far as one can really understand the decision in the case reported in I. L. R., 17 Bombay, it would appear to be immaterial whether a plaintiff proved the cause of action which he alleged when suing on a mortgage or in respect of a mortgage, so long as he did not resort to dishonest artifices to procure evidence for his case and the position of mortgagor and mortgagee was admitted by the defendants, but not under the mortgage alleged by the plaintiff. If that were the law, clause (*d*) of section 50 of the Code of Civil Procedure might as well be struck out of the statute book.

In this case the rulings of this Court bind us as to the view of the law which we should follow; and whether I agreed with them or not I should feel myself bound by them and should not question them. Settled principles of law administered by a Court of Justice ought not to be lightly disturbed or doubt cast upon them without very sufficient reason. Not only do I see absolutely no reason for the slightest doubt as to the correctness of those decisions of this Court, but I entirely approve of them. They are in accordance with the views of the Privy Council; they are in accordance with the intentions of the Legislature and with principles of sound common sense and justice, according to which a man who brings a false case, or even brings a true case and fails to prove it, should not

(1) I. L. R., 17 Bom., 365. (2) I. L. R., 4 Bom., 584.

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get a decree on a different cause of action from that alleged by him, and a cause of action which he has repudiated in the Court of first instance and in the Court of first appeal, and only relies on as an off-chance in the Court of second appeal. I would dismiss this appeal with costs.

BLENNERHASSETT, J.—I concur.

Appeal dismissed.

1896
May 30.

Before Mr. Justice Blair and Mr. Justice Banerji.

SUNDAR SINGH AND OTHERS (PLAINTIFFS) *v.* GHASI AND OTHERS (DEFENDANTS).*

Civil Procedure Code, sections 278, 283—*Execution of decree—Application in execution department—Separate suit—Remedy under section* 283 *not excluded by previous application under section* 278.

The provisions of section 278 of the Code of Civil Procedure and the sections immediately succeeding are not exclusive of the remedy by suit. *Man Kuar v. Tara Singh* (1) considered.

THIS was a suit brought by Sundar Singh and others, who claimed to be owners of a certain zamindari share, for a declaration that such property, which had been attached by one Ram Dayal as the property of Ghasi and others his judgment-debtors, was not liable to attachment and sale in execution of Ram Dayal's decree. The decree-holder, the judgment debtors and certain other co-sharers in the village in which the property in suit was situated were made defendants.

The decree-holder and the judgment-debtors each filed a similar defence to the suit, that the share in question was owned and possessed by the judgment-debtors and had never been in the possession of the plaintiff.

The court of first instance (Munsif of Etáwah) found twelve years' adverse possession in favour of the plaintiff, and decreed the claim for removal of the attachment.

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* Second Appeal No. 420 of 1894, from a decree of Syed Siraj-ud-din, Additional Subordinate Judge of Mainpuri, dated the 7th March 1894, reversing a decree of Babu Madho Das, Munsif of Etáwah, dated the 15th December 1892.

(1) I. L. R., 7 All., 583.