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Before Mr. Justice Tudball and Mr. Justice Rafiq.

ABDUL HAKIM AND OTHERS (DEPENDANTS) v. KARAN SINGH AND ANOTHER (PLAINTIFFS) AND RAHIM ALI KHAN AND OTHERS (DEPENDANTS)*
Civil Procedure Code (1908), order II, rule 2—Omission to sue for right relief—Maintainability of subsequent suit.

Where a plaintiff knew what relief he was entitled to and deliberately omitted to claim the right relief, his subsequent suit in respect of the same cause of action for the right relief was held to be barred by the provisions of Order II, rule 2., of the Code of Civil Procedure.

THE facts of this case are fully set forth in the judgement.

Mr. B. E. O'Conor (with him Maulvi Iqbal Ahmad), for the appellants.

Babu Piari Lal Banerji, for the respondents.

TUDBALL and RAFIQ, JJ. :—The facts which have given rise to this appeal are as follows: Rahim Ali Khan, one of the defendants respondents, was the owner of 7½ biswas in village Dastra. On the 5th of December, 1902, he executed a sale-deed in respect of six biswas out of the 7½ biswas in lieu of Rs. 14,000, in favour of Abdul Hakim Khan and his three minor sons. Out of the consideration the sum of Rs. 12,000 was left with the vendees for the discharge of two prior mortgages, namely, Rs. 6,000 were to be paid on account of a usufructuary mortgage to the credit of Har Bhajan Lal and others, mortgagees, and Rs. 2,924-5-0 were to be paid to one Lala Sant Lal for a simple mortgage. It was further agreed that any balance left over, after payment to the two prior mortgagees, would be repaid to the vendor; the payments to the two prior mortgagees were to be made at stated times which were mentioned in the sale-deed. The prior mortgagees were admittedly not paid on the date mentioned in the sale-deed. On the 12th of September, 1912, Rahim Ali Khan executed a deed of assignment in favour of Karan Singh and Ahmad Ali Khan in respect of the money due from the vendees, that is, the balance of the purchase money and damages on account of non-payment of the prior mortgages on the dates mentioned in the sale-deed. On the 9th of January, 1913, Karan Singh and Ahmad Ali Khan, the assignees, instituted the suit out of which this appeal has arisen for the recovery of Rs. 9,000, the amount said to be due on account of damages and the balance

*First Appeal No. 9 of 1914, from a decree of Sushil Chandra Banerji, Additional Subordinate Judge of Aligarh, dated the 26th of September, 1913.

of purchase money. The claim was brought against the vendees and against Rahim Ali Khan and others. The claim was resisted on various pleas one of which was that it was barred by order II, rule 2, of the Code of Civil Procedure. The learned Subordinate Judge in whose court the suit was filed decreed it in part. The vendees have preferred the present appeal. They challenge the decree against them on the ground, among others, that the suit is not maintainable in view of the provisions of order II, rule 2, of the Code of Civil Procedure. The argument is based on the allegation that on the 11th of September, 1905, Rahim Ali Khan brought a suit in the court of the Subordinate Judge of Aligarh for the cancellation of the deed of the 15th of December, 1902, against the appellants on the allegation that the latter had failed to carry out their part of the contract by not paying the prior mortgagees and not paying him the balance of the purchase money. The said claim was dismissed on the ground that the remedy sought by Rahim Ali Khan was not open to him, as the non-payment of sale price or the non-fulfilment of some of the terms of the contract of sale did not entitle the vendor to ask for cancellation of the sale. It is contended on behalf of the appellants that the cause of action alleged in the suit of the 11th of September, 1905, was the same as the cause of action stated in the present suit, namely, the breach of contract by the appellants. It was open to Rahim Ali Khan in the former suit to sue for damages and the return of the unpaid sale price and that his omission to do so bars the present suit under order II, rule 2, of the Code of Civil Procedure. In support of this contention the learned counsel for the appellants relies on the wording of the said provisions of law and on the following cases: *Rangayya Goundan v. Nanjappa Rao* (1); *Badri Bisal v. Musammatt Lalta Koer* (2); *Raja Bahadur Shiv Lal Moti Lal v. Rajeevappa Pampanna* (3). For the respondents the reply is that the provisions of order II, rule 2, of the Code of Civil Procedure do not apply to the present case inasmuch as the remedy sought by Rahim Ali Khan in his former suit was misconceived and could not be granted to him. It is said that where

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(1) I. L. R., 24 Mad., 491.

(2) (1906) 10 Oudh Cases, 44.

(3) 11 Bom. L. R., 46.

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a plaintiff sues for a relief to which he is not entitled a subsequent suit by him for the right relief on the same cause of action is not barred by order II, rule 2, of the Code of Civil Procedure. In support of his contention the learned counsel for the respondents has relied on the following cases: *Piari v. Khiali Ram* (1); *Darbo v. Kesho Rai* (2); *Sarsuti v. Kunj Behari Lal* (3); *Mohan Lal v. Bilaso* (4); *Bande Ali v. Gokul Misir* (5); *Musammam Prab Debi v. Harkishn Das* (6); *Musammam Parmeshri v. Vasdec* (7).

The strongest cases for the respondents are those reported in Indian Law Reports, 3 All., page 857, and the Punjab Records for 1885, case No. 35, page 65. If it be conceded that the propositions of law laid down in the said two cases is correct, it does not help the respondents in the present case, for it was laid down in those cases that where a plaintiff has asked for a wrong relief presumably under a misapprehension of what relief he is entitled to seek, his subsequent suit for the right relief is not barred. In the present case we find on reference to the plaint of the suit of the 11th of September, 1905, that Rahim Ali Khan knew perfectly well that he was then entitled to claim both the damages and the balance of sale-price. In fact he stated in paragraph 9 of his plaint that he was entitled to recover damages and the balance of unpaid price from the defendants of the suit as well as ask for the cancellation of the sale-deed, but he was for the present asking merely for the cancellation of the sale and that he would subsequently sue in respect of the other reliefs. The cases relied upon by the learned counsel for the respondents do not go the length of saying that in a case like the present where Rahim Ali Khan knew perfectly well what relief he was entitled to and he deliberately omitted to claim the right relief, that his subsequent suit in respect of the same cause of action for the right relief does not stand barred by the provisions of order II, rule 2. It is clear that Rahim Ali Khan was entitled to more than one relief on his own statement in the plaint of 1905. He deliberately chose to sue in respect of one and omitted to sue in respect of the

(1) (1881) I. L. R., 3 All., 857.

(4) (1892) I. L. R., 14 All., 512.

(2) (1879) I. L. R., 2 All., 356.

(5) (1911) 9 A. L. J., 111.

(3) (1888) I. L. R., 5 All., 345.

(6) Punjab Rec., 1884, C. J., 110.

(7) Punjab Rec., 1885, C. J., 65.

others and he did not obtain the leave of the court in respect of the reliefs which he had omitted. The present claim therefore stands clearly barred under order II, Rule 2, as the cause of action in the two suits is exactly the same.

BY THE COURT:—

The appeal therefore prevails and we allow it. The decree of the lower court is set aside and the claim of the plaintiffs is dismissed with costs in both courts. The objections filed by the plaintiffs as regards the amount disallowed by the court below are also dismissed with costs.

Appeal decreed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Rafiq.

KUNDAN LAL (PLAINTIFF) v. JAGANNATH (DEFENDANT).*

Act No. IX of 1872 (Indian Contract Act), sections 59—61—Appropriation.

An appropriation of payment must be made by the debtor at the time of paying and by the creditor at the time of receiving the money. If neither of them makes the appropriation the law appropriates the payment to the earliest debt.

Sections 59 to 61, of the Indian Contract Act enacted the rule of the Civil Law as laid down in *Clayton's case* (1) with certain modifications.

THE material facts were as follows:—

The bond in suit was executed on the 10th of September, 1910. The defendant pleaded payment by cheque. The plaintiff alleged that there were several debts due to the plaintiff from the defendant and that payment was made in respect of debts other than that in suit and that the documents paid off had been returned to the defendant. The court below held that at the time of the payment neither party had appropriated the money to a particular debt and as the debt earliest in time was the debt in suit the law appropriated the payment to this particular debt under section 61 of the Contract Act. The suit was therefore dismissed.

The Hon'ble Munshi *Gokul Prasad* (with him The Hon'ble Dr. *Tej Bahadur Sapru*), for the appellant:—

The bond in suit remained with the plaintiff even after payment by cheque was made by the defendant. The presumption is that there was some other debt in respect of which the money,

* Second Appeal No. 1056 of 1914, from a decree of C. E. Guiterman, Additional Judge of Moradabad, dated the 15th of April, 1914, reversing a decree of Kali Das Banerji City Munsif of Moradabad, dated the 13th of December, 1913.

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