Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep, and Mr. Justice Norris.

1892
May 21.

DUNCAN BROTHERS & Co. (PLAINTIFFS) *v.* JEETMULL GREEDHAREE LALL (DEFENDANTS).*

Civil Procedure Code (Act XIV of 1882), s. 43—Breaches of the same contract, how sued upon—Cause of action—Contract.

Where a contract for the sale and purchase of goods is broken by the purchaser, in part by refusal to take delivery, and in part by refusal to pay for goods delivered, both breaches having occurred before any suit is brought, the vendor is debarred by section 43 of the Code of Civil Procedure from bringing two suits against such purchaser, his claim being one arising out of one cause of action and based on one and the same contract.

The view taken by Wilson, J., in *Anderson, Wright & Co.* v. *Kalagarla Surjinarain* (1) approved.

PETHERAM, C.J.—"The whole of the claim which the plaintiff is entitled to make in respect of the cause of action" in section 43 means, in the above case, the entire claim which the plaintiff has against the defendant at the time the action is brought, in respect of any failure or failures to accept and pay for goods purchased of him by the defendant under one contract, and the whole of such claim must be included in one action.

PRINSEP, J.—The expression 'cause of action' is to be construed with reference to the substance rather than the form of the action. The claim in both the above cases being for damages on account of breaches of the same contract, section 43 read with the Illustration debars the plaintiff from bringing two suits.

REFERENCE to the High Court made by R. S. T. MacEwen, Esq., 2nd Judge of the Calcutta Court of Small Causes.

The following was the referring order:—"The defendants entered into a contract No. 1797 with the plaintiffs on the 7th January 1889 for the purchase of '50 bales grey shirtings, quality 3019, at Rs. 4-13 per piece, shipment in March or April next. Bill of lading date to be counted as date of shipment under this contract. Goods to be as per sample shown buyer in seller's possession. Dimensions 37" x 38 yards. Goods to be stamped T. P.'

* Small Cause Court reference No. 3 of 1891, made by R. S. T. MacEwen, Esq., Second Judge of the Calcutta Court of Small Causes, dated the 13th April 1891.

(1) I. L. R., 12 Calc., 339.

"All the bales arrived between 25th April and 14th June 1889. The defendants took delivery of 1 bale on 1st May and paid for it; 5 bales were delivered to them on 27th July for which they refused to pay, and they refused to take delivery of, and pay for, the remaining 44 bales, which were resold by the plaintiffs after notice to the defendants.

"The plaintiffs instituted two suits on the same date—one for Rs. 1,628-8-3, being the damages arising on the resale of the 44 bales: the other for Rs. 1,229-3-6, the price of the 5 bales and interest.

"By consent both suits were heard together. In both suits the defence was taken that the plaintiffs had split their cause of action. In the suit for damages it was also pleaded that the goods were not according to sample: that the breach was on the part of the plaintiffs: that the plaintiffs had no right of resale, and that the defendants were not liable in damages.

"In the suit for the price of the 5 bales it was pleaded that there had been no acceptance of the goods, and that the suit would consequently not lie.

"The contract sued upon was admitted. I found the following facts: that 41 bales had been shipped within the contract time: that 9 had not been so shipped: that the defendants had notice of the arrival of all the bales, including the 9 late shipped: that the defendants despatched the first bale received by them to a constituent up-country without opening it or examining its contents: that in consequence of information received from this constituent they, for the first time, on the 13th June 1889, complained to the plaintiffs in a letter of that date that the bale sent up-country was found to be 'of very inferior quality,' and desired that the contract should be cancelled: that they had no personal knowledge of the fact therein stated: that in reply to this complaint the plaintiffs refused to cancel the contract, but offered to put the matter in the hands of the Chamber of Commerce for survey: that the defendants refused the offer: that thereafter, that is to say on 10th August 1889, Hazareemull, one of the defendants, proposed that the goods should be surveyed by two gentlemen—one from the firm of Messrs. Horne, Dunlop & Co., and the other from the firm of Messrs. Hoare, Miller & Co.: that the plaintiffs, waiving their right

1892

DUNCAN BROTHERS & Co. v. JEETMULL GREE-DHAREE LALL.

under the contract to nominate a surveyor, agreed to this proposal that the decision of the surveyor should cover all the bales which had then arrived, that is to say, 44 then in the plaintiffs' godowns, and the 5 which had been previously delivered to the defendants: that the defendants had accepted the 5 bales subject to the survey agreed upon: that in pursuance of such agreement the plaintiffs on 21st August intimated to the defendants that the survey would be held in their office at 12 o'clock the next day, when they were requested to be present: that on 22nd August the survey was duly held by Mr. Dunlop, of Horne, Dunlop & Co., and Mr. Ormerod, of Hoare, Miller & Co.: that there was no difference between the sample and the goods tendered: that the goods tendered were a fair delivery, and that the defendants had no cause of complaint on the ground of inferiority, which was the only ground of complaint at that time.

"I held that the defendants having refused to take and pay for the 44 bales and to pay for the 5 bales delivered to them after the survey agreed upon, had committed a breach of the contract: that the plaintiffs were entitled to resell the 44 bales: that the damages and the price of the goods claimed had been proved, and that the plaintiffs were entitled to a decree in both suits.

"My judgment is contingent upon the opinion of the High Court on the following question submitted by the defendants' pleader:—

"'Whether or not the plaintiffs are debarred from bringing two suits against the defendants based on one and the same contract, both causes of action having accrued at the time of the institution of the suits.'

"This question was decided in the case of *Anderson, Wright & Co.* v. *Kalagarla Surjinarain* (1), but there was a difference of opinion between the learned Judges on the point. The Chief Justice, Sir Richard Garth, held that a claim for the price of goods sold was a cause of action of a different nature from a claim for damages for non-acceptance of goods, and that such claims, although arising under one and the same contract, may be sued upon separately, section 43 of the Civil Procedure Code notwithstanding.

(1) I. L. R., 12 Calc., 339.

1892

DUNCAN BROTHERS & Co. v. JEETMULL GREEDHAREE LALL.

"Mr. Justice Wilson held that 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 (which is precisely the present case), and both breaches occur before any suit is brought, the plaintiff's claim is one arising out of one cause of action, and the whole claim must be included in one suit.

"The whole claim in the present case exceeds the pecuniary jurisdiction of this Court. The Court has only jurisdiction if the plaintiffs are entitled to bring two suits in the way they have done: or one suit embracing both counts, but abandoning any excess over Rs. 2,000. The question in dispute between the parties at the time that the defendants agreed to a survey as a means of settlement affected all the goods, *i.e.*, the 5 bales which had been delivered to the defendants and the price of which is claimed in one suit: and the 44 bales which formed the subject of the resale, and in respect of which damages are claimed in the other suit: and the decision was to cover the whole 49 bales.

"I considered myself bound by the decision in the above-quoted case, and gave the plaintiffs a judgment in both cases. But having been asked to refer the question under section 69 of the Act, and having regard to the fact that it is a decision of only two Judges, and that they differed in opinion, I considered I ought to comply with the application for a reference.

"The debt and costs in both suits and the costs of this reference have been deposited."

Mr. *Acworth* appeared for the defendants.

Mr. *Henderson* appeared for the plaintiffs.

Mr. *Acworth*.—I adopt the view of Wilson, J., in *Anderson Wright & Co.* v. *Kalagarla Suryinarain* (1), and I submit the terms of section 43 of the Code of Civil Procedure are in my favour. The section was enacted to prevent multiplicity of suits, and its language shows that what the Legislature intended to look to was the substance of the action, and not the technical cause of

(1) I. L. R., 12 Calc., 339.

1892

DUNCAN BROTHERS & Co. v. JEETMULL GREE-DHAREE LALL.

action—see *Soorjomonee Dayee* v. *Suddanund Mohapatter* (1). It was meant that all the claims as to one cause of action should be included in one suit. The cause of action is the breach of the contract, and all the breaches must be sued upon at one and the same time—*Grimbly* v. *Aykroyd* (2), *Mackintosh* v. *Gill* (3), *Wood* v. *Perry* (4), *Shib Kristo Dah* v. *Abdool Sobhan Chowdhry* (5), *Rangamma* v. *Vohalayya* (6), *Alagu* v. *Abdoola* (7).

Mr. *Henderson*.—The two claims here are of a different nature, the first being for non-payment of sums due for goods accepted, and the second being for damages for non-acceptance. 'Cause of action' means the right to come into Court to enforce a claim. I rely on the judgment of Garth, C.J., in *Anderson, Wright & Co.* v. *Kalagarla Surjinarain* (8).

Mr. *Acworth* was not heard in reply.

The following opinions were delivered by the Court (PETHERAM, C.J., PRINSEP and NORRIS, JJ.)

PETHERAM, C.J.—My answer to the question referred to us by the Judge of the Small Cause Court is, that the plaintiffs are debarred from bringing these two suits against the defendants by section 43 of the Code of Civil Procedure. I frame my answer to the question in this form, because, as was said by Mr. Justice Wilson in the case of *Anderson, Wright & Co.* v. *Kalagarla Surjinarain* (8), I prefer to guard myself against expressing any opinion wider than is necessary for the purposes of this case, and as was done by that learned Judge in that case, I found my judgment solely on the construction which I place on section 43 of the Code. I agree with him in thinking that the words "the whole of the claim which the plaintiff is entitled to make in respect of the cause of action" in that section in such a case as the present means the entire claim which the plaintiff has against the defendant at the time the action is brought, in respect of any failure or failures to accept or pay for goods purchased of him by the

(1) L. R., I. A., Sup. Vol., 212; 12 B. L. R., 304.
(2) 1 Exch., 479.
(3) 12 B. L. R., 37.
(4) 3 Exch., 442.
(5) 15 W. R., 408.
(6) I. L. R., 11 Mad., 127.
(7) I. L. R., 8 Mad., 147.
(8) I. L. R., 12 Calc., 339.

defendant under one contract, and that the whole of such claim must be included in one action.

I am not aware of any other decision on this section, except the one cited in the judgment, and to which I have referred, and, as I have said before, I base my judgment on the construction of that section alone.

PRINSEP, J.—This is a reference from a Judge of the Small Cause Court, Calcutta, in which the opinion of this Court is asked whether the two suits tried by that Court are or are not barred by reason of section 43 of the Code of Civil Procedure. The objection taken is not merely technical, because, if under section 43 the claims now made should have been made the subject of one suit, the amount involved would exceed the jurisdiction of the Small Cause Court.

The point referred to us is thus stated by the learned Judge of the Court of Small Causes:—

"Whether or not the plaintiffs are debarred from bringing two suits against the defendants based on one and the same contract, both causes of action having accrued at the time of the institution of the suits."

The case stated is admittedly on all fours with *Anderson, Wright & Co.* v. *Kalagarla Suryinarain* (1), in which the learned Judges (Garth, C.J., and Wilson, J.) differed.

The two suits are based on breaches of the same contract. One suit is for the price of goods delivered, the other for damages for non-acceptance of other goods. Section 43 of the Code of Civil Procedure declares that "every suit shall include the whole claim which the plaintiff is entitled to make in respect of the cause of action." The matter submitted to us therefore is, are these one or two causes of action arising out of this transaction; in other words, what is the proper meaning of 'cause of action' in section 43.

Garth, C.J., in the case already mentioned, laid down that the "real principle 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

(1) I. L. R., 12 Calc., 339.

1892

DUNCAN BROTHERS & Co. v. JEETMULL GREE-DHAREE LALL.

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." The learned Chief Justice observed that in that case, as in the case now before us, there is "a claim for debt and a claim for damages," and he mainly relied on the fact that the evidence in each case would be different, so as to entitle the plaintiff to bring separate suits.

Wilson, J., observed that "in one sense every breach of contract is a separate cause of action." But, he added, the Illustration to section 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."

I do not propose to consider the cases cited by the learned Judges which relate to the practice in the Courts of England, and which do not, therefore, necessarily help us in deciding the practice in the Courts of India which has been laid down by a special Code, and has been discussed in some of our reported cases. The terms of section 7 of the Code of 1859, and of section 43 of that of 1882, do not vary materially. The former declared that "every suit shall include the whole of the claim arising out of the cause of action;" section 43 of the Code of 1882 provides that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." The cases, therefore, decided under the Code of 1859 are in point.

Their Lordships of the Privy Council expressed their opinion on this subject in *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1) (see page 605 of the report). In that case, after previous litigation to recover various moveable properties misappropriated by the defendant, the plaintiff brought a fresh suit to recover some "Company's paper" which she might have included in the former suit as part

(1) 11 Moo. I. A., 551.

1892

DUNCAN BROTHERS & Co. v. JEETMULL GEEE-DHAREE LALL.

of her claim. Their Lordships stated that "the correct test in all cases of this kind is, whether the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit.....But the cause of action in the former suit of the respondent seems to them to be the refusal by the husband to restore, or his misappropriation of the wife's property which he says she intrusted to him. There is nothing to distinguish the deposit of this particular Company's paper from the deposit of those which she deposited with it, and has recovered in the former suit. It was a mere item of her demand, and is admitted on the face of the present plaint to have been omitted from it for no other reason than the very insufficient one before mentioned."

In *Thakur Shankar Baksh* v. *Dya Shankar* (1) the plaintiff sued for redemption of a mortgage of certain villages, having previously sued for redemption on a sub-proprietary or lesser title in the same village. Their Lordships held that the second suit was barred, holding that it did not make any difference as regards the cause of action, that in the former suit the plaintiff asked for the sub-proprietary right and in the latter for the superior proprietary right. "It is not," their Lordships state, "part of the cause of action. It is the manner in which the redemption of the mortgage was to be given." As their Lordships laid down in *Soorjomonee Dayee* v. *Suddanund Mohapatter* (2), "the term 'cause of action' is to be construed with reference rather to the substance than to the form of action."

To apply the test laid down by their Lordships of the Privy Council, each of the two cases before us is founded, in fact, on a cause of action distinct from that which is the foundation of the other. The two suits were brought simultaneously, and they are no doubt different in the form of action, but still the claim on both is for damages on account of breaches of the same contract. The difference in the form of action is of no consequence, for it has been laid down by their Lordships of the Privy Council that the substance rather than the form of action should be taken into consideration.

(1) L. R., 15 I. A., 66; I. L. R., 15 Calc., 422.

(2) L. R., I. A. Sup. Vol., 212; 12 B. L. R., 304.

1892

DUNCAN BROTHERS & Co. v. JEETMULL GREEDHAREE LALL.

In both the plaintiff seeks to recover monies due from the defendant on breach of the same contract—in the one suit as the price of goods delivered, in the other as damages in consequence of non-acceptance of other goods. In substance, however, the two suits are the same. In both the plaintiff seeks to obtain the benefit of his contract. Taking this with the illustration to section 43 of the present Code, I think that the plaintiff was debarred from bringing two suits, and we should answer the learned Judge of the Small Cause Court accordingly.

NORRIS, J.—I concur in holding that the question upon which our opinion is asked by the learned Judge of the Small Cause Court should be answered in the affirmative.

Attorney for the plaintiffs: Messrs. *Dignam, Robinson* and *Sparkes.*

Attorney for the defendant: Mr. *N. C. Bose.*

A. A. C.

CRIMINAL REFERENCE.

Before Mr. Justice Norris and Mr. Justice Beverley.

1892
April 20.

QUEEN-EMPRESS *v.* HARADHAN *alias* RAKHAL DASS GHOSH (ACCUSED).*

Forgery—Cheating—Using a forged document—"Fraudulently"—"Dishonestly"—Penal Code (Act XLV of 1860), *ss.* 24, 25, 415 & 471—*Practice—Right to begin in Reference by Presidency Magistrate on question of law—Criminal Procedure Code (Act X of* 1882), *s.* 432.

In construing ss. 24 and 25 of the Penal Code, the primary and not the more remote intention of the accused must be looked at.

Queen-Empress v. *Girdhari Lal* (1) cited.

Under the rules of the Calcutta University a private student desiring to appear at the Entrance examination is required to forward to the Registrar, with his application for permission to appear, a certificate to the effect, *inter alia*, that he is of good moral character and has submitted himself to a test examination by, and furnished exercises to, the person signing the certificate sufficient in that person's opinion to show that his

* Criminal Reference No. 1 of 1892, made by F. J. Marsden, Esq., Chief Presidency Magistrate, Calcutta, dated the 11th of February 1892.

(1) I. L. R., 8 All., 653.