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he might have done under other circumstances." The learned author at page 494 puts the reason of the decision as follows: "One might generalise the rule in some such form as this: 'Not only a man cannot with impunity harm others by his negligence, but his negligence cannot put them in a worse position with regard to the estimation of default. You shall not drive a man into a situation where there is loss or risk every way, and then say that he suffered by his own imprudence. Neither shall you complain that he did not foresee and provide against your negligence'."

We are of opinion that the principle laid down in the cases decided and very clearly put by the learned author should be adopted as the basis of our decision, and we do adopt it.

In the result we allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance. The plaintiff will have his entire costs throughout.

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April, 24.

Before Mr. Justice Mukerji and Mr. Justice Bajpai.

SHIAM LAL (DEFENDANT) *v.* ABDUL SALAM (PLAINTIFF).*

Contract Act (IX of 1872), section 73—Breach of contract—Money left with vendee to pay off a mortgage—Vendee's failure to pay—Suit for compensation—Anticipated damages—Actual occurrence of damages not necessary to maintain suit—Cause of action.

Money was left with a vendee to pay off an existing mortgage on the property. The vendee failed to pay it and the mortgagees sued on their mortgage and got a decree for sale. Thereupon the mortgagor vendor sued the vendee for damages for breach of contract, claiming the amount of the decree together with interest. The suit was resisted on the ground that there was no cause of action for the suit, inasmuch as the plaintiff had not paid the mortgagees nor had his property been sold and, so far, he had suffered no actual damage. *Held*

*First Appeal No. 145 of 1930, from an order of Banarsi Das Kankan, Additional Subordinate Judge of Moradabad, dated the 19th of May, 1930.

that a decree for sale having been passed against the plaintiff, he had a good cause of action for the suit, although actual damage or loss, in the narrower sense of the word, had not yet occurred.

Mr. *Panna Lal*, for the appellant.

Mr. *Mushtaq Ahmad*, for the respondent.

MUKERJI and BAJPAI, JJ. :—This is an appeal against an order of remand made under the following circumstances. The respondent, Abdul Salam, executed a mortgage in favour of three persons, Hari Chand and others, and thereby hypothecated a third share in two shops and other properties on foot of a mortgage bond dated the 18th of November, 1920. He acquired the remaining two-third share in the two shops which we have mentioned, and, later, on the 26th of July, 1924, he sold the two shops to the appellant Shiam Lal for a sum of Rs. 6,250. Abdul Salam left with the vendee out of the purchase money a sum of Rs. 3,107-2-0 to be paid to Hari Chand and others in order that the mortgage of 1920 might be cleared off. Owing to certain circumstances which we need not mention and which will be duly inquired into by the court of first instance, Shiam Lal made no payment to the mortgagees. The mortgagees brought a suit for sale and obtained a decree on the 3rd of January 1929. This mortgage decree was partly based on a compromise. Shiam Lal agreed with the mortgagees that the latter, in consideration of a sum of Rs. 2,300 paid to them, would release from liability the two shops purchased by Shiam Lal. As the result of this compromise and payment, the money due to the mortgagees was reduced in amount and a decree for sale was passed against the remaining properties of Abdul Salam for the realisation of a sum of Rs. 2,758-14-0. Thereupon, Abdul Salam brought the suit out of which this appeal has arisen to recover the sum of Rs. 2,758-14-0 with interest from 3rd of July, 1929, (after the expiry of the six

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months' time allowed for payment), in all for recovery of Rs. 2,779 from Shiam Lal.

The court of first instance dismissed the suit, having held that it was premature. The basis of the judgment was that so far the plaintiff has not paid the mortgagees, nor has his property been sold, and, therefore, the plaintiff had no cause of action to maintain the suit. The learned Subordinate Judge who heard the appeal was of a contrary opinion, and he set aside the decree of the court of first instance and remanded the suit for trial on the merits.

In this Court the learned counsel for the appellant has argued that the plaintiff has no cause of action, because he has suffered, so far, no actual damage.

If we look to the Contract Act, section 73, we shall find that the construction which the learned counsel for the appellant would put on section 73 is too narrow. The section reads as follows: "When a contract has been broken, the party who suffers by such breach is entitled to receive. . compensation for any loss or damage caused to him thereby . . . " The learned counsel agrees that by non-payment of the money due to Hari Chand and others, the mortgagees, his client did commit a breach of the contract, but he says that compensation can be had by Abdul Salam only if he proved any loss or damage. His argument is that a loss or damage can accrue if the property is sold or the plaintiff has to pay the money to the mortgagees. He went so far as to argue that if the decree obtained by Hari Chand and others became time-barred, the appellant would reap the benefit of the event and the plaintiff cannot recover.

We need not consider whether the plaintiff would be entitled or not to recover the money if the decree of Hari Chand and others became time-barred, but we are clear that a loss or damage has already accrued to the plaintiff on account of a decree for sale being passed against the plaintiff.

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If we look to the illustrations attached to section 73, we shall see that the interpretation put by the learned counsel for the appellant is too narrow. The first illustration is where *A* contracts to sell and deliver fifty maunds of saltpetre to *B* at a certain rate. The promise is broken and it is said that *B* is entitled to receive from *A*, by way of compensation, the sum, if any, by which the contract price falls short of the price for which *B might have obtained* fifty maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered. There is no condition laid down in the illustration that in order to enable *B* to recover compensation *B* should have actually purchased saltpetre and should have actually paid a higher price than he had contracted to pay to *A*. Similar remarks may be made with respect to other illustrations, especially illustration (*f*).

The learned counsel for the appellant argued that this view would be in accordance with English law, but it would not be consistent with the Indian law. In India, however, we have got some cases, including a case decided by our own High Court, where the same view has been taken, although section 73 of the Contract Act has not been quoted.

In the case of *Kumar Nath Bhuttacharjee* v. *Nobo Kumar Bhuttacharjee* (1) there was a suit for recovery of damages where damages had actually accrued. In discussing the law at pages 244 and 245 the learned Judges (including Mr. Justice AMEER ALI, as he then was) quoted certain cases and remarked as follows: "All these cases point substantially to the conclusion that when a person contracts to indemnify another in respect of any liability which the latter may have undertaken on his behalf, such other person may compel the contracting party, *before actual damage is done* to place him in a position to meet the liability that may

(1) (1898) I.L.R., 26 Cal., 241.

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hereafter be cast upon him." The authorities quoted were both English and Indian.

In the case of *Ramalingathudayar* v. *Unnamalai Achi* (1) there was an agreement between two persons who compromised a case which had been instituted *in forma pauperis*, that if the court fee was eventually levied by the Government, the plaintiff would pay a sum of Rs. 250 and the balance would be paid by the defendant. The court subsequently made an order directing the plaintiff to pay the whole court fee. Thereupon, the plaintiff brought the suit for recovery of the balance after making a deduction of Rs. 250. The question was whether the suit was premature. Their Lordships said: "Assuming in favour of the defendant that his agreement was to pay the balance of the court fee to the court and not to the plaintiff, at the date of suit the defendant had committed a breach of his contract and the plaintiff had suffered damage by having her property attached. There was, therefore, sufficient to give her a cause of action." It will be noted that in the present case a decree for sale has been passed against the plaintiff, and a decree for sale is certainly much more effective than a mere order of attachment. In the case of *Raghubar Rai* v. *Jaij Raj* (2) the view was taken by two learned Judges of this Court that a cause of action arose when a breach took place. The learned Judges went somewhat further and said that there could be only one cause of action, namely the breach, and if a subsequent damage actually occurred, that could give no further cause of action. We need not consider how far we would agree with the second proposition of law, but as regards the first proposition of law there seems to be no reason to doubt its correctness.

The learned counsel for the appellant quoted before us the case of *Sarju Misra* v. *Ghulam Husain* (3), where two learned Judges of this Court distinguished the case of *Raghubar Rai* v. *Jaij Raj*, but that was a case

(1) (1914) I. L. R., 38 Mad., 791. (2) (1912) I.L.R., 34 All., 429.
(3) (1920) 63 Indian Cases, 87.

where an actual loss, in the narrower sense of the word, had occurred.

Having regard to the codified law, and having regard to the decided cases, we are of opinion that the plaintiff has a good cause of action and his suit should be tried. The other points that the appellant may have to argue will be heard, no doubt, by the court of first instance. We uphold the order of remand and dismiss the appeal with costs.

FULL BENCH.

Before Sir Shah Muhammad Sulaiman, Acting Chief Justice, Mr. Justice Sen and Mr. Justice Niamat-ullah.

1931 *May*, 6.

RAM KARAN SINGH AND OTHERS (PLAINTIFFS) *v.* NAKCHHED AHIR AND OTHERS (DEFENDANTS).*

Civil Procedure Code, order II, rules 2 *and* 4; *order XX, rule* 12—*Mesne profits—Suit for possession and past mesne profits—Second suit for* pendente lite *and future mesne profits—Maintainability—Cause of action.*

A suit for the recovery of possession and of mesne profits up to the date of the suit was decreed. Mesne profits *pendente lite* and future were neither claimed nor refused in that suit. After obtaining possession the plaintiff brought a second suit for recovery of mesne profits from the date of institution of the first suit to the date of obtaining possession. *Held* that the second suit was maintainable and was not barred by order II, rule 2, of the Civil Procedure Code.

The cause of action for recovery of possession is not necessarily identical with the cause of action for recovery of mesne profits. The provisions of order II, rule 4, recognize this and indicate that the legislature thought it necessary to provide specially for joining the two causes of action in the same suit and that but for such an express provision such a combination might well have been disallowed.

*Second Appeal No. 195 of 1928, from a decree of S. Iftekhar Husain, Officiating District Judge of Azamgarh, dated the 2nd of November, 1927, confirming a decree of Hardeo Singh, City Munsif of Azamgarh, dated the 15th of July, 1927.