

asked for a further relief. In effect he wants that so far as he is personally concerned the *ex parte* decree against him should be cancelled and set aside and it cannot possibly be said that a claim of this description amounts to only a mere declaration. In these circumstances we are of opinion that the court below was right in holding that the plaintiff was liable for payment of the additional court fee. The decision of the court below must therefore be affirmed.

For the reasons given above we dismiss the appeal. The respondents will get their costs in this Court from the appellant.

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 KAILASH
NARAIN
v.
GOPI NATH

Before Mr. Justice Harries and Mr. Justice Ganga Nath
JWALA PRASAD (DEFENDANT) v. PADMAVATI (PLAINTIFF)*
Civil Procedure Code, order II, rule 2—Suit by wife for maintenance—Subsequent suit by her for charging the maintenance on the husband's property—Same cause of action—Suit barred.

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September, 10

A Hindu wife brought a suit for maintenance against her husband and obtained a decree for the payment of Rs.25 per month for her maintenance. Subsequently she brought another suit for getting the said maintenance allowance charged on the husband's property, as she apprehended that the husband intended to transfer his property with a view to deprive her of the maintenance allowance:

Held that the second suit was barred by the provisions of order II, rule 2 of the Civil Procedure Code. It was open to the plaintiff to have prayed for a relief in her former suit to get her maintenance allowance charged on the property of her husband. Both the reliefs, namely that for getting a maintenance and that for having it charged on the property, arose out of the same cause of action; the mere ground that the plaintiff now entertained an apprehension that her husband might transfer his property did not afford her a new cause of action for the second suit.

Mr. Gadadhar Prasad, for the appellant.

Mr. Shiva Prasad Sinha, for the respondent.

HARRIES and GANGA NATH, JJ.:—This is a defendant's appeal and arises out of a suit brought against

*First Appeal No. 193 of 1933, from a decree of Muhammad Akib Nomani, Subordinate Judge of Agra, dated the 9th of February, 1933.

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him by the plaintiff respondent who is his wife for getting her maintenance charged on the property of the defendant described in the plaint. The plaintiff brought suit No. 22 of 1931 against the defendant for maintenance which was decreed on the 3rd of September, 1931. The plaintiff was given a decree for Rs.25 per month for her maintenance. This maintenance allowance has been regularly paid by the defendant to the plaintiff. The plaintiff brought this suit (suit No. 89 of 1932) out of which this appeal arose for getting the maintenance, fixed in the former suit, charged on the property of the defendant on the ground that the defendant was intending to transfer or make a gift of the property in suit to his second wife or any other person with a view to interfere with the maintenance allowance of the plaintiff. The defendant contended that the plaintiff had no cause of action and the suit was barred by order II, rule 2 of the Civil Procedure Code. The learned Subordinate Judge has decreed the suit. He has found that the suit is not barred by order II, rule 2 and that the plaintiff was entitled to the relief claimed by her on account of her personal apprehension that the defendant was going to transfer his property.

The only question that arises for consideration in this appeal is whether the plaintiff's suit is barred by order II, rule 2. The claim of a wife for maintenance is not a charge upon the estate of her husband, whether joint or separate, until it is fixed and charged upon the estate. It was open to the plaintiff to have prayed for a relief in her former suit for getting her maintenance allowance charged on the property of her husband but she did not ask for any such relief in her former suit. The relief for a charge is connected with the relief for maintenance and both the reliefs arise out of the same cause of action, namely the husband's failure to maintain his wife or her right to maintenance. The plaintiff therefore has no cause of action

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for the present suit. The mere ground that the plaintiff entertains any apprehension as regards the husband's transferring his property would not afford her a new cause of action for the relief sought for by her in her present suit. In *Rangamma v. Vohalayya* (1), the plaintiff had obtained a decree against the defendants for the payment to her of a monthly sum for her maintenance. She subsequently sued to have it constituted a charge on certain land. It was held that the claim in both suits arose out of the same cause of action and therefore the plaintiff was precluded by section 43 of the Civil Procedure Code from asserting in the second suit the claim which she might have asserted in the first. In *Saminatha v. Rangathammal* (2), a Hindu woman having obtained a decree for maintenance against her husband, alleged that he had alienated part of his property with a view to defeat her claim for maintenance, and sued him for a declaration that certain land which he had not alienated was liable for maintenance. It was held that no cause of action was shown.

The plaintiff's case is analogous to that of a vendor to enforce his claim for the unpaid sale price against his vendee. Under section 55 of the Transfer of Property Act the vendor has a charge for the unpaid sale price on the property sold. It is open to him to bring a suit to enforce his claim by getting either a simple money decree or a decree to enforce his charge on the property. If he sues only for a simple money decree he cannot subsequently bring a separate suit to enforce his statutory charge.

The plaintiff's suit therefore is barred by order II, rule 2 of the Civil Procedure Code. She has no cause of action for the present suit. It is therefore ordered that the appeal is allowed, the decree of the lower court be set aside and the plaintiff's suit be dismissed. In view of the relations between the parties we make no order as to costs in both courts.

(1) (1887) I.L.R., 11 Mad., 127.

(2) (1889) I.L.R., 12 Mad., 285.