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As the plaintiff has failed almost entirely we direct that he pay his own costs and the costs of the respondents in this appeal. These costs will, however, not form a portion of the main decree, but will form a portion of an additional decree.

*Appeal dismissed.*

## REVISIONAL CIVIL.

*Before Mr. Justice Wazir Hasan and Mr. Justice Gokaran Nath Misra.*

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MIRZA ZAMIN ABBAS (PLAINTIFF-APPLICANT) v. LACHHMI NARAIN AND ANOTHER (DEFENDANTS-OPPOSITE-PARTY).\*

*Provincial Small Cause Courts Act (IX of 1887), second schedule, article 15—Pawning of goods—Suit for recovery of goods pawned or their value, whether a suit for specific performance—Jurisdiction of courts of small causes—Small cause courts jurisdiction to try suit for recovery of goods pawned, or their price.*

A contract of pledge becomes complete when the pledgor hands over those goods to the pawnee after the receipt of money for which they have been pawned or pledged. If after the contract is complete the pawnee desires to recover the money, which he had lent to the pledgor or the pawner, or if the pawner sues for recovery of the goods pawned on condition of payment by him of the money due to the pawnee, he cannot be considered to be suing for specific performance. He is, no doubt, suing to enforce a right incidental in law to a contract of this nature. After the loan is received and the goods have been bailed the contract becomes an *executed* one. It passes from the domain of an *executory* contract into that of an *executed* contract. If subsequently anyone of the parties choose to enforce any right arising out of that contract he cannot be deemed to be suing for the specific performance of his contract and the suit is cognizable by the

\*Miscellaneous Application No. 18 of 1927, against the order of Kishun Lal Kaul, Second Additional Judge of the Court of Small Causes, Lucknow, dated the 16th of March, 1927.

court of small causes. If the contract of bailment by pledge is not a completed transaction and, therefore, merely an *executory* contract and not an executed contract the suit is not cognizable by a court of small causes. [*Lala Babu Ram v. Deputy Commissioner, Hardoi, Manager, Court of Wards, Kakrali Estate* (1), dissented from. *Mathura v. Raghunath Sahai* (2), followed.]

This case was originally heard by MISRA, J., who referred it to a Bench. His order of reference is as follows :—

MISRA, J. :—This application for revision arises out of a suit brought by the plaintiff-applicant in the Court of the Additional Judge of Small Causes, Lucknow. The suit was for redemption of certain articles pawned by the plaintiff with defendant No. 1 and in the alternative for the recovery of the money for which they had been pledged with the defendant. The learned Judge of the Court of Small Causes has held that the suit is not cognizable by the court of small causes, being a suit for specific performance and thus exempted from the cognizance of the court of small causes under article 15 of the second schedule, attached to the Provincial Small Cause Courts Act (IX of 1887).

It is contended before me in revision that the suit cannot be considered to be one for specific performance of contract. The suit is merely for the recovery of the specific articles pledged, and in any case it is a suit for recovery of the money, since the plaintiff claimed the alternative relief in his plaint to that effect.

The learned Subordinate Judge relied on a ruling of the late Court of the Judicial Commissioner of Oudh, reported in *Lala Babu Ram v. Deputy Commissioner, Hardoi, and Manager, Court of Wards, Kakrali Estate* (1). Mr. LINDSAY, J. C. (now Mr. Justice LINDSAY) held in that case that a suit for the recovery of the specific property, e.g., property pawned with the defendant

(1) (1921) 8 O.L.J., 209.

(2) (1920) 58 I.C., 663.

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was a suit for the specific performance of contract and was, therefore, not cognizable by the court of small causes in view of article 15, schedule 2 of the Provincial Small Cause Courts Act. In the judgment I do not find any reasoning beyond the statement by the learned Judge to the effect that being a suit for the recovery of the specific property the suit must be treated as a suit for specific performance. With great respect for the learned Judge, who decided the case, it appears to me that a suit for recovery of specific movable property cannot be considered to be a suit for specific performance. It is really a suit for redemption and if in the case of immovable property a redemption suit cannot be considered to be a suit for specific performance, there does not seem to me to be any reason to hold why such a suit in case of the movables should be treated as a suit for specific performance. I am supported in this view by a decision of Justice Sir P. C. BANERJI, reported in *Mathura v. Raghunath Sahai* (1). A similar view opposite to what was previously held by Mr. LINDSAY is to be found in a case decided by him as a Judge of the Allahabad High Court and reported in *Chhedi Lal v. Jawahir Lal* (2). In that case the learned Judge decided that a suit for recovery of specific ornaments was not exempted from the cognizance of the court of small causes. If a suit for return of specific goods could not be considered to be exempted from the cognizance of the court of small causes, I do not see how a suit for recovery of the pledged ornaments can be held to be a suit of another character. In a case reported in A. I. R. (1926) Oudh, 272, Mr. DALAL, J. C., held that a suit for recovery of a certain weight of silver and gold, which the plaintiff alleged that he had given to the defendant for making certain ornaments was one for recovery of money and was cognizable by the court of small causes.

(1) (1920) 53 I.C., 663.

(2) (1927) A.I.R., All., 160.

Suits for recovery of pledged ornaments are usually instituted almost every day in the court of small causes, and it seems to me to be proper that an authoritative decision should be passed by this Court in regard to this matter. In view of the conflict in the decisions quoted above I think it expedient to refer this case to a Bench of two Judges. I do so accordingly.

Mr. *Muhammad Ayub*, for the applicant.

Mr. *S. N. Roy*, for the opposite party.

HASAN and MISRA, JJ. :—This is an application for revision arising out of a suit brought by the plaintiff-applicant in the Court of the Second Additional Judge of Small Causes, Lucknow. It originally came up before one of us and on a reference it has now been placed before a Bench.

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The suit, out of which this application arises, was one for redemption of certain articles pawned by the plaintiff with defendant No. 1, and in the alternative for the recovery of their value. The learned Judge held that the suit was not cognizable by the court of small causes, being a suit for specific performance and thus exempted from its cognizance under article 15 of the second schedule attached to the Provincial Small Cause Courts Act (IX of 1887).

In revision it is contended that a suit for redemption of pledged articles cannot be considered to be a suit for specific performance of contract. It was merely a suit for the recovery of the articles pledged, or for recovery of money on account of the price of the articles, it being the alternative relief claimed in the present suit.

The question which we have, therefore, to decide in the present case is whether a suit of the nature like the present one can be considered to be a suit for specific performance. The learned Judge of the Court of Small

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Causes relied upon a ruling of the late Court of the Judicial Commissioner of Oudh reported in *Babu Ram v. Kakrauli Estate* (1). The case was decided by Mr. LINDSAY, J. C., (now Mr. Justice LINDSAY). He held that under article 15 of the second schedule of the Provincial Small Cause Courts Act (IX of 1887) such a suit was not cognizable by the court of small causes on the ground that it was a suit for the recovery of specific property, and as such must be deemed to be a suit for specific performance. With great respect to the learned Judge who decided the case we regret we are unable to take that view.

The article which we have to interpret in the present case is article 15 of the second schedule attached to the Provincial Small Cause Courts Act (IX of 1887). Chapter II of the Specific Relief Act (I of 1877) deals with specific performance of contracts and is headed as such. Chapter III of the said Act deals with rectification of instruments. Chapter IV of the said Act deals with rescission of contracts and is headed as such, and chapters IX and X of the said Act deal with injunctions. Bearing in mind articles 16 and 17 of the schedule, it appears to us to be clear that when the Legislature framed article 15 of the second schedule of the Provincial Small Cause Courts Act they had in view suits for specific performance or rescission of contracts as contemplated by chapters II and IV of the Specific Relief Act (I of 1877), article 16 of the second schedule exempts a suit for rectification or cancellation of instruments from the cognizance of the court of small causes, and article 17 similarly exempts from its cognizance a suit to obtain an injunction. We think we are safe in concluding that articles 15, 16 and 17 were framed by the Legislature to cover suits under the Specific Relief Act. We also find that an express provision has been made in article 6

(1) (1921) 8 O.L.J., 209.

of the second schedule of the said Act exempting a suit brought by a mortgagor of an immovable property for the redemption of the mortgage from the cognizance of a court of small causes. If the view that a suit for redemption of a mortgaged property is to be considered as a suit for the specific performance of the contract were to be accepted, there appears to us to have been no necessity for the Legislature to have introduced a separate article to cover such cases. The inference, therefore, seems to us to be obvious that where a mortgagee comes to court for the purpose of enforcing his mortgage either by foreclosure or by sale of the property mortgaged, or where the mortgagor seeks redemption of the mortgaged property, the suit cannot in any of these cases be considered to be a suit for specific performance. As stated above if that had been the view taken by the Legislature, it would have been quite unnecessary to enact article 6, article 15 being quite sufficient for the purpose.

We would further like to state that there are recognized in law two kinds of contracts, one called *executory* contract and the other *executed* contract. An *executory* contract, according to Lord SELBORNE, is one which is "not intended between the parties to be the final instrument regulating their mutual relations"; while an *executed* contract is one, "which is intended to be thus final." Where, for instance, the goods are bargained for and sold, the price being paid down and the delivery made on the spot, nothing more remains to be done by either party, the contract may be said to have been *performed*, or *executed*. If, on the other hand, only the bargain is struck and the payment of price or delivery or both are postponed to a future date, the contract is an *executory* one. (*Vide* Dr. S. C. Banerji's Law of Specific Relief, 2nd edition, page 21). Snell, in his well-known work on Equity, defines "specific performance" as "turning an executory contract into an executed one,

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by decreeing the execution of the document (or other thing), which in and by the executory contract is provided for." (*Vide* Snell on Equity, 15th edition, page 527).

A contract of pledge of movables is essentially a contract of bailment. In chapter IX, section 148 of the Indian Contract Act (IX of 1872) "bailment is defined as delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them." The person delivering the goods is called the bailor and the person to whom they are delivered is called the bailee. It, therefore, appears to us that a contract of pledge becomes complete when the pledger hands over those goods to the pawnee after the receipt of money for which they have been pawned or pledged. If after the contract is complete the pawnee desires to recover the money, which he had lent to the pledger or the pawner, or if the pawner sues for recovery of the goods pawned on condition of payment by him of the money due to the pawnee, he cannot, in our opinion, be considered to be suing for the specific performance. He is no doubt suing to enforce a right incidental in law to a contract of this nature. After the loan is received and the goods have been bailed the contract becomes an *executed* one. It passes from the domain of an executory contract into that of an executed contract.

To make our meaning clearer: if the contract of bailment by pledge is not a completed transaction and, therefore, merely an *executory* contract and not an *executed* contract the suit would not be cognizable by a court of small causes. For instances, where the pledger has been delivered possession of the goods pledged but has not paid the money which he promised to advance; or where the pledger has received the money agreed to be

advanced to him but has not delivered possession of the goods promised to be pledged, and a suit is brought in the one case by the pledgee for recovery of the goods promised to be pledged and in the other case by the pledger for recovery of money promised to be advanced, a suit of either of these descriptions would undoubtedly be a suit for specific performance of a contract. In short, it would be a suit asking the court to grant relief by converting the *executory* contract into an executed one. If, however, the bailment of the goods has taken place and the money has also been advanced to the pledger of those goods, the contract of pledge becomes a completed contract in the sense that it must be reckoned as an executed contract. If, therefore, subsequently anyone of the parties chooses to enforce any right arising out of that contract he cannot be deemed, in our opinion, to be suing for the specific performance of his contract.

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The learned Counsel for the respondent, we may state, had to admit that if a pawnee sues for recovery of his money, his suit cannot be considered to be of the nature of a suit for specific performance of contract. If this is the real position, we fail to see why a suit brought by the pawner for recovery of the goods bailed on condition of the payment of the money due to the pawnee should be considered to be a suit for specific performance.

In the view which we have taken of article 15 we are supported by a decision of the Allahabad High Court reported in *Mathura v. Raghunath Sahai* (1). Sir P. C. BANERJI, J., held that the suit before him in that case being a suit brought by the plaintiffs for the recovery of the pledged ornaments and in the alternative for their value was cognizable by the court of small causes.

We, therefore, accept this application for revision, set aside the order of the Second Additional Judge of the



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Court of Small Causes, and direct that the suit be reinstated at its original number and tried on the merits. The applicant will get his costs in this Court.

*Application accepted.*

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### APPELLATE CIVIL.

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*Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Muhammad Raza.*

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Septem-  
ber, 23.

MIRZA MUHAMMAD SADIQ ALI KHAN (DECREE-HOLDER-APPELLANT) v. SAJJAD MIRZA *alias* MUNNEY AGHA (JUDGMENT-DEBTOR-RESPONDENT).\*

*Civil Procedure Code (Act V of 1908), order XXI, rules 15 and 16—Death of a decree-holder—Substitution of names of legal representatives—Execution of decree by any one of the several persons entitled to take out execution, whether takes effect in favour of all.*

*Held*, that there is no rule under which the legal representative of a deceased decree-holder can or should apply merely for substitution of names. The application should be for execution. [*Baij Nath v. Ram Bharose* (1), followed.]

Where there are several persons entitled to take out execution, any one of these may take out execution, and the action of any one will take effect in favour of all.

Mr. *Ali Zaheer*, for the appellant.

Mr. *Haider Husain*, for the respondent.

STUART, C.J., and RAZA, J. :—The late Nawab Baqar Ali Khan obtained a decree on the 23rd of November, 1918. He applied for execution on the 1st of March, 1919. He died on the 17th of January, 1921. On the 30th of January, 1921, certain of his heirs applied for substitution of names. In their application they stated

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\*Execution of Decree Appeal No. 42 of 1927, against the order of Bhagwat Prasad, First Additional Subordinate Judge of Lucknow, dated the 30th of April, 1927, dismissing the appellant's application.

(1) (1927) 25 A.L.J., 249.