APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1907. *July* 19.

DAMODAR *alias* TATYAJIBOWA VAMANBOWA AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SATYABHAMA BAI, WIDOW OF SHRIDHAR SAKHARAM, AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Pensions Act (XXIII of 1871), section 4†—Cash allowance from Government—Suit to recover a sum of money from the cash allowance—Suit based upon an agreement.

The plaintiff sued to recover a sum of money as the amount of her maintenance. She claimed under an agreement whereby the defendants agreed to pay her Rs. 52 every year for her maintenance out of a cash allowance which was received by the latter from Government. It was objected to the suit that it was bad in absence of a certificate from the Collector under section 4 of the Pensions Act, 1871:

Held, that the suit could not be taken cognizance of without a certificate under section 4 of the Pensions Act (XXIII of 1871). The words of the section were wide enough to include any suit to enforce such a claim provided it related to a pension or grant of money or of land revenue; it was immaterial whether the claim was based on an agreement between the parties or arose out of any other legal right or liability and whether it was a claim for a share by way of partition or maintenance or otherwise.

APPEAL from order passed by R. S. Tipnis, District Judge of Dhulia, reversing the decree passed by, and remanding the case to D. S. Sapre, Subordinate Judge of Shirpur.

Suit to recover maintenance.

The plaintiff brought a suit claiming arrears of maintenance for ten years at the rate of Rs. 52 a year, and a declaration that she had a right to receive during her life-time Rs. 52 a year out of Rs. 217 which the defendants (first cousins of plaintiff's deceased husband) received from the Government as cash allowance.

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* Appeal No. 28 of 1906 from order.

† The section runs as follows:—

4. Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted.

The right accrued to the plaintiff by virtue of an agreement which the defendants passed in her favour.

The agreement in question was executed on the 22nd July 1895, by the defendants whereby they agreed to pay the plaintiff Rs. 52 per year during her life-time for her maintenance out of the annual cash allowance (*rarshasan*) of Rs. 217 received by the defendants.

The defendants objected to the suit that it did not lie in absence of a certificate from the Collector under the Pensions Act (XXIII of 1871), section 4.

The Subordinate Judge held that the certificate was necessary; and on that ground dismissed the plaintiff's suit.

On appeal, the District Judge held that no certificate was necessary and he, therefore, reversed the decree and remanded the suit to the Subordinate Judge. His reasons were as follows :—

It will be seen that the plaintiff does not ask for a declaration of her charge on the cash allowance. There is no such prayer in the plaint. Moreover what she wants is a declaration that she has a right to receive Rs. 52 a year from the defendant out of the cash allowance when defendant receives it. The relief A in paragraph 4 of the plaint must I think be read with the prayer in paragraph 1 the concluding portion of which clearly states that, in virtue of the agreement, plaintiff has a right to receive Rs. 52 for her maintenance from the defendant when he receives Rs. 217 for his cash allowance. Out of that sum defendants are to pay every year Rs. 52 to plaintiff in other words it was purely for the convenience of the parties that the cash allowance was indicated as the fund out of which maintenance was to be received by the plaintiff. In the words of Mr. Justice Batty in *Trimbakrao* v. *Balwantrao* (I. L. R. 30 Bom. 101 and 108), which I have altered slightly to suit the facts of the present case, the present suit "In no way affects the property falling within the purview of the Pensions Act" but seeks a declaration of the plaintiff's right to maintenance as against particular defendants indicating "a fund available to the defendant for the purpose of discharging that liability by reason of the agreement to that effect." To such a declaration no certificate under the Pensions Act is necessary. This point was not considered or commented upon in *Miya Vali Ulla* v. *Sayad Bava* (I. L. R. 22 Bom. 496) or *Vyankaji* v. *Sarjarao* (I. L. R. 16 Bom. 537). In both these suits it would seem that the point did not arise, for in the first case it was a suit for an account and for the recovery of a co-trustee's share in a certain cash allowance allowed for the worship of an idol. Similarly in the second case the suit was by a manager of the Shrines of two deities to recover from the defendants, the inamdar of the village, the amount

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of the cash allowance due to the Shrines. In both suits the claim was directly to recover the cash allowance. In the present case it is not a claim for the recovery of a share of the cash allowance as such, but it is a suit for a declaration and for recovery of a certain amount of maintenance due to a Hindu widow from a cash allowance, which, according to the terms of the agreement between the parties concerned, was indicated as the fund from which it was to come. The destruction of the cash allowance for any reason would not destroy the plaintiff's right to maintenance. In this view of the case differing from the lower Court I hold that no certificate under the Pensions Act is necessary for a mere declaratory suit; for, a declaration of the plaintiff's right upon an agreement to recover from the holder of the cash allowance her maintenance is not a suit relating to the cash allowance within the contemplation of section 4 of the Pensions Act. It would at first appear from the Court fee paid on ten times the annual claim of plaintiff, both in suit and in appeal, that plaintiff seeks to make her maintenance a charge on the cash allowance to the extent of Rs. 52 a year, but if that was her intention it has not been expressly stated in appeal, and her pleader expressly mentions to the Court that she does not pay for a charge but merely for a declaration as mentioned in the plaint and has relied upon *Trimbakrao v. Balwantrao* (I. L. R. 30 Bom. 101).

Viewing, therefore, the claim as nothing more than for a declaration of plaintiff's right to receive from the defendant her maintenance, the cash allowance being merely mentioned there as the fund which is available to the defendant for the purpose of discharging that liability, I decide to reverse the decision of the lower Court on this preliminary point.

The defendants-appealed.

G. K. Dandekar, for the appellants.

D. A. Khare, for the respondent.

CHANDAVARKAR, J.:—The claim allowed by the lower Court in favour of the respondent is one for maintenance on the basis of an agreement between her and the appellants. In the plaint she alleges that under the agreement she is entitled to an annual payment of Rs. 52 for her maintenance out of a cash allowance which is received by the appellant from Government. It is not disputed before us, and in fact both the Courts below have held, that the cash allowance falls within the definition of a pension or grant of money or of land revenue within the meaning of those terms in the Pensions Act XXIII of 1871. If this is a suit relating to a pension or grant of money or land revenue, the suit could not be taken cognizance of without a certificate under section 4 of the Pensions Act. It is argued that this claim arises from an agree-

ment between the parties. The words of that section are, however, wide enough to include any suit to enforce such a claim. Provided it relates to a pension or grant of money or of land revenue, it is immaterial whether the claim is based on an agreement between the parties or arises out of any other legal right or liability and whether it is a claim for a share by way of partition or maintenance or otherwise. This was the view taken by Sargent, C. J., and Telang, J., in Appeals Nos. 18 of 1891 and 129 of 1890. In the former the suit was brought against a *Saranjamdar* by one who claimed a share of his income as his illegitimate son entitled to it either as a sharer in the *Saranjam* regarded as ancestral property or by way of maintenance. The judgment delivered was in these terms:—

"The claim can be only for a share in the ancestral property or, in the event of its being impracticable, for a share in the income, and, therefore, in either view a claim against a *Saranjam* which the Civil Court cannot entertain without the sanction of the Collector."

That judgment was followed in the other Appeal, No. 129 of 1890. There the suit was brought by certain *bhaubands* of the defendant *Saranjamdar* for a share in the profits of the *Saranjam* entitled to maintenance under the terms of a deed of partition and of an agreement. The Court held that it could not take cognizance of the suit without a certificate under the Pensions Act. There is no written judgment of this Court in the latter case but one of the Judges of the present Division Bench, who was then a member of the Appellate Bar, appeared in the case for the respondent and is able to say that that was the ground on which the appeal was decided.

Those two decisions apply to the present case. But it is argued by Mr. Khare in support of the decree of the Court below that the agreement on which his client relies, creates no charge on the cash allowance in the hands of the appellants. The words are sufficient, we think, to create a distinct charge upon the cash allowance and impose no personal liability on the appellants. The undertaking by them is to pay Rs. 52 out of the cash allowance. The source from which the payment is to come

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is marked out, and if that liability fails, there is no other liability for which the appellants can be held responsible. We do not agree with the District Judge when he says that in the plaint all that the plaintiff asks is a declaration that the respondent has a right to receive Rs. 52 from the appellants. The words "out of the cash allowance" mean a charge, nothing less or more, and the construction which the learned Judge has placed upon the relief claimed in the plaint is, we think, wrong. Mr. Khare asks us to give him an opportunity of once more going before the Collector for a certificate under the Pensions Act but once an application was made to the Collector and he has refused to grant a certificate. We do not think we should give the respondent another opportunity.

We must therefore reverse the order of the Court below and restore that of the Subordinate Judge. The costs of this appeal and of the appeal to the District Court to be on the respondents.

Decree reversed.

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

1907.
March 21.

MOWJI MONJI (PLAINTIFF) *v.* KUVERJI NANAJI AND OTHERS (DEFENDANTS).*

Civil Procedure Code (Act XIV of 1882), *section* 28—*Misjoinder of parties and causes of action—"In respect of the same matter", Meaning of—Practice.*

The plaintiff sued two sets of defendants to recover from either the one or the other a sum of money for the rent of his godown. The plaintiff agreed to let a godown to defendants 1—6 from 1st May 1906. At the date of the agreement the godown was in the possession of Messrs. N. and Co. Defendants 1—6 alleged that they did not get possession of the premises in terms of this agreement; that only one compartment out of three was given to them on the 22nd May; that they did not get possession of the other two compartments and in consequence they had to hire other premises. Messrs. N. and Co. plead that there was an oral agreement with the plaintiff that they should occupy the godown till the end of May 1906; that they gave up possession of one compart-

* Original Suit No. 445-20047 of 1906.