ceremonial competence; and I do not think that the fact of her having an infant son, who died prior to the adoption, could put an end to her power to adopt with the consent of her father-in-law.

It is not necessary to consider in this case whether the adoption would be valid if the infant son had attained ceremonial competence; and I desire not to be understood as expressing any opinion on the question. I desire to add that the fact of Tanu having an infant son does not appear to have been relied upon by either side in the lower Courts: and there is no finding on this point. It is recited as a fact in the deed executed by Pandu. Even if Tanu had no infant son I think that the adoption of defendant No. 11 by her with the consent of her father-in-law would be valid.

No question is raised in this litigation as to the validity of the plaintiff's adoption by Pandu on the footing of Tanu having an infant son at the date of the adoption.

I would, therefore, confirm the decree of the lower appellate Court and dismiss the appeal with costs.

CRUMP, J.:—I concur.

Decree confirmed

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

LAXMISHANKAR DEVSHANKAR (ORIGINAL PLAINTIFF), APPELLANT *v.* HAMJABHAI USUFALLY VOHRA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1919. *November* 25.

Civil Procedure Code (Act V of 1908), Order VI, rule 17, Order XXI, rule 103—Amendment of plaint—Suit for possession—Conversion of the suit to one for redemption of mortgage—Practice and procedure.

* First Appeal No. 265 of 1917.

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The plaintiff, a decree-holder, was, when seeking to recover possession of the property under the decree, obstructed by defendants who claimed to be mortgagees in possession. The plaintiff then filed a suit, as provided by Order XXI, Rule 103 of the Civil Procedure Code, to establish his right to possession of the property and alleged that the mortgage relied on by defendants was a sham. The Court coming to the conclusion that the mortgage was not a sham, the plaintiff applied to be allowed to convert his suit into one for redemption :—

Held, that the plaintiff should not be permitted to alter the nature of the suit from a suit for possession into one for redemption, as it would entirely alter the character of the suit.

FIRST appeal from the decision of Karsandas J. Desai, Additional First Class Subordinate Judge at Ahmedabad.

Suit to recover possession.

One Surajbharthi, a Gossain, was originally the owner of the property in dispute. On his disappearance in 1886, his son Dattabharthi became the Mohant of the property. In 1902 Dattabharthi went on a pilgrimage. A rumour having been afloat of Dattabharthi's death, Waghbharthi, as the Chela of Surajbharthi, became the Mohant. His claim to the Mohantship was challenged by Shivabharthi, who stated that he was the Chela of Dattabharthi.

Shivabharthi next sued Waghbharthi in the Mamlatdar's Katchery to recover possession of the property and obtained a decree. In the meantime, Dattabharthi appeared, and was put in possession in execution of the decree.

In May 1904, the property was mortgaged by Dattabharthi and Shivabharthi to Shivanath for Rs. 3,000; and re-mortgaged to Shivanath for Rs. 5,000 in October of the same year.

In 1907, Waghbharthi sued Dattabharthi, Shivabharthi and Shivanath to recover possession of the

property. Waghbharthi and Shivabharthi referred their disputes to arbitration. On the 21th April 1907, the arbitrators delivered their award, whereby Dattabharthi was to give up claim to the Mohantship on receiving Rs. 1,201 from Waghbharthi. A decree was passed in terms of the award. The amount of Rs. 1,201 was paid to Dattabharthi on the 1st May 1907 ; and on the 14th May Dattabharthi passed a registered release giving up his claim to the Mohantship and its properties. Neither Shivabharthi nor Shivanath were parties to the decree.

Afterwards Waghbharthi filed a Darkhast to recover possession of the property under the decree passed in terms of the award. He was obstructed by Shivabharthi and Shivanath in recovering possession.

This led to a suit by Waghbharthi against Shivabharthi and Shivanath to redeem the mortgage ; but the suit was dismissed for default in December 1908.

In 1910, Waghbharthi again applied to execute the decree ; but this Darkhast also was dismissed for default.

About that time, Dattabharthi and Shivabharthi mortgaged the property to Shivanath for Rs. 9,000.

In 1911, Waghbharthi also sold the property to the plaintiff ; and assigned the decree to him in 1915.

In the meanwhile, in 1912, Dattabharthi and Shivabharthi sold the property to the defendants, who paid off the mortgagee Shivanath and took a reconveyance from him.

The plaintiff first applied to execute the decree for taking possession of the property ; but he was obstructed by the defendants. He applied to the Court to remove the obstruction, but the Court dismissed the application and referred him to a regular suit.

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In 1915, the plaintiff filed the present suit, under Order XXI, Rule 103, of the Civil Procedure Code, to establish his right to the present possession of the property.

The defendants contended *inter alia* that they stood in the shoes of Shivanath whose mortgage-rights they had purchased.

The trial Court held that the two mortgages of 1904 were *bona fide* and the defendants could rely on them.

The plaintiff therefore applied to the Court to convert his suit into one for redeeming the mortgages. The Court declined to give him the permission. It ordered the suit to be dismissed.

The plaintiff appealed to the High Court.

G. N. Thakor, for the appellant :—The lower Court took all the evidence, framed all the issues and found a majority of the issues in favour of the appellant, e.g., it held Shivabharthi was not the disciple of Dattabharthi. It held that the amount of Rs. 10,000 was not paid. It held the suit maintainable. It has, however, refused to give me relief on technical grounds.

I contend on facts that the mortgage of 1904 should have been held to be nominal and without consideration. The lower Court was bound to consider whether any amounts were paid under the said mortgages. If no amount was in fact paid the suit should have been decreed. The evidence of the mortgagors would show that nothing was paid.

The lower Court erred also in holding that the remedy of the appellant was to bring a regular suit. This was the very thing contemplated by the order of the High Court. All the necessary issues were framed and evidence recorded. There was no reason why all

questions should not have been finally decided in the present case.

[MACLEOD C. J.:—This is only a suit under Order XXI, Rule 103 and you cannot have all questions decided in this suit.]

I submit it is an error to regard the present suit as a continuation of execution proceedings. The Privy Council ruling relied on is no authority for the proposition. It was a ruling relating to the question of court-fees which the trial Court has obviously misunderstood.

The High Court's Order in First Appeal No. 168 of 1913 directed in appeal that I should bring a suit to get rid of the mortgages. This is virtually the suit contemplated by the High Court. I am not necessarily confined to particular reliefs even if this suit is treated as one under Order XXI, Rule 103. I rely on *Sadu bin Raghu* v. *Ram bin Govind*[1], which will show that I can ask for and obtain all kinds of reliefs in a suit like the present. Order XXI, Rule 103, provides for a "suit" and it is a complete misapprehension of the Code to say that a suit under Order XXI, Rule 103, is a continuation of the execution proceedings.

I further submit that I should have been allowed to claim redemption in this very suit. There was no objection to taking accounts and claiming redemption in this very suit. There being an issue as to consideration the Court should have proceeded to find upon it and then to take accounts.

Even now I pray that I should be allowed to amend the plaint if necessary and have a decree for redemption on taking accounts passed in my favour.

[1] (1892) 16 Bom. 608 at p. 613.

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This Court always allows amendments to avoid multiplicity of proceedings. The materials being on the record there is no prejudice to the respondent. I rely on *Parshotam Bhaishankar* v. *Rumal Zunjar*[1] and *Hassanbhai* v. *Umaji*[2] and other similar cases. The new Code allows amendments of pleadings at any stage. In this case I asked for redemption in the lower court before judgment.

The subsequent sales being ineffective and the only obstruction being the mortgage of 1904, there is no reason why I should not be allowed to remove the same by redeeming on payment of the amount found due, and why the Court should not have proceeded to find the amount due under the mortgage.

H. V. Divatia, for the respondent, not called upon.

MACLEOD, C. J. :—The property to which this suit refers is situated in Ahmedabad and known as the Dudhadhari Vadi, which was managed by the Mohants of a certain temple. The last Mohant was one Surajbharthi who disappeared in 1886. Thereafter one of his sons Dattabharthi took his place until he went on a pilgrimage. In 1902 a report having been received that he was dead one Waghbharthi was installed on the Gadi alleging that he was a Chela of Surajbharthi. One Shivbharthi, claiming to be the Chela of Dattabharthi filed a suit in the Mamlatdar's Court for possession. Meanwhile Dattabharthi returned and a decree was passed in Shivbharthi's favour in 1904 under which Dattabharthi got possession of the Vadi. Dattabharthi and Shivbharthi mortgaged the property to one Shivnath in 1904 for Rs. 3,000, and again executed a fresh mortgage, which consolidated the 1st mortgage, on the 25th October 1904 for Rs. 5,000. Shivnath got possession of the property as mortgagee. Then Waghbharthi filed a suit for possession against Dattabharthi.

(1) (1895) 20 Bom. 196. (2) (1903) 28 Bom. 153.

Shivbharthi and Shivnath. Waghbharthi and Dattabharthi referred the disputes between themselves to arbitration, and under an award decree the property was awarded to Waghbharthi on payment of Rs. 1,261 to Dattabharthi. That sum was paid in satisfaction which was recorded. It must be noted that Shivnath and Shivbharthi were not parties to these proceedings. Waghbharthi then attempted to obtain possession of the property under the award decree, but owing to the opposition of Shivnath and Shivbharthi he did not obtain possession. His next step was to file a redemption suit against Shivnath, and that was dismissed for non-payment of court-fees. In 1910 he again attempted to issue execution under the award decree, but that application was dismissed for default. In the same year Dattabharthi and Shivbharthi executed another mortgage to Shivnath for a total of Rs. 9,000, which included the Rs. 5,000 belonging to the mortgage of 1904. It was obvious that Dattabharthi was then adopting an attitude opposed to the award decree. In February 1911 Waghbharthi agreed to sell to Laxmishankar, the present plaintiff, but the sale deed was not registered until the 21st February 1912, and it was not until 1915 that Waghbharthi assigned the award decree to the purchaser. About the same time the sale deed to Laxmishankar was registered, Shivnath, Dattabharthi and Shivbharthi purported to sell the property to the present defendants for Rs. 25,000, and Shivnath was actually paid Rs. 12,000, and he passed an indemnity bond undertaking to refund Rs. 12,000 if it was found that the vendor had no title. Laxmishankar in 1912 issued a Darkhast to execute the award decree and execution was opposed by the present defendants. He then applied by Miscellaneous Application No. 87 of 1913 to have the obstruction removed. That application was made under Order XXI, Rule 97. The Court rejected the

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application and said that the applicant must bring a regular suit if he wanted possession from Shivnath, the original mortgagee, or his representatives, under the circumstances stated above. He did not attempt to enter into an inquiry whether the claim of the mortgagee to be in possession was good against the applicant. The applicant appealed from that order and the order was confirmed by a decree of the High Court in First Appeal No. 168 of 1913. The judgment says: "It is clearly for the benefit of the purchasers of Shivnath's rights under the deed of 23rd February 1913 to keep alive these mortgage rights. We cannot hold that they have been extinguished. It may be a question, whether Shivnathji had any rights, but that could only be established in a suit brought against Shivnathji or his transferees, who were not parties to the award decree".

Thereupon the plaintiff filed this suit under Order XXI, Rule 103. It states: "Any party not being a judgment-debtor against whom an order is made under Rule 98, Rule 99 or Rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any), the order shall be conclusive". There must be some distinction between a regular suit and a suit filed under Order XXI, Rule 103. There is a specific period of limitation prescribed for suits brought under Order XXI, Rule 103, namely, Article 11 A of the Indian Limitation Act. But that only applies when the Court dealing with an application under Order XXI, Rule 97, enters upon an inquiry and investigates the claim—see Rustamji's Limitation Act, p. 215, referring to *Meeru-din Saib* v. *Rahisa Bibi*[1] and other cases cited in foot-note 4. But if it appears that the Court declines to enter upon an inquiry regarding the validity or otherwise of the mortgage or other title on which

[1] (1903) 27 Mad. 25.

the person obstructing the possession of the decree-holder relies, and directs the decree-holder to bring a regular suit, then it seems to me that it is no use for the decree-holder to bring a suit under Order XXI, Rule 103. He is referred to the ordinary procedure to establish a claim which he seeks to make against the property. In this case as the Subordinate Judge had made no inquiry into the validity of Shivnath's mortgage, but merely directed the decree-holder to bring a regular suit, and that order was confirmed by the High Court, it follows that no conclusive order had been made, and the decree-holder was entitled to his ordinary remedies to establish his right to the property claimed by Shivnath, and he could only do that by getting the mortgage set aside. This suit now under appeal, although filed under Order XXI, Rule 103, is dealt with by the learned Subordinate Judge as a regular suit. Although he came to the conclusion that the plaintiff ought to have filed a regular suit, and not one under Order XXI, Rule 103, still a very large number of issues were raised, and a great deal of evidence relating to those issues was taken, and the learned Judge came to the conclusion that Shivnath's mortgages were not nominal mortgages or without consideration.

The plaintiff, considering the attitude of the learned Judge as regards the mortgages of Shivnath, seems to have then asked that the nature of the suit should be changed to a suit for redemption. This request was disallowed, and we think rightly, as that would entirely alter the nature of the suit, whether it was brought under Order XXI, Rule 103, or whether it had been brought originally as a regular suit. It seems to me that the finding of the learned Judge that the mortgage was not purely nominal, and without consideration, is justified by the facts of the case, since so far back as 1907 Waghbharthi had filed a suit to redeem Shivnath, and

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thereby admitted that the mortgage was valid, and the only question to be considered was what was the amount due to the mortgagee so that the mortgagor could redeem the mortgage, and these facts were perfectly well-known to the plaintiff who bought Waghbharthi's rights in 1911.

Mr. Thakor for the appellant very strongly urged us to allow him to redeem on the ground that a great deal of evidence which has been taken on the issues in the case with regard to the history of the parties and their relation to the property in suit which he filed would all be thrown away. No doubt the rules with regard to the amending of pleadings are very wide, but the Court is generally strongly opposed to allow an amendment which entirely alters the nature of the suit. The suit was one really, although it was not specifically so stated in the plaint, to get rid of the mortgages in favour of Shivnath, and having failed to do that, the plaintiff now wants to turn round, and to alter the nature of the suit to make it one based on the validity of the mortgages, the only question being what amount the plaintiff should pay to redeem the mortgages. In a recent case which was before the Court of Appeal in England, a suit was filed for damages for breach of contract. The defendant pleaded that there had been negotiations between the parties after the breach, the result of which was a second agreement in discharge of the alleged cause of action for the original breach. The Court found that the original cause of action had disappeared, for the parties had agreed that that breach should be considered as satisfied. Then the plaintiff asked for leave to amend his suit so as to make it a claim for damages for breach of the second agreement. The trial Judge disallowed that request to amend, and the Appeal Court supported him on the ground that the nature of the suit being changed,

it was far more convenient that the claim for damages for breach of the second agreement should be brought in a separate suit. In my opinion, therefore, the decree dismissing the suit of the learned trial Judge must be upheld and this appeal must be dismissed with costs. The cross-objections in view of our finding do not arise and must be taken as withdrawn. No order as to costs of the cross-objections.

HEATON, J. :—We are deciding this case as it was put before the Court by the plaintiff. It is a suit to recover possession. The principal opponent to the suit is one who claims as being a mortgagee and who claims to be in possession in virtue of the mortgage. The plaintiff claims to dispossess him. If the conclusion is arrived at that the defendant's claim under the mortgage is not disproved, then the suit must be dismissed, and that is the conclusion arrived at. I speak of a mortgage though there are several, but I have in mind the earliest mortgage of all, one of 1904, or rather the second mortgage of that year. It has been said that the property Dattabharthi was mortgaging was not his to deal with ; secondly, that the mortgage was nominal ; and, thirdly, that the consideration was never paid. These matters have all been dealt with in great detail by the trial Judge who has written a very long and a clear judgment and has arrived at definite findings on those points against the plaintiff. It seems to me now that we have looked into the facts of the case, that the judgment of the Court is unanswerable on these particular points that he has decided. It seems to me quite impossible to hold in the circumstances disclosed, that Dattabharthi mortgaged a property which was not his to mortgage, or in which he had not an interest which he could mortgage. We think it impossible to assert that the mortgage was nominal or that it was without consideration. But the plaintiff

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has strongly urged us to allow him to amend the plaint and convert the suit into, at any rate alternatively, a claim for redemption. It is perfectly true that the inquiry made by the trial Judge and the decision arrived at by him, cover a great deal of the ground that will have to be covered in a redemption suit, and from the plaintiff's point of view it would be very convenient that he should have his present claim for redemption determined in this suit, where there is already a great deal of the evidence required for the purpose. But the suit itself was brought quite clearly and definitely to show that there was no mortgage which he need redeem. It was fought out on those allegations, and the appeal here was most strenuously pressed on the same allegations. So it comes to this, and it is a very common practice, that when a party has obtained a decision against him in the highest Court of Appeal to which he can resort, then he says "Oh! now that you have decided against me on the ground on which I brought my suit, I want to put in an alternative claim, and have that decided." We are very frequently asked to allow such requests and sometimes we do it. But in my own mind there is no doubt that a tendency to accede to requests of that kind is an encouragement to careless and slipshod pleading, and may be an encouragement to dishonest pleading. In this particular case I am very strongly of opinion that we should not accede to the plaintiff's request. I think we should confirm the dismissal of the suit by the trial Court. I agree to the order proposed.

Appeal dismissed.

R. R.