

Cause Court, who found that the plaintiff's cause of action had arisen within the local limits of the Court's jurisdiction.

It was, however, found that the plaintiff was only entitled to recover a sum considerably under Rs. 500; and that the balance of his claim had been thrown in in order to bring his claim within the extended jurisdiction conferred by section 2, Act XXVI. of 1864.

The First Judge also found that the defendant was not subject to the jurisdiction of the Court, on any of the grounds set forth in section 28, Act IX. of 1850; and, being of opinion that the case, as being in reality a claim for less than Rs. 500, fell properly within the provisions of that section, held that he had no jurisdiction to try it.

I think taking this finding in connection with the matters which have been brought before us, and it is agreed are to form part of the case, *viz.*, the summons, the particulars of the demand contained in the letter, and the bond, that this finding means that the plaintiff, in order to give jurisdiction to the Small Cause Court, claimed as damages sums which by law he could not recover, which he could not be entitled to at all, and added them to his claim for that purpose. In such a case as this, I think the Small Cause Court has not jurisdiction. The plaintiff could not give jurisdiction merely by adding to his claim sums which he could not, under any circumstances, be entitled to recover. The

Sikhurchunder *vs.* Soorjee Mull, 1 Hyde 272.

decision of Mr. Justice Wells in the case referred to is quite in accordance with this view, because it is stated there that the suit "was a suit to recover Rs. 848-12 for damages from the defendants, who had failed to fulfil their contract;" and the learned Judge said that "the plaintiffs had, owing to the evidence adduced by them being defective, failed to prove that they had sustained damages to a larger amount than Rs. 75." The case was not that they had put forward a claim for damages which they could not properly recover; but the evidence being defective, they could not succeed in getting more than Rs. 75; and the learned Judge held that, in such a case; the Court had jurisdiction under the words in the Letters Patent (section 12), "in which the debt, or damage, or value of the property sued for, does not exceed Rs. 100." There the suit was *bonâ fide* brought for a sum exceeding Rs. 100, and the jurisdiction of the Court could not be taken away,

because the evidence was defective. The other part of the judgment, as to the suit being brought in bad faith, and the Court being able to compensate the defendant by awarding costs against the plaintiff, was extra-judicial. The Courts having such a power does not affect its jurisdiction. Has the plaintiff in this case increased his claim by adding to it an amount which could not be included in it? If he has, he ought not to be allowed by so doing to give the Small Cause Court jurisdiction, and we must say that, in such a case as that, the Small Cause Court has no jurisdiction. As the plaintiff has done that, and has taken the opinion of this Court on the doubts which arose in the minds of the Judges of the Small Cause Court, we must say that Mr. Kennedy's client must pay the costs of reserving this case for the opinion of this Court.

The 18th November 1872.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

Unregistered Documents—Evidence—Objections—Costs.

Case No. 206 of 1872.

Special Appeal from a decision passed by the Officiating Additional Judge of Patna, dated the 17th July 1871, modifying a decision of the Subordinate Judge of that District, dated the 11th April 1871.

Oomatool Fatima (Plaintiff),
Appellant,

versus

Gnunnoo Singh and others (Defendants),
Respondents.

Mr. C. Gregory and Moonshee Mahomed Yusuf for Appellant.

Mr. R. E. Twidale and Baboo Nil Madhub Bose for Respondents.

A Lower Appellate Court was held to have done wrong in giving effect to an unregistered bond which, by reason of its not having been registered, was not admissible as evidence under the provisions of the Indian Registration Act, even though it was not specifically objected to in either of the Courts below.

The party, however, who succeeded on the footing of this objection in special appeal, was held not entitled to the costs of such appeal, because he had omitted to take the objection at an earlier stage.

Phear, J.—THIS is a redemption-suit in which the plaintiff is the assignee of the original mortgagor. He complains that the Lower Appellate Court has made it a condition of redemption that he should pay a bond made by the original mortgagor to secure the sum of Rs. 171, which bond is not registered according to the provisions of section 17 of the Indian Registration Act. By section 17, a document securing a sum of upwards of Rs. 100 is directed to be registered; and section 49 says that "No instrument required by section 17 to be registered shall be received in evidence in any Civil proceeding in any Court, or shall be acted on by any public servant as defined in the Indian Penal Code, or shall affect any property comprised therein, unless it shall have been registered in accordance with the provisions of this Act."

The Lower Appellate Court has, in this instance, given effect, as against the property sought to be redeemed, to the unregistered bond for an amount greater than Rs. 100.

Baboo Nil Madhub Bose and Mr. Twidale for the respondent have not, in fact, disputed that this bond does fall within the literal terms of section 49 of the Registration Act, but they urge that the objection now made by the appellant was never made in either of the Courts below, and, therefore, ought not to be entertained by this Court on special appeal; and in support of this contention, they have quoted a case reported in 9 Weekly Reporter, page 493, and I believe

there are other cases in the reports of a tenor similar to that of the decision in that case.

But here we observe that whether or not the objection was made in terms in either of the Courts below, the Lower Appellate Court had the fact distinctly before it that this document was an unregistered document. It is not suggested for a moment that any evidence could have been brought to throw doubt upon that fact. Indeed, it is admitted by the respondents' pleaders that the document is not registered. This being so, I think that the principle enunciated in the case which has been quoted, a principle which is a most wholesome one, is not applicable to the present case. The Judge was clearly aware that the document was not registered, and he ought to have borne in mind that such a document was forbidden by the Legislature to be taken into consideration in any suit for the purpose of affecting any property to which it applies.

With these views I think that the judgment of the Lower Appellate Court was wrong to the extent of Rs. 171. It ordered the plaintiff to pay for the purposes of redemption a sum too great by that amount. At the same time I think it is also clear that this objection, which has now been successful, was not specifically taken in either of the lower Courts; and that it was entirely the fault of the present appellant that it was not so taken. I apprehend that, if the plaintiff had really brought this objection to the notice of the Lower Appellate Court, he would have at once got the benefit of it, and, therefore, there would have been no need whatever to come up to this Court in special appeal. So far, therefore, as he succeeds on the footing of this objection, I think he is not entitled to the costs of this Court.

He has further objected to the decision of the Lower Appellate Court that he ought not to have been made to pay the whole costs of the defendant in the suit. But he is obliged, I think, to admit that, up to the time of the decision of the Lower Appellate Court, he had not tendered to the defendant the full amount of the money, which it was necessary for him to tender before he could be entitled to recover the property for which he sued. The defendant was, therefore, it seems to me, quite justified in defending the suit in the Lower Appellate Court, and he could not defend the suit by halves or by parts. He could only say, you are not ready to pay the

all the money to which I am entitled before you can compel me to give up my hold on the property. For this reason, it appears there is no fault to find in the decree of the Lower Appellate Court with regard to costs.

Therefore, I am of opinion on the whole that the decree of the Lower Appellate Court should be simply modified to the extent of diminishing the redemption-money by the amount of the non-registered bond, and that each party should bear his own costs in this Court.

Ainslie, J —I concur.

The 20th November 1872.

Present:

The Hon'ble J. B. Phear and W. Ainslie,
Judges.

**Contribution—Joint Obligation—Co-sharers—
Cause of Action.**

Case No. 260 of 1871.

*Regular Appeal from a decision passed by
the Subordinate Judge of Gya, dated
the 18th July 1871.*

Ram Pershad Singh and others (Defendants),
Appellants,

versus

Nirbhoy Singh and others (Plaintiffs),
Respondents.

*Mr. C. Gregory and Baboos Kali Mohun
Doss and Chunder Madhub Ghose for
Appellants.*

*Mr. R. T. Allan and Baboos Mohesh Chun-
der Chowdhry and Nil Madhub Sen for
Respondents.*

Three brothers carrying on business jointly borrowed money from one G. M. after which one of them died, and the survivors (plaintiff and T), for the purpose of making up the consideration-money of certain property purchased, borrowed a further sum from G. M. and

executed a bond to secure repayment of all these sums. The property was purchased, and joint possession obtained. Subsequently plaintiff and T separated after executing each to each certain ikrarnamas by which each undertook to pay his share of the joint debts. The bond-holder then sued plaintiff and the representatives of T, and obtained a decree against plaintiff only, who, upon the decree holder being about to sell his property, sued the representatives of T for a moiety of the debt. Defendants objected that as plaintiff had not paid the decretal money, no cause of action had accrued:

Held that the objection was good, and that plaintiff had no right to come into Court, and ask to be paid by his co-sharers before he had done anything himself, even to discharge his own portion of the obligation:

Held, also, that, as defendants had been acquitted by a competent Court of all obligation to pay the original creditor, plaintiff's only right (if any) was to call upon them to pay himself, and this he could not do, until he could show that he had done something on their behalf:

Held (by Phear, J.) that, if plaintiff could have alleged that his own separate property was mortgaged by the bond, at the request of T, that the money so borrowed was applied with T's sanction to the benefit of the joint property, and that, afterwards, the brothers separated and divided the joint property, his plaint would have disclosed a good ground to maintain an equity on his part to call upon T's representatives to help in the proportion of his share in redeeming the mortgage.

Phear, J.—The plaint in this suit states that the petitioner, Tundun Singh and Monoruth Singh, were three uterine brothers; that all the three brothers, while living jointly, carried on business jointly, and also purchased properties jointly; that certain moneys were, on dates mentioned, in the years 1270 and 1271, borrowed from one Gossai Munraj for the management of the joint business and for joint gain; that in this state of things, one of the three brothers, Monoruth Singh, having died, the survivors, that is, the plaintiff and Tundun Singh, purchased a certain property from one Kesso Lall, and for the purpose of making up the consideration-money, borrowed a further sum from Gossai Munraj, and thereupon executed a bond, dated the 15th August 1864, to secure repayment of all these sums, that is, the two sums which the three brothers had previously borrowed from Gossai Munraj, and the third sum which the two brothers, after the death of the one, had borrowed from the same creditor.

The plaint goes on to say that the borrowed moneys was applied to the aforementioned purposes, the property was purchased, and possession jointly obtained by the plaintiff and Tundun Singh after some litigation which was necessary to obtain it. Subsequently to this, the two surviving brothers, plaintiff and Tundun Singh, separated and, on the occasion of separation, executed each to each certain ikrarnamas by which, each undertook to pay his share of the joint