APPELLAT JURIDICTION. (*a*)

Regular Appeal No. 40 *of* 1861.

LAKSHMI AMMAL.....*Appellant.*

TIKARÁM TOVAJI.....*Respondent.*

A suit between two brothers, A and B, respecting ancestral property was compromised and the particulars of the compromise embodied in a rázináma presented in Court by both parties. A having died, his widow and B presented in Court another rázináma embodying the particulars of an arrangement respecting the property in which she had become interested as widow and which was comprised in the former razinama and of this second rázináma they subsequently put in an amended copy:—*Held*, that a claim arising out of such arrangement could not, within the meaning of Act VIII of 1859, sec. 2, be considered to have been a cause of action heard and determined in the former suit.

A plaint will not be rejected under sec. 32 of Act VIII of 1859, if the subject-matter alleged raises a fair question of claim or right for trial and determination between the parties. The mere unlikelihood of the plaintiff's success is not enough to justify the rejection of his plaint.

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THIS was a regular appeal from the decision of R. R. Cotton, the Civil Judge of Madura, in Original Suit No. 1 of 1853. The suit was brought by a Hindu widow to recover property which had belonged to her husband and vested in her on his death, and the claim now set up arose out of an arrangement between the plaintiff and the deceased's brother the 1st defendant, the terms of which were embodied in razinama (filed on the 22nd July 1854) of which the following is a translation.

TO ALEXANDER WILLIM PHILLIPS. ESQ., *the Acting Sub-Judge in charge of Madura.*

The motion submitted by Ramachendra Sástriyár, pleader, on behalf of Lakshmi Ammál, the wife of Jeyarám Tovaji Ayyar the deceased plaintiff, in Original Suit No. 1 of 1853 on the file of the said Court, and by Gurusvámi Sástriyár pleader, on behalf of Tikaram Továji the first defendant in the said suit.

In the said suit the plaintiff and the first defendant filed a rázináma. On becoming possessed under the terms thereof of certain properties, moveable, and immoveable, the plaintiff died on the 29th May 1854. The first defendant, therefore, is entitled to protect the plaintiff's widow Lakshmi Ammál. He and the said Lakshmi Ammál entered into a compromise, stipulating that, out of the properties noticed in the rázináma, saving those moveable and im-

(*a*) Present : Scotland, C. J. and Strange, J.

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moveable in the possession of Lakshmi Ammal and the garden to the west of the Narayanapákku Bungalow, the first defendant should take possession of the Kochatai garden, the Narayanapákku Bungalow, the village of Achambattu, and the sicca rupees 29,200 in bonds; that the first defendant, in keeping up the customary allowance made by the plaintiff, should, from the income of the said properties, pay monthly on the 30th of every month from this July, rupees 30 to the said Lakshmi Ammál, rupees 10 to the plaintiff's brother-in-law Maiyári Rámadevari, and rupees 15 to the plaintiff's elder sister's son Sandirami Páttya; that he should further, within the 30th of every Panguni from the Panguni of Ánanda, convey to the house of the said Lakshmi Ammál and measure out to her 20 kalams of milagu paddy, and equal quantities of samba and vellakkádi paddies; and that, in default of payment of any instalment of money or paddy, the allowance of paddy for the year and of rupees 55 should be compellable under a precept of the Court. On the 5th July this year, a petition was accordingly presented, which has been filed. But, as in the above petition it is not explicitly provided for that the said Lakshmi Ammál should continue in the receipt of rupees 55 per mensem, and that in default the payment thereof should be enforceable under a precept of the Court, we pray that this provision may be accepted by the Court.

(Signed) RÁMACHENDRA SÁSTRI, *Vakil.*

(„) GURUSVÁMI SÁSTRI.

Mayne for the appellant, the plaintiff.

Branson for the respondent, the defendant.

The other facts of the case sufficiently appear from the following

JUDGMENT:—The plaintiff, as the widow of one Jeyaram Tovaji, brought this suit for recovery of property belonging to her husband and vesting in her on his decease.

The defendant is Tikarám Tovaji, brother of the deceased.

Jeyaram Tovaji had brought a suit against his brother, to recover from him possession of patrimonial property. This suit, No. 1 of 1853, ended in a compromise

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pursuant to which one-third of the property was devoted to a charitable purpose, and the brothers divided the residue equally. Jeyarám had at the time possession of a portion of his allotted share, and the remainder was to be made over to him by Tikarám, after which each was to have absolute control over his share with independent right of alienation. These particulars were embodied in a rázináma presented in Court by both parties on the 9th December 1853. As stipulated, Tikarám made over possession of certain property to Jeyarám, after which, on the 29th May 1854, Jeyarám died.

On the 5th July of the same year the present plaintiff and the defendant Tikarám filed in Court an instrument in writing, bearing date the 3rd July, of which on the 22nd of the same month they put in an amended copy. In this instrument it is stated that Jeyarám having died, the defendant was entitled to take under his protection Jeyarám's widow (the plaintiff). It is then stated that she and the defendant had entered into a compromise before certain arbitrators, and that it had been agreed that the property mentioned in the aforesaid rázináma, with certain reservations, should be made over to the defendant, and that out of the income thereof he should provide the plaintiff with certain allowances in money and grain, failing which these allowances should be levied by process of Court.

The plaintiff rests her right to maintain the suit upon the grounds that she did not absolutely relinquish all right to the property, that the defendant made away with part of the property made over to him contrary to the terms of the last mentioned instrument, and that she had ceased to have confidence in him for the safe custody of the rest and the payment of the allowances agreed upon.

The Civil Judge, under sections 2 and 32 (*a*) of the Code of Civil Procedure, rejected the plaint upon its presentation,

(*a*) Act VIII of 1859, sec. 2, enacts that "the Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim."

Sec. 32 enacts that "if upon the face of the plaint, or after questioning the plaintiff it appear to the Court that the subject-matter of the plaint does not constitute a cause of action, or that the right of action is barred by lapse of time, the Court shall reject the plaint. Provided that the Court may in any case allow the plaint to be amended, if it appear proper to do so."

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apparently treating the agreement of the 5th July 1854 as a razinámma upon which the cause of action in the suit No. 1 of 1853 was determined, and that therefore section 2 prevented his taking cognizance of the suit. He seems, further, to have considered that under section 32 the subject-matter of the plaint did not constitute a cause of action.

Against this decision the plaintiff has appealed, and we are of opinion that the Civil Judge was not warranted in the preliminary rejection of the plaint.

We are unable to see any ground for considering the agreement of the 5th July 1854 as a ráziná·ma s› connected with the suit No. 1 of 1853, as that the alleged cause› of action in this suit can be held to have been heard and determined in the former suit. That suit appears to have been brought to a termination by the ráziná·ma presented by the brothers (parties to the suit) on the 9th December 1853. The matter in litigation between them was completely adjusted by the provisions of such ráziná·ma. On the death of Jeyará·n a fresh interest sprang up in the person of his widow, now the plaintiff, and the present claim arising out of an arrangement made with Tikará·n in respect of property in which she became interested as widow cannot because of the petition filed in the Civil Court in July 1854 be considered to have been a cause of section heard and determined in the former suit, within the meaning of the 2nd section. The suit therefore, we think, should not have been dismissed summarily as one of which the Civil Court could not take cognizance under section 2 of the Code of Civil Procedure.

Then as regards the rejection of the plaint under section 32, it does not we think, appear that the subject-matter of the plaint does not, constitute a cause of action. Whether there appears to be a cause of action that is likely to succeed is not the question. It is enough, we think, if it appears that the subject-matter alleged raises a fair question of claim or right for trial and determination between the plaintiff and the party made defendant. Where that is the case the plaintiff is entitled to institute his suit and to have it regularly proceeded with and fully heard, and a decree pronounced upon the matter in question.' Here the Civil Judge deciding upon what appeared in the plaint, has,

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by rejecting the plaint, refused to allow suit to be instituted.

Now the plaintiff's alleged cause of action is the breach of the agreement of the 5th July, and this depends upon the meaning and effect to be given in the construction of the agreement to the language used, as regards the intention of the parties. For this purpose evidence of the position and circumstances in which the parties were at the time placed, and under which they entered into the agreement, is admissible and may (we do not say it will) be relied upon and materially affect in the plaintiff's favor, the question of the intention and meaning of the words used in the agreement. But before there has been an opportunity of considering these circumstances in evidence it cannot rightly be decided that the plaintiff's construction of the agreement is wrong, and that she has absolutely parted with the property which she claims to have inherited from her husband.

The case is in its nature such as to make it probable that circumstances proper for consideration in construing the agreement will be relied upon. But without further alluding to them, or in any way intending to express an opinion as to the construction of the agreement, or the ultimate success of the plaintiff's alleged cause of action, we are of opinion that there appears no sufficient ground to warrant rejection of the plaint under section 32, and that the Civil Judge ought to receive the plaint and proceed to hear and determine the suit in the proper and ordinary way.

Appeal allowed.