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Present : Schneider and Lyall Grant JJ.

ANNAMALAY CHETTY *v.* THORNHILL.

168—D. C. (Inty.) Ratnapura, 4,687.

Res judicata—*Action for goods delivered—Failure to register under Business Names Ordinance—Institution of fresh action pending appeal—Merger of claim—Civil Procedure Code, ss. 34 and 406.*

In action No. 4,122 of the Court the plaintiff sued the defendant to recover a sum of money upon a running account between them in respect of goods sold and delivered and money advanced.

The defendant pleaded that the plaintiff had not complied with the requirements of the Business Names Registration Ordinance, and that his action failed.

The plaintiff obtained judgment and the defendant appealed. While the appeal was pending, the plaintiff having conformed to the requirements of the Ordinance instituted the present action, in which the claim was founded upon the same transactions as in the previous action save for the addition of a cause of action based upon an account stated.

***Held*, that the plaintiff's claim was merged in the decree entered in the previous case, and that the decree barred the second action.**

IN action No. 4,122 the plaintiff sued the defendant to recover a sum of Rs. 54,577·46 with further interest as balance due upon a running account between him and the defendant in respect of moneys advanced and goods sold and delivered between the month of August, 1923, and June, 1924.

The defendant while denying the correctness of the statement of claim pleaded *inter alia* that the plaintiff was precluded by the provisions of section 9 of the Business Names Registration Ordinance, No. 6 of 1918, from enforcing his rights under the contract.

After trial, judgment was entered in favour of the plaintiff on January 17, 1927, but the defendant appealed. During the pending of this appeal, the plaintiff having complied with the requirements of the Business Names Registration Ordinance instituted the present action on June 2, 1927, the foundation of which was the same transaction as the previous action except for the addition of a cause of action based upon an account stated. The defendant contended that the action was barred by the decree entered in the previous action. Thereupon the learned District Judge dismissed the plaintiff's action.

Hayley, K.C. (with *Gnanapragasam*), for plaintiff, appellant.

In Roman-Dutch law the principle of *res judicata* is discussed in *4 Nathan, pp. 2157 and 2158.*

Under the Indian Civil Procedure Code of 1908, section 10, and the older Code of 1892, section 12, it was held that the second action on the same cause of action cannot go on, neither section precludes the institution of a second action: only the trial is precluded. See *Nemaganda v. Paresha.*[1]

The same principle has has been applied where letters of administration have not been stamped: a second action is allowed (*Karunawardene v. Wijesuriya*[2]).

Similarly under the Business Names Ordinance, it is open to a party to bring a fresh action (*Karuppen Chetty v. Harrison, Crosfield, Ltd.*[3]). See *Meheti v. Tulya.*[4]

See *4 Maarsdorf 226*, para 2.

Under section 207 of the Civil Procedure Code an order is not final if there is an appeal from it. In this case there has been no application for stay of action. (*Sarkar 830.*) Section 13 of the Old Indian Code of Civil Procedure, 10 of the New Indian Code.

See *Voet X. 1, 2; 3 Court of Appeal Cases 30; Hukm Chand 145.* In *Singh et al. v. Singh*[5] Privy Council held that the appeal destroyed the finality of the decision (*Spencer Bower, p. 100*).

H. V. Perera, for defendant, respondent.—The cause of action in this case and the causes of action in the other case are the same: the non-payment of a debt. The promise to pay is not a further cause of action.

A promissory note extinguishes the liability on the bare debt (*Palaniappa v. Saminathan*[6]).

The provisions of the Code against appellant are sections 406, 33, 34: the whole of the claim must be included in the same action.

All rights of the plaintiff are merged in the first decree. It is not merely a question of *res judicata:* it is also a merger of rights in a decree. (*Spencer Bower 175.*) Former recovery or *Autrefois acquit, 1909) 2 Chancery 656: 11 Adolphus & Ellis's Report 763: 6 Bom. 112: 24 Cal. 616: 11 All. 148.*

Even when permission is given by the Appeal Court to bring a fresh action it does not validate an action brought before. (*Ponniah v. Payhamy.*[7])

Final does not mean not open to appeal but merely as opposed to interlocutory. A judgment does not operate any the less as *res judicata* merely because it is liable to be reversed in appeal (*Marchioness of Huntley v. Caskell*[8]).

[1] *22 Bomb. 640.*
[2] *11 N. L. R. 220.*
[3] *24 N. L. R. 317.*
[4] *3 Bom. 223.*
[5] *24 Cal. 626.*
[6] *17 N. L. R. 56.*
[7] *8 N. L. R. 375.*
[8] *(1905) 2 Chan. 656.*

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Hayley, K.C. in reply.—There is a difference between subject-matter and juridical matter (*Spencer Bower, pp. 115, 119, 121*). Account stated is a new cause of action. Under section 8 of Ordinance No. 22 of 1871 a specific period of limitation is given to "account stated."

March 13, 1928. SCHNEIDER J.—

These appeals were argued together. Counsel for both parties were agreed that there was no controversy as regards the facts. The facts might be stated to be the following:—

In action No. 4,122 the plaintiff sued the defendant to recover a sum of Rs. 54,577.46 with further interest as being the balance due to him upon a running account between him and the defendant in respect of moneys advanced and goods sold and delivered between the months of August, 1923, and June, 1924. The defendant denied the correctness of the statement of claim and pleaded further that the claim was prescribed and also that the plaintiff was precluded by the provisions of section 9 of the Business Names Registration Ordinance, No. 6 of 1918, from enforcing his rights, if any, under the contract set out in the plaint as he had failed to comply with the requirements of that Ordinance. The plaintiff challenged the soundness of both these defences. After trial he obtained a decree in his favour as prayed for on January 17, 1927, but the defendant on January 19 appealed against that decree. During the pendency of this appeal the plaintiff having complied with the requirements of the Business Names Registration Ordinance instituted the present action in the same District Court on June 2, 1927. In the present action the foundation of the claim is the same transactions as were relied on in the previous action and the sum claimed is identically the same but for the addition of further interest. But in the present action the claim is set out as on two alternative causes of action. In the first of these causes of action the claim is alleged to be due, as in the previous action, for moneys advanced and goods sold and delivered. But in this action certain acknowledgments by the defendant are pleaded as taking the case out of the operation of prescription. In the second and alternative cause of action the claim is made as being upon an account stated. It is obvious, and the plaintiff-appellant's counsel frankly admitted, that the present action was instituted with the sole object of preventing prescription being pleaded as a bar to plaintiff's claim, should the decree in the plaintiff's favour in the previous action be set aside.

Beyond instituting this action the plaintiff does not appear to have had any desire to proceed further with it till the fate of the appeal was decided. This is evident from certain facts which are to be found on the record itself. Having accepted the plaint in the

present action the Court directed the issue of the summons on the defendant to appear on July 5, that is in the ordinary course. On July 1 the plaintiff took the unusual step of moving the Court for the returnable date of the summons to be extended to September 15. This was allowed and no summons was in fact issued. But the defendant appears to have been vigilant. He too adopted an unusual course by appearing in Court on July 5, although he had not been required to appear on that or any other date, and then and there tendering his answer and moving that the Court should fix the case for trial of the question of law raised in the answer. As the returnable date of the summons had been altered from July 5 to September, the plaintiff was not present in Court on the 5th. Presumably to meet the unusual situation and any consequent delay the defendant's Proctor undertook to give notice to the plaintiff of what had happened. The Court accepted the answer and allowed the motion by fixing the case for trial on August 22. The notice which was duly issued by the defendant's Proctor was to the effect that the answer of the defendant, of which a copy was attached to the notice, had been filed on July 5, and that August 22 had been appointed for the trial of the question of law raised in the answer and that that date would be confirmed as the date for the trial unless sufficient reason to the contrary was shown by the plaintiff. In pursuance of this notice the parties appeared in Court. The plaintiff asked that the trial of this action should not be fixed till the appeal in the previous action was heard and decided. He contended that the Court did not have the power to fix a case for trial upon only a question of law. The learned District Judge declined to entertain this contention and confirmed his order fixing the trial for August 22. From this order the plaintiff appealed and that appeal is the one bearing Interlocutory No. 168. It was filed on the same day the order was made. Despite this appeal the District Judge held the trial on the day fixed by him and decided two issues of law. He pronounced his judgment on August 31 dismissing the plaintiff's action with costs. The plaintiff's appeal from that judgment is the one marked Final No. 344.

The issues of law were the following:—

(1) Is this action barred by the action No. 4,122 of this Court and the final decree entered of record therein ?

(2) Is there a decree that can operate as a bar to the action in D. C. 4,122 ?

The precise meaning of the 2nd issue is not quite apparent, but it is obvious that what the Court was invited to decide was whether the decree in D. C. No. 4,122 in the plaintiff's favour debarred him from instituting or maintaining the present action. That is the question which was discussed both in the lower Court and before us on appeal.

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It is convenient to deal with the interlocutory appeal first. A preliminary objection was taken to it. It was submitted that the order was not appealable. It was argued for the defendant that the plaintiff's appeal was in effect an appeal from an order fixing a date for the trial of the action and nothing more, and that no appeal lies from such an order; *Le Mesurier v. Le Mesurier*,[1] *Adamaly & Co. v. de Soysa*,[2] were cited as supporting this contention. It was submitted for the plaintiff that the order appealed against was an order involving something more than the mere fixing of the trial for a particular date; that the Court after hearing the parties had decided that the question of law raised in the answer should be first tried, and that the trial should be on the date mentioned, and in pursuance of that decision had made the order appealed against. It is an order therefore falling within the description of an order in section 5 of the Civil Procedure Code, and was an order within the meaning of section 75 of the Courts Ordinance. In view of the manner I propose to deal with this appeal, I feel I need say no more than that I hold with the contention that the plaintiff had a right of appeal.

In my opinion this appeal must fail. The only objection raised by the plaintiff-appellant to the course the Judge of the lower Court proposed to follow was that he should have first framed the issue of law before forming his opinion that the action can be disposed of on the issue of law only. Sections 146 and 147 of the Civil Procedure Code were referred to as supporting this contention. I am unable to take that view from the provisions of those sections. The objection has no substance and there is no good reason for fettering the discretion of a Judge in the manner contended for. I hold that the Judge's order that he would try the question of law as a preliminary issue was rightly made. Accordingly I dismiss the interlocutory appeal with costs.

Before proceeding to consider the final appeal I would state one other fact. The judgment in appeal in action No. 4,122 was pronounced on October 21, 1927, dismissing the plaintiff's action on the sole ground that as he had failed to comply with the requirements of the Registration of Business Names Ordinance, the action could not be maintained. The contention on behalf of the plaintiff-appellant on the appeal in the present case is that the former action could not be pleaded as barring the institution or the hearing of the present action. The decree in that action was not final inasmuch as it was a case in which an appeal is allowed, and the decree was in fact the subject of an appeal. The words of section 207 of the Civil Procedure Code: "All decrees passed by the court shall, subject to appeal, when an appeal is allowed, be final between the parties," were relied upon as supporting this contention and

[1] *(1891) 2 C. L. R. 21.*

[2] *(1918) 5 C. W. Rep. 285.*

also *Balkishan and another v. Kishan Lal*,[1] *Nilvaru v. Nilvaru and others*,[2] especially the passage in the latter case: " We consider that when the judgment of a Court of first instance upon a particular issue is appealed against, the judgment ceases to be *res judicata*, and becomes *res sub-judice*." To the contrary it was submitted on behalf of the defendant that what was meant by the language of section 207 was that the decree of the Court of first instance was final till it was set aside on appeal. That the word " Final " is used as contrasted with " Interlocutory " and the following passage from the judgment of Cozens-Hardy, L.J. in *Marchioness of Huntly v. Gaskell* (*supra*) was cited:—

> "It is urged that the judgment of the Scotch Court of Session is not a final judgment; but when the word ' final ' is used, as I think it is in some authorities with reference to judgments, that does not mean, I apprehend, a judgment which is not open to appeal, but merely ' final ' as opposed to ' Interlocutory '. A judgment is, in my opinion, not the less an estoppel between the parties to the action because it may be reversed on appeal to the House of Lords."

If it had been necessary to make a holding between these contentions, as at present advised, I would hold that the decree of the District Court was not final within the meaning of section 207 for the reason that an appeal is allowed and an appeal had in fact been preferred. But I do not think I am called upon to decide that question for the purpose of deciding this appeal. It was submitted again on behalf of the plaintiff that the former action was not *lis pendens* in the Appeal Court inasmuch as the " cause of action " set out in the former action was not the same as the alternative cause of action upon which the present action was based, and that it was essential that there should be an identity of causes of action in the two actions to sustain a plea of *lis pendens*. For the defendant it was submitted that the cause of action in the former action was identically the same as in the present action; that in the language of the interpretation clause of the Civil Procedure Code " cause of action " is " the wrong for the redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation "; that in both actions the wrong complained of by the plaintiff was one and the same, the non-payment of money due to him for goods sold and delivered and moneys advanced to the defendant. I am unable to say that I agree wholly with either of these contentions. The one view appears to tend to narrow down the scope of the rule of *res judicata* while the other may result in extending it beyond its well recognized limits. If in the cases under

[1] *I. L. R. 11 All. 148.* [2] *I. L. R. 6 Bom. 110.*

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consideration now the Court had decided in the former action that the plaintiff's action failed because the transactions relied on by him had never taken place, that decision would, in my opinion, bar him from maintaining the present action, although he may set out the claim as due upon an account stated, and therefore upon a different contract to goods sold and delivered which alone was the contract pleaded in the former action. The reason, as I conceive it, is that the former decision went to the root of the plaintiff's claim, which in both actions is based upon the transactions which are set out in the plaints in both actions, and which are the same. But once again I do not think it necessary to decide any of the questions which must necessarily arise if this appeal has to be decided on a plea of *lis pendens alibi*.

In my opinion the dispute between the parties turns upon a simple question, namely, whether the plaintiff having obtained a decree for the whole of the sum claimed and claimable upon the transactions relied on by him in both actions, can maintain this action during the existence of that decree. In both actions he seeks the same relief, that is, the payment of a sum of money upon certain transactions. When he obtained the decree in his favour in the former action the claim was merged into the decree upon whatever cause of action that decree may be actually founded. There is also another way of putting the same reason. His causes of action are alternative in the sense that the money is due either upon a contract for goods sold and delivered and moneys advanced, or, upon an account stated in respect of the same transactions. He elected to sue upon the former contract and had succeeded. It is therefore not open to him to assert the alternative cause of action and once again claim a decree for the same sum. It would be unconscionable to decree the defendant to pay a debt twice over. It was submitted as an argument for the plaintiff that there was no provision of our law which prevents him from maintaining two actions simultaneously to recover the same sum of money. Even granting the assumption which underlies that argument to be correct, although I am not prepared to admit its correctness, the position would still be the same because as soon as he obtains a decree in one of those actions the other must fail.

I must, accordingly, dismiss the final appeal also with costs and affirm the decree of the District Court.

LYALL GRANT J.—I agree.

Appeal dismissed.