1955 *Present:* **Pulle, J., and H. N. G. Fernando, J.**

DIAS, Appellant, *and* EASTERN HARDWARE STORES LTD., Respondent

S. C. 185—D. C. Colombo, 14,496/S

Promissory note—Joint debt—Judgment entered against one debtor—Does it always exhaust cause of action against the co-debtors?

Where, in an action for the recovery of a sum of money due on a joint promissory note given by two defendants, judgment is entered in favour of the plaintiff in consequence of the default of both the defendants in appearing, subsequent vacation of the decree against the first defendant does not entitle him to contend that the plaintiff cannot maintain the action against him on the ground that on a joint liability incurred by him and the second defendant a decree has already been entered against the latter. In such a case, a judgment against one joint debtor does not so exhaust the cause of action as to debar further proceedings against his co-debtor.

APPEAL from a judgment of the District Court, Colombo.

Walter Jayawardene, with *K. Viknarajah*, for the 1st defendant-appellant.

H. V. Perera, Q.C., with *S. Subramaniam*, for the plaintiff-respondent

Cur. adv. vult.

July 27, 1955. PULLE, J.—

The appellant in this case is the 1st defendant in an action instituted under Chapter LIII of the Civil Procedure Code against her and the 2nd defendant for the recovery of a sum of Rs. 11,153·60 and interest alleged

to be due on a joint promissory note. The prayer in the plaint asked for judgment against the two defendants jointly and not jointly and severally. The question we have to decide is whether the circumstances in which a decree entered against the appellant was vacated resulted in the plaintiffs being debarred from further prosecuting their claim against her, inasmuch as there was of record an unvacated judgment against the joint debtor, the 2nd defendant.

The defendants failed to appear within the time prescribed in the summonses and on the 22nd April, 1953, the proctor for the plaintiffs moved to enter judgment against them and the court made the order,

" Judgment for plaintiff as prayed for with costs. "

The formal decree entered upon the same day, however, ordered the defendants to pay the sum due " jointly and severally ".

On the 25th April, 1953, the appellant moved by petition and affidavit to have the decree entered against her vacated on the ground that the summons and the copy of the plaint served on her were not in the Sinhalese language. The court on the 6th July, 1953, held that the service of summons was irregular, vacated the decree entered against her and ordered fresh summons. On the fresh summons being served she appeared and moved to defend the action unconditionally. Of the grounds urged one was that the plaintiff could not maintain the action against her because on a joint liability incurred by her and the 2nd defendant a decree had already been entered against the latter. Pending an inquiry into her application the plaintiffs on the 9th February, 1954, moved to have the decree against the 2nd defendant vacated because the one of 22nd April, 1953, had been entered *per incuriam* and because the decree against the appellant had been vacated. The learned District Judge granted the plaintiff's application and ordered the appellant to provide security in a sum of Rs. 5,000 as a condition of filing answer. The present appeal is from this order.

The authorities which lay down the principles underlying the rule that a judgment against one of two joint debtors discharges the second are reviewed in the judgments of Abrahams, C.J., and Poyser, J., in *Suppaiya Reddiar v. Mohamed et al.* [1]. The position is explained by Bowen, L.J., in *In re Hodgson, Backett v. Ramsdale* [2] as follows :

" There is in the cases of joint contract and joint debt as distinguished from the cases of joint and several contract and joint and several debt, only one cause of action. The party injured may sue at law all the joint contractors or he may sue one, subject in the latter case to the right of the single defendant to plead in abatement ; but whether an action in the case of a joint debt is brought against one debtor or against all the debtors, or continued against one debtor or all the debtors, it is for the same cause of action—there is only one cause of action. This rule though the advantage or disadvantage of it may have been questioned in times long past, has now passed into the law of this country. I should only

[1] *(1937) 39 N. L. R. 459.* [2] *(1886) 31 Ch. D. 177 at 188.*

wish to observe that whether or no the rule by the right of pure reason and unassisted by authority might or might not have recommended itself to modern minds, the rule is by no means a technical rule. It is based, right or wrongly, on the idea that a joint debtor has a right to demand, if he pleases, that he shall be sued at one and the same time with all his co-debtors. To enforce this right he is only entitled to plead in abatement, but the right is one of considerable business value, and is so recognised by the law. In order to protect each of the joint debtors, the law treats the cause of action as being a joint one, and as capable of being merged whenever it is pursued to a judgment. It is absorbed and merged in the judgment which is recovered against one of the debtors not only as against him but as against all the rest, and the object is to prevent the prejudice which the law conceives might arise to a joint debtor who is not being sued, if he were left with future litigation still hanging over his head. All his liability is merged therefore in the judgment,—the old debt disappears and the judgment is left in its place."

It has to be borne in mind in this case that the plaintiffs did not move for and obtain judgment only as against the 2nd defendant. Had they done so they would have been faced with the defence of the appellant that their cause of action against her had already merged in the judgment against the 2nd defendant. On the basis that they were entitled to a decree ordering both defendants to pay jointly the amount due, they moved for judgment on the 2nd April, 1953. It has been conceded that the decree actually entered was erroneous and the legal effect of vacating it as against the appellant must be considered on the footing that a proper decree, not joint and several but only a joint one, was drawn up. The argument that upon the decree against the appellant being vacated there was left no cause of action against her presupposes that the joint decree could still survive. I agree with the learned Additional District Judge when he says that in the case of a joint decree there is only one decree against all the defendants, so that when such decree is vacated at the instance of any one defendant there would be no decree subsisting against the other defendant. A joint decree being one is indivisible. It cannot survive in part.

It has been freely recognized that the rule that a judgment against one joint debtor so exhausts the cause of action as to debar further proceedings against his co-debtor can work injustice in many cases. I do not think that this rule should be extended beyond the limits within which it has been applied. The plaintiffs at no time took up any other position than that they wanted a single decree against both defendants and they should not be deprived of this opportunity solely for the reason that the appellant succeeded in showing that there was a defect in the service of summons on her in the first instance.

In my opinion the appeal fails and should be dismissed with costs.

H. N. G. FERNANDO, J.—I agree.

Appeal dismissed.