APPELLATE CIVIL.

Before Fletcher and Teunon JJ.

JANARDAN KISHORE LAL

v.

SHIB PERSHAD RAM.*

1915

April 8.

Appeal—Consolidation of Appeals—Plaint, amendment of, when allowable—Practice.

The Code of Civil Procedure contains no provisions for consolidating proceedings in India. Whether the Court has jurisdiction to consolidate proceedings or not, it would only do so where the consolidation is asked for before the trial of the suits begins or where the evidence given in the two cases is common in both of them.

No amendment of plaint can be allowed where the proposed amendment would take away from the defendants, if allowed, a right that they would have if the plaintiffs had proceeded against them by way of original suit.

APPLICATION by Janardan Kishore Lal and another, the plaintiffs.

The plaintiffs, who were minors, and whose estates were under the Court of Wards, sued the defendants on the 18th March, 1909, (suit No. 119 of 1909) to recover arrears of minimum royalty in respect of certain mining leases that were held by the defendants as transferees from the original lessee. The amounts sued for were a portion of the royalty payable for 1312, the whole of the royalty payable for 1313 and 1314, and the royalty up to the Pous *kist* of 1315 B. S. There was also the prayer that as the plaintiffs believed that the defendants raised coal much in

* Application *in re* Appeals from Original Decrees No. 147 of 1911 and No. 216 of 1913.

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excess of the quantity guaranteed and as the exact quantity raised thus was not yet known to the plaintiffs, they might be allowed to reserve their right to bring a separate suit for the excess quantity on ascertainment. The Court allowed this on the day the suit was filed. The primary Judge (Babu Bankim Chandra Mitra) passed a modified decree in favour of the plaintiffs on the 27th June, 1910. Against this decision, the plaintiffs filed an appeal in the High Court, the appeal being R. A. 147 of 1911.

On the 14th November, 1910, the plaintiffs filed another suit (suit No. 595 of 1910) against the same defendants in respect of the aforesaid coal mines for recovery of minimum and excess royalty due to them, viz., minimum royalty from Kartik to Chaitra 1311, Baisakh to some portion of the month of Pous of 1312, Magh to Chaitra *kist* of 1315, the whole of 1316 and for Baisakh to Aswin of 1317 and excess royalty for the years 1312, 1313, 1314, 1315 and 1316. In this suit they allowed a certain deduction from their total claim on account of certain specific payments that had been made by the defendant towards the payment of certain other rents that were then in arrears. The Subordinate Judge (Babu Bijoy Gopal Basu) disallowed the claim for the period prior to Pous 1312, as not included in the previous suit and therefore barred under O. II, r. 2, Civil Procedure Code, but allowed the rest of the claim, both as regards minimum and excess royalty. Against this decision, both parties appealed to the High Court. The defendant's appeal was numbered R. A. 208 of 1913, and the plaintiffs' appeal R. A. 216 of 1913.

After filing the appeal No. 216 of 1913, the Court of Wards made an application that appeals 147 of 1911 and 216 of 1913 be heard one after another, and the said application was granted on the 19th December, 1913.

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When the appeals came on for hearing, the Court of Wards filed an application for consolidation of Appeals 147 of 1911 and 216 of 1913 and further prayed therein that the entire claim of the two appeals be heard as one claim. The petitioners stated in the said application that in making up the claim in suit No. 119 of 1909, the sums paid by the defendants during the years 1313, 1314 and 1315 for the royalty of those years were appropriated by the petitioners towards the previous arrears due for 1310, 1311 and 1312 and that they were therefore unable to sue for those years, but that when the Court below held the sums paid during the years in suit, viz., 1313 to 1315, should have been appropriated for those years, they became entitled to ask the Court to rebut and consolidate the appeals, as otherwise the minors would suffer.

Babu Ramcharan Mitra (*Senior Government Pleader*) and *Babu Srishchandra Chaudhuri*, for the petitioners. Section 151 of the Code of Civil Procedure gave the Court ample power to allow them to withdraw Appeal No. 147 of 1911 and consolidate the suits: *Kali Charan Dutt* v. *Surjoo Coomar Mundle* (1).

[*Dr. Dwarka Nath Mitra.* The trying officers were different in the two suits.]

The plaint in suit No. 595 of 1910 can be easily amended.

[TEUNON J. In that case the limitation would run from the date of the amendment. Would that help the minors?]

As regards the right to withdraw suits in appeals, see *Gregory* v. *Dooley Chand Kandary Mull* (2), *Mussamut Khatoon Koonwar* v. *Babu Hurdoot*

(1) (1912) 16 C. L. J. 591. (2) (1868) 14 W. R. (O. J.) 17.

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Narain Singh (1) and *Ganya Ram* v. *Data Ram* (2) See also in connection with this matter: *Raniganj Coal Association, Limited* v. *Judoonath Ghose* (3).

Dr. Dwarka Nath Mitra (with him *Babu Mohini Nath Bose*), for the opposite party. No consolidation order can be passed, as no petition was presented to the Court below for the same. Such an order under s. 151 would prejudice the defendants and take away from them a valuable right secured to them under the Statute of Limitation. The case of *Kali Charan Dutt* v. *Surjoo Coomar Mundle* (4) is distinguishable from the present one on facts. No consolidation can be made of two distinct proceedings in the Court below, when different witnesses were examined and cross-examined in the two cases without any suggestion of consolidation. A consolidation would not be a consolidation of suits but of different proceedings. There is no provision for consolidation at the appellate stage. It is true there is express provision for consolidation in Order XLV of the Code. But there is no provision anywhere else, and the implication would go against my learned friend. Even Order XLV would not authorize consolidation of distinct suits not tried as analogous in the Court of first instance.

If the plaintiffs withdraw now, their suit would be barred to some extent.

I would further resist withdrawal on the authority of *Kharda Co, Ltd.* v. *Durga Charan Chandra* (5) and *Mabulla Sardar* v. *Rani Hemangini Debi* (6).

FLETCHER J. This application for amendment of the plaint is, in my opinion, too late. No application was made to the Court of first instance nor has it been

(1) (1873) 20 W. R. 163.
(2) (1885) I. L. R. 8 All. 82.
(3) (1892) I. L. R. 19 Calc. 489.
(4) (1912) 16 C. L. J. 591.
(5) (1909) 11 C. L. J. 45.
(6) (1910) 11 C. L. J. 512.

made until after the opening of the appeals before us. I think we ought not to assent to the amendment prayed for when the learned Senior Government Pleader tells us quite frankly that, if the amendment is now permitted it will, in fact, deprive the defendants of the right that the law has given them, namely, to state or allege that the claim is now barred by limitation. By the proposed amendment we would take away from the defendants, if we grant it, a right that they would have if the plaintiffs proceed against them by way of original suit.

Then the other part of the application is that we should consolidate the two appeals. The cases were not consolidated in the Court of first instance. The evidence has been taken separately and different witnesses have been called and cross-examined. The Code contains no provisions for consolidating proceedings in India. Whether or not the Court has jurisdiction to consolidate the proceedings, I imagine that it would only do so where the consolidation is asked for before the trial of the suits begins and where the evidence given in the two cases is common in both of them. I do not know any instance where the appeals have been consolidated so as to treat the evidence in one case as evidence in the other when the trial proceeded separately in the Court of first instance. In many cases in India it happens that the evidence is given before different Judges in the Court of first instance. As a matter of fact, in the present case, the Judge who decided the suit which forms the subject matter of Appeal No. 147 of 1911 is a different Judge from the Judge who decided the suit which forms the subject matter of Appeal No. 208 of 1913. To consolidate the two cases that have been tried by different Judges in that manner is a proceeding which I have never heard of before. It will also be noticed in this

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case that the second suit now under appeal, that is, the suit which forms the subject matter of appeal No. 208 of 1913, was not instituted until after the former suit had been finally determined by the Court of first instance. If the plaintiffs intended to proceed by way of amendment or otherwise, they ought to have made the application to the Court of first instance before the institution of the second suit. I see no reason which would lead us to assent to the present application. The application seems to me to be altogether a novel one. I think, therefore, that the present application should be dismissed with costs.

TEUNON J. I agree.

S. M. *Application refused.*

CIVIL RULE.

Before Sharfuddin and Richardson, JJ.

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April 9.

SURENDRA NARAYAN SINGH

v.

LACHMI KOER.*

Deposit in Court—Judgment-debtor—Transferee of the judgment-debtor—Bengal Tenancy Act (VIII of 1885), s. 174—Sale, setting aside of.

An application under s. 174 of the Bengal Tenancy Act can be made by the judgment-debtor alone and by no other person.

Ranjit Kumar Ghosh v. *Jogendra Nath Ray* (1) referred to.

* Civil Rules Nos. 58 and 59 of 1915, against the order of Sheikh Rahaman, Munsif of Katihar, dated Oct. 22, 1914.

(1) (1912) 16 C. L. J. 546.