ORIGINAL CIVIL.

Before McNair J.

1934

Aug. 24, 27

PRABODHLAL MUKHERJI

v.

NEELRATAN ADHIKARI.*

Parties—Non-joinder—Legal representative—Person in possession of assets of deceased debtor, if represents his estate—Limitation.

On the death of a debtor, who left two widows as his heiresses, the creditor brought a suit against one only of the widows and certain other persons as being in possession of the assets of the deceased.

Held that the other widow was a necessary party and in her absence the estate of the deceased was not fully represented. The period of limitation having expired, she could not be added as a party and the suit must be dismissed.

Ambika Charan Guha v. *Tarini Charan Chanda* (1) and *Haran Sheikh* v. *Ramesh Chandra Bhuttacharjee* (2) followed.

Chaturbujadoss Kushaldoss and Sons v. *Rajamanicka Mudali* (3) distinguished.

ORIGINAL SUIT.

The material facts of the case appear from the judgment.

H. K. Bose for the plaintiff. The defendants are persons in possession of the assets of the deceased. They are sued in their representative capacity and if a decree is passed against them it would bind the estate. *Chaturbujadoss Kushaldoss* v. *Rajamanicka Mudali* (3).

J. N. Majumdar (with him *M. N. Ghose*) for the defendant Gopeshchandra Adhikari. The other widow is a legal representative and in her absence the estate is not fully represented. She is a necessary party to the suit. An effective decree cannot be passed against those persons who are on record.

*Original Suit No. 2204 of 1932.

(1) (1913) 18 C. W. N. 464. (2) (1920) 25 C. W. N. 249.
(3) (1930) I. L. R. 54 Mad. 212.

The case of *Chaturbujadoss Kushaldoss and Sons* v. *Rajamanicka Mudali* (1) is distinguishable. There the Court was considering whether after a decree had been obtained *bona fide* against a representative approved by the court, it would bind the estate. But in the present suit, that stage has not been reached. Here objection as to parties was taken at the earliest opportunity and, although the plaintiff knew long before the trial that he had not impleaded all the necessary parties, he took no steps as provided in the Code of Civil Procedure to add the other widow as a party. He cannot be allowed now to amend the pleadings after the period of limitation and the Court should not pass a decree which may be infructuous. *Ambika Charan Guha* v. *Tarini Charan Chanda* (2), *Haran Sheikh* v. *Ramesh Chandra Bhuttacharjee* (3).

McNAIR J. The plaintiff in this suit seeks to obtain a decree for a sum of Rs. 6,866 against the estate of Krishnakishore Adhikari, deceased, in the hands of the persons whom he has impleaded as defendants.

On September 25, 1929, Krishnakishore Adhikari executed a promissory note for the sum of Rs. 5,000 payable to the plaintiff on demand with interest at the rate of 12 per cent. per annum.

On April 29, 1930, Krishnakishore died leaving two widows as his heiresses. In his suit the plaintiff states in paragraph 2 of his plaint that Krishnakishore had died leaving the defendant No. 3 his widow him surviving. He then states in paragraph 3 that he is informed that Krishnakishore had left a will and appointed the second defendant as his executor. In paragraph 4 he says, the plaintiff has ascertained that defendants Nos. 1 and 2 the brothers of the deceased and the defendant No. 3 his widow are in possession of the assets of the deceased. He then sets out particulars of his claim and asks for a

(1) (1930) I. L. R. 54 Mad. 212. (2) (1913) 18 C. W. N. 464.
(3) (1920) 25 C. W. N. 249.

1934

Prabodhlal Mukherji v. *Neelratan Adhikari.*

McNair J.

decree against the assets in the hands of the defendants, and, if necessary, for administration. The plaint was filed on November 14, 1932.

The brothers Neelratan Adhikari and Gopeshchandra Adhikari filed a written statement, in which they deny knowledge of execution of the promissory note and state in paragraph 2 of their written statement that Krishnakishore died intestate leaving him surviving two widows as his heiresses and legal representatives under the Bengal School of Hindu law, by which he was governed. They deny that they or either of them is in possession of the assets, but they admit that they are in possession of certain properties which were formerly their joint properties and which they say no longer form part of the assets of their deceased brother. In paragraph 5 of their written statement they take a definite plea that the second widow, Indumati Debee, is a necessary party to the suit and that the suit is bad as framed.

The widow, Saratbala Debee, who has been impleaded has put in no defence. The defendant Neelratan Adhikari, one of the brothers, has died and there has been no substitution of his heirs on the record.

The first issue, which was framed, was, "Is the "suit bad for non-joinder or mis-joinder of parties?" and this matter has been argued by way of demurrer.

On behalf of the plaintiff it is urged that the suit has been brought *bona fide* against those persons whom he thought were representing the estate. He admits that he has not used the word "representative", but he contends that, from the way in which his plaint is framed and the allegation that the defendant No. 3, the widow, is in possession of part of the assets, that that widow is sued in a representative capacity. It seems to me that this is stretching the language a great deal further than is legitimate. In support of his contention he relies on the case of *Chaturbujadoss Kushaldoss and Sons* v. *Rajamanicka Mudali* (1)

(1) (1930) I. L. R. 54 Mad. 212.

decided by the Madras High Court. That case, however, is not really an authority for the proposition which the plaintiff is trying to set up here, for, in that case, a creditor had brought a suit against the widow whom he considered to be the sole legal representative of the debtor and had obtained an *ex parte* decree for the payment of the debt out of the assets in his hands and the Court held that the widow sufficiently represented the estate to make the decree binding on a residuary legatee under the debtors will. One of the learned Judges in that case in delivering his judgment says :—

> I do not think it necessary to discuss cases of the Bombay High Court or other Courts which adopt the view that the crucial question is whether the right heir or successor is on record, not whether the deceased's estate is sufficiently represented and to my mind the question whether the representative on record is actually in possession of any of the deceased's property is not of importance, except as throwing light on the question of the plaintiff's good faith.

The learned Judge then considers the argument, which has sometimes been put forward, that a change has been brought about by the Code of Civil Procedure of 1908 and that some of the older cases are, therefore, not in point, he says :—

> The words of the Code of 1882, and that of 1859, may perhaps be taken to have given more freedom to a plaintiff in bringing on record the representative he chose and the words of the present Code to throw more responsibility in the matter on the court. But that certainly cannot make a decree obtained after impleading a representative approved by the court of less effect against the deceased's estate.

These final words make it quite clear that the matter which that Court was considering was not a matter such as is being considered here, namely, whether the proper parties have been impleaded before the decree is sought, but that the Court were considering whether, after a decree had been obtained and a representative approved by the court had been impleaded, the deceased's estate would be bound. The question here is whether a plaintiff, who know more than a year before his suit came to trial that he had impleaded the wrong parties, should be entitled to continue his suit in spite of that knowledge.

1934

Prabodhlal Mukherji v. *Neelratan Adhikari.*

McNair J.

The provisions of the Civil Procedure Code which are in point are contained in Order I, rules 3, 8, 9 and 10. Rule 3 mentions the persons who may be joined as defendants, and rule 8 states that one person may sue or defend on behalf of all in the same interest. Rule 9 says that no suit shall be defeated by reason of misjoinder or non-joinder of parties, and rule 10 provides that the Court may strike out or add the name of any party who ought to have been joined as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit. Sub-rule (*4*) of Order I, rule 10, states that where a defendant is added the plaint is to be amended, and sub-rule (*5*) says:—

> Subject to the provisions of the Indian Limitation Act, 1877, section 22, the proceedings as against persons added as defendant shall be deemed to have begun only on the service of the summons.

It was suggested early in the hearing that it would be advisable for the plaintiff to amend his suit and bring on the record persons who appeared from the written statement to be the proper persons representing the estate of the deceased debtor. It was then admitted by the learned counsel for the plaintiff that there was a difficulty in his way, because the suit had been brought only shortly before the period of limitation expired and were the amendment to be made the suit would be barred.

The question which now arises is whether the persons on the record are the proper persons, and whether all the necessary parties have been brought on the record. The Court has to consider whether an effective decree can be passed against those persons who are on the record.

The defendant points out that he took the objection as to parties at the very earliest moment, as he is called upon to do under Order I, rule 13 of the Code of Civil Procedure, that is to say, he took the objection on the 16th day of January, 1933, when he filed his written statement. In support of his contention that

the court cannot pass a decree against the estate in the absence of the legal representatives, he has referred me to the judgment of this Court in *Haran Sheikh* v. *Ramesh Chandra Bhuttacharjee* (1) which was a suit for a declaration of a right of way and one of the persons interested in the servient tenement had not been made a party to the suit. In that case, it was pointed out that, although under the provisions of Order I, rule 9 of the Civil Procedure Code, it is provided that no suit shall be defeated by reason of misjoinder or non-joinder of parties, yet the court will not, in certain cases, proceed to make a decree, if that decree, when made, will be infructuous. Reliance was also placed on the case of *Ambika Charan Guha* v. *Tarini Charan Chanda* (2). That was a suit for accounts of a partnership in which the plaintiff and the defendants Nos. 1, 2 and 4 had been members, the remaining partner died after the partnership business came to an end but before the suit was brought and left two sons who were defendants Nos. 3 and 5. Of those two sons, only the third defendant was originally impleaded and objection was taken in the written statement as has been done in this case that the deceased partner was not properly represented. The plaintiff after waiting sometime then brought the other son of the deceased partner on the record and by that time the period of limitation prescribed for such a suit had expired. It was held that all the partners or their representatives were necessary parties, and further, on the facts of that case, it was held that the two sons of the deceased partner were both necessary in order to represent the estate of their deceased father. Referring to Order I, rule 9, the learned Judges said :—

> That rule, however, properly understood, does not do away with the necessity for bringing a necessary party on the record. If a necessary party is not on the record the proper course is to apply to have him joined. If he is not brought on the record at all, or if when he is brought on the record the suit as against him is barred by limitation the suit will be dismissed.

They held that the plaintiff ought to have impleaded all the legal representatives of the

(1) (1920) 25 C. W. N. 249. (2) (1913) 18 C. W. N. 464.

1934

Prabodhlal Mukherji v. *Neelratan Adhikari.*

McNair J.

deceased defendant and that, in the absence of one of the sons of the deceased partner, the estate was not fully represented and the suit was not properly brought and must be dismissed. The reasoning in that case seems to me to be entirely applicable here. It is true that this is not a question of partnership, but the circumstances are much the same. As I have already pointed out, the defendants took the objection at the earliest possible moment and definitely pleaded that the other widow was a necessary party to this suit. In my opinion, that was a correct submission, and, in view of the fact that no amendment has been asked for and that the necessary parties are not on the record, the suit must be dismissed. The defendants are entitled to their costs on scale No. 2.

Suit dismissed.

G. K. D.