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ELLOKASSEE DOSSEE v. DURPONARAIN BYSACK.

prior tenancy for life, the period of survivorship was deferred to the death of the tenant for life.

Attorney for the plaintiff: Mr. *Fink.*

Attorney for the defendant Durponarain Bysack: Baboo *P. C. Mookerjee.*

Attorneys for the defendant Kheroda Dossee: Messrs. *Swinhoe, Law, & Co.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Prinsep.

1879 *March* 31.

NEHORA ROY AND OTHERS (PLAINTIFFS) *v.* RADHA PERSHAD SINGH (DEFENDANT).*

Practice—Amendment of Issues—Act VIII of 1859, *s.* 141—*Act X of* 1877, *s.* 149.

A Judge is not bound to make any amendment in the issues of a case, except for the purpose of more effectually putting in issue and trying the real question or questions in controversy as disclosed by the pleadings on either side.

Bizjie Bebee v. *Monohur Doss* (1), *Wilkin* v. *Reed* (2), *Lucas* v. *Tarleton* (3) followed.

Where no injustice would be done to either party, the Courts, in the exercise of their discretion, under special circumstances, may allow issues to be raised upon matter which does not strictly come within the proper scope of the pleadings. The power to allow such amendments is given by the first part of s. 149 of Act X of 1877 corresponding with the first part of s. 141 of Act VIII of 1859.

THIS was a suit to recover possession of certain lands, of which the plaintiffs alleged they had been dispossessed by one Radha Pershad Singh (who had taken the lands in execution under a decree obtained by him in 1866 against the predecessors in title

* Appeal from Original Decree, No. 1 of 1878, against the decree of Moulvi Mahomed Nurul Hosain, Subordinate Judge of Shahabad, dated the 20th September 1877.

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of the plaintiffs), but which the plaintiffs alleged were not in reality the subject-matter of that decree.

It appeared that, on the 14th April 1856, Moheshur Bux Singh (the father of Radha Pershad Singh) obtained in the Ghazipore Court a decree against the predecessors in title of the present plaintiffs for possession of certain lands, which decree was upheld on appeal in the year 1859, and also further upheld on review on the 7th April 1866. Execution was taken out in the District Court of Ghazipore, but subsequently the lands to which the decree related were excluded from the jurisdiction of the Court of Ghazipore, and included in that of the district of Shahabad, under a notification issued by the Government in 1867; the execution proceedings were, therefore, transferred to the Court of Shahabad. An amin was deputed to measure out the lands, and having done so, he put the plaintiff into possession. The judgment-debtor objected formally that the measurements of the amin were wrong, and that he had put the plaintiff (Moheshur Bux Singh) into possession of lands which were not included in his decree; these objections were overruled, and the order so overruling them was affirmed by the High Court.

The judgment-debtor (the present plaintiff) then brought this suit to recover possession of the lands in question, and to have it declared that the orders passed in the execution proceedings were null and void.

The defendant contended that the decree of the 7th April 1866 had been executed, and that according to the decree he obtained possession of the land, and that therefore a second suit for the same land would not lie according to s. 2, Act VIII of 1859, and further that the amin's proceedings in execution had been upheld by the lower Court, and the order rejecting the objections to such proceedings had been upheld on appeal by the High Court, and that such being the case, a regular suit to cancel a miscellaneous order in execution of a decree would not lie under s. 11, Act XXIII of 1861.

The Subordinate Judge held that the plaintiffs' claim was inadmissible under s. 11, Act XXIII of 1861, inasmuch as all questions raised in execution of a decree must be raised in the execution department, and refused to allow the plaintiffs to enter

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into the question as to whether the Judge of Ghazipore was at liberty to transfer the execution proceedings to the Subordinate Judge of Ghazipore, and from thence to the Subordinate Judge of Shahabad, inasmuch as the plaintiffs had nowhere stated in their plaint that the proceedings taken by the Court of Shahabad were contrary to law; and without entering into the other question dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Siris Chunder Chowdry* for the appellants.—I raise the preliminary objection that the proceedings in execution in the Court of the Subordinate Judge were without jurisdiction: the Judge below was wrong in not allowing me to go into this question. I offered to amend, and asked for a special issue to be fixed in respect of the question of jurisdiction.

Baboo *Juggadanund Mookerjee* for the respondent.—They never objected to the proceedings below on the ground that the Court was not competent; there is nothing in their plaint stating that the proceedings taken in execution in the former suit were without jurisdiction; they simply based their suit on the ground that we had taken possession of the land in an illegal manner, having taken out execution contrary to the purport of the decree we had obtained against them. In our written statement we object that their suit is barred and cannot be maintained, because the question now attempted to be raised ought to have been raised whilst the execution proceedings were going on, and it is not open to them to raise the question in a new suit. [GARTH, C. J.—The question is, whether having omitted to raise a point in their plaint, are they entitled to have an issue raised? If it was a *bonâ fide* point, was the Judge justified in refusing to raise the issue?] The Judge would have no right to put this issue on the record, it would put us to great expense, and we should have had no time to get the papers from England as they were sent up to the Privy Council.

Baboo *Chunder Madhub Ghose* on the same side.—Regard being had to the true nature of the suit, the point now raised

could not have been raised in the lower Court; it is wholly beside the case. Their cause of action accrued in 1876, when the defendant was put into possession, and they in their suit only complain that we have taken possession of land which we are not entitled to under the decree. Although s. 141 of the Civil Procedure Code of 1859 gives power to amend, such amendments must come within the scope of the plaint.

Baboo *Mohesh Chunder Chowdhry*.—I rely on s. 141, Act VIII of 1859. The Judge may amend or add issues at any time before the passing of a decree. I have a right at all events to be heard on the other issues raised; the Judge has dismissed the case on hearing one issue only; the second issue was whether s. 11 of Act XXIII of 1861 prevents me contending that the orders made in the execution proceedings should be cancelled. [GARTH, C. J.—Section 141 is nearly identical with the English rule as to amendments, which allows the Court not to amend a plaint, so as to make a fresh cause of action, but to amend a plaint, for the purpose of giving effect, as far as possible, to the plaint as drawn in the first instance.]

Baboo *Chunder Madhub Ghose*.—No fresh allegations are to be allowed in amending a plaint—*Bizjie Bebee* v. *Monohur Doss* (1).

The judgment of the Court was delivered by

GARTH, C.J. (PRINSEP, J., concurring).—We think that the appellants are not entitled under the circumstances to raise the point upon which they have appealed; and we consider that they were very properly precluded from raising that point in the Court below. It is to be hoped that this is nearly the last scene in a long series of litigation which has been going on between these parties for upwards of twenty years. In the year 1860, a final decree was made by the Sudder Court at Agra, which determined the rights of the parties in a suit which had been going on for a very long time, and that Court sent the decree to the Court of Ghazipore, which was the Court

(1) 2 Ind. Jur., N. S., 118.

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of first instance, to be executed. In January 1867, a readjustment was made by the Government of India of the boundary line between Lower Bengal and the North-Western Provinces, by means of which the whole or the greater part of the property in dispute, which had before belonged to the North-Western Provinces, became a portion of Lower Bengal, and as the Court of Ghazipore had no longer any jurisdiction over the property which had come within the jurisdiction of the Court of Shahabad, the Judge sent the case to the Subordinate Judge's Court at Shahabad, in order that the execution proceedings should be carried out there. For many years after this transfer, the proceedings, which were very lengthy and complicated, were carried on under the direction of that Court. No objection was made by either party that the Court at Shahabad had not jurisdiction to entertain them, and eventually, after that Court had arrived at a final decision, the case was appealed to the High Court here, and was heard by a Division Bench composed of Mr. Justice Kemp and Mr. Justice Pontifex. This was in March 1876, and still no objection was made by either party to the jurisdiction of the Shahabad Court, in the form in which it is now raised. In point of fact, the present appellants submitted themselves during all this time to the Shahabad Court's jurisdiction, and fought the case there from one stage to another in the hope that the proceedings would be carried out in accordance with their views. They were content to take the chance of this. They appealed to the High Court upon the merits of the case without taking the present objection to the jurisdiction; and the High Court eventually decided against them. They then almost contemporaneously commenced two different proceedings,—one in the Court at Ghazipore, and one in the Court at Shahabad. They made an application to the Judge at Ghazipore to set aside the execution proceedings, upon the ground that the certificate, by which they were transmitted to the Subordinate Judge of Shahabad under s. 284 of the Code, had been illegally issued by the Subordinate Judge of Ghazipore, and that those proceedings ought to have been held before the District Court at Ghazipore which passed the decree. In the Court at Shahabad they brought this present

suit; and the claim made in their plaint was not to set aside the execution proceedings, upon the ground that they were without jurisdiction, but on the contrary, admitting the jurisdiction of the Shahabad Court, they complained that the proceedings had been carried out in certain respects contrary to the intention and directions of the Sudder Court at Agra. The defendant's answer (*inter alia*) to that plaint was, that the matters regarding which the plaintiffs now sued could only be determined in the course of execution of the decree under s. 11 of Act XXIII of 1861, and that they had taken a wrong course in bringing this suit. After the written statement had been put in, the issues were settled. They were framed so as to raise the points relied upon by the parties in the plaint and written statement, and no suggestion was made at that time that the execution proceedings were void or illegal. But on the 6th of August 1877, it appears that an application was made by the plaintiffs to have another issue framed for the purpose of raising the question whether those proceedings were not altogether void, upon the ground that the Shahabad Court had no jurisdiction to entertain them. The Subordinate Judge, however, considered that the application was one which in the exercise of his discretion he might grant or refuse, and he accordingly refused it. It is clear that what induced the plaintiffs to make this application on the 6th of August, was that they had received intimation that two days before, on the 4th of August, upon the application which they had made to the Court of Ghazipore, the Judge there had decided in their favor that the certificate had been illegally sent to the Court at Shahabad. In this suit then the Subordinate Judge at Shahabad, having refused the plaintiffs' application to add an issue, proceeded to try the case, and decided the other issues against the plaintiffs. The plaintiffs have now appealed, and the only points which they raise, are—*first*, that the Subordinate Judge ought to have allowed the additional issue to be framed; and *secondly*, that even under the issues as fixed, the plaintiffs had a right to raise the question of jurisdiction. We have heard both sides very fully upon these points, and we are clearly of opinion that the Judge in the Court below had a right, in the exercise of his

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discretion, to grant or refuse the application, and that he was quite justified under the circumstances in exercising it as he did.

It has been strongly pressed upon us, that, under s. 141 of the Code of Civil Procedure, the addition of the proposed issue here was an amendment of the record, which the Court was bound to make, upon the ground that it was necessary for determining the real question or controversy between the parties.

The power of amending issues, which is given to the Courts of this country by s. 141 of the Code, is almost in the same language as the power of amendment given to Judges in England by s. 222 of the Common Law Procedure Act, 1852; and it has been held here, as well as in the English Courts, that a Judge is not bound to make such amendments, except for the purpose of more effectually putting in issue and trying the real question or questions in controversy as disclosed by the pleadings on either side; see *Bizjie Bebee* v. *Monohur Doss* (1), and in England, see *Wilkin* v. *Reed* (2), *Lucas* v. *Tarleton* (3). The pleadings here consist of the plaint and written statements, and unless a Judge can see that the issue proposed to be added or amended will raise some point which is disclosed by the plaintiffs' pleadings on the one hand, or by the defendant's on the other, he is clearly not bound under the obligatory words of the latter part of the section to allow the amendment. It is true that in some cases the Courts in the exercise of their discretion have been allowed, under special circumstances, to go beyond this line, and when no injustice would be done to either party, to allow issues to be raised upon matter which does not strictly come within the proper scope of the pleadings; but then the amendment must be made under the first part of the section, which apparently gives a discretion to the Judge, and not under the obligatory words of the latter portion of the section. Now in this case it is quite clear, that the point sought to be raised by the plaintiffs in the proposed issue was never suggested in the plaint, and that it never occurred to the plaintiffs till after the issues had been fixed for trial, and until they had heard of the decision of the Court of Ghazipore. It was an entirely new issue upon an entirely new point; and if it could be

(1) 2 Ind. Jur., N. S., 118. (2) 15 C. B., 192. (3) 3 H. & N., 116.

raised at all, the case was clearly one of those in which it was for the Judge in his discretion to allow the amendment or not. Then, considering that for ten years past the appellants had been submitting to the jurisdiction of the Shahabad Court, and taking part in carrying out the execution proceedings there; considering also that when they appealed the case to the High Court in 1876, they never thought of raising this question of jurisdiction; considering also that in the present suit they never thought of raising this issue until they had heard the opinion which had been expressed by the Judge of Ghazipore, we think that the Judge acted very rightly, after this long series of litigation, in not allowing the plaintiffs at that stage of the case to raise a point which after all was foreign to the merits. We are now asked on appeal to say that the Judge has exercised his discretion improperly, and to allow the plaintiffs to raise this issue. We are clearly of opinion that if we have a right to interfere at all with the exercise of the Judge's discretion, we ought certainly not to do so in this instance, and the more so, perhaps, because we are now informed that the Allahabad High Court has reversed the decision of the Judge of Ghazipore. We also think it perfectly clear that upon the issues already raised, it was not open to the plaintiffs to raise the question of jurisdiction.

The appeal is dismissed with costs.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

SOOPROMONIAN SETTY *v.* HEILGERS.

1879
May 16.

Principal and Agent—Undisclosed Principal—Liability of Agent—Contract Act (Act IX of 1872), s. 230—Evidence Act (Act I of 1872), s. 92—Charter-Party—Employment of Stevedores to Load and Discharge Cargo.

The defendants let a steamship to the plaintiff for a certain term, and signed a charter-party "by and on behalf of the owners of the steamship A." The charter-party was a time charter to commence on arrival at Calcutta, and to terminate at one of certain ports; the steamer in the interim