

## APPELLATE CIVIL.

Before Mr. Justice Wilkinson and Mr. Justice Handley.

KHADIR MOIDEEN (DEFENDANT No. 5), APPELLANT,

v.

RAMA NAIK AND ANOTHER (PLAINTIFFS NOS. 1 AND 2), RESPONDENTS.\*

*Limitation Act—Act XV of 1877, s. 22—Joint contractors—Civil Procedure Code—Act XIV of 1882, s. 32—A party to a contract joined as defendant and subsequently made a plaintiff.*

Limitation Act, s. 22, is not applicable to cases where the court of its own motion orders that a party to a contract originally joined as defendant be made a plaintiff under Civil Procedure Code, s. 32.

SECOND APPEAL against the decree of H. H. O'Farrell, District Judge of Trichinopoly, in appeal suit No. 104 of 1890, affirming the decree of M. A. Tirumala Chariar, District Munsif of Kullitalai, in original suit No. 212 of 1889:

Suit to redeem a mortgage. The District Munsif passed a decree as prayed, which was affirmed on appeal by the District Judge. This second appeal was preferred by defendant No. 5.

The facts of this case appear sufficiently for the purposes of this report from the following judgment.

*Ramachandra Rau Saheb and Narasimha Chariar for appellant.  
Parthasaradhi Ayyangar for respondents.*

JUDGMENT.—The facts of the case are as follows. In October 1877 the first defendant, the father of defendants 2 and 3 and brother of fourth defendant, borrowed a sum of Rs. 200 from Subba Naick, the brother of the two plaintiffs and of sixth defendant, on the security of certain immovable property of which fifth defendant has since become the purchaser. Subba Naick having died, the plaintiffs instituted the present suit to recover two-thirds of the amount due on the mortgage; as the other claimant, sixth defendant, would not join, they made him sixth defendant and relinquished one-third of the amount due. During the progress of the suit the sixth defendant was, by order of the Court, made third plaintiff, but at the time his right to recover was barred. Two contentions were raised by defendants 1-5: first, that the suit

\* Second Appeal No. 300 of 1892.

was not maintainable, second; that the debt had been satisfied. Both were overruled and plaintiffs 1 and 2 obtained a decree. The fifth defendant appeals.

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By section 22 of the Limitation Act it is provided that "when, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party." No doubt it has been held by both the High Courts of Bombay and of Calcutta that a suit by several persons, as to some of whom the right to sue is barred, is virtually a suit by the other plaintiff or plaintiffs alone, and that if a suit so framed will not lie, as it will not in the case of a joint cause of action, there can be no other course than to dismiss the claim; but in the cases so decided, *Ramsebuk v. Ramlall Koondoo*(1) and *Kauidas Kevaldas v. Nathu Bhagvan*(2), the suit was brought by only one of the joint contractors, the other joint contractors not being parties to the suit. But in the present case the absence of the sixth defendant is satisfactorily accounted for. He was unwilling to join his brothers in the suit. They had therefore no option but to make him a defendant and to relinquish his share of the claim. There is no authority for holding that section 22 of the Limitation Act applies when the Court of its own motion acts under section 32, Civil Procedure Code, and orders that a defendant be made a plaintiff. All that was held in *Krishna v. Mekamperuma*(3) was that "the procedure of the District Judge in transforming certain defendants into plaintiffs was under the circumstances of the case irregular." No doubt the whole of the mortgage debt is due to the persons claiming under the original mortgage jointly and not severally and a person entitled to a moiety of the mortgage debt cannot demand to be paid that moiety (*Bishan Diab v. Manni Ram*(4)), but that ruling does not apply to a case like the present, where all the parties are before the Court and the matter can be finally dealt with by the decree in the suit.

On the merits also the second appeal must fail. The Judge has found as a fact that the debt was not discharged and it is not contended that he has misconstrued the evidence.

The second appeal therefore fails and is dismissed with costs.

(1) I.L.R., 6 Cal., 815.

(2) I.L.R., 7 Bom., 219.

(3) I.L.R., 10 Mad., 44.

(4) I.L.R., 1 All., 297.