APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

1904.
November 22, 25, 28, 29, 30.
December 5.

LAKSHMAKKA AND ANOTHER (DEFENDANTS NOS. 1 AND 3), APPELLANTS,

v.

NAGI REDDI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 26, 53—Amendment of plaint—Amendment may be allowed when such amendment does not raise a case essentially different from that first set up—Mis-joinder of parties and causes of action.

Where in a suit brought by four members of a Hindu family against the widow of a fifth to recover the property of the deceased by right of survivorship, the plaint contained the further allegation that one of the plaintiffs was the adopted son of the deceased, and the defendant pleaded division and also denied the adoption, it is open to the Court on finding the adoption proved, to pass a decree in favour of the adopted son alone, even in the absence of a prayer in favour of such adopted son, without trying the question of division between the plaintiffs and the husband of the defendant. Such a course in no way contravenes the provisions of section 53 (c) of the Code of Civil Procedure, as the object of the proviso to that section is only to prohibit amendments which involve the trial of issues substantially different from those raised by the original pleadings.

Where the finding on one of the issues negatives any right in the defendant to hold the properties on the case set up by such defendant, it is not open to such defendant to insist on the trial of other issues, , can only affect the rights of the plaintiffs *inter se* and probably other rights defendant and plaintiffs not in issue in the suit.

Semble: A plaint will not be bad as contravening section 26 of the Code of Civil Procedure because it prays for a decree in favour of all the plaintiffs on certain allegations, or in the alternative, in favour of one of them, if other allegations should be proved.

Subrahmanyam v. *Venkamma*, (I.L.R., 26 Mad., 627), referred to.

IN this suit the plaintiffs alleged that they and the deceased husband of the first defendant were members of an undivided Hindu family. They sued to recover property in the possession of the first defendant and her agent, the second defendant, on the ground that the property belonged to the joint family and had

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* Appeal No. 59 of 1902, presented against the decree of W. M. Tho Esq., District Judge of Kurnool, in Original Suit No. 3 of 1900 (*vide* A Nos. 60 and 61 of 1902).

devolved on the plaintiffs by right of survivorship. It was further alleged in the plaint, that subsequent to the death of her husband, the first defendant adopted the fourth plaintiff. The plaint prayed for a decree in favour of all the plaintiffs, but contained no alternative prayer for a decree in favour of the fourth plaintiff, if the alleged adoption was proved. The first defendant contended that the properties were the separate properties of her husband, who was divided from plaintiffs and that she did not adopt the fourth plaintiff.

The first issue was, whether the family was divided or undivided, while the second was, as to whether the fourth plaintiff had been adopted by the defendant. On the second issue the District Judge found in favour of the adoption and struck out the first issue as unnecessary. He passed a decree in favour of the fourth plaintiff alone.

First and third defendants appealed to the High Court.

Dr. *Swaminadhan* and *V. Krishnaswami Ayyar* for appellants.

P. R. Sundara Ayyar and *A. S. Balasubrahmania Ayyar* for respondents.

JUDGMENT.—According to the plaint the claim was for the recovery of the property in dispute in the joint right of four plaintiffs, the first plaintiff being the uncle of the other three. It was also alleged that the fourth plaintiff who is a minor had been adopted by the first defendant as son to her deceased husband Pedda Nagi Reddi, first cousin of the first plaintiff, with the assent of that plaintiff. The case of the plaintiffs was that they, and the deceased Nagi Reddi were members of an undivided family, while the first defendant contended that her husband had become divided from them. Among others, issues were raised as to whether Nagi Reddi and the plaintiffs were the members of an undivided family and as to the alleged adoption of the fourth plaintiff. At the trial, the District Judge refrained from deciding the question of division or non-division, and being satisfied that the adoption was true gave a decree in favour of the fourth plaintiff only. In effect he proceeded to deal with the case on the footing that the plaint was to be treated as amended, as one by the fourth plaintiff only. It was contended before us that this procedure was opposed to section 53 of the Code of Civil Procedure and illegal. No doubt the proviso to that section states that no amendment should be allowed "so as to convert a suit of one character into a suit of another and

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inconsistent character." In our opinion this provision was intended to ensure due observance of the well-known rule "*judicis est judicare secundum allegata et probata.*" The words of the proviso relied on should be understood as intended to prevent a case being raised which would involve the trial of issues essentially different from those that would have risen for the determination of the real contest between the parties with reference to the substance of the pleadings as originally framed. In other words the proviso was meant to guard against parties being taken by surprise by the starting of new cases in the progress of litigation and prejudiced by the determination of issues, without their having had full and proper opportunity of adducing all the evidence in respect of them and of raising all available legitimate defences. Tested by these principles the course adopted by the Judge in this case does not appear to be open to objection; for the real question between the plaintiffs, on the one hand and the first defendant on the other, was the issue as to adoption. If the adoption is proved, the first defendant has no right to retain possession of the properties and the question whether she should be directed to surrender them to all the plaintiffs or only to the fourth plaintiff is one in which she is not in truth interested. Her own case was that her husband was divided and in that view, on the adoption being proved the decree to be made should properly be in favour of the fourth plaintiff only. The parties really interested in agitating the question of non-division are plaintiffs Nos. 1 to 3. They acquiesced in the course adopted by the Judge and have not preferred any appeal because a decree was not given in their favour also. Such being the case, it seems clear that the omission to try the issue as to non-division is one about which the first defendant has no real ground for complaint. No doubt the question of division or non-division may be relevant as between the first defendant on the one hand and the plaintiffs on the other in other circumstances; as for instance, if it should become necessary to determine whether the fourth plaintiff's interest, in the event of his demise, would pass to the other plaintiffs or some of them by survivorship or to the first defendant as heir. The question would also be more or less relevant if the first defendant should bring forward a claim for maintenance. But these are contingencies which we are not called upon to deal with now and of course it would be prejudicial to the interest of the infant fourth plaintiff to involve him in an enquiry relating to

matters arising between him and third parties who are content to leave those matters for adjudication in the future, if necessary. So with reference to any question about the guardianship of the fourth plaintiff the status of the plaintiffs *inter se* might have a bearing; but as the first defendant has repudiated the alleged adoption altogether she could hardly put forward any right to be recognised as his guardian.

Our attention was drawn on behalf of the appellants to a number of authorities with reference to this question of amendment. In nearly all of them, the point considered was, whether with reference to the facts of that particular case the amendment then for decision was appropriate. None of the authorities relied on will be found to be in conflict with the view which we take of the proviso to section 53 of the Code of Civil Procedure. Nor is it necessary for us to express any decided opinion with reference to another point also urged at length on behalf of the appellants, viz., had the plaint been framed in the alternative, that is to say, praying for a decree in favour of the plaintiffs Nos. 1 to 4 as undivided members and, if the Court should find that they were not undivided members, then a decree in favour of the fourth plaintiff only, whether such frame of the plaint would be unwarranted by section 26 of the Code for the effect of the amendment involved in the decision of the Judge is not to convert the plaint into such an alternative plaint. As at present advised, however, it seems to us such a plaint would have been admissible under that section according to the principle of the decision of the (Full Bench) in *Subramanyam* v. *Venkamma*(1).

Passing to the merits, we have no hesitation in holding that the adoption of the fourth plaintiff has been established. The evidence on the point is all one way. The gift and acceptance of the boy have been clearly proved and there is no reason whatever for thinking that in executing the document referring to the adoption and subsequently admitting the adoption before the public officials, the first defendant acted otherwise than as a free agent. It was not until some weeks after this adoption took place that she changed her mind, being probably prompted thereto by the question raised by the Sub-Registrar as regards the validity of the instrument of adoption executed by her on the ground of its having been engrossed on an unstamped paper as well as by the fact that the

(1) I.L.R., 26 Mad., 627.

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Tahsildar ordered the registration of the lands in the names of all the plaintiffs instead of in the name of the fourth plaintiff only, as was desired by her. In short, her own evidence fully proves the fourth plaintiff's case.

As regards the claim by the first defendant in respect of some of the jewels stated to be her streedhanam we see no sufficient reason to differ from the District Judge in holding them to be family property.

So far as the third defendant, who is one of the appellants in appeal No. 59 of 1902, is concerned the decree as against him cannot be upheld as there is absolutely nothing against him. He must be exonerated from all liability to the fourth plaintiff, and the suit as against him dismissed but without costs.

As to the appeal No. 60 of 1902 also, we agree with the District Judge that the appellant has failed to prove that the money and property taken charge of from the first defendant's house in which he, her servant was lodging, was his own or his wife's. His admitted circumstances strongly argue against the probability of his being able to amass Rs. 2,000 and jewels worth over Rs. 300. The fact that the cash was buried in the wall of the house is not as contended by his counsel, a circumstance in his favour but against him, implying as it would *primâ facie* that the property was hidden there by the owner of the house who is proved to have similarly secured property in another house, the one occupied by herself.

In appeal No. 61 of 1902 also by the second defendant the appellant's claim must be disallowed. No doubt she had been living with her daughter, the first defendant. And it is not unlikely she had some property of her own with her; but the properties claimed are such as she should have been able to prove more satisfactorily than she has done were they in truth hers. If, as alleged by her a large sum of Rs. 4,000 had been secured under ground along with that of her son-in-law, the deceased Nagi Reddi it is likely that some voucher or proof would have been obtained by her. Her allegation that she had a thousand rupees worth of grain also mixed up with that of her daughter is highly improbable and is unsupported by any evidence worth the name. As regards the jewels claimed by her, with the exception of the one awarded by the District Judge, the weight as stated in the inventories prepared by the officer of Court deputed to take charge of them does not tally with the weight shown in the partition-deed entered into by her

with her husband's co-parceners. She made no attempt in the Court below to throw any doubt upon the correctness of the weight specified in the inventories referred to; and the difference in weight is strongly against the truth of her claim. She admits that about Rs. 3,000 are due to her by persons to whom they have been lent, and since the partition she has acquired a considerable extent of land. And these will account for the money, which she got in the partition, about Rs. 2,500.

Before the District Judge there was a distinct allegation that the first and second defendants and their partisans had removed property of considerable value from their house. It would have been more satisfactory had the District Judge recorded evidence as to the truth of this complaint. But his omission to do so did not prejudice the defendants, and they have not attempted to show that the Judge excluded any evidence which they were desirous of adducing in regard to their ownership of the jewels, etc., claimed to be their own property.

We, therefore, dismiss the appeals except so far as the third defendant is concerned as already stated. The first, second and fourth defendants will pay the costs of their respective appeals. We see no reason to make any order on the memorandum of objections.

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Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

1905. March 16, 17.

PULLANAPPALLY SANKARAN NAMBUDRI (DEFENDANT), APPELLANT,

v.

VITTIL THALAKAT MUHAMOD AND OTHERS (PLAINTIFFS AND FIRST PLAINTIFF'S REPRESENTATIVES), RESPONDENTS.*

Ryotwary tenure—Grant of bed of tidal and navigable river on ryotwary tenure—Power of Government to determine such tenure—Limitation Act XV of 1877, sch. II, art. 149—Decree in the alternative, legality of.

Land forming the bed of a tidal and navigable river is the absolute property of Government. Where Government has for a long time been collecting revenue

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* Second Appeal Nos. 127 and 128 of 1903, presented against the decree of M.R.Ry. T. Krishna Rau, Subordinate Judge of South Malabar at Calicut, in Appeal Suit Nos. 96 and 97 of 1899, respectively, presented against the decree of M.R.Ry. T. V. Anantan Nair, District Munsif, Kutnad, in Original Suit No. 507 of 1897.