

APPELLATE CIVIL.

{Before Mr. Justice Wallis.

AIYATHURAI RAVUTHAN (SECOND DEFENDANT),

APPELLANT,

v.

SANTHU MEERA RAVUTHAN AND ANOTHER (PLAINTIFF
AND FIRST DEFENDANT), RESPONDENTS.*

1907.
November 6.
December
10
1908.
February 11,
25.

Civil Procedure Code, Act XIV of 1882, ss. 26, 28—The words 'same matter' in section 28 wider than the words 'same cause of action' in section 26—Suit sustainable against several defendants if in respect of 'same matter' although in respect of several causes of action.

The words 'same matter' in section 28 of the Code of Civil Procedure have a wider scope than the words 'same cause of action' in section 26 of the Code of Civil Procedure, and a suit against several defendants is not bad for misjoinder if the suit, although in respect of different causes of action against different defendants is in respect of the same matter.

The English decisions on the scope of Order XVI, Rule 4, are not applicable to cases of joinder of defendants under section 28 of the Code of Civil Procedure.

Muthappa Chetty v. Muthu Palani Chetty, (I.L.R., 27 Mad., 80), not followed.

A suit by the transferee of a mortgage for sale against the mortgagor, in which is also included a claim for damages against the transferor, the original mortgagee, if it should appear that any portion of the mortgage debt had been discharged by the mortgagor before the transfer and so was not recoverable from the mortgagor, is a suit in respect of the 'same matter' within section 28 of the Code of Civil Procedure, and is not bad for misjoinder.

THE facts are sufficiently set out in the judgment.

This case first came on for hearing before Sir Arnold White, C.J., and Benson, J., when the Court delivered the following judgment.

Ramachandra Ayyar for *V. Krishnasami Ayyar* for appellant.

V. C. Desikachariar for first respondent.

K. Baiamukunda Ayyar for second respondent.

JUDGMENT—Sir ARNOLD WHITE, C.J. — In this case the plaintiff alleges that the first defendant executed a mortgage to the second defendant to secure moneys due by the first defendant to the second defendant; that the second defendant assigned the mortgage to the plaintiff; that the plaintiff gave notice of the assignment to the first

* Second Appeal No. 1550 of 1904, presented against the decree of M.R.Ry. M. Visvanatha Ayyar, Subordinate Judge of Madura (West), in Appeal Suit No. 238 of 1904, presented against the decree of M.B.Ry. T.S. Krishna Ayyar, District Munsif of Dindigul, in Original Suit No. 297 of 1908.

defendant and demanded payment, and that the first defendant stated he had paid Rs. 200 to the second defendant. The first defendant's case is that he paid the Rs. 200 to the second defendant before the latter assigned the mortgage to the plaintiff. The second defendant denies this alleged payment. The plaintiff asked for a decree for the amount due under the mortgage and for sale of the mortgaged property as against both defendants.

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The District Munsif held the suit was bad for misjoinder. The Subordinate Judge held there was no misjoinder. The plaintiff is, of course, not entitled to the relief for which he asked, viz., a mortgage decree against both defendants; but the lower Appellate Court gave him a decree on the mortgage as against the first defendant and a decree for Rs. 200 as against the second defendant.

Although the plaintiff does not expressly claim the Rs. 200 in the alternative from the first or second defendant, in substance his claim is for a mortgage decree for the amount mentioned in the mortgage as against the first defendant if the Rs. 200 has not been paid off, and in the alternative, if the Rs. 200 has been paid off, for a mortgage decree for the amount mentioned, less the Rs. 200, as against the first defendant, and for Rs. 200 by way of damages as against the second defendant.

The question of misjoinder turns on whether the plaintiff's right to relief is alleged to exist as against the two defendants in respect of the 'same matter' within the meaning of section 28 of the Code of Civil Procedure. The plaintiffs' alleged right of relief as against the first defendant is a right of relief based on the mortgage. His right of relief as against the second defendant would seem to be damages for the breach of an implied covenant that the debt due on the mortgage was outstanding at the date of the assignment, or damages for the fraudulent suppression of the fact that Rs. 200 due on the mortgage had been paid off. In *Muthappa Chetty v. Muthu Palani Chetty*(1), it was held that on the true construction of section 28, two distinct causes of action could not be joined against two defendants in one suit, and I see no reason to doubt that that decision was right. If, in the present case, the causes of action alleged against the first defendant is distinct from that alleged against the second, I think the suit is bad for misjoinder. As regards *Meyappa Chetty v. Periannan Chetty*(2), which was cited to

(1) I.L.R., 27 Mad., 80.

(2) I.L.R., 29 Mad., 50.

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us, speaking for myself, I should find some difficulty in following it. It seems to me that in that case there were two distinct causes of action against two defendants. In *Serajul Huq Khan v. Abdul Rahaman*(1), there would seem to have been, as the Court pointed out, only one cause of action, viz., the dispossession of the plaintiff.

I think the District Munsif was right and I would allow the appeal and restore the decree of the District Munsif.

BENSON, J.—The facts being as stated by the learned Chief Justice, I am of opinion that relief is sought as against both defendants in regard to the same matter, and that both defendants may be sued in one suit under section 28, Civil Procedure Code, and judgment may be given against either or both according to their respective liabilities.

One chief object of the section is to avoid multiplicity of suits, and the risk of inconsistent decisions in several suits arising out of the same matter, that is, as I take it, out of the same transaction or connected series of transactions constituting the cause of action against each defendant. The present case indicates how easily the Courts might be led to give inconsistent decisions if the pleas of the two defendants were tried separately and on different evidence in each suit. It is obviously convenient and in the interest of justice to try the whole matter in one suit. The case is similar in principle to that of *Mejappa Chetty v. Periannan Chetty*(2), from which the case of *Muthappa Chetty v. Muthu Palani Chetty*(3) is distinguished.

There is in my opinion no misjoinder and the second appeal must be dismissed with costs.

Sir ARNOLD WHITE, C.J.—Under sections 575 and 587 of the Code Procedure an order is made referring the appeal to a third Judge.

This second appeal coming on for hearing in pursuance of the above order on Tuesday, 11th February 1908, and having stood over for consideration till this day, the Court delivered the following.

JUDGMENT.—In this case, as pointed out in the judgment of the learned Chief Justice, the transferee of a mortgage has brought a suit for sale against the mortgagor, and has joined therewith a claim against his transferor, the original mortgagee, for damages in

(1) I. L. R., 29 Calc., 257.

(2) I. L. R., 29 Mad., 50.

(3) I. L. R., 27 Mad., 80.

case it should appear that any portion of the mortgage debt had been discharged by the mortgagor before the date of the transfer, and so not be recoverable in the present suit from the mortgagor. The question is, is such a joinder of defendants and causes of action permissible? and this again appears to me to depend on the question whether the decision against allowing such a joinder in *Muthappa Chetty v. Muthu Palani Chetty* (1) or the contrary decision in *Meeyappa Chetty v. Periamman Chetty* (2) should be followed. The decision in *Muthappa Chetty v. Muthu Palani Chetty* (1) proceeded upon the authority of English cases, and the chief question in my opinion is, are these cases applicable?

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The law, as to joinder of parties and causes of action embodied in sections 26, 28 and 46 of the Civil Procedure Code, is borrowed, with modifications, from the rules in Orders XVI and XVIII of the Civil Rules of Practice under the Judicature Act. These rules again are largely derived from the provisions of the Common Law Procedure Act, 1852 and the 1858, which modified the rigour of the rules of pleading at Common Law. The history of these changes is lucidly traced in the well-known judgment of Lord Justice Bowen in *Hannay v. Smurthwaite* (3), which was approved by the House of Lords in *Smurthwaite v. Hannay* (4). Sections 26 and 28 of the Civil Procedure Code reproduce the language of Rules 1 and 4 of Order XVI as to joinder of plaintiffs and defendants with this modification that, whereas Rules 1 and 4, as originally framed, provided for the joinder of plaintiffs or defendants in or against whom the right to any relief was alleged to exist, section 26 expressly provides that in the case of joinder of plaintiffs, the relief must be "in respect of the same cause of action" and section 28 that in the case of joinder of defendants, the relief must be "in respect of the same matter." Now it was decided by the House of Lords in *Smurthwaite v. Hannay* (4) under Rule 1, as it originally stood, that plaintiffs could only be joined in respect of the same cause of action, and that the Rule did not permit several causes of action by several plaintiffs to be joined against the same defendant; that is to say, Rule 1 was interpreted as confined to cases in which relief was sought "in respect of the same cause of action," so that the introduction of the words "in respect of the

(1) I.L.R., 27 Mad., 80.

(3) (1893), 2 Q.B., 412.

(2) I.L.R., 29 Mad., 80.

(4) (1894), A.C., 494.

AIYATHURAI same cause of action " into section 26 did not really make any
 RAVUTHAN difference, and therefore English decisions on Rule 1 are appli-
 2. cable to cases of joinder of plaintiffs under section 26. It does
 SANTHU not, however, follow that English decisions as to rule 4 are
 MEERA applicable to cases of joinder of defendants under section 28.
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Although the decision in *Muthappa Chetty v. Muthu Palani Chetty* (1) may perhaps be supported on the ground that the facts in that case were not such as to admit of the joinder of defendants there attempted on any view of section 28, yet the decision proceeds on the authority of *Saddler v. Great Western Railway Company*(2), in which it was held by the House of Lords that a plaintiff could not, under rule 4, join separate cause of action against different defendants in one suit. With great respect, I am of opinion, that English decisions on the scope of Rule 4 are not necessarily applicable to cases in India coming under section 28. These decisions treat Rule 1 and Rule 4 as not concerned with joinder of causes of action at all, but merely with joinder of parties. The fact, however, that under the Civil Procedure Code, joinder of plaintiffs is only permitted when the relief is claimed in respect of the same cause of action, while in the case of defendants joinder is permitted when the relief is claimed in respect of the same matter, goes, in my opinion, to show that it was not intended to restrict the joinder of defendants to cases in which relief is sought in respect of the same cause of action, and, if this had been the intention, the words "in respect of the same cause of action" would have been used in section 28 as well as in section 26. The use of the less definite words "in respect of the same matter" in section 28 would seem to show that it was intended to allow joinder of defendants not only when relief was sought in respect of the same cause of action, but also when relief is sought in respect of separate causes of action, against the different defendants so long as they all arise "in respect of the same matter." The inconveniences of allowing defendants only to be joined in respect of the same cause of action in the strict sense, and the consequent multiplicity of suits and failure of justice that must often result, are forcibly pointed out by Lindley, M. R., in *Frankenburg v. Great Horseless Carriage Company* (3), where the Court of Appeal put a liberal

(1) I.L.R., 27 Mad., 80.

(2) (1896), A.C., 450.

(3) (1900), 1 Q.B., 504.

construction upon the term "cause of action" for the purpose of avoiding such inconveniences. Any other decision would, it is there pointed out, have revolutionised the practice of the Chancery Division. This, in my opinion, explains why the words "in respect of the same cause of action" in section 26 are replaced by "in respect of the same matter" in section 28, the intention being that claims to relief might be joined in one suit against several defendants, whether they constituted separate causes of action or not, so long as they were "in respect of the same matter." That the words "in respect of the same matter" in section 28 are wider than the words "in respect of the same cause of action" has been pointed out by Sir Bhashyam Ayyanagar in *Damparaboyina Gangi v. Adalata Ramaswami*(1). If section 28 is wider than section 26, it is also wider than Order XVI, Rule 1, as it originally stood, and is also wider than Rule 4 which has been held to be as restricted as Rule 1 with regard to joinder of causes of action. The conclusion follows that English decisions under Rule 4 are not applicable to section 28, Civil Procedure Code, as the scope of the section is wider than that of the rule. The decision in *Muthappa Chetty v. Muth Palaniu Chetty*(2) proceeds on the view that the English decisions, as to the scope of Rule 4, must govern cases under section 28, Civil Procedure Code. If this is not so, and the English decision on Rule 4 can be treated as inapplicable, the present case presents no difficulty, and there is a uniform course of decisions in favour of allowing joinders such as that in the present case, so long as the relief is sought "in respect of the same matter." *Buddree Doss v. Hoare, Miller & Co.*(3), *Rajothur Chowdhry v. Kalikristna Bhatta Charjya*(4), *Madan Mohun Lal v. Holloway*(5), which two cases closely resemble the present; *Meyappa Chetty v. Periamnan Chetty*(6) and *Mowji Monji v. Kuvorji Nanaji*(7).

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For these reasons I agree with the conclusion arrived at by Benson, J., and dismiss the second appeal with costs. The second defendant must pay the first defendant's separate costs of the appeal in this Court.

(1) I.L.R., 25 Mad., 736 at p. 745.

(3) I.L.R., 8 Cal., 171.

(5) I.L.R., 12 Cal., 555.

(7) I.L.R., 31 Bom., 516.

(2) I.L.R., 27 Mad., 80.

(4) I.L.R., 8 Cal., 963.

(6) I.L.R., 29 Mad., 50.