Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Macpherson.

HARANUND MOZOOMDAR (PLAINTIFF) *v.* PROSUNNO CHUNDER BISWAS AND OTHERS (DEFENDANTS.)* 1883 *March* 30.

Misjoinder—Parties—Suit to recover property sold in execution of decree.

Certain properties were sold to *A* by private contract. Subsequently the properties were attached in execution of a decree against *A's* vendors and sold in execution to various purchasers. *A* instituted a suit against his vendors, the decree-holders, and the purchasers, to set aside the execution sale.

Held, that the suit was not defective by reason of misjoinder of parties. *Rajaram Tewari* v. *Luchman Prasad* (1) distinguished.

THE plaintiff in this case alleged that the defendants 4 to 6 were the owners of certain lands, and that on the 1st Bysack 1286 (13th April 1879) they sold these lands to him; that after sale the defendants 1 to 3, in execution of a decree against the defendants 4 to 6, attached the lands and put them up to sale; that the plaintiff preferred a claim which was disallowed, and the properties were sold and purchased separately by the defendants 7 to 11. The plaintiff now sued to set aside the sale in execution, and to establish his right to the lands by virtue of the conveyance to him of the 1st Bysack 1286. The defendants 7 to 11 contended that the properties having been separately purchased at auction by different individuals, the plaintiff should have brought separate suits for the property purchased by each of them, and that the suit was wrongly framed. Both the lower Courts, on the authority of the case of *Rajaram Tewari* v. *Luchman Prasad* (1), dismissed the suit.

The plaintiff appealed to the High Court.

Baboo *Mohini Mohun Roy* for the appellant.

Baboo *Rajendro Nath Bose* for the respondents.

* Appeal from Appellate Decree No. 1981 of 1881, against the decree of F. W. U. Peterson, Esq., Judge of Jessore, dated the 12th August 1881, affirming the decree of Baboo Prosunno Coomar Ghose, Munsiff of Magoora, dated the 24th January 1881.

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The judgment of the Court (GARTH, C.J., and MACPHERSON, J.) was delivered by

GARTH, C.J.—We think it clear that the lower Courts have made a mistake in this case.

They have dismissed the suit upon the ground that there was a misjoinder of defendants; or, in other words, that instead of bringing one suit against all the defendants, Nos. 7 to 11, who purchased at the execution sale different portions of the property in question, they ought to have brought five different suits, one against each of those defendants.

The plaintiff's case is, that before the execution sale, under which the defendants 7 to 11 purchased these properties, they were purchased by him from the execution-debtors by private contract, and that he took possession of them. These properties were afterwards attached in execution under a decree obtained against the judgment-debtors by the defendants Nos. 1 to 3, whereupon the plaintiff preferred a claim to the whole property in the execution proceedings, but the Court decided against him; and so it was sold and bought by the defendants 7 to 11.

The plaintiff then brought this suit against the defendants 7 to 11 to set aside the execution sale, and to establish his right to the property under the private sale to himself; and as the judgment-creditors and the judgment-debtors were both interested in the subject of the suit, he very properly made them parties.

The only point raised by the defendants upon the merits is, that the alleged sale to the plaintiff was not *bonâ fide*, but void as against defendants Nos. 1 to 3 and 7 to 11; and this, so far as we can see, is really the only question in the cause. But the defendants have raised the preliminary point, upon which the suit has been dismissed by the Courts below, that the plaintiff, instead of bringing one suit, should have brought five separate suits one against each of the defendants 7 to 11.

In support of this objection a Full Bench case has been referred to, *Rajaram Tewari* v. *Luchman Prasad* (1), in which Sir Barnes Peacock in giving judgment observed upon the inconvenience of one suit being brought against several defendants, *each of whom*

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had a distinct and separate interest, and each of whose cases depended upon different points and different evidence.

That case appears to us to be very clearly distinguishable from the present; and in order to understand the distinction, it is only necessary to pay a little attention to the Full Bench judgment. It will be observed that the defendants in that case claimed under different titles, and that their respective cases depended upon wholly diverse evidence and considerations.

The case of each defendant was a separate contest. There was therefore ample reason for the remark of Sir Barnes Peacock at the close of the case: "The necessity of separating all these different cases in delivering judgment in appeal shows the difficulty and annoyance to which defendants must be put by being joined in one action in respect of different causes of action, to set aside various deeds executed under different circumstances, and in respect of which they have no common interest."

The present is a case of a totally different character. The plaintiff has but one object, namely, to establish his private purchase as against the sale in execution; and the defendants, who contest his claim, *have but one defence, which is common to them all, viz., that the plaintiff's purchase is invalid.*

The plaintiff might, as a matter of strict law, if he had been so advised, have brought five different suits instead of one, each to try the self-same question; but if he had done so, he would probably have incurred a good deal of blame, and not without good reason, for multiplying suits and expense to no good purpose.

There is also another consideration in this case, which does not appear to have occurred to either of the Courts below, namely, that by dismissing this suit upon the preliminary point they were depriving the plaintiff for ever of trying his case against the defendants upon the merits. If, as the defendants contend, the plaintiff had but one year after the order in the execution proceedings to bring his suit, the effect of the dismissal of the suit upon this technical ground would have been to bar the door of justice against him for ever.

Courts of law should be especially careful in dealing with technical objections to see what effect their decision will have in defeating substantial justice.

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The case must go back to the Court of first instance for retrial upon its merits.

The respondents must pay to the appellant the costs of the proceedings in all the Courts so far as they have gone, inasmuch as it was at their instance that the preliminary objection has been allowed.

Appeal allowed.

PRIVY COUNCIL.

P. C.* 1882 *November* 17. *December* 9.

JANOKI DEBI (PLAINTIFF) *v.* GOPAL ACHARJIA GOSWAMI AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Fort William in Bengal.]

Hindu Law—Endowment—Succession to the management of a religious endowment, as sebait—Usage of the institution.

On a claim to succeed to the management, as sebait, of a religious institution endowed with property, it was contended that in the absence of prescribed rule, or of established usage, succession took place according to the ordinary rules of the Hindu law of inheritance, where the sebait led a family life.

Held, that, where owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower, it must be proved by evidence what is the usage. In the present instance the usage did not support the claim; and, upon the evidence, the claimant, who was out of possession, failed to make a title.

APPEAL from a decree of the High Court (29th January 1877), upholding a decree of the Subordinate Judge of Manbhoom (31st August 1874), whereby appellant's suit was dismissed.

The appellant claimed to succeed to the management of a religious endowment, as sebait, and set up a title relying on the application of the ordinary rules of the Hindu law of inheritance.

Whether those rules were applicable to the succession to the management of this institution, and also, whether a title under them had been made out, were questions decided, among others, in the judgment of the High Court (1), forming the subject of this appeal.

(1) *Janokee Debia* v. *Gopal Acharjea*, I. L. R., 2 Calc., 365.

Present: LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.