

APPELLATE CIVIL.

*Before Mr. Justice Krishnan Pandurai and Mr. Justice
Curgenvven.*

A. M. RAMASAMI CHETTIAR (SECOND PLAINTIFF),
APPELLANT,

1933,
August 2.

v.

RENGAN CHETTIAR AND FIVE OTHERS (DEPENDANTS
ONE TO FIVE AND FIRST PLAINTIFF), RESPONDENTS.*

*Civil Procedure, Code of (Act V of 1908), O. XXIII, r. 1, sub-
rule (4)—One of several plaintiffs—Right of, to withdraw
from suit.*

A Court has power to refuse to allow one of several plaintiffs to withdraw from a suit if such a course is not consented to by the remaining plaintiff or plaintiffs and would be prejudicial to his or their interests.

APPEAL against the decree of the District Court of West Tanjore at Tanjore, dated 7th February 1927, in Original Suit No. 9 of 1926.

B. Sitarama Rao and S. R. Muttuswami Ayyar for appellant.

K. S. Sankara Ayyar for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by CURGENVEN J.—The first plaintiff is the Zamin- CURGENVEN J.
dar of Naduvasal. He succeeded his father, who died on the 18th August 1923. On the 22nd November 1920 the father and son joined in executing a sale deed of the suit property for a sum of Rs. 30,000. After the first plaintiff had succeeded to the estate, on the 14th August 1926, he mortgaged the same property to the second

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plaintiff. Both plaintiffs then brought the present suit for a declaration that the sale-deed of the 22nd November 1920 was invalid and inoperative beyond the father's lifetime, under the terms of the Impartible Estates Act (II of 1904). The defendants, who were the vendees, filed their written statements and the suit was posted for settlement of issues when the first plaintiff applied to withdraw from the suit. This was objected to by the second plaintiff, the mortgagee, but was eventually allowed. We have been unable to find any order upon the application to withdraw itself, but the result is so stated in the learned District Judge's judgment. Having thus allowed the first plaintiff to withdraw, the question was considered whether the second plaintiff was entitled by himself to continue the suit and was answered in the negative. This latter question will only arise if we confirm the order allowing the first plaintiff to withdraw.

Under sub-rule 1 of rule 1 of Order XXIII, Civil Procedure Code, "the plaintiff" may at any time after the institution of the suit withdraw it as against all or any of the defendants; sub-rule (2) enables the Court to permit the plaintiff to withdraw from a suit with liberty to institute a fresh suit; and sub-rule 3 relates to withdrawal without such permission. Sub-rule 4 runs as follows :—

"Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to withdraw without the consent of the others."

The use of the word "rule" supports the view that this qualification applies not only to sub-rules 2 and 3 but also to sub-rule 1. On the

other hand, it has been pointed out that, under sub-rule 1, no permission of the Court is necessary, so that sub-rule 4, which contemplates an operation requiring such permission, is not suitably worded to apply to a withdrawal under sub-rule 1. There is some authority for the view that sub-rule 4 does not apply to sub-rule 1. It was so held in *Mohamaya Chowdhraïn v. Durga Churn Shaha*(1) under the corresponding provision (section 373) of the Code of Civil Procedure, 1877. That was a case of two co-plaintiffs and it was held that one could withdraw without the consent of the other under this provision of the Code. The matter came up in relation to an appeal in *Nilappagouda v. Basangouda*(2) where a similar view was taken by SHAH J. FAWCETT J., while agreeing that in that particular case one of the appellants might be permitted to withdraw and being inclined to accept the construction put upon the rule, reserved his opinion whether apart from the terms of the rule the Court had not power to control a co-plaintiff who desires to withdraw from a suit, if such withdrawal would operate to the prejudice of his co-plaintiffs. He referred to an English case, *Mathews, In re. Oates v. Mooney*(3), in which it was held that one of several co-plaintiffs has no absolute right to withdraw from an action and have his name struck out. The reason of course is that, if one person engages with another or others to institute a suit, he ought not to be allowed to resile if such action will be to the detriment of his co-plaintiff in the conduct of the proceedings. This, we

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(1) (1881) 9 C.L.R. 332.

(2) (1926) 29 Bom. L.R. 299.

(3) [1905] 2 Ch. 460.

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think, is a perfectly valid principle and it finds support in the terms of sub-rule 1 of Order XXIII, rule 1, which says "the plaintiff" may withdraw. Where there are more plaintiffs than one the expression, "the plaintiff", must be read as all the plaintiffs collectively, and not so as to include one only amongst several plaintiffs. This principle has been recognised and acted upon in two cases cited before us; *Tukaram Mahadu v. Ramchandra Mahadu*(1) and *Punnayya v. Lingayya*(2). Irrespective therefore of the question whether sub-rule 4 governs sub-rule 1 we think that the Court can refuse to allow one of several plaintiffs to withdraw if such a course is not consented to by the remaining plaintiff or plaintiffs and be prejudicial to his or their interests. In the present case the first plaintiff, we think, having given the second plaintiff a mortgage, presumably on the understanding that the sale was not binding after the father's death, ought not to be allowed to abandon a suit intended to secure a declaration to that effect. We think accordingly that the withdrawal petition, Interlocutory Application No. 243 of 1926, should not have been allowed and we dismiss it. We further set aside the judgment and decree in Original Suit No. 9 of 1926 and direct the lower Court to restore the suit to file and proceed with it according to law. The respondents will pay the appellant's costs of the appeal.

The appellant will be entitled to a refund of the court-fee paid upon the appeal memorandum under section 13 of the Court Fees Act.

G.R.

(1) (1925) LL.R. 49 Bom. 672.

(2) A.I.R. 1928 Mad. 496.