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bound to do, and this they have done in the present instance. It might perhaps be contended that if the committing Magistrate had stated in his order of commitment that he had been influenced by a certain witness in ordering an accused person to be committed, Counsel for the Crown was in common fairness bound either to examine such witness or to tender him for cross-examination. In the present case the witness Tyrrell was a witness called especially by the Court, and, for reasons which will presently appear, I will say nothing further than this—that after examining him the committing Magistrate placed on record that his evidence was not evidence which induced him to make or led him in any way up to his order of committal. I have said this much in order that Counsel may in future cases have a guide to what I believe ought to be the practice in criminal trials in this Court. As, however, many observations have been made respecting this witness to the jury, I will under the circumstances call him under the special powers given to me under s. 540.

APPELLATE CIVIL.

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June 13.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

IMAM-UD-DIN AND ANOTHER (DEFENDANTS) v. LILADHAR (PLAINTIFF).*

Suit—Non-joinder of parties—Limitation—Act XV of 1877 s. 22—Civil Procedure Code, s. 32—Partnership—Right of surviving partner to sue for debts due to firm.

Except possibly in the case of an assignment by the other surviving partner or partners, it is not competent to one only of two or more surviving partners to sue for a debt due to the firm. *Dular Chand v. Balram Das* (1) and *Gobind Prasad v. Chandar Sekhar* (2) referred to.

A Court may, under s. 32 of the Code of Civil Procedure, add a party necessary to a suit, although it may be obliged by the Indian Limitation Act, 1877, to dismiss the suit after such party has been added. *Ramsewak v. Ram Lall Koondoo* (3) and *Kalidas Keval Das v. Nathu Bhagvan* (4) referred to. *The Oriental Bank Corporation v. Charriol* (5) discussed.

* First appeal No. 7 of 1892 from an order of W. Blennerhassett, Esq., District Judge of Aligarh, dated the 18th December 1891.

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| (1) I. L. R., 1 All., 453. | (3) I. L. R., 6 Calc., 815. |
| (2) I. L. R., 9 All., 486. | (4) I. L. R., 7 Bom., 217. |
| (5) I. L. R., 12 Calc., 642. | |

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *W. M. Colvin*, Babu *Jogindro Nath Chaudhri*, and Maulvi, *Ghulam Muftaba*, for the appellants.

Mr. *Hameed-ullah*, for the respondent.

EDGE, C. J. and TYRRELL, J.—This appeal has arisen in a suit brought on two *hundis*. The promisees of the *hundis* were a firm called Moti Ram, Liladhar. The drawers of the *hundis* are the defendants, appellants here. The suit was originally brought by Liladhar alone. The defendants required inspection of the books of the firm Moti Ram, Liladhar, and from time to time obtained further time for filing their written statement. When they filed their written statement they distinctly raised the objection that all the parties who should necessarily be joined as plaintiffs were not joined. Upon that Jiwa Ram applied to be made a co-plaintiff. Liladhar opposed, but in the result the Subordinate Judge, exercising his powers under s. 32 of the Code of Civil Procedure, made Jiwa Ram a co-plaintiff with Liladhar. Now at the time when Jiwa Ram was made a co-plaintiff any suit on those *hundis* in which it was necessary to make him a party was barred by limitation. The Subordinate Judge found that Jiwa Ram, Liladhar and Moti Ram, who was their father, were joint owners and co-parceners in the firm of Moti Ram, Liladhar, and that on the death of Moti Ram the surviving “co-parceners,” who, on those findings were the surviving co-partners, were Liladhar and Jiwa Ram. Liladhar on his own behalf appealed against the decree of the Subordinate Judge, which had dismissed the suit on the ground of limitation. His grounds of appeal are as follows :—

- (1) The shop of Moti Ram and Liladhar is not ancestral.
- (2) The plaintiff alone is entitled to sue.
- (3) Jiwa Rám has no right of suit.
- (4) Jiwa Rám has been improperly made a plaintiff.

The District Judge on appeal allowed the appeal on the ground that “the defendants did not raise the plea of non-joinder at the

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earliest possible period, nor before the first hearing; consequently they must be taken to have waived it, and the suit can proceed in Liladhar's, plaintiff's, name," and remanded the case under s. 562 of the Code of Civil Procedure. From that order of remand this appeal has been brought. The learned District Judge apparently confounded the right of a defendant to object on the ground of the want of parties with the power of a Judge to act under s. 32 when the fact of the want of parties is brought to his attention by the pleadings or otherwise. The objection as to want of parties was taken by the defendants in their written statement and could not well have been taken before. Section 117 of the Code of Civil Procedure shows that when a written statement has been filed, whether it has been filed at or before the first hearing of the suit, the Court, amongst other things, shall at the first hearing of the suit ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the written statement, if any, of the opposite party and are not expressly or by necessary implication denied by the party against whom they are made. The written statement is the most formal document in which a defendant can raise an objection of want of parties or that he did not make the contract as alleged. In our opinion the objection was in this case taken at the earliest possible opportunity, and the Subordinate Judge was not precluded by s. 34, and by the fact that the objection was taken at the first hearing from making his order under s. 32. Having regard to ss. 64, 68 and 69 of the Code of Civil Procedure the first hearing of a suit might be the earliest opportunity which a defendant might have of raising any question as to want of parties. It is difficult to understand how a defendant could be deemed to have waived an objection for want of parties by not having taken the objection before the first hearing when he had no opportunity of taking his objection until the first hearing, or was until then ignorant of the facts on which the objection depended. Whether under such circumstances a defendant could be deemed to have waived the objection or not, his omission could not deprive the Court of the power to act under s. 32. Now the plaintiff, Liladhar, had taken out a certificate for the purposes of this case which

covered only one half of the amount claimed. The explanation given for that is that he required no certificate so far as his own moiety of the firm's claim is concerned, and that a certificate was only required in respect of the share of his deceased father. This negatives the suggestion that this was not a case of partnership, but only a case of survivorship in a joint family. The meaning of the first ground in the memorandum of appeal in the Court below is not very plain. It had been found that the business or firm of Moti Ram Liladhar was a co-partnership. The second, third and fourth grounds of appeal appear to raise only questions of law on the findings of fact in the first Court. The lower appellate Court did not come to any finding of fact inconsistent with any findings of fact in the first Court. It apparently assumed that they were correct. Two questions arise. The first is, where a contract is made with or a debt incurred to a firm consisting of three partners and one of those partners dies, can a suit be maintained by one of the two surviving partners alone, against the contractors or debtors? In our opinion it cannot, except possibly in the case of an assignment by one of the two surviving co-partners to the other, which is not the case here. It was decided by this Court in the case of *Dular Chand v. Balram Das* (1) that a suit cannot be maintained by one only of the partners of a firm in respect of a cause of action which had accrued to all jointly. It was decided by this Court in *Gobind Prasad v. Chandar Sekhar* (2) that the surviving partner or partners were the persons to sue on a contract made with the firm. In our opinion that is good law, and it was necessary in order that this suit should be maintainable that the surviving partners of the firm of Moti Ram, Liladhar should be plaintiffs in the suit. The next question is what is the effect of one of those surviving partners not having been made a party until after the period of limitation for such a suit had expired? In *Ramsebuk v. Ram Lall Koondoo* (3) and *Kalidas Kevaldas v. Nathu Bhagvan* (4) it was held that where an objection on the ground of non-joinder of parties was taken in proper time by the defendants, and limitation had run so far as the

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persons were concerned who should have been joined as plaintiffs and had not been joined, the whole suit must be dismissed. It appears to us that the same result must follow where a Judge acting under s. 32 of the Code of Civil Procedure adds a person as a necessary plaintiff after the period of limitation for a suit by him alone or with others has expired. S. 22 of the Indian Limitation Act, 1877, would clearly apply to the right of suit of the person so added, and the suit could not be maintained without him. The only case which has been suggested as throwing any doubt on that being the correct view of the law is the case of *The Oriental Bank Corporation v. Charriol* (1). All that that case apparently decided was that limitation does not preclude a Court from acting under s. 32 of the Code of Civil Procedure in adding a person as a necessary party to a suit. It is not obvious how the observations of the learned Judges in that case could be reconciled with the specific provisions of s. 22 of the Indian Limitation Act, 1877, if those observations are to be read as implying that any Court could do otherwise than dismiss a suit which was barred by limitation. The power of a Court to add a party and the duty of that Court to dismiss the suit as barred by limitation are two different questions. Some of the illustrations referred to in that case appear to be cases contemplated in the provisoes to s. 22 of the Indian Limitation Act, 1877. The recent Full Bench case of *Bindeshri Naik v. Ganga Saran Sahu* (2) as to the question of limitation where a party is joined related to the joinder of a party under the provisions of s. 559 of the Code of Civil Procedure.

In our opinion the decree of the first Court was right. We set aside the order under appeal and affirm the decree of the first Court.

Appeal decreed.

(1) I. L. R., 12 Calc. 642.

(2) I. L. R., 14 All. 154.