1903

LEKHRAJ v. GURDAT.

patti. According to the terms of the wajib-ul-arz which governs the rights of the parties, when a sale or mortgage takes place the first right to claim to take over the sale or mortgage rests with the near co-sharers (*shurkae qarib*). If they refuse, the right to buy or take the mortgage comes to other co-sharers of the village who are near in the property (*digar shurkae diha jo qarabat qarib haqiat men rakhte hôn*). If no one out of these two categories chooses to buy or take the mortgage, then the property may be sold or mortgaged to any outsider. The learned Judge has interpreted *shurkae qarib* as referring, not to consanguinity but to vicinage. No doubt in some documents such words do bear that meaning, just as in others they refer to relationship. In the present case I have no doubt they refer to relationship, as, if they did not, the second category would be meaningless. In my opinion the plaintiff in this case comes within the second category and the defendant vendee does not. The result is that I allow the appeal with costs, and, setting aside the decree of the lower appellate Court with costs, I restore that of the Court of first instance.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

1903 *November* 23.

RAM ADHAR (PLAINTIFF) *v.* RAM SHANKAR AND ANOTHER (DEFENDANTS).*

Act No. I. of 1877 (Specific Relief Act), section 42—Suit to set aside an auction sale—Plaint not asking for possession—Defendant subsequently put into possession of property sold.

A plaintiff instituted a suit to set aside an auction sale. The plaintiff, not having at the time of filing the suit been dispossessed of the property sold, claimed only the setting aside of the auction sale and costs, and paid a proper court fee on the suit so framed. About a month after the institution of the suit the auction purchaser was put into possession of the property which he had purchased. When the suit came on for hearing the plaintiff was directed to amend his plaint by adding a claim for possession of the property, and to pay the proper court fee upon a suit for possession, and on his declining to do so his suit was dismissed with costs. On appeal by the plaintiff it was *held* that the suit when instituted being in every respect regular and properly stamped no action on the part of the defendants subsequent to the institution of the suit could affect or prejudice the right of the

* First Appeal No. 6 of 1902, from a decree of Munshi Sheo Sahai Subordinate Judge of Cawnpore, dated the 16th of October, 1901.

1903

RAM ADHAR v. RAM SHANKAR.

plaintiff, and the suit was remanded under section 562 of the Code of Civil Procedure to the lower Court for determination according to law. *Surjan Singh* v. *Baldeo Prasad* (1) followed.

THE suit out of which this appeal arose was one to set aside an auction sale held in execution of a decree. The suit was instituted on the 3rd of June, 1901, and the plaintiff, not having on that date been dispossessed of the property sold, did not claim possession, but only cancellation of the sale. The proper court fee was paid. On the 1st of July, 1901, the auction purchaser was put into possession of the property purchased by him. When the suit came on for hearing, the Court (Subordinate Judge of Cawnpore), finding the auction purchaser to be in possession of the property sold, directed the plaintiff to amend his plaint by adding a claim for possession of the property and to pay the proper court fee upon a suit for possession. The plaintiff declined to amend the plaint, and in consequence his suit was dismissed. Against this decree the plaintiff appealed to the High Court.

Babu *Satya Chandra Mukerji*, for the appellant.

Pandit *Sundar Lal* and Pandit *Moti Lal Nehru* (for whom Pandit *Baldeo Ram*), for the respondents.

STANLEY, C. J.—The suit out of which this appeal has arisen was brought by the plaintiff appellant, Ram Adhar, to set aside an auction sale. It was instituted on the 3rd of June, 1901. The proper court fee in respect of such a suit was paid. On the 1st of July, 1901, that is almost a month after the institution of the suit, the auction purchaser was put into possession of the property which he had purchased. When the suit came before the learned Subordinate Judge, he, finding the defendants to be in possession of the property, directed the plaintiff to amend his plaint by adding a claim for possession of the property and to pay the proper court fee upon a suit for such possession. The plaintiff declined to amend his plaint, and in consequence of this his suit was dismissed with costs. The action of the learned Subordinate Judge was, in my opinion, wholly unjustified. The suit, when it was instituted, was in every respect regular and properly stamped, and no action on the part of the

(1) Weekly Notes, 1900, p. 172.

defendants subsequent to the institution of the suit could affect or prejudice the right of the plaintiff, who in his plaint asked for no relief beyond the relief to which he was entitled. This question came before a Bench of this Court of which my brother Burkitt was a member, namely in the case of *Surjan Singh* v. *Baldeo Prasad* (1). In that case the plaintiff had instituted a suit for a declaration as to his title, and two days afterwards the defendants were put into possession of the property in dispute under a decree. The Subordinate Judge called upon the plaintiff to amend his plaint so as to include in it a prayer for possession. The plaintiff refused to do so, and in consequence the suit was dismissed. In that case it was held that the District Judge was entirely in error and that the position of the plaintiffs could not be affected by any action taken by the defendants after the suit had been filed, and therefore there neither was nor could have been any omission within the meaning of section 42 of the Specific Relief Act, the plaintiffs being as a matter of fact in possession at the date of the institution of the suit. In this decision I entirely concur. We are told that it was brought to the notice of the learned Subordinate Judge when hearing the suit, and I fail to understand how he came to disregard it, for the facts are simple and the law is expressly laid down in the judgment. It is on all fours with the present case and cannot be distinguished. The learned vakil for the respondents, admitting that the decision to which we have referred is against him, relies upon the provisions of section 561 as enabling him to satisfy us that that the plaintiff has no cause of action, basing this upon the statements contained in the plaint. It is not open to the respondents to rely upon the provisions of this section. It enables a respondent who has failed to appeal against any portion of a decree upon the hearing to support the decree on any of the grounds decided against him in the Court below. Here nothing was decided against the respondents in the Court below and the section obviously has no application. I would set aside the judgment of the lower Court and remand the case to that Court under the provisions of section 562 of the Code of Civil Procedure,

(1) Weekly Notes, 1900, p. 172.

1903

RAM ADHAR v. RAM SHANKAR.

with directions to readmit the suit under its original number in the register of pending cases and proceed to determine it according to law. The respondents must pay the costs of this appeal.

BURKITT, J.—I fully concur in the judgment which has just been delivered by the learned Chief Justice and see no reason whatever for resiling from the opinion which, in concurrence with Mr. Justice Henderson, I expressed in the case of *Surjan Singh* v. *Baldeo Prasad* (1).

Appeal decreed and cause remanded.

1903
November 30.

Before Mr. Justice Knox and Mr. Justice Aikman.

BAIJ NATH AND ANOTHER (PLAINTIFFS) *v.* CHHOWARO AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 53—*Plaint*—*Misjoinder of causes of action*—*Misjoinder discovered after framing of issues*—*Amendment of plaint.*

One Baij Nath sued as adopted son of Hira Lal, deceased, to recover the estate left by Hira Lal. With him was joined as plaintiff a daughter of Hira Lal, who prayed that if the adoption were not proved she might recover the estate for herself and her two sisters. Objection was taken that the suit was bad for misjoinder, but notwithstanding this, issues were framed. Subsequently the Court ordered the plaintiffs to amend the plaint, having elected which of them should continue the suit. *Held* that whilst there was undoubtedly a misjoinder of parties and causes of action, the order passed by the Court was erroneous, inasmuch as after the framing of issues the plaint could only be amended by the Court itself.

IN the suit out of which this appeal arose the plaint was filed by two plaintiffs jointly. The claim as laid was for the recovery of the estate of one Hira Lal. Of the two plaintiffs one, Baij Nath, alleged that he was the adopted son of Hira Lal and claimed the estate for himself. The other, Musammat Bishan Devi, a daughter of Hira Lal, prayed that, if the adoption were not proved, she might recover the estate for herself and two sisters who were made defendants as the daughters of Hira Lal. Objection was taken from the very first to the frame of the suit as being bad for misjoinder of plaintiffs and causes of action. Issues were framed on the 23rd of September,

*First Appeal No. 141 of 1902, from an order of A. Rahman, Esq., Subordinate Judge of Meerut, dated the 17th of November, 1902.

(1) *Weekly Notes, 1900*, p. 172.