

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

NIAZ AHMAD (PLAINTIFF) v. ABDUL HAMID (DEFENDANT).*

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Civil Procedure Code, sections 43, 373—Act No XV of 1877 (Indian Limitation Act), schedule II, article 106—Suit for division of alleged partnership assets—Separate suits for property at different places.

The plaintiff sued for possession of one-half of certain property in the Moradabad district, alleging that it had been purchased out of the profits of a partnership subsisting between himself and the defendant. Other similar property in Naini Tal was mentioned in the plaint, but the plaintiff said he would bring a separate suit in respect of that property. The first suit was withdrawn, but without permission being granted to bring a fresh suit. Subsequently a second suit was brought in Naini Tal respecting the property there. The plaintiff alleged himself to be in possession of this property, but it was found that he was not. *Held* that the second suit was barred by the operation of section 43 as well as of section 373 of the Code of Civil Procedure, as also, on the finding that the partnership had been dissolved more than three years before suit, by article 106 of the second schedule to the Limitation Act.

THE plaintiff in this case filed a suit in the Moradabad district for the recovery of certain property. He alleged that the property had been acquired by the defendant out of partnership funds, and that it had been dishonestly entered by the defendant in his own name. The plaintiff prayed for a declaration that the property in question was partnership property, and further asked to be put into possession of one half of it. In his plaint the plaintiff mentioned that there was other similar property in Naini Tal, and said that, as he could not legally sue for it in the Moradabad court, he would bring a separate suit for it. The suit filed in Moradabad terminated by being withdrawn without permission under section 373 of the Code of Civil Procedure to bring a fresh suit. The plaintiff then brought a second suit in the court of the Deputy Commissioner of Naini Tal in respect of the property alluded to in his former plaint. Of this property he alleged himself to be in possession and asked for a partition. The Court of first instance found that the plaintiff was not in possession, and dismissed the suit as being barred by the provisions of section 43 of the Code of Civil Procedure and also by article 106 of the Limitation Act, and this decree was affirmed in appeal by the Commissioner. On the plaintiff's application certain questions, which are stated in the opinion of the Court,

* Miscellaneous No. 196 of 1907.

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were referred by Government to the High Court under rule 17 of the Kumaun Rules of 1894.

Pandit *Moti Lal Nehru* and Pandit *Mohan Lal Nehru*, for the applicant.

Babu Jogindro Nath Chaudhri and the Hon'ble Pandit *Sundar Lal* for the opposite party.

AIKMAN and KARAMAT HUSEIN, JJ.—This is a reference by Government under rule 17 of the Kumaun Rules, 1894, asking for the report and opinion of this Court on certain questions arising out of an appellate decree of the Commissioner of Kumaun. The case is a difficult one. After hearing it thoroughly and ably argued by the counsel on both sides, we reply as follows:—

In the suit filed in Moradabad, the plaintiff came into Court alleging a partnership between himself and the defendant. He asserted that certain property had been acquired by the defendant out of the partnership funds, and that it had been dishonestly entered by the defendant in his own name. He asked for a declaration that the property in question was partnership property, and further asked to be put in possession of one-half of it. In that plaint he referred to the existence of other property in Naini Tal and said that as he could not legally sue for it in the Moradabad Court, he would bring a separate suit for it. The Moradabad suit was afterwards withdrawn by the plaintiff, no permission being given under section 373 of the Code of Civil Procedure to bring a fresh suit. The plaintiff afterwards filed in the Court of the Deputy Commissioner of Naini Tal the suit which has given rise to this reference. The suit is in regard to property which, according to the statements in paragraph 1 of the plaint and the evidence of the plaintiff, was partnership property as defined in section 253 of the Contract Act. The plaintiff stated that he was in possession of this property and asked for a partition. In his plaint and in his evidence, the plaintiff alleged that he was in possession of the property in suit. The defendant denied that plaintiff was in possession. The Deputy Commissioner found that plaintiff was not in possession, and this finding was not challenged by the plaintiff in his appeal to the Commissioner. The Courts

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below held that the suit was barred under the provisions of section 43 of the Code of Civil Procedure and also by article 106 of the Limitation Act.

The first question asked by the Government is—"whether, having regard to the statements in the plaints of the suits filed in Moradabad and Naini Tal, separate causes of action was disclosed, or whether the cause of action in both suits was one and the same?" We have carefully studied the plaints, and in our opinion the cause of action in both suits was in reality one and the same, *viz.*, a claim to property arising out of the relation of the parties as partners in the firm at Naini Tal.

The second question is—"whether, if there was only a single cause of action in both suits, the plaintiff was bound to include the claim for the Naini Tal property in the suit filed in Moradabad, and whether his omission to do so precludes the institution of the present suit?" In our opinion, the plaintiff not only might but ought to have included his present claim in the first suit, and his omission to do so precludes the institution of the present suit.

The third question is—"did the reference to arbitration in the Moradabad suit bar the trial of that suit? If it did, is the present suit affected or not by the provisions of section 43 of the Code of Civil Procedure?" This question appears to be based on some misconception. The parties are agreed that no reference to arbitration was made in the Moradabad suit.

The fourth question is—"does the withdrawal of the Moradabad suit without permission to bring a fresh suit, under section 373, Civil Procedure Code, bar the present suit for the portion of the claim omitted in the previous suit?" Having regard to our answer to the second question, we answer this in the affirmative.

The fifth question is—"is the present suit barred under article 106 of the second Schedule of the Limitation Act (XV of 1877)?" Although the suit is not in terms a suit for a share of profits of a dissolved partnership, it is found by the Courts below that the partnership was dissolved upwards of three years before the suit was instituted in Naini Tal, and as the plaintiff would not have been entitled to the relief he asked for without

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an account and a finding as to his share of the profits of the partnership, we hold that his present suit is barred.

This is our reply to the reference. In our opinion the respondent is entitled to his costs in all courts.

FULL BENCH.

*Before Mr. Justice Sir George Knox, Mr. Justice Banerji and
Mr. Justice Aikman.**

SADDU (DEFENDANT) v. BIHARI SINGH (PLAINTIFF).

*Land-holder and tenant—Partition—Rights of tenants in respect of house
sites in the abadi.*

As the result of the partition of a village hitherto forming one mahal into two mahals the occupancy holding of a tenant fell into one mahal owned by one co-sharer, whilst a house which the tenant and his predecessors in title had occupied for a considerable period as appurtenant to the agricultural holding fell into the other mahal owned by the other co-sharer. *Held* that the partition effected no change in the position of the tenant: so long as he continued in possession of his occupancy holding he could not be ejected from his house in the abadi of the village, nor could he be required to pay rent therefor. *Dharam Singh v. Bhoolar* (1) followed. *Sundar Lal v. Chajju* (2) distinguished. *Panna v. Nazir Husain* (3) doubted.

THIS was a suit brought by one of the zamindars of the village Bharatpur, a hamlet of Darihal, for the ejectment of the appellant, Saddu, from the site of his dwelling house and for a decree directing him to remove the materials of the house or to receive compensation for the value of those materials. The house was situated in a portion of the abadi of the village which had fallen into the share of the plaintiff by partition. The defendant cultivated land in another mahal of the same village, under a different proprietor. The plaintiff sought to eject him from his house on the ground that he refused to pay ground rent for the site of the house. The Court of first instance (Munsif of Moradabad) dismissed the suit, but the lower appellate Court (District Judge) reversed this decree and decreed the plaintiff's claim. The defendant appealed to the High Court. Issues were referred to the lower appellate

* Second Appeal No. 961 of 1905 from a decree of D. R. Lyle, District Judge of Moradabad, dated the 20th of July 1905, reversing a decree of Mohan Lal, Munsif of Moradabad, dated the 2nd of March 1905.

(1) Weekly Notes, 1908, p. 123. (2) Weekly Notes, 1901, p. 42.
(3) Weekly Notes, 1902, p. 60.