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HAMID UN-NISSA BIBI v. NAZIR-UN-NISSA.

We refer the above issue to the learned District Judge under order 41, rule 25, Civil Procedure Code. These issues he will determine upon the evidence already before him. On return of the findings the parties will have the usual ten days for filing objections.

Issues remitted.

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

1909 *January* 8.

RAM KUMAR SINGH (DEFENDANT) *v.* ALI HUSAIN AND OTHERS (PLAINTIFFS).*

Suit for damages against joint tort feasors—Compromise between plaintiff and one of the defendant—such compromise no bar to a decree against the other defendants.

The plaintiff sued several defendants jointly to recover damages in respect of an alleged assault committed on him by the defendants, but entered into a compromise with one of the defendants. *Held* that the existence of this compromise did not preclude the plaintiff from recovering damages against the remaining defendants. *Brinsmead* v. *Harrison* (1) and *Thurman* v. *Wild* (2) referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgment of RICHARDS, J. The facts are stated in the judgment under appeal, which was as follows:—

"This was a suit for damages for assault. Before the institution of the present suit criminal proceedings had been commenced against some 12 persons, with the result that 8 out of 12 were convicted. The criminal proceedings were followed by the present proceedings in the Civil Court for damages against the same 12 persons. Before the suit was tried one of the four persons who had been acquitted by the Criminal Court entered into a compromise with the plaintiff. The suit then proceeded against the remaining defendants, with the result that a decree was given against the same 8 persons who had been convicted by the Criminal Court. The only plea argued in the present appeal is that the compromise by one of the defendants, to which I have referred above, barred the plaintiff's right to a decree against the other defendants or any of them. The appellant relies upon Pollock on Torts, 7th edition, p. 194.

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* Appeal No. 45 of 1908 under section 10 of the Letters Patent.

(1) (1872) L R., 7 C. P., 547. (2) (1840) 11 A. and E., 453.

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He also cites the case of *Brinsmead* v. *Harrison* (1) in which it was held that a judgment recovered against one of several joint tort-feasors is a bar to an action against the others for the same cause. It is contended that the compromise is analogous and equivalent to the recovery of a judgment. In my opinion this contention is not correct. The principle on which the case of *Brinsmead* v. *Harrison* was decided was that the plaintiff's cause of action had merged in the judgment on the principle of *transit in rem judicatam*. In my opinion there is no force in this ground of appeal which is the only ground pressed. It must also be remembered that the compromise was confined to the particular defendant with whom it was made. I accordingly dismiss the appeal with costs.

"The objections under section 561 of the Code of Civil Procedure cannot be sustained and are dismissed with costs."

The same defendant appealed. On this appeal—

Babu *Satya Chandra Mukerji* for the appellants, contended that, since the plaintiff had accepted Rs. 25 from one of the defendants and had exempted him, he could not maintain his claim as against the other defendants. The act of the plaintiff amounted to a release of the other defendants. He cited *Underhill* on Torts, pp. 112 & 113, *Pollock* on Torts, 7th edition, p. 194, *Brinsmead* v. *Harrison* (1) and *Thurman* v. *Wild* (2).

Mr. *Muhammad Ishaq Khan*, for the respondent, was not called upon.

STANLEY, C.J. and BANERJI, J:—The circumstances under which this appeal has arisen are as follows. The plaintiff, Sheikh Ali Husain, was mercilessly beaten by some persons including some of the defendants in this suit. Thirteen persons were prosecuted for this assault, with the result that eight were convicted. After the conviction of these parties the plaintiff instituted the suit out of which this appeal has arisen for damages for the injuries sustained by him at the hands of his assailants. He claimed a sum of Rs. 325. Amongst the defendants were the 8 persons who were convicted of the assault. During the progress of the case one of the defendants admitted that the assault had been

(1) (1872) L. R., 7 C. P., 547. (2) (1840) 11 A. and E., 453.

committed and represented that he was willing to pay a sum of Rs. 25 as his share of the damages claimed by the plaintiff. As the sum of Rs. 325 only was claimed in the suit, it will be seen that Rs. 25 represented the proportionate share of the damages, which the defendant in question would be in fairness bound to pay. The plaintiff was willing to accept this amount and so certified to the Court. The Court of first instance decreed the plaintiff's claim as against eight of the defendants and in its decree exempted the party who had paid or secured the payment of the Rs. 25 and also the other defendants from the operation of the decree. On appeal this decree was upheld with this modification that the damages were reduced to a sum of Rs. 150. A second appeal was preferred to this High Court, mainly on the ground that inasmuch as the plaintiff had accepted from one of the defendants a sum of Rs. 25 in satisfaction of his liability the plaintiff's claim against the other defendants could not be sustained. Reliance was placed upon the leading case of *Brinsmead* v. *Harrison* (1) in support of this contention. The learned Judge did not accede to the argument advanced by the appellants before him and dismissed the appeal. Hence this appeal under the Letters Patent.

We think that the learned Judge of this Court was right in the conclusion at which he arrived. The fact that one of several tort-feasors in the progress of a suit admits his liability as well as that of the other defendants and agrees to pay a sum of money in satisfaction of his liability does not exonerate the other defendants, who may be found responsible for the acts complained of, from liability. In the case of *Brinsmead* v. *Harrison*, one of the tort-feasors, was sued for damages for trover of a piano and damages were recovered as against him. In that case it was held that a suit against the other tort-feasor could not be sustained for the same cause of action, notwithstanding the fact that the judgment already recovered remained unsatisfied. That is a very different case from the case before us. In the case before us all the tort-feasors were sued in one and the same suit and judgment was not recovered only against the party who had admitted his liability in the progress of the suit

(1) (1872) L. R., 7 C. P., 547.

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and had agreed to pay a sum of money in satisfaction of his liability. Another case which was relied upon by the learned vakil for the appellants is the case of *Thurman* v. *Wild* (1). This case does not appear to us to assist the appellants. In it an action was brought for damages for a trespass committed by the defendant as servant and by command of his master. It was held that the acceptance of satisfaction by the plaintiff from the master was a good defence to an action against the servant. The ground upon which this decision was arrived at is to be found in the judgment of LORD DENMAN at page 461 of the report. The passage runs as follows:—"He (*i. e.* the plaintiff) has chosen to accept from one of the trespassers a compensation for the whole trespass, and in discharge of all parties, and whether this was rendered with or without the consent of some of them he is equally barred as against all." The ground, therefore, of this decision was that the plaintiff had accepted complete redress from one of two joint tort-feasors, and having done so he could not sustain a suit against the others. As LORD DENMAN says:—"He had accepted a compensation for the whole trespass and in discharge of all parties." We think under the circumstances that the learned Judge of this Court was perfectly right in dismissing the appeal to him and we accordingly dismiss this appeal with costs.

Appeal dismissed.

FULL BENCH.

1909.
March 5.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knox, Mr. Justice Banerji, Mr. Justice Aikman and Mr. Justice Richards.

CHANDRADEO SINGH AND OTHERS (DEFENDANTS) APPELLANTS *v.* MATA PRASAD AND ANOTHER (PLAINTIFFS) AND SHEO BABU SINGH AND OTHERS (DEFENDANTS) RESPONDENTS.*

Hindu law—Mitakshara—Joint Hindu family—Mortgage of joint family property by father—Liability of sons in suit to enforce mortgage—Antecedent debt—Family necessity—Burden of proof.

The father of a joint Hindu family governed by the Mitakshara law cannot execute a mortgage of the joint family property which will be binding on his sons where the loan is not obtained for family necessity or to meet an antecedent debt.

A debt is not "antecedent" if it is incurred at the time of the execution of a mortgage for the purpose of securing such debt.

* Second Appeal No. 1028 of 1907.

(1) (1841) 11 A. & E., 453.