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of determining whether there was a mutual, open and current account between the parties of the nature pointed out above; whether the claim for the balance of such an account was or was not time-barred under article 85 of the second schedule to Act No. XV of 1877, and whether any and what balance was due to the plaintiffs. We accordingly allow the appeal, discharge the decrees of the courts below and remand the case to the court of first instance under order 41, rule 23, of the Code of Civil Procedure with directions to re-admit it under its original number in the register and dispose of it on the merits, having regard to the observations made above. The parties respectively will abide their own costs of this appeal. As to other costs hitherto incurred, the Court in finally deciding the suit will pass proper orders.

Appeal allowed: *Cause remanded.*

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August 5.

Before Mr. Justice Banerji and Mr. Justice Alston.

HARBANS TIWARI (PLAINTIFF) *v.* TOTA SAHU AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1882), *sections* 44, 45—*Misjoinder—Pre-emption—Two sales to same vendee—Suit in respect of both sales—Joinder of vendors as defendants.*

Of the four owners of undivided shares in immovable property three sold their interest in the property, and the fourth sold his interest separately at a later date to the same vendee. A pre-emptor sued for pre-emption on the basis of both these transactions, impleading as defendants the vendors and a rival pre-emptor as well as the vendee. *Held* that the suit was not bad for misjoinder of either causes of action or parties. *Bhagwati Prasad Gir* v. *Bindeshri Gir* (1) dissented from. *Kalian Singh* v. *Gur Dayal* (2) referred to. *Held* also that the vendor is not a necessary party to a suit for pre-emption. *Hira Lal* v. *Ram Jas* (3), *Lok Singh* v. *Balwan Singh* (4) and *Ram Sarup* v. *Sital Prasad* (5) referred to.

THE facts of the case were briefly as follows:—

Four persons were owners of a certain property. They executed a sale-deed thereof, which, however, was registered on behalf of only three of them, as doubts arose whether the fourth,

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* Second Appeal No. 663 of 1908, from a decree of E. H. Ashworth, District Judge of Gorakhpur, dated the 11th of April 1908, confirming a decree of Bhawani Chandra Chakarvarty, Subordinate Judge of Gorakhpur, dated the 28th of September, 1907.

(1) (1883) I. L. R., 6 All., 106.
(2) (1881) I. L. R., 4 All., 163.
(3) (1883) I. L. R., 6 All., 57.
(4) Weekly Notes, 1903, p. 239.
(5) (1904) I. L. R., 26 All., 549.

Bechan Tiwari, was of age. The sale-deed was thus operative as regards ¾ths of the property only. The remaining ¼th was conveyed to the same vendee by a second sale-deed executed by Bechan Tiwari five months afterwards. The plaintiff brought a suit for pre-emption of the whole property in respect of both the sale-deeds. He impleaded as defendants the vendee and the vendors respectively of both the sale-deeds, as also one Tota, a rival pre-emptor in respect of both the sales. The courts below dismissed the suit on the ground of misjoinder of parties and of causes of action.

The plaintiff appealed.

Rai *Brij Narain Gurtu* (for Babu *Iswar Saran*), for the appellant, contended that there was no misjoinder of parties and of causes of action. Section 45 of the Code of Civil Procedure of 1882 permitted the joinder of such causes of action. The real defendant, the vendee of both the sale-deeds, was one and the same person. The vendors were only *pro formâ* defendants and were not necessary parties. It was optional with the plaintiff to make them defendants or not. He cited *Hira Lal* v. *Ramjas* (1), *Lok Singh* v. *Balwan Singh* (2) and *Ram Sarup* v. *Sital Prasad* (3). The vendors were not necessary parties. If the suit without them would not be bad, merely impleading them as parties would not make the suit bad for misjoinder. The two transactions were of the same nature; they related to different portions of the same property; the vendee was the same in both. Such causes of action were allowed to be joined together against the same defendant, the vendee; *Ambika Dat* v. *Ram Udit Pande* (4), *Raghubar Dayal* v. *Jwala Singh* (5). In any event the court ought not to have dismissed the suit altogether, but should have allowed the plaintiff an opportunity to amend the plaint; *Baij Nath* v. *Chhowaro* (6). The court could at any time amend the plaint by ordering that the names of unnecessary parties might be struck off.

Babu *Benode Behari* (with him Babu *Purushottam Das Tandan* for the Hon'ble Pandit *Madan Mohan Malaviya*), for

(1) (1883) I. L. R., 6 All., 57.
(2) Weekly Notes, 1903, p. 239.
(3) (1904) I. L. R., 26 All., 549.
(4) (1895) I. L. R., 17 All., 274.
(5) (1903) I. L. R., 25 All., 229.
(6) (1903) I. L. R., 26 All., 218.

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the respondents, contended that the suit was bad for misjoinder; the vendors might be unnecessary parties, but having been impleaded as defendants, the suit as it stood was open to the objection of misjoinder. It was too late to strike out the names of the vendors after the first hearing; *Abbasi Begam* v. *Imdadi Jan* (1). He further submitted that such causes of action could not be joined together and the suit should be dismissed; *Harbans Singh* v. *Lachmina Kuar* (2).

BANERJI, and ALSTON, JJ.:—This appeal arises out of a suit for pre-emption which has been dismissed on the ground of misjoinder of parties and causes of action. The facts are these:—On the 12th of April, 1906, four persons, *viz.*, Rajman Tiwari, Raj Mangal Tiwari, Musammat Gajra and Bechan Tiwari executed a sale-deed in favour of the defendant Mohar Ali Khan. When the sale-deed was presented for registration, doubts arose as to whether Bechan was of full age, and therefore it was registered at the instance of Rajman Tiwari, Raj Mangal Tiwari and Musammat Gajra only. It was thus a valid sale of the ¾ths share of the property owned by the three persons mentioned above. On the 13th September, 1906, Bechan Tiwari sold to the same vendee the remaining ¼th share. In respect of both these sales the plaintiff, Harbans Tiwari, brought the present suit for pre-emption on the basis of custom, alleging that he was entitled to pre-empt the property. The defendants to the suit were the four vendors, the vendee, and one Tota, who had brought rival claims for pre-emption in respect of the two sales. The vendors did not contest the claim. The vendee denied the existence of the custom alleged by the plaintiff, but at the hearing withdrew that objection and admitted that the custom alleged by the plaintiff prevailed. Tota alone seriously contested the claim and he did so on two grounds; (1) that the plaintiff had no preferential right of pre-emption and (2) that there was a misjoinder of parties and causes of action. The first plea he abandoned in the court of first instance and admitted that the plaintiff's right was superior to his. It was also admitted that the amount of consideration mentioned in the sale-deeds was the true consideration for

(1) (1895) I. L. R., 18 All., 53. (2) Weekly Notes, 1888, p. 230.

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the sales. He thus disputed the plaintiff's claim solely on the ground of misjoinder. This plea prevailed in both the courts below: hence this appeal.

We may observe in the first place, that if there was a misjoinder of parties and causes of action the suit ought not to have been dismissed, but the court should have amended the plaint and allowed the plaintiff to proceed with the claim in respect of one of the sales. We are, however, of opinion that there was no misjoinder such as would be fatal to the hearing of the suit. Under section 45 of the Code of Civil Procedure, 1882, separate causes of action might properly be joined together against the same defendants, provided that the provisions of section 44 were not contravened. There is no question of the application of section 44 in this case. Each sale was a distinct cause of action as against the vendee, and, as the vendee in regard to each sale was the same individual, the plaintiff was competent to unite different causes of action in one suit against the same vendee. The court below, in holding the contrary, has relied upon the decision of this Court in *Bhagwati Prasad Gir* v. *Bindeshri Gir* (1). This case no doubt supports the view of the court below, but we may observe that Mr. Justice OLDFIELD who was one of the learned judges who decided that case, held the contrary, sitting with Mr. Justice BRODHURST, in *Kalian Singh* v. *Gur Dayal* (2), and expressed the opinion that one suit could be brought in respect of several sales against the same vendee and that this procedure would be justified by the provisions of section 45. In our opinion claims for pre-emption in respect of more sales than one can be joined together against the same vendee in one suit. This would not offend against the provisions of section 44 and is permissible under section 45. and such a procedure would prevent multiplicity of actions. It is true that in *Kalian Singh* v. *Gur Dayal* (2) it was held that where there were different vendors, the result of their being joined together in the same suit would be a misjoinder of defendants; but in that case it was not considered whether the vendors were necessary parties to the suit. If the vendors were not necessary parties, their being joined with the vendee was

(1) (1883) I. L. R., 6 All., 106. (2) (1881) I. L. R., 4 All., 163.

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superfluous. It was held in *Lok Singh* v. *Balwan Singh* (1), following *Hira Lal* v. *Ramjas* (2), that in a suit for pre-emption the vendor was not a necessary party. The same view was held in *Ram Sarup* v. *Sital Prasad* (3). Having regard to these authorities, the joinder of the vendors was an unnecessary act on the part of the plaintiff and ought not to have the effect of rendering the suit liable to dismissal on the ground of misjoinder. However, this defect, if any, could have been easily cured by striking out from the array of parties the names of the vendors. There was, as we have stated above, no substantial defence to the claim; the plaintiff's right was admitted, and there was no dispute as to the amount of the purchase money. It was only on the ground of the alleged defect in the frame of the suit that the claim of the plaintiff was thrown out. In our judgment there is no pretence that the adding of the vendors caused any prejudice to any of the parties or any inconvenience to them. The vendors did not appear and object to the plaintiff's claim. It is they alone who could have pleaded inconvenience, but they did not do so. In our judgment the courts below were wrong in holding that the claim was bad for misjoinder of causes of action and of parties. There is no other question in the case, and it is clear that if there is no fatal defect in the frame of the suit, the plaintiff is entitled to the decree which he asks for. In our opinion there is no such defect. We accordingly allow the appeal, set aside the decrees of the courts below, direct that the names of the vendors defendants be removed from the array of parties and decree the plaintiff's claim with costs in all courts. We allow the plaintiff three months from this date to pay the purchase money. In the event of his failing to pay the purchase money within the time fixed, the suit will stand dismissed w costs in all courts.

Appeal decree

(1) Weekly Notes, 1903, p. 232. (2) (1883) I. L. R., 6 All., 57.
(3) (1904) I. L. R., 26 All., 549.