1917

NARSINGH SAHAI v. SHEO PRASAD.

reviewed, the time requisite for obtaining a copy of the judgement on which it is founded shall also be excluded." Nothing further is said, and we are unanimous in holding that this Court has no power by any rule that it may make to alter the period of limitation prescribed by the Indian Limitation Act. We would further say that the rule as it stands was never intended to and can in no way be construed as altering in any way the Indian Limitation Act. This Court has power to alter, amend and add to rules of procedure laid down by the Code of Civil Procedure, vide section 122, but nowhere has any power been given to it to touch the Limitation Act. Our answer then to the question which has been sent to us is that the present appeal is barred by limitation.

We have not got to determine whether this is a case in which the provisions of section 5 of the Limitation Act are to be applied. That is a matter for the Bench hearing the appeal.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

1917
June, 23.

AFZAL SHAH AND ANOTHER (PLAINTIFFS) *v.* LACHMI NARAIN AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), order I, rule 3; order XXIII, rule 1—Procedure—Suit dismissed for misjoinder of parties and of causes of action—Plaintiff permitted to withdraw suit on terms with liberty to bring fresh suits.

Where it was found on second appeal to the High Court that the suit out of which the appeal had arisen was bad for misjoinder of parties and of causes of action, in that there was no community of interest between the various defendants, whose sole connection with each other was that they were purchasers of different portions of property, the whole of which was claimed by the plaintiff, the High Court permitted the suit to be withdrawn on terms as to costs, with liberty to the plaintiff to bring separate suits against each of the defendants.

THE facts of this case were as follows :—

The plaintiffs purchased certain items of immovable property in one lot at a sale held in execution of a decree. Somehow the same property again came to be sold, as belonging to the former

* Second Appeal No. 373 of 1916, from a decree of Durga Dat Joshi, First Additional Judge of Aligarh, dated the 4th of December, 1915, modifying a decree of Banke Behari Lal, Additional Subordinate Judge of Aligarh, dated the 14th of March, 1913.

1917

AFZAL SHAH v. LACHMI NARAIN.

owner, in execution of decrees against him, and was purchased at auction in separate lots by different purchasers, who obtained possession. The plaintiffs then brought a suit against these purchasers for a declaration of their own title by their prior purchase, for possession and for mesne profits. Each defendant or set of defendants was in possession only of the item purchased by him or them, respectively; there was no allegation of conspiracy among the purchasers. Both the lower courts dismissed the suit as being bad for multifariousness. The plaintiffs appealed to the High Court.

Dr. *S. M. Sulaiman*, for the appellants, contended in the first place that the suit was maintainable. Order I, rule 3, of the Code of Civil Procedure was wide enough to cover the case. The right to relief was alleged to exist against the defendants either jointly, severally or in the alternative, and the question common to them all was whether the whole of the rights in the property had passed to the plaintiffs or any portion had been left over which could pass to a subsequent purchaser. Order I, rule 3, applied to questions of joinder of causes of action as well as to questions of joinder of parties; *Ramendra Nath Ray* v. *Brojendra Nath Dass* (1). The plaintiffs' title in respect of all the items was one and the same; and the relief regarding declaration of title was common against all the defendants. Reference was also made to order I, rules, 4, 5, 7; order II, rule 3, and order VII, rule 8. In the next place it was submitted that, even if the suit was defective by reason of multifariousness, it should not have been dismissed altogether. There was no provision in the Code of Civil Procedure laying down that a suit was to be dismissed for misjoinder of causes of action. The courts should have asked the plaintiffs to confine the suit to one cause of action, and given them an opportunity to amend the plaint. The following cases were relied on: *Behari Lal* v. *Kodu Ram* (2) and *Baij Nath* v. *Chhowaro* (3).

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Munshi *Panna Lal*) for the respondents, contended that the suit as brought could not be proceeded with. Two conditions were laid down by order I, rule 3, itself before it could be applied, and the first was that the right to relief must be "in respect of or arising

(1) (1917) 21 C. W. N., 794. (2) (1893) I. L. R., 15 All., 380.

(3) (1903) I. L. R., 26 All., 218.

out of the same act or transaction or series of acts or transactions." This condition was not satisfied by the present case. Order I, rule 5, was governed by order I, rule 3. Order I, rule 9, applied only to misjoinder of parties and not to misjoinder of causes of action. The leading case on the subject of multifariousness was that of *Sadler* v. *The Great Western Railway Co.* (1). Separate torts committed by separate defendants could not be joined together in one suit. Separate acts of trespass by separate individuals upon different items of property could not be made the subject-matter of the same suit. The following case was also cited: *Gower* v. *Couldridge* (2). There were two later cases which at first sight might seem to run counter to the cases mentioned above; they were *Frankenburg* v. *Great Horseless Carriage Co.* (3) and *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co.* (4). But in reality there was no conflict; for, in the first case it was held that in substance there was only one cause of action, and in the second it was held that the two defendants could be regarded as being principal and agent. In the lower courts the plaintiffs did not choose to ask for an opportunity to amend the plaint or to take any other steps to remedy the defect in the suit.

Dr. *S. M. Sulaiman*, in reply, submitted that order I, rule 3, made a distinction between one cause of action being *alleged* to exist and separate causes of action being *found* to exist. The fact that it was found on the evidence that the defendants were separately in possession would not affect the fact that the cause of action was *alleged* against them jointly. An application was then made on behalf of the appellants praying for leave under order XXIII, rule 1, to withdraw the suit with liberty to bring a fresh suit or suits, and was opposed by the respondents.

PIGGOTT and WALSH, JJ.:—This is a second appeal which comes before us under the following circumstances. The plaintiffs alleged themselves to have acquired certain property at public auction. They alleged that, under circumstances perhaps amounting to fraud on the part of the judgement-debtor, the property was put up to sale a second time and was purchased in different lots by different persons. On this they impleaded three different

(1) (1896) A. C., 450.
(2) (1898) 1 Q. B., 348.
(3) (1900) 1 Q. B., 504.
(4) (1910) 2 K. B., 854.

1917

AFZAL SHAH v. LACHMI NARAIN.

sets of defendants, claiming a declaration of their own title, recovery of possession, and mesne profits. Separate defences were filed by the members of the different sets of defendants, and in each of these defences the particular defendant concerned protested that he had nothing to do with the property specified in the plaint, except only one single item of the same. Arising out of this plea of fact, the point was taken that the suit was bad for misjoinder of causes of action and that each defendant, or set of defendants, should have been separately sued for ejectment as a trespasser in respect only of such items of property as were in the possession of such defendant or defendants severally. A curious feature of the case was that, when the pleadings of the parties were complete, it was apparent that a portion of the property specified in the plaint was not claimed by any of the defendants at all, that is to say, the plaintiffs were claiming to recover possession of some property from defendants who repudiated having anything to do with it. In the result the court of first instance dismissed the suit, and this dismissal has been affirmed by the Additional District Judge in appeal. The only point dealt with by the lower appellate court was that the suit was bad for multifariousness. As a matter of fact there had been an order by the predecessor in office of the learned Judge who finally disposed of the appeal, which was no doubt well intended, being an effort on the part of the court to bring the question in dispute to a final adjudication; but the actual effect of that was to make the confusion worse. The learned Judge directed the plaintiffs to implead a number of fresh defendants, presumably on the ground that they were the persons in possession of those portions of the property in suit which were not claimed by any of the original defendants. This order was complied with in a curious fashion by the addition of two new defendants in the specification of defendants in the plaint, without the addition of any statement of any sort or kind in the body of the plaint to suggest what the cause of action against the defendants thus added was supposed to be. However, the suit having been, as already stated, dismissed by the lower appellate court, the plaintiffs come to this Court in second appeal, and in their memorandum of appeal as drafted they simply call in question the finding of law on which their suit was dismissed by

the court below. The pleas in the memorandum of appeal are that the suit is not bad for multifariousness, that it was maintainable as framed and that the reliefs claimed therein could have been granted in one suit against all the defendants. It is unnecessary for us, as the case now stands, to go further into this matter beyond saying that we could not have acceded to this contention. There was no allegation in the plaint of any joint action or community of interest as between the different sets of defendants. If the principle suggested by the memorandum of appeal before us were correct, it would follow that any owner of property might bring one single suit against an unlimited number of wholly unconnected trespassers on different portions of his property, merely on the ground that he himself owned the entire property under a single title. This is a proposition which could not be affirmed. It is idle for the appellants to refer us to those rules in the Civil Procedure Code which refer to the circumstances under which different defendants may be jointly impleaded on a single cause of action. The present is not a case of an alleged misjoinder of defendants on a single cause of action, but of alleged misjoinder of causes of action. In the course of arguments before us it was strongly represented to us on behalf of the plaintiffs appellants that their suit ought not to have been allowed to fail altogether upon such a merely technical ground. Various suggestions were put forward as to the manner in which the defect, if found to exist, might be remedied. Finally, we gave the plaintiffs time to consider their position, in order that they might, if they thought fit, apply to this Court for permission to withdraw from the suit under order XXIII, rule 1, of the Code of Civil Procedure. An application to this effect has now been laid before us, and we have heard both parties concerning it. The jurisdiction of this Court to take action under the rule above mentioned, even at the stage of second appeal, is not questioned, and such jurisdiction has from time to time been exercised in suitable cases. Neither can it be denied that the suit now before the Court is one which must fail by reason of a formal defect, namely, that of misjoinder of causes of action in a single suit ; that is to say, the error made by the plaintiffs in filing one single suit when they ought to have brought three or more, is clearly a defect of a formal nature having nothing to do

1917

AFZAL SHAH v. LACHMI NARAIN.

with the merits or otherwise of the plaintiffs' claim. The only question therefore for us to consider is whether this is a proper case for the exercise of our discretion in favour of the plaintiffs. On a fair consideration of the matter it seems to us that, subject to full compensation being made to the defendants in the matter of costs for the expenses to which they have been subjected up to this stage in the litigation, the case is a suitable one for permitting the plaintiffs to abandon the untenable position which they took up when they filed this suit, leaving their rights otherwise unimpaired, so that they may seek redress from the law for any wrong which they may have suffered by the institution of such properly framed suit or suits as may be found to be necessary. First, we make the order which we propose to pass subject to this condition that all costs incurred up to this date by any of the defendants respondents in all three courts are hereby made payable by the plaintiffs appellants. Subject to this condition, we set aside the decrees of both the courts below and in place thereof pass an order permitting the plaintiffs to withdraw from the present suit with liberty to institute such fresh suit, or rather fresh suits, in respect of the subject matter of the present suit as they may be legally advised.

Suit withdrawn.

1917
August, 7.

Before Mr. Justice Tudball and Mr. Justice Walsh.

QASIM ALI KHAN (JUDGEMENT-DEBTOR) *v.* BHAGWANTA KUNWAR (DECREE-HOLDER).*

Civil Procedure Code (1908), *section* 47; *order XLI, rule* 1—*Execution of decree—Appeal—Limitation—Copy of decree or final order necessary to the filing of an appeal.*

On an objection taken by the judgement-debtor that the execution of a decree was barred under section 48 of the Code of Civil Procedure, the Court, in disallowing the objection, wrote a judgement and also drew up a formal order, or decree, being the formal expression of the decision of the question.

Held that order XLI, rule 1, of the Code applied, and no valid appeal could be filed against the decision of the court below which was not accompanied by a copy of such formal order, or decree. *Khirode Sundari Debi* v. *Janendra Nath Pal Chaudhuri* (1) discussed.

* First Appeal No. 41 of 1917, from a decree of Suraj Narain Majju, Subordinate Judge of Azamgarh, dated the 23rd of September, 1916.

(1) (1901) 6 C. W. N., 283.