1934

MESSRS. RAM CHANDRA AND BROTHERS THROUGH MR. RAM CHANDRA v. THE CONTINENTAL STORES AND AGENCY COMPANY, LIMITED

"unless a different intention is expressed therein". The use of the word "arbitrators" in plural in paragraph 18 of the agreement shows very clearly that the intention of the parties was that the submission should be to more than one arbitrator and not to a single arbitrator. In this view of the matter the above mentioned provision of the first schedule has no application to the case and the learned District Judge had no jurisdiction to appoint an arbitrator under section 8 clause (2) of the Arbitration Act.

Srivastava, A. C. J. and Thomas, J.

We are therefore of opinion, though for reasons somewhat different from those given by the learned District Judge, that his order dismissing the application was correct. The application therefore fails and is dismissed with costs.

Application dismissed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Acting Chief Judge and Mr. Justice G. H. Thomas

1934 *September*, 26

MUSAMMAT RANI KUAR (DEFENDANT-APPELLANT) *v.* AJODHIA AND 2 OTHERS, PLAINTIFFS, AND OTHERS, DEFENDANTS (RESPONDENTS)*

Civil Procedure Code (Act V of 1908), order VI, rule 17—Case should be decided on facts as they stand on the date of institution of suit—Amendment of pleadings—New cause of action arising out of facts subsequently coming into existence—Amendment introducing new cause of action should be allowed only if no injustice done to opposite party.

A Court may take into consideration facts which come in existence during the pendency of the litigation in order to prevent multiplicity of suits, but according to the general rule the decision of a case ought to be based upon the state of facts as they existed at the time of institution of the suit and the plaintiff, if he seeks to introduce a new cause of action, must do so by means of an amendment of the pleadings in which case the

*Second Civil Appeal No. 203 of 1932, against the decree of Pandit Bishambhar Nath Misra, District Judge of Unao, dated the 2nd of May, 1932, upholding the decree of Pandit Krishna Nand Pandey, Additional Subordinate Judge of Unao, dated the 16th of January, 1931.

defendant must be allowed an opportunity to raise appropriate defences to it. It may be possible to dispense with these formalities in certain cases where no complications arise and there is no fear of causing injustice to the opposite party, but not where the opposite party is materially prejudiced. *Javitri* v. *Gendan Singh* (1), and *Vishnu Narhar Sapre* v. *Shriram Raghunath Karkare* (2), referred to.

Messrs. *M. Wasim* and *K. N. Tandon*, for the appellant.

Mr. *Radha Krishna Srivastava*, for the respondents.

SRIVASTAVA, A. C. J., and THOMAS, J.:—This is an appeal by defendant No. 1 against the decree dated the 2nd of May, 1932, of the learned District Judge of Unao upholding the decree dated the 16th of January, 1931, of the learned Additional Subordinate Judge of that place.

It arises out of a suit for possession of certain zamindari property.

The plaintiffs' case was that Gopali Singh was the last male owner of the property in suit, that on his death he was succeeded by his widow Musammat Chitya and that on the latter's death, which took place in September, 1920, the plaintiffs as the nearest reversioners were entitled to get possession of the property. It was admitted that Gopali Singh had left a daughter Musammat Rani Kuar defendant No. 1 who is the appellant before us. But it was pleaded that she was excluded from succession under a family custom. The defendant No. 1 resisted the suit on the ground that the plaintiffs were not the nearest reversioners inasmuch as Musammat Kaunsillya mother of Gopali Singh and Jit Bahadur, son of Sheo Bakhsh, were living and had a preferential right to that of the plaintiffs. She also denied the existence of the custom set up by the plaintiffs. Both the lower courts have concurrently found that Jit Bahadur was not the son of Sheo Bakhsh. This finding is no longer in dis-

(1) (1927) I.L.R., 49 All., 779. (2) (1921) I.L.R., 45 Bom., 983.

1934

MUSAMMAT RANI KUAR v. AJODHIA

pute. The two lower courts are also unanimous in finding that the custom about the exclusion of daughters has been satisfactorily established. The correctness of this finding also is not questioned before us. As regards Musammat Kaunsilya the trial court found that she was in existence but was also excluded from inheritance by virtue of the family custom. The learned District Judge disagreed with this finding of the trial court and held that the custom of exclusion of mother from inheritance had not been established. He however found that Musammat Kaunsilya had died during the pendency of the litigation and was therefore of opinion that it would not, in the circumstances, be proper to dismiss the plaintiffs' suit on the ground of Kaunsilya having been in existence when the suit was instituted.

Srivastava, A. C. J. and Thomas, J.

The only contention urged before us is that the learned District Judge was wrong in decreeing the plaintiffs' suit on the basis of a new cause of action arising on the death of Musammat Kaunsilya which was never set up in the plaint. It is contended that if the plaintiffs are allowed to avail themselves of this cause of action the defendants should be allowed an opportunity to amend their written statement and to plead that Gopali Singh had left a son Baba Din who survived him and that the defendant No. 1 as sister of Baba Din was his heir under the Hindu Law of Inheritance Act (II of 1929). It has been frankly admitted by the learned Counsel for the defendant-appellant that she had in the courts below admitted the plaintiffs' allegation about Baba Din having pre-deceased Gopali Singh but it is said that this admission was made under a misapprehension and that in justice and fairness they should be allowed to withdraw the admission in case the plaintiffs are granted the indulgence of getting a decree on the basis of a cause of action which was never set up by them in the plaint. We think the contention of the appellant is not without force. There are reasons to think that the admission about Baba Din having predeceased his father was made

under some misapprehension. The learned District Judge has stated in his judgment that it was "by way of indulgence and to prevent further unnecessary litigation" that he upheld the decree in the plaintiffs' favour on the basis of a new cause of action. He did not think it necessary to allow the defendants opportunity to amend their written statement as he was of opinion that even if Baba Din died after Gopali the defendant No. 1 could not be his heir under Act II of 1929 and in any case would be excluded from inheritance under the custom. In view of the order which we propose to pass it would not be right for us to express any opinion as regards either of these questions. It would be enough to say that the questions deserve more careful consideration than has been bestowed on them by the learned District Judge who has dealt with them rather summarily.

The learned Counsel for the plaintiffs-respondents has relied on the decisions in *Javitri* v. *Gendan Singh* (1) and *Vishnu Narhar Sapre* v. *Shriram Raghunath Karkare* (2) in support of the contention that it was open to the learned District Judge to uphold the decree of the lower court on the basis of facts which had come into existence during the pendency of the litigation. We are prepared to agree that in suitable cases a Court may take into consideration facts which come in existence during the pendency of the litigation in order to prevent multiplicity of suits. At the same time it cannot be gain-said that according to the general rule the decision of a case ought to be based upon the state of facts as it existed at the time of institution of the suit and that the plaintiffs, if they seek to introduce a new cause of action, must do so by means of an amendment of the pleadings in which case the defendant must be allowed an opportunity to raise appropriate defences to it. It may be possible to dispense with these formalities in certain cases where no complications arise and there is no fear of causing injustice to the opposite party. In the present case how-

(1) (1927) I.L.R., 49 All., 779. (2) (1921) I.L.R., 45 Bom., 984.

1934

MUSAMMAT RANI KUAR v. AJODHIA

ever it seems to us that the course of action adopted by the learned District Judge has materially prejudiced the defendant-appellant. We accordingly allow the appeal, set aside the decree of the lower appellate court and send the case back to the lower court with the direction that it should be re-entered in the appropriate register at its original number and the plaintiffs should be required to amend their plaint so as to base their claim on the cause of action arising on the death of Musammat Kaunsilya. When the amendment has been carried out the defendants should be allowed an opportunity to raise necessary pleas in defence. The District Judge will then frame proper issues arising on these pleadings and try them either himself or remit them for trial to the trial court. Costs in this Court and hereafter shall abide the result.

Srivastava, A. C. J. and Thomas, J.

Case remanded.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Acting Chief Judge and Mr. Justice G. H. Thomas

1934 *September*, 27

HARCHARAN LAL (PLAINTIFF-APPELLANT) *v.* NURUL HASAN KHAN AND OTHERS (DEFENDANTS-RESPONDENTS)*

Transfer of Property Act (IV of 1882), section 55(1)(g)—'Incumbrances' in section 55(1)(g), meaning of—Person declared to have charge of guzara on certain property—Sale-deed of property without provision that vendee will be liable for guzara charge—Charge of guzara, whether vendor or vendee liable to pay.

Where a person is declared to have charge of a monthly *guzara* for life on certain property and that property is subsequently sold and there is not a word in the terms of the sale-deed which might indicate that the property was sold subject to that incumbrance, the vendors are bound under the provisions of section 55(1)(g) of the Transfer of Property Act to meet the charge of

*Second Civil Appeal No. 192 of 1933, against the decree of Chaudhri Akbar Husain, I.C.S., District Judge of Sitapur, dated the 22nd of April, 1933, upholding the decree of Pandit Piarey Lal Bhargawa, Munsif, Biswan, Sitapur, dated the 31st of August, 1932.