1923.

LALLOO PRASAD SINGH v. LACHMAN SINGH.

I ought to mention that this decision does determine one way or the other anything as to right of the landlord to enter into possession of t property. All that is necessary and all that determined by this decision is that at the date wh this suit was instituted the plaintiffs had not ma out that they had any right or title to the proper

J. I understand that the property is still under att ment by the Magistrate and the question of w entitled to possession has yet to be determined. plaintiffs in this suit can satisfy the Magistrate the question of possession in favour of Mussammat Marachi Kuer as immediately the person entitled to succeed on the death of her father and mother to has relinquished her rights in favour ffs by way of accelerating the succession Magistrate will be perfectly justified in ver possession of the property to the plaintiffs the result of the judgment in the present case Mussammat Marachi Kuer is the person really entitled to the property on the death of her father and mother, and the only reason why the plaintiffs fail is because they have failed to make out that at the date of this suit there had been any relinquishment in their favour.

MULLICK, J.—I agree.

S. A. K.

Appeal allowed.

APPELLATE CIVIL.

Before Das and Ross, J.J:

1923.

Dec., 4.

EAST INDIAN RAILWAY COMPANY

v.

RAM LAKHAN RAM.*

Parties—Misdescription—amendment—limitation—Code of Civil Procedure, 1908 (*Act* 5 *of* 1908), *Order* 1, *rule* 10(5).

*Appeal from Appellate Order No. 49 of 1923, from an order of Babu Kamala Prashad, Additional Subordinate Judge of Shahabad, dated the 22nd December, 1922, remanding the order of Babu Ramesh Chandra Sur, Munsif, second Court of Buxar, dated the 26th April, 1922.

1923.

EAST INDIAN RAILWAY COMPANY v. RAM LAKHAN RAM.

... a suit was instituted against the "The Agent— ...way, Company," *held*, that the plaintiff was not entitled, ...r the period of limitation for the suit had expired, to amend ...e plaint by substituting the railway company for the defendant originally sued.

Mt. ... Kasaundhan v. *Crooke*(1), *Peary Mohan Mukherjee* v. *Nityendra Nath Mukherjee*(2), *Saraspur Manufacturing Company, Limited* v. *B. B. and C. I. Railway Company*(3), distinguished.

Gate ... Chunder Paul v. *Stephenson*(4) and *India ... N. ... Company, Limited* v. *Lal Mohan Sana*(5), followed.

Appeal by the defendant.

The suit out of which this appeal arose was filed on the 23rd December, 1920, against the Agent, East Indian Railway Company. Subsequently the plaintiff sought to substitute the railway company for the defendant originally sued. It was admitted that had the suit been filed at the date when the plaintiff presented his application for amendment, it would have been open to the Railway Company to contend that the suit was barred by limitation; the Munsif gave effect to the rule that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendment, and declined to accede to the application for amendment made on behalf of the plaintiff. The learned Subordinate Judge in the Court below came to the conclusion that the application for amendment of the plaint ought to have been allowed by the Munsif and in that view he remanded the case to the Court of first instance for disposal on the merits. Against that order the defendant appealed.

Noresh Chandra Sinha and *Nitai Chandra Ghosh*, for the appellant.

(1) (1880) I. L. R. 2 All. 296.
(2) (1905) I. L. R. 32 Cal. 582.
(3) (1923) I. L. R. 47 Bom. 786.
(4) (1871) 15 W. R. 534.
(5) (1916) I. L. R. 43 Cal. 441.

1923.

EAST INDIAN RAILWAY COMPANY v. RAM LAKHAN RAM.

DAS, J.

Parmeshwar Dayal and *Tribhuan Nath Sanai*, the respondent.

DAS, J.—(after stating the facts as set out above proceeded as follows:)

In my opinion the question must be decided on the terms of Order I, rule 10 (5), of the Code of Civil Procedure. On the language deliberately employed by the legislature in the provision of the Code to which I have referred, there is no room for controversy that the proceedings as against any person added as a defendant shall be deemed to have begun only on the service of the summons. Now it is admitted before us that the suit as against the Railway Company would be barred by limitation if the proceedings in connection with the suit be deemed to have begun only on the service of the summons. That being so, it seems to me that the learned Munsif was right in declining to accede to the application made before him on behalf of the plaintiff that the Railway Company be regarded as an added party to the suit.

It was strongly contended before us that the Railway Company should not be regarded as "a person added as defendant" within the meaning of the term as used in Order I, rule 10 (5) of the Code. I quite admit that where there is a misdescription of the defendant in the cause title there is complete power in the Court to make the necessary correction without any regard to lapse of time; for in a case of misdescription the Court will not have any difficulty in coming to the conclusion that the defendant had been substantially sued, though under a wrong name. The cases relied upon by the learned Vakil for the respondent are all cases of misdescription, and the decisions in all these cases rest on the view that the defendant sought to be added as a party was always in the record as a defendant, though under a wrong name. In the case of *Manni Kasaundhan* v. *Crooke* (1) the plaintiff intended to sue, and did sue, the Municipal Committee of Gorakhpur; but instead of

(1) (1880) I. L. R. 2 All. 296.

1925.

EAST INDIAN RAILWAY COMPANY v. RAM LAKHAN RAM.

DAS, J.

suing the Committee through the President as the plaintiff should have done, he sued it through the Secretary. It was a case of misdescription, pure and simple, and the Allahabad High Court pointed out that no personal relief was sought against the Secretary; the whole object of the plaintiff being to bind the Committee by any decree that might be passed in his favour. In *Peary Mohan Mukerjee* v. *Narendra Nath Mukerjee* (1) the plaintiffs claimed a decree expressly against the *debutter* estate and the defendant was brought on the record not only in his personal capacity, but also as the receiver of the *debutter* estate. Subsequently after the expiry of the period of limitation pre[illegible]dant (who was a party on the record both in his personal c[illegible]scribed in the receiver of the *debutter* estate) was desc[illegible]state. The cause title as the *sebait* of the *debutter* e[illegible] the lower Calcutta High Court, in affirming the view of [illegible]allowed, appellate Court that amendment should be [illegible] for, pointed out that the plaintiffs expressly asked decree against the *debutter* estate and that the only question was whether the *debutter* estate was actually before the Court, as in substance it was throughout; and it expressed the view that "where relief was originally claimed as against a party who had to be represented by some person, the proper representation of that party subsequently made has not the effect of adding a new defendant to the suit. As I read the decision of the Calcutta High Court, it is based on the view that where the party intended to be sued and substantially sued has been misdescribed in the cause title there is complete power in the Court to give the appropriate relief to the plaintiff without any regard to the terms of section 22 of the Limitation Act. The other cases (except one to which I shall presently refer), upon which reliance was placed substantially take the same view.

But in my opinion there is all the difference in the world between misdescribing a party intended to be

(1) (1905) I. L. R. 32 Cal. 582.

1923.

EAST INDIAN RAILWAY COMPANY v. RAM LAKHAN RAM.

DAS, J.

sued and suing a wrong party. It was strongly contended before us that the plaintiff intended to sue the Railway Company and in substance sued the Railway Company; but the plaint speaks for itself; and if is quite impossible for us to have recourse to extrinsic evidence. A personal decree was sought against the Agent, East Indian Railway Company, and there is no suggestion in the plaint that it was sought to bind the Railway Company by any decree that the plaintiff might obtain against the defendant. No question of representation arises in this case and it is quite impossible for us to have recourse to the doctrine enunciated in *Peary Mohan Mukerjee* v. *Narendra Nath Mukerjee*(1). The only case which appears to support the contention of the respondent is the case of *Saraspur Manufacturing Company Ltd.* v. *B. B. & C. I. Railway Company* (2), but there is this difference between the Bombay case and the case before us that though the title of the defendant was entered in the plaint as follows:—"The Agent, B. B. & C. I. Railway Company, Limited," the prayer was that the defendant company should pay the amount sued for. In these circumstances the Bombay High Court took the view that the relief having been claimed against the Railway Company and not against the Agent personally, it was the Railway Company which was substantially the defendant in the suit. But as I have pointed out, in the present case the plaintiff asks for a personal decree against the Agent of the Railway Company. The point has been expressly decided by my learned brother in the case of *Sinchi Ram Bihari Lall* v. *The Agent, East Indian Railway Company* (3), and I entirely agree with the conclusion at which my learned brother arrived. It may be pointed out that a similar view has been taken at least in two cases in the Calcutta High Court [*Nubeen Chunder Paul* v. *Stephenson, Agent of the East Indian Railway Company* (4) and *Indian General Steam Navigation and Railway Company, Limited* v. *Lal Mohan Saha*(5).

(1) (1905) I. L. R. 32 Cal. 582. (2) (1923) I. L. R. 47 Bom. 785.
(3) (1921) 64 Ind. Cas. 125; 2 Pat. L. T. 679. (4) (1871) 15 W. R. 534.
(5) (1916) I. L. R. 43 Cal. 441.

In the last mentioned case the suit was filed against two companies and the defendant companies were described as "the Indian General Steam Navigation and Railway Company, Limited, and the Rivers Steam Navigation Company, Limited, by their joint Agent, A. E. Rogers." Notice was served on Mr. Rogers and subsequently Mr. Rogers retired from the services of the companies and left the country. At the trial of the suit, the plaint was amended and Mr. Roger's name was omitted from the title of the suit which was proceeded with against the two companies. It was held by Mukherjie and Rowe J.J., that the plaint as originally framed was in contravention of Order XXIX, rule 1 of the Code. It was argued that the suit was in essence brought against the two companies and that the plaintiffs mentioned the name of Mr. Rogers as the person upon whom the process was to be served. With regard to this argument the learned Judges observed as follows:—"There is obviously no foundation for this theory. The suit was substantially against Mr. Rogers, although he was sued in his capacity as joint Agent of the two companies mentioned. The suit however, should have been framed as one against the two Companies described by their proper names, as is clear from the decisions mentioned. There is plainly no excuse for the mistaken course deliberately adopted by the plaintiffs," and the question then arose whether in the circumstances of the case the Court below should have amended the plaint by striking out the name of Mr. Rogers and allowing the suit to proceed against the companies. On this point the learned Judges said as follows:—"In the circumstances of this case, *as no question of limitation arises even if the suit be taken to have been instituted against the two Companies on the date when the plaint was allowed to be amended*, we are of opinion that the amendment may stand." I read the decision of Mookerjee, J., as containing a strong intimation to the effect that amendment would not have been allowed if any question of limitation arose in the case. In my opinion when there were two known persons in existence and the plaintiff brings the

1923.

EAST INDIAN RAILWAY COMPANY v. RAM LAKHAN RAM.

DAS, J.

suit against one of them and afterwards applies to have the other brought on the record as a defendant on the ground that he all along intended to sue the other and that in substance he sued the other, and no question of representation arises in the case, it is impossible to maintain the view that the case is one of misdescription.

I would allow the appeal, set aside the decree passed by the Court below and restore the decree passed by the Court of first instance. The appellant is entitled to its costs throughout.

ROSS J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Jwala Prasad and Foster, J.J.

1923.

Dec., 4.

NAGESHWAR BUX RAI

v.

BISESWAR DAYAL SINGH.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order V, rules* 10 *and* 17, *Order IX, rule* 13—*Summons, service of—copy delivered to defendant—acknowledgment not signed—*ex parte *decree passed—application to set aside decree on ground of summons not being "duly served".*

Where a summons is served by delivering a copy of it to the defendant under Order V, rule 10, Civil Procedure Code, and the defendant refuses to sign an acknowledgment for it, it is not necessary for the serving officer to affix a copy of it to the defendant's house under rule 17.

Maruti v. *Vithu*(1), *Rajendro Nath Sanyal* v. *Jan Meah*(2), *Gopaldas Girdhari Lal* v. *Sayad Islu*(3), *Diwan Chand* v. *Mussammat Parbati*(4), *Kassim Ebrahim Saleji* v. *Johurmull Khemka*(5), *Kistler* v *Tettmar*(6), referred to.

*Appeal from Original Order No. 48 of 1923, from an order of Babu Baij Nath Sahay, Subordinate Judge of Palamau, dated the 11th January, 1923.

(1) (1892) I. L. R. 16 Bom. 117.
(2) (1899) I. L. R. 26 Cal. 101.
(3) (1918) 46 Ind. Cas. 277.
(4) (1918) 48 Ind. Cas. 23.
(5) (1916) I. L. R. 43 Cal. 447.
(6) (1906) L. R. 1 K. B. 39.