

REVISIONAL CIVIL.*Before Mullick and Ross, J.J.*

KALI RAI

v.

TULSI RAI.*

1925.

April, 8.
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Code of Civil Procedure, 1908 (Act V of 1908), section 115—Order refusing to add a party as defendant—Revision—Government of India Act, 1915, section 107.

An order refusing to add a party as a defendant cannot be revised under section 115, Civil Procedure Code, 1908.

Rabbaba Khanum v. Noorjehan Begum (1), approved.

Jugal Krishna Mullick v. Phul Kumari Dassi (2) and *Dwarka Nath Sen v. Kisori Lal Gosain* (3), referred to.

In such a case, however, the High Court may interfere under section 107, Government of India Act, if there is a denial of the right of fair trial.

In a mortgage suit brought by the petitioner's uncle Tulsi Rai against certain persons styled the Ojhas upon a bond executed in 1916 and standing in the name of the petitioner's uncle Tulsi Rai, the Ojhas objected that the petitioner Kali Rai was a necessary party inasmuch as his father Raghunath had had a share in the money which was originally lent to the defendants. It was also alleged by the defendants that the bond of 1916 was merely a renewal of an old bond of 1904 after Raghunath's death. After the defendants made this objection as to non-joinder the petitioner came forward with a petition praying to be joined as plaintiff in the suit. That petition was

* Civil Revision no. 463 of 1924, from an order of Babu A. N. Das, Subordinate Judge of Godda, dated the 8th July, 1924.

(1) (1886) I. L. R. 13 Cal. 90.

(2) (1918) 44 Ind. Cas. 564.

(3) (1910) 11 Cal. L. J. 426.

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disallowed by the Subordinate Judge and hence this application in revision to the High Court.

S. S. Bose, for the applicant.

L. K. Jha, for the opposite party.

MULLICK, J. (after stating the facts set out above, proceeded as follows): It is quite clear that the addition of the petitioner as a plaintiff will cause great inconvenience in the trial of the mortgage suit. It would be altogether out of the scope of that suit to introduce into it a conflict between the plaintiffs and a person who claims adversely to them. The question whether there had been in fact a partition in 1904 between Tulsi Rai and Raghunath is one which will require much evidence unnecessary for the mortgage suit and I agree with the learned Subordinate Judge that to join the petitioner as a plaintiff would be improper and inconvenient.

The petitioner, however, now says that he is quite willing to be joined as a defendant. That again is a position which he cannot be allowed to take up. It is quite conceivable that the petitioner's appearing in the role of a defendant will raise obstacles in the way of the plaintiffs which were altogether unforeseen and the balance of convenience decidedly requires that the petitioner should be left to bring a separate suit against the plaintiffs if he has any share in the bond upon which the suit has been brought.

It is contended that the non-joinder of the petitioner may possibly entail the dismissal of the suit. It has, however, been held in this Court that unless there are very strong reasons for doing so, a mortgage suit will not be dismissed on the ground that the other members of the joint family have not been joined as plaintiffs. In any event if the suit is dismissed the petitioner will not be affected and the only objection the petitioner can raise is that there may possibly be a multiplicity of suits. In the circumstances of this

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case such a result cannot be avoided, if the plaintiff desires to assert his claim to the mortgage money.

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MULLICK, J.

With regard to a question whether section 115 of the Civil Procedure Code applies and whether we have jurisdiction to interfere, it seems that there has in this case been no refusal on the part of the Subordinate Judge to exercise jurisdiction. He may have exercised it wrongly, but it cannot be said that there has been any failure on his part to exercise jurisdiction. In *Rabbaba Khanum v. Noorjehan Begum alias Dalim Shahiba*(¹), the same point came up before the Calcutta High Court and it was held that a refusal to add a party as a defendant could not be revised under section 622 of the Civil Procedure Code which corresponds to the present section 115. On the other hand, there are other cases of the Calcutta High Court where the Court has revised the decision of a lower Court in the matter of joinder of parties [see for instance *Jugal Krishna Mullick v. Phul Kumari Dassi*(²), and *Dwarka Nath Sen v. Kisori Lal Gosain*(³)]. These cases, however, were decided on their own facts and it is not clear whether the Court was acting under section 115 or its general powers of superintendence. In my opinion section 115 is clearly not applicable. Possibly section 107 of the Government of India Act might apply to cases where the result is a denial of the right of fair trial. In the present case there has been no such denial and therefore we cannot interfere in exercise of our powers of superintendence.

In my opinion the merits are altogether against the petitioner and therefore the application must be dismissed with cost.

Ross, J.—I agree.

Application dismissed.

S. A. K.

(1) (1886) I. L. R. 13 Cal. 90.

(2) (1918) 44 Ind. Cas. 564.

(3) (1910) 10 Cal. L. J. 426.