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suspension. James, J. observed that the difficulty of enforcing against the plaintiff the penalty of suspension of rent on account of dispossession was increased by the fact that there was nothing on the record to indicate the rents chargeable for the two plots in suit; but this difficulty has now been overcome by means of inquiries made by the parties.

I would accordingly allow this appeal and modify the decree in favour of the landlords by confining it to the rent of plot no. 833 only. We know from Mr. Gendhari Prasad Singh that this plot was assessed in the batwara proceedings at Rs. 2-14-6 besides cess; and there is no dispute before us that there is no reason why the tenant appellant should not pay rent for this plot.

The appeal succeeds in respect of the rent of plot no. 902 only. I would allow the tenant appellant proportionate costs in all the courts, and direct the decree of the lower court to be corrected accordingly.

COURTNEY TERRELL, C.J.—I entirely agree.

Appeal allowed.

Decree modified.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Dhavle, J.

1936.

August 12.
January, 24.

MUSAMMAT DAIWATI KUER

v.

MUSAMMAT TUNKI KUAR.*

Pleadings—inconsistent pleas by parties, when entertainable—suit for declaration that plaintiff's father was the last surviving member of the joint family and for possession—alternative claim to a moiety if her father be found to have

* Appeal from Original Decree no. 110 of 1932, from a decision of Babu Narendra Nath Chakravartti, Subordinate Judge of Patna, dated the 21st December, 1931.

died in a state of separation, if maintainable—defendant, whether can plead a title under a Will without taking probate.

Where the plaintiff alleged that her uncle predeceased her father and claimed the whole estate and in the alternative prayed that if her father be found to have died while separate she may be awarded a moiety. Defendant no. 1 contended that plaintiff's father died in the life-time of his brother and she was not entitled to any relief. Defendant no. 2 asserted that plaintiff's father was separate from his brother and claimed a 6 annas interest under his Will.

Where the facts are presumably within a plaintiff's knowledge he should not be allowed to plead inconsistent facts, but should be required to elect, so that the defendant may know what case he has to meet. Similarly the defendant may not plead inconsistent facts unless he is a stranger to the transaction and the true facts are not within his personal knowledge.

The rule against the joinder of inconsistent and alternative titles is not of an absolute character, and cases are conceivable where a plaintiff may, from obscurity or from complexity of facts, be in honest doubt as to the nature of relief available to him, and inconsistent claims may be entertained but not where there would be no reasonable excuse for them.

Bhimnath Misra v. *Jagarnath Prasad*(1), *Dwarka* v. *Ram Jatan*(2) and *Owen* v. *Morgan*(3), referred to.

A pleading by a defendant should not be struck out *in limine* on the ground of want of probate, because it is open to the party to take probate after the framing of issues and before the date of trial of the case.

Appeal by defendants 1 and 4.

The facts of the case material to this report are set out in the judgment of Dhavle, J.

Manohar Lal (with him *Syed Hasan* and *B. N. Rai*), for the appellants.

Baldeo Sahai (with him *Birijnandan Sahai* and *Nawal Kishore Sahai*), for the respondents.

(1) (1925) 7 Pat. L. T. 82.
(2) (1930) I. L. R. 53 All. 16.
(3) (1887) 35 Ch. Div. 492.

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MUSAMMAT DAIWATI KUER v. MUSAMMAT TUNKI KUER.

DHAVLE, J.

DHAVLE, J.—This is an appeal by defendants 1 and 4 in a title suit brought by Musammat Tunki Kuar as daughter and sole heir of one Umrao Singh. Her brothers Chamroo and Pitambar had predeceased their father and left behind two widows Musammat Sohago Kuar and Musammat Suraj Barto Kuar, defendants nos. 2 and 3. Umrao himself had a brother Tengar with whom and whose son Mangar Singh he was joint. Tengar and Mangar died in the life-time of Umrao. Mangar's son Chandi Singh was the husband of Musammat Daiwati Kuar, defendant no. 1. Plaintiff's case was that Chandi predeceased Umrao who died in Bhado 1326. Plaintiff thus became entitled to all the properties of the joint family, but as she was a young girl married elsewhere the management of the properties was left in the hands of Ramkishun Singh, defendant no. 4, brother of Daiwati and cousin of Sohago and Suraj Barto. Plaintiff was married to one Madan Singh who on her attaining majority started looking into her affairs, as a result of which Ramkishun Singh was dismissed. There followed proceedings under sections 144 and 145 of the Code of Criminal Procedure between the parties, and in these Madan Singh failed and Ramkishun succeeded. Plaintiff, therefore, brought the suit for recovery of the property left by Umrao, viz., about 40 bighas of land. In paragraph 24 of her plaint she set up an alternative case,

> "in view of several pieces of documentary evidence which were filed by both the parties in the case under section 145, Cr. P. C.",

that if it should be found that Umrao and Chandi were separate, the properties may be partitioned and the plaintiff put in separate possession of a moiety. Defendants nos. 2 and 3 were impleaded on the ground that Ramkishun had their names entered in the zamindari laggits and had three sale deeds executed by them along with defendant no. 1, besides two ijaras, executed one by defendant no. 1 and the other by the other widows; there was also a will of Umrao

leaving his property to Sohago (6 annas) and Suraj Barto (10 annas), and a deed of relinquishment by Sohago in favour of the plaintiff.

The case of defendants nos. 1, 3 and 4 was that Umrao had predeceased Chandi, who had thus become sole owner of the property of the joint family, and that accordingly the plaintiff had no title at all. Defendant no. 2 urged that Umrao and Chandi were separate, that she had taken 6 annas of Umrao's property under his will, and that her ladavi deed in favour of the plaintiff had been obtained from her by misrepresentation.

The substantial issue in the case was

"3. Were Umrao Singh and Chandi Singh living separate? Did Chandi Singh predecease Umrao Singh?"

The lower Court answered the first part of this issue in the affirmative, and the second in the negative and accordingly decreed the suit in part, giving the plaintiff possession of Umrao's half share "after partition".

It has been contended on behalf of the appellants that the decree of the lower Court in favour of the plaintiff proceeds on a basis which was not the plaintiffs' case, and that as it has been found that Umrao predeceased Chandi and as it was the common case of the plaintiff and the appellants that the family was joint, the suit should have been dismissed altogether because Chandi being the last and sole holder of the properties, the plaintiff could have no title at all. The finding that Umrao predeceased Chandi is supported by Exhibit F1 a registered ijara of February, 1920, executed by Chandi Singh for a loan for

"defraying the expenses of the Sradh of my grandfather's brother Umrao Singh",

and is unquestionably correct. On her own case that Umrao and Chandi were joint, the plaintiff would,

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therefore, have no title. There was, however, the alternative case in paragraph 24 of the plaint to which I have already referred. It has been contended for the appellants that the plaintiff should not have been allowed to plead an alternative claim based on the separation of Umrao and Chandi, and that their jointness being common ground between the plaintiff and the appellants, the issue of separation raised by defendant no. 2, should not have been gone into in the case, as she only claimed under a will of which no probate has yet been taken. But the issue was actually raised and tried without any objection that defendant no. 2 had been wrongly imported into the suit; and the finding on the issue will be res judicata not merely between plaintiff and defendant no. 2 but also between defendant no. 2 and defendant no. 1. Defendant no. 2 was clearly a necessary party to the suit, and though it is true that she could make no title against the plaintiff or any other party on the basis of her father-in-law's will without taking out probate, her pleading could not have been struck out *in limine* on the ground of want of probate—even if the appellants had moved the lower Court to do so—because it was open to her to take out probate after the framing of the issues and before the close of the trial of the case. Learned Counsel for the appellants has cited a decision of this Court—*Bhimnath Misra* v. *Jaggarnath Prasad*(1)—as an authority against allowing a plaintiff to make inconsistent alternative claims. But what was laid down in that case was that where the facts are presumably within a plaintiff's knowledge, he should not be allowed to plead inconsistent facts but should be required to elect so that the defendant may know what case he has to meet, and similarly, the defendant may not claim inconsistent facts unless he is a stranger to the transaction and the true state of facts is not within his personal knowledge. The rule against the joinder of inconsistent and alternative titles is thus not of

(1) (1925) 7 Pat. L. T. 82.

an absolute character, and, as was observed in *Dwarka* v. *Ram Jatan*(1), cases are conceivable where a plaintiff may, from obscurity or from complexity of facts, be in honest doubt as to the nature of relief available to him, and inconsistent claims may, therefore, be entertained but not where there could be no reasonable excuse for them. *See* also *Owen* v. *Morgan*(2) where the Court of Appeal reversed North, J. and allowed a number of alternative defences to stand, subject to particulars being given. In the present case the plaintiff had ample excuse for setting up the alternative case made out in paragraph 24 of the plaint. She was a girl of 10 or so at the time of her father's death and had no personal knowledge of affairs at all, and the inference from the documents (if proved) was a matter of law. The appellant Ramkishun admittedly looked after the affairs of Daiwati at least on Chandi's death, and this according to the case of the appellants means that he looked after the cultivation of all the lands in suit. During his management, about a year after Chandi's death, three sale deeds were executed by Daiwati as well as Sohago and Suraj Barto conjointly (Exhibits 2, 4 and 3) in May, 1921. Daiwati says that the other widows were joined in these deeds because the purchasers insisted on their doing so; and Murli Singh, defendant no. 5, the purchaser under Exhibit 2, says in his evidence that he did so because the names of these widows were entered in the laggits of other zamindars, though not in his own. The explanation is plainly unsatisfactory, especially as we find Daiwati mortgaging her half-share and the other widows their half-share in some plots on one and the same day (Exhibits 5 and 6), and Sohago and Suraj Barto sign by the pen of Ramkishun. The oral evidence adduced on behalf of the plaintiff was directed to showing that Umrao and Chandi were joint; and these sale deeds were put in for the

(1) (1930) I. L. R. 53 All. 16.
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plaintiff not so much to establish the separation of the two men as to obtain a declaration that the sales were not binding on her. The plaintiff cannot, therefore, be said to have caused the appellants any embarrassment by the production of such documents, and it was doubtless such evidence that the learned Subordinate Judge had in mind when he observed that

> "the evidence on behalf of defendant no. 2 *and the documentary evidence on behalf of the plaintiff* show that they were separate .".

[His Lordship then discussed the evidence on the record and proceeded :]

On the evidence before him, therefore, the learned Subordinate Judge was quite right in holding that Umrao and Chandi were separate. If Sohago had gone further and claimed her share after taking probate of the will, questions would have arisen regarding the effect of her ladavi deed and of Suraj Barto's denial of Umrao's will. It was unnecessary for the Subordinate Judge to pronounce on these matters, and the question he had to deal with was whether or not to give any relief to the plaintiff on the basis of the finding of separation which he had arrived at on the evidence before him. In my opinion, the plaint was properly framed to include a relief on the basis of separation between Umrao and Chandi, and there was no reason why this relief should have been refused to the plaintiff merely because she made her claim primarily on the footing that the two men were joint. It has been urged on behalf of the appellants that the finding of separation is inconsistent with the order to partition plaintiffs' half share. The learned Advocate for the plaintiff-respondent has endeavoured to meet this by urging that though according to the evidence adduced on behalf of defendant no. 2 the lands had been partitioned in the life-time of Umrao, the partition has been undone by the claim made by both parties before the Magistrate that Umrao and Chandi were joint. The partition

spoken of by the witnesses was not of a very formal order. There was no document written and no phatbandi, as Sukhdeo the only Panch examined admits in cross-examination; the big plot of 10 bighas was divided equally between Chandi and Umrao, the other plots were given wholly to one or the other of them and the evidence does not show which particular plot fell to Umrao. In these circumstances the partition between Umrao and Chandi, spoken to by Sukhdeo and Sohago's father Ganauri who claims to have been accidentally present on the occasion, may, I think, be well ignored, though in view of the documentary evidence the fact need not be doubted that Umrao and Chandi did become separate at that time.

At the close of the arguments in this case we understood that there was a chance of the parties compromising this case in view of the probate proceedings started by Sohago Kuar and we adjourned the case especially as it seemed that the cost of a formal partition by the Court might be out of all proportion to the benefit that the parties were likely to receive in the event of the registered will being established. The parties have since informed us that no compromise can be arrived at and that the partition ordered by the lower Court has in fact been carried out.

It would, therefore, be sufficient, in my opinion, now to say that the appellants have failed in showing that the decree of the lower Court is wrong and that the appeal must be dismissed with costs to the contesting respondent no. 1.

COURTNEY TERRELL, C.J.—I agree.

Appeal dismissed.