essentially different, then, I think, it cannot be supposed that the finding is a final decision. It seems to me to be merely an expression of opinion and nothing more.

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Therefore I think that this appeal should be dismissed with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Pratt.

SHAHASAHEB MARD SABDARALLI AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 3), APPELLANTS *v.* SADASHIV SUPDU (ORIGINAL PLAINTIFF), RESPONDENT.*

1918.
December 3.

Civil Procedure Code (Act V of 1908), Order XXXIV, Rule 1—Mortgage suit—All persons interested in the mortgage to be parties to the suit—Some only of the heirs of mortgagor joined as parties—Suit not bad for non-joinder of parties.

The plaintiff, a mortgagee, sued to recover the mortgage debt by sale of mortgaged properties. The original mortgagor, who was a Mahomedan, having died before the suit, only his widow and daughters were made defendants. It was contended that the suit was bad for non-joinder of other heirs of the mortgagor, viz., his brother and sister's children :—

Held, that the non-joinder of parties was not fatal to the suit, inasmuch as the suit was properly constituted at the date of the plaint so as to enable the Court to adjudicate as between the parties impleaded.

SECOND appeal from the decision of C. C. Dutt, Assistant Judge of Khandesh, confirming the decree passed by M. M. Bhatt, Subordinate Judge at Erandol.

One Sabdaralli, a Mahomedan, executed two mortgages in 1896 in favour of the plaintiff. After Sabdaralli's death, the plaintiff brought a suit on the 11th January

* Second Appeal No. 654 of 1916.

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1911 to recover the money due on the mortgage. The widow and the daughters of Sabdaralli were made defendants; the other heirs of Sabdaralli, namely, his brother and sister's children, were not made parties to the suit. The widow (defendant No. 1) contended *inter alia* in her written statement that the suit was bad for non-joinder of parties.

The Subordinate Judge was of opinion that the whole suit was not bad for non-joinder of parties, though persons not joined as defendants would not be bound by the decree. He, therefore, passed the usual mortgage decree against the widow and daughters of Sabdaralli, defendants Nos. 1 to 3.

The Assistant Judge, on appeal, confirmed the decree.

Defendants Nos. 1 to 3 appealed to the High Court.

S. M. Kaikini, for the appellants:—The suit being defective for want of parties should be dismissed: see Civil Procedure Code, 1908, Order XXXIV, Rule 1 and *Ghulam Kadir Khan* v. *Mustakim Khan*[1]. The object of the rule is to prevent multiplicity of suits. Here, the suit has been filed on the last day on which it could be filed; so that, if any party is freshly added now, the suit would be beyond time under section 22 of the Limitation Act, 1908. The lower Court has relied on *Virchand Vajikaranshet* v. *Kondu*[2] and decided against us. But that case is based on the doctrine of representation, which doctrine, it has been recently held, does not apply to Mahomedans: see *Mirkha* v. *Bhagirthibai*.[3] As regards section 22 of the Limitation Act, the equity of redemption cannot be split up; the omitted persons are therefore necessary parties; and as against them the suit is already barred. In *Guruvayya* v. *Dattatraya*[4] the newly

(1) (1895) 18 All. 109.
(2) (1915) 39 Bom. 729.
(3) (1918) 43 Bom. 412.
(4) (1903) 28 Bom. 11.

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added parties were not necessary parties; and that case has been dissented from in *Mathewson* v. *Ram Kanai Singh Deb*[1]. The terms of Order XXXIV, Rule 1, are imperative.

P. B. Shingne, for the respondent:—The present case is governed by *Virchand Vajikaranshet* v. *Kondu*[2]. The suit as instituted was properly constituted. Order XXXIV, Rule 1, enacts only a rule of procedure. Any objection as to non-joinder of parties is only a technical objection: see section 99 of the Civil Procedure Code. It is only the mortgaged estate that is liable. Further, the persons not impleaded were not necessary parties. Any person interested in the equity of redemption can redeem: see section 91 of the Transfer of Property Act. If so, he alone can be sued and compelled to redeem.

PRATT, J.:—In this suit the mortgagee, who is respondent in this appeal, sued to recover the mortgage debt by sale of properties mortgaged in 1896 by the deceased Sabdaralli. The suit was brought within the extended period of limitation allowed by section 36 of the Indian Limitation Act, 1908, and the original mortgagor having died before the suit his wife and daughters—the appellants—were made defendants.

Objection was taken in the first Court that the suit was bad for non-joinder of other heirs of Sabdaralli—his brother and sister's children. But the mortgagee did not join them in spite of the objection as the period of limitation as against them had expired.

The Subordinate Judge held that the non-joinder of these heirs was not fatal to the suit and decreed the suit as against the interest of the wife and daughters. The lower appellate Court confirmed this decree and

[1] (1909) 36 Cal. 675. [2] (1915) 39 Bom. 729.

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the wife and daughters in this appeal contend that the provisions of Order XXXIV, Rule 1, are imperative and that the non-joinder of the heirs admittedly interested in the equity of redemption necessitated the dismissal of the suit.

This is the only point raised in the appeal.

Now the mortgage security is of course indivisible and the mortgagee must sue to realize the whole of his debt out of the property mortgaged. This is the substantive law enacted in section 67 of the Transfer of Property Act. Then Order XXXIV, Rule 1, is a rule of procedure that all persons interested in the mortgage security or the right of redemption shall be made parties to the suit. The object of this rule is clearly to avoid multiplication of suits, but does a breach of this rule involve the consequence that the suit should be dismissed? The answer to this question is, I think, supplied by section 99 of the Code. That section refers to cases of mis-joinder of parties but mis-joinder includes non-joinder: *Yakkanath Eacharaunni Valia Kaimal* v. *Manakkat Vasunni Elaya Kaimal*[1]. According to that section non-joinder of parties, though a breach of the procedure enjoined by the Code, is not a fatal defect unless it affects the merits of the case or the jurisdiction of the Court. Neither of these conditions is fulfilled in the present case. The right to enforce the mortgage charge against the part of the security represented by the shares of the excluded heirs is lost. The joinder of these heirs will not affect the merits of the case, for it is only the right, title and interest of the defendants that can be sold. The mortgagee, though he has lost part of the security, is entitled to enforce his charge against the rest and there is no bar on the jurisdiction of the Court to entertain such a suit.

(1) (1909) 33 Mad. 436.

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The terms of section 85 of the Transfer of Property Act (IV of 1882) which corresponded to Order XXXIV, Rule 1, were held by the Allahabad High Court in *Mata Din Kasodhan* v. *Kazim Husain*[1] and *Ghulam Kadir Khan* v. *Mustakim Khan*[2] to be imperative so that failure to join the parties indicated involved dismissal of the suit. These cases proceeded on what was supposed to be the imperative character of the word "must" in section 85. But this word is now dropped out and the section is incorporated in the Code of Civil Procedure showing that the matter is one of procedure andregulated by section 99. The judgment in *Mata Din's case*[1] said (page 465) that the imperative construction was necessary in order that "litigants should be made to know and feel the Statute Law." This can hardly be admitted as a valid argument and justifies the criticism of Mr. Ghose in his work on the Law of Mortgages in India that Courts exist not for the sake of discipline but for determining matters in controversy between the parties. I think the correct construction was that put upon the section in the dissentient judgment of Mahmood J. in *Mata Din's case*[1]. In the absence of words of prohibition the section is not to be read as if it began by saying that "No suit shall be entertained unless all parties, &c." This view is supported by a dictum of the Privy Council in *Umes Chunder Sircar* v. *Zahur Fatima*[3]. At page 179 of the report their Lordships say :—

"Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they are never made parties."

[1] (1891) 13 All. 432.
[2] (1895) 18 All. 109.
[3] (1890) 18 Cal. 164.

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Evidently their Lordships thought a suit on the mortgage would be competent although assignees of the equity of redemption had not been made parties.

We have next been confronted with cases on section 22 of the Indian Limitation Act which decide that when necessary parties are not joined within the period of limitation the suit must be dismissed. In *Gururayya* v. *Dattatraya*[1] it was said that "such a result must depend upon consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given in the suit as framed" for instance, in a suit by one of several joint promisees the other promisees are necessary parties for no relief can be given to one of them. The suit is not properly constituted unless all the co-promisees join, for the plaintiff can only enforce his claim in conjunction with them: *Ramsebuk* v. *Ramlall*[2]. So also a partition suit cannot be constituted unless all the co-parceners are made parties. But on the other hand when the suit can be constituted without the other parties and their joinder is only desirable as in *Gururayya's case*[1] "for the purpose of safe-guarding the rights subsisting as between them and others claiming generally in the same interest" the suit should proceed and the Court should award such relief as may be given in the suit as framed. That necessary parties mean parties necessary to the constitution of the suit seems to have been the view taken by the Privy Council in the case of *Kishan Prasad* v. *Har Narain Singh*[3]. Their Lordships said:—

"By this time the three years allowed by Act XV of 1877, Second Schedule, Article 64, had expired, and it became necessary to determine whether or not the additional plaintiffs were really necessary parties,

[1] (1903) 28 Bom. 11 at p. 17. [2] (1881) 6 Cal. 815.
[3] (1911) 33 All. 272 at p. 276.

because if not, the suit had always been properly constituted and the time under the statute stopped running on the 3rd June, 1904 (the date of the plaint), within the three years."

The distinction between necessary parties and proper parties is made in Order I, Rule 10 (2), where necessary parties are parties "who ought to have been joined" and who are indispensable as without them no decree at all can be made and proper parties are those whose presence enables the Court to adjudicate more "effectually and completely." This is the distinction made in the passage quoted from Pomeroy on Remedies in *Keshavram* v. *Ranchhod*[1].

Now this suit was properly constituted when the plaint was filed for I have already shown that the Court could award relief against the interest of defendants. Section 22 of the Indian Limitation Act does not therefore necessitate the dismissal of the suit.

The test, therefore, both under Order XXXIV, Rule 1, and section 22 of the Indian Limitation Act is the same: was the suit properly constituted at the date of the plaint so as to enable the Court to adjudicate as between the parties impleaded?

My conclusions both as to the effect of Order XXXIV, Rule 1, and section 22 of the Indian Limitation Act are supported by a recent decision of this Court in *Virchand Vajikaranshet* v. *Kondu*[2]. I do not however express agreement with the decision in that suit that the mortgage decree would be binding on the Mahomedan co-heirs who were not parties. But this point does not arise for decision.

I, therefore, think the lower Courts were right and would confirm the decree and dismiss this appeal with costs.

[1] (1905) 30 Bom. 156 at p. 161. [2] (1915) 39 Bom. 729.

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HEATON, J.:—I emphatically agree that the Courts below were right not to dismiss the suit. This is the only matter before us. We are not asked to decide what will be the effect of the decree that has been made; so on that point I say nothing.

A mortgagee's claim when it is put forward in the form taken in these proceedings, is primarily a claim against property. The claim here, so far as it concerned the property, was made in time, the persons cited as defendants were correctly made defendants but they did not comprise all who should be defendants. Possibly the correct procedure in the trial Court would have been to direct the plaintiff to add the other defendants. But the real attack on the decision of the lower Courts is not on that ground at all. In order to be able to appreciate the true legal position I will assume that the others were added as defendants and that the claim against them was time-barred. I cannot see how in justice or in law it follows that the whole claim must be dismissed. It is not so provided by Order XXXIV, Rule 1, either expressly or as I think impliedly. The disadvantages of failing to join in time persons who ought to be defendants are quite serious enough without adding to them by dismissing a suit. There is certainly no other provision in the Procedure Code which supports the view that in such circumstances as these a suit should be wholly dismissed.

If that is the position reached after a study of the law of procedure, it remains unassailed by anything to be found in the law of mortgage, as I understand it.

In the case of *Virchand Vajikaranshet* v. *Kondu*[1] this Court, in circumstances almost identical with those now before us, arrived at the same conclusion as that we propose to give effect to. It is true that my

[1] (1915) 39 Bom 729.

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learned brother and myself have given reasons a good deal different from those given in that case. But where several different lines of reasoning lead to the same result, one is fortified in the belief that the result is correct.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Shah; on difference between Mr. Justice Heaton and Mr. Justice Hayward.

1918.

December 18.

SHANKARLAL TAPIDAS (ORIGINAL PLAINTIFF), APPELLANT *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

Summary Settlement Act (Bombay Act VII of 1863)—Land granted to a mosque—At summary settlement land continued to mosque on payment of annual quit-rent—Alienation of land by mutavali of the mosque—Full assessment demanded by Government from the alienee.

At the time of the summary settlement held in 1879, the land in dispute which had been granted to a mosque was continued on payment to Government of an annual quit-rent, under the Sanad which ran as follows :—

" By Act VII of 1863 of the Bombay Legislative Council...is hereby declared that the said land, subject...to the payment to Government of an annual quit-rent of Rs. 17-8-0, seventeen and annas eight only, shall be continued for ever by the British Government as the endowment property of the Jumma Masjid...without increase of the said quit-rent, but on the condition that the managers thereof shall continue loyal and faithful subjects of the British Government. "

Nearly sixty years before suit, the then manager of the mosque alienated (it was assumed that the alienation was unlawful) the land to a stranger. From 1912 onwards, the Government levied full assessment on the land in the hands of the alienee. A suit having been brought to recover the extra assessment so levied :—

Held, by Shah and Hayward, J.J. (Heaton J., dissenting), that the provisions of the Summary Settlement Act, 1863, and the terms of the Sanad pointed

* First Appeal No. 130 of 1915.