PRIVY COUNCIL.

MONGHIBAI, APPELLANT *v.* COOVERJI UMERSEY, RESPONDENT.

[On Appeal from the High Court at Bombay]

J. C. * 1939 *May* 2

Civil Procedure—Parties—Suit by one of several joint owners—Assignment pendente lite*—Code of Civil Procedure (Act V of 1908), O. I, rr. 10 (1), (2) and O. XXII, rr. 10 (1), 11.*

A suit on an equitable mortgage of property valued at more than Rs. 100 in favour of several persons is maintainable by one of them to whom his co-mortgagees have assigned their rights in the mortgage by an unregistered deed when the assignors have been added as defendants and they may be so added by amendment of the plaint where they have not originally been made parties to the suit.

Where one of several joint mortgagees commences an action against the mortgagor on the mortgage and makes his co-mortgagees defendants to the action and his co-mortgagees by a registered deed executed during the pendency of the action assign their rights under the mortgage to him, the suit may be continued by him and a decree may be made in his favour.

Luke v. *South Kensington Hotel Company*,[1] *Cullen* v. *Knowles*,[2] *Hughes* v. *Pump House Hotel Co. Ltd. (No. 2)*,[3] *Seear* v. *Lawson*,[4] and *Campbell* v. *Holyland*,[5] referred to.

JUDGMENT of the High Court affirmed.

Appeal (No. 51 of 1938) from a decree of the High Court in its Appellate Jurisdiction (March 16, 1937), which affirmed a decree made in its Original Civil Jurisdiction (July 30, 1936).

The material facts and contentions are stated in the judgment of the Judicial Committee.

Rewcastle, K. C., and *Subba Row*, for the appellants.

Dunne, K. C., *Sir Thomas Strangman, K. C.*, and *Bagram*, for the respondents.

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The judgment of the Judicial Committee was delivered by

LORD PORTER. This case raises a short point for the decision of the Board. It is an appeal from the judgment

* *Present :* Lord Thankerton, Lord Porter and Sir George Rankin.

(1) (1879) 11 Ch. D. 121.
(2) [1898] 2 Q. B. 380.
(3) [1902] 2 K. B. 485.
(4) (1880) 16 Ch. D. 121.
(5) (1877) 7 Ch. D. 166.

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and decree of the High Court at Bombay in its appellate jurisdiction dated March 16, 1937. By its judgment the Appeal Court affirmed a decree of the High Court in its ordinary original civil jurisdiction dated July 30, 1936.

Up to and after the year 1925 a firm of Cooverji Umersey & Co. were carrying on business in partnership in Bombay. In 1925 it consisted of nine partners, Cooverji Umersey, the respondent, his father Umersey Katchra, and seven others who were the defendants Nos. 4 to 10 below.

On September 30, 1925, one Mawji Waghji and his wife, the appellant, borrowed Rs. 1,20,000 from the firm and gave a promissory note for that sum in favour of the firm. The advance was secured by certain bales of cotton and at the same time the title deeds of two houses belonging to the appellant and to her husband and situated at King Lane and Borah Bazar Street were deposited with the firm by way of equitable security and as further cover for the loan. In case of default the firm was to have recourse to the bales of cotton in the first instance and against the house property for any deficiency.

In pursuance of this arrangement the firm sold the bales of cotton, leaving, however, a large portion of the debt unpaid.

In November, 1926, seven members of the firm retired, leaving the respondent and his father the only remaining members.

Of those seven the tenth defendant, Bhulabhai Devi, pursuant to an oral agreement made on November 6, 1926, with the respondent and his father retired from the firm, paid to them the sum of Rs. 17,000 for his share of the losses of the business, released all his share, right, title and interest in the assets, outstandings, property and good will of the partnership business in favour of the respondent and his father, and agreed to execute in their favour all such transfers as might become necessary for better and more

effectively assigning and transferring his share, right, title and interests.

On November 17, 1926, the other six defendants—Nos. 4 to 9—executed a document purporting to assign their interest in the partnership property to the respondent and his father.

This document was not registered in accordance with the terms of s. 17 (*1*) (*b*) of the Indian Registration Act, 1908, and it was contended by the appellant and was not disputed by the respondent that neither the tenth defendant's oral agreement nor the written document of November 17, were effective to transfer an interest in immoveable property. The mortgage rights in the house property therefore remained in all the original partners.

After November, 1926, the respondent and his father continued to carry on business in the firm name. On January 21, 1927, the firm as then constituted brought the present suit in the High Court of Bombay against the appellant and her husband for a declaration that the plaintiffs were equitable mortgagees of the two houses, for an order that the defendants pay them the sum of Rs. 1,33,500 with interest on Rs. 1,20,000 at 9 per cent. per annum from January 1, 1927, until judgment, and that in default of payment the mortgaged properties might be sold and the proceeds applied in and towards payment of the plaintiffs' claim. In this action the respondents raised a counter claim. No question now arises with regard to the cotton, the promissory note or the counter claim, but it was and is contended on behalf of the appellant that the suit in respect of the equitable mortgage of the houses was not maintainable inasmuch as the proper parties to the suit had not been joined. In her submission the houses not having passed under the unregistered assignment of November 17, 1926, still remained vested in the original partners and could only be recovered in an action in which they were plaintiffs or at least were parties.

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Pending the trial of the action the respondent's father Umersey Katchra died on or about October 21, 1928, leaving the respondent solely entitled beneficially to all the assets, outgoings, property and good will of the partnership business and to the sum of Rs. 1,20,000 and to the benefit of the mortgage securing it.

The case came on for hearing before Wadia J. on June 28, and August 9, 1934, and the appellant thereupon raised the contention that the transfer was ineffective as it had not been registered, and that the property had never passed from the original partners to the present respondent and his father. With this contention the learned Judge agreed, but allowed the suit to proceed and oral evidence to be given in case the respondent could prove some oral terms of dissolution which should be admissible.

To meet the objection that all the necessary parties had not been joined the plaintiffs applied that the seven retiring partners should be placed on the record as co-plaintiffs or as co-defendants. Upon this application the learned Judge granted leave to amend the title of the suit by adding the retiring partners as defendants and by making the necessary consequent amendments in the plaint. Following this order the seven retiring partners were added as defendants and the appropriate amendments made.

Defendants Nos. 4 to 10 put in a joint written statement referring to the document of November 17, 1926, and stating that they had transferred all their interest in the assets of the firm and had no further interest in the amount due from their co-defendants.

It appears that after the hearing before the learned Judge and before the making of the written statement all the seven retiring partners had executed a fresh deed dated August 22, 1934, transferring the assets of the firm to the respondent as sole owner of the business. This deed was duly registered and was relied upon by the respondent and defendants Nos. 4 to 10.

The case came on for hearing before the learned Judge for the second time on December 11, 1934, when two of the retiring partners, one of whom had and the other of whom had not executed the document of November 17, 1926, gave evidence and stated that they made no claim to any of the assets of the firm. The respondent also attempted to put in evidence the documents of November 17, 1926, and of August 22, 1934, but this evidence was rejected.

After hearing the evidence the learned Judge delivered judgment, holding that the only proof of the respondent's title was to be found in the document of November 17, 1926, and that as it required to be registered it could not transfer the property and was inadmissible in evidence. He also rejected the contention based on the second document since it had been executed subsequently to the institution of the suit. He accordingly held that the suit was not maintainable.

From this judgment the respondent appealed on the ground that the learned Judge should have allowed the defendants Nos. 4 to 10 to be made co-plaintiffs, but that in any case once they had been made defendants all parties interested were before the Court and appropriate relief could have been given.

The Appeal Court allowed the appeal on the ground that as soon as the application to join the other seven partners was granted by the learned Judge and the amendment made, the Court had before it all persons interested in the equitable mortgage the creation of which was not in dispute.

The learned Chief Justice stated that the respondent was clearly before the Court as plaintiff, although, in his view, inaccurately described as Cooverji Umersey & Co. Moreover the Court had all the other persons interested in the equitable mortgage before it as defendants and in those circumstances why the Court could not grant a decree enforcing the equitable mortgage he had great difficulty in understanding. In his

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view, with which Rangnekar J. agreed, the action in which the plaintiffs were described as Cooverji Umersey & Co. must in the circumstances be considered to have been brought by the respondent and his father. At that time, however, the right to recover had not passed from the original nine partners since the oral and written but unregistered transfers were ineffective to bring about that result. The suit, however, could and would logically have been properly constituted if it had been amended by making the nine partners plaintiffs. But the same result could be achieved by making the seven retiring partners defendants since in that case all the parties would be before the Court. Technically the respondent's name should be substituted for that of the firm, inasmuch as the father was dead and the respondent was the sole owner of the partnership property, but such a change constituted only a formal amendment and once it was made judgment could be entered for the respondent since he alone was beneficially entitled and the defendant partners disclaimed any interest.

The Appeal Court accordingly ordered the plaint to be amended by inserting the name of Cooverji Umersey in place of Cooverji Umersey & Co. and the suit was remitted to the lower Court for the trial of the issue raised by the counter claim.

After hearing issues the learned Judge on July 30, 1936, passed the usual preliminary mortgage decree for payment of a sum of Rs. 1,37,287-2-8 with interest and in default of payment that the respondent should be entitled to apply for a decree absolute for the sale of the mortgage security. The second defendant appealed against the preliminary mortgage decree and this appeal was dismissed with costs and the decree passed accordingly on March 16, 1937. It is from this decree that the present appeal is brought.

The only question argued before their Lordships was whether this suit was maintainable by the present respondent.

By O. I, r. 10, of the Code of Civil Procedure :—

"(1) . . . the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

"(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

It was not disputed that the bringing of the action in the names of the two remaining partners as plaintiffs was due to a genuine mistake and in any case this order gives the Court full power to amend the parties at any time. If, as was admitted in argument and as their Lordships think, the mortgagee's interest in the two houses did not pass to the respondent and his father by reason of the unregistered document of November 17, 1926, and the oral agreement made by the 10th defendant, that property remained in the nine original partners. In those circumstances their Lordships agree with the Appeal Court, thinking it would have been more satisfactory that the seven retiring partners should have been made co-plaintiffs instead of co-defendants, but it may be that they objected to being so joined or there may be other reasons which do not appear on the record for joining them as co-defendants. In any case they were so joined, the record amended, and no appeal from the learned Judge's order was made. The whole of the necessary parties were therefore before the

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Court and there seems no reason why the appropriate relief should not have been given.

It has long been recognised that one or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs if they will consent or as co-defendants if they will not. Such cases as *Luke* v. *South Kensington Hotel Company*,[1] and *Cullen* v. *Knowles*,[2] are examples of this principle. Nor indeed would it matter that a wrong person had originally sued though he had no cause of action. See *Hughes* v. *Pump House Hotel Co., Ltd.* (No. 2).[3] Once all the parties are before the Court the Court can make the appropriate order and should give judgment in favour of all the persons interested whether they be joined as plaintiffs or defendants. *Prima facie*, therefore, the trial Court in the present case should have given judgment in favour of the eight of the original partners who survived, though some of them had been made defendants. See *Cullen* v. *Knowles*[2] at p. 382.

But it was argued that even if this view be true seven of the original partners had by the transfer of August 22, 1934, made *pendente lite* assigned all their rights and interest in the mortgaged houses and could not thereafter maintain an action for sale in respect of them. No doubt it is true that parties who have assigned the whole of their interest *pendente lite* cannot ask for judgment in respect of an interest which is no longer theirs. But it does not follow that their assignees are thereby precluded from recovering. If it were so, no assignments of property during the course of a trial would be possible. Such a contention

[1] (1879) 11 Ch. D. 121. [2] [1898] 2 Q. B. 380.
[3] [1902] 2 K. B. 485.

is, on the face of it, improbable, and it is now dealt with by O. XVII, r. 1, of the Rules of the Supreme Court, which states :—

"A cause or matter shall not become defective by the assignment of any estate or title *pendente lite*."

But apart from the rule the principle has long been established in English law, and examples will be found in such cases as *Seear* v. *Lawson*,[1] and *Campbell* v. *Holyland*.[2] The same principle is applied in India and is now embodied in O. XXII, rr. 10 (*1*) and 11, which provides :—

"In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

"In the application of this Order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal."

Therefore though at the beginning of the suit the appropriate persons to recover were the nine original partners, once the transfer of August 22, 1934, was made, the party entitled to sue was the present respondent. As their Lordships have indicated, apart from the assignment of August 22, 1934, a decree should *prima facie* have been passed for the eight survivors of the original partnership, but all eight were before the Court, the respondent after amendment in fact alone was plaintiff, and the retired partners expressly disclaimed any interest.

In these circumstances their Lordships think the Appeal Court were right in looking at the substance of the matter and ordering the decree to be passed in favour of the respondent alone. But in any case once the assignment of August 22, 1934, was executed, the respondent alone was entitled to recover and the decree was rightly passed in his favour.

One further argument urged on behalf of the appellant was that to grant the relief asked for would be to make the registration law of India of no effect.

[1] (1880) 16 Ch. D 121. [2] (1877) 7 Ch. D. 166.

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In their Lordships' view, having regard to the grounds which they have given for affirming the judgment of the Court of Appeal, no such objection can be sustained.

They will humbly advise His Majesty that the appeal be dismissed and the order of the Appeal Court affirmed. The appellant must pay the costs of this appeal.

Solicitor for the appellant: Mr. *Harold Shephard.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. S. S.

ORIGINAL CIVIL.

Before Mr. Justice Rangnekar.

1938
August 1

HIRACHAND GANGJI, PLAINTIFF *v.* RAO SAHEB SOJPAL AND OTHERS, DEFENDANTS.*

Hindu law—Effect of partition on joint family—Coparcenary extinguished by partition—Adoption by widow of predeceased coparcener—Validity and effect of—Whether it affects ancestral property in the hands of divided coparceners—Applicability of Hindu law to Jains.

In 1892 one G a Jain died leaving him surviving a widow, his father, S, and three brothers, R, P and M, who continued to live jointly. Provision was made by the joint family for the maintenance of the widow of G. In 1915 S and his three sons R, P and M separated and a partition of the family property was effected. In 1928 S died and his property was distributed according to his directions in charity. In 1935 the widow of G purported to adopt H (plaintiff). On a suit filed by H for the declarations *inter alia* (*a*) that he was the validly adopted son of G, (*b*) that the partition was not binding on him, (*c*) that he was entitled to have the partition reopened his share in the property ascertained and given to him:

Held, (1) that the law in India was well settled that the Hindu law of adoption applied to Jains and the burden of showing any custom contrary to the ordinary principles of adoption would be on the party who sets it up;

(2) that on partition the coparcenary became extinct and the power of the widow of G, the predeceased coparcener, to adopt to her husband, was gone and an adoption by her was not valid since there was no undivided family into which the adopted son could be admitted by virtue of his adoption:

Observations in *Chandra* v. *Gojarabai*,[1] followed;

*O. C. J. Suit No. 1950 of 1935.

[1] (1890) 14 Bom. 463.