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judgment in that case as laying down that an accused person can never be guilty of corruptly using fabricated evidence when he uses it in his defence. In that particular case, the accused was acquitted as there was no evidence of the use being corrupt. But that case does not present any insuperable difficulty in the way of our holding in this case that the use of fabricated evidence was corrupt. While I am not prepared to hold that an accused person, when he uses the fabricated evidence as genuine in his defence, can never do so corruptly, it is clear that his position as an accused person must be taken into consideration in determining on the evidence in a particular case whether he uses it corruptly or not. It is not necessary for the purpose of this case to define the scope of the word 'corruptly' : but where a public servant has been induced by an accused person to produce a fabricated document in order to support his false defence, it is not difficult to support the inference as to the corrupt use by him of the fabricated evidence as being within the scope of section 196, Indian Penal Code. I, therefore, concur in the order proposed by the Chief Justice.

Rule discharged.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

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July 27.

GULABCHAND CHHOTIRAM MARWADI AND ANOTHER (ORIGINAL PLAINTIFFS NOS. 2 AND 3), APPELLANTS *v.* RAMNATH CHHOTIRAM MARWADI AND OTHERS (ORIGINAL PLAINTIFF NO. 1 AND DEFENDANTS), RESPONDENTS*.

Partition suit—Rent notes and bonds assigned to plaintiffs' share—Separate suit for rents recovered and amount due on bonds—Maintainability of a separate suit—Negligence, charge of, against the manager of family—The charge

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In pursuance of a preliminary decree passed in a partition suit of 1909 certain rent notes and bonds belonging to the joint family were assigned to the plaintiffs' share. The Court while passing the decree remarked in its judgment that the rents collected for 1905 to 1910 were entered in the account books and it was open to the plaintiffs to sue the tenants and the defendants on the rent notes in respect of which there were outstanding balances. On appeal to the High Court it was held that the trial Court was wrong in allowing rent of lands for the years 1905 to 1910. Pending the appeal in the High Court, the plaintiffs filed the present suit to recover rents for the years 1905 to 1910 and amounts due on the bonds from the defendants who were sought to be made liable for their neglect in not recovering the amounts,

Held, that the separate suit was not maintainable as the claim in respect of which the suit was filed was a matter which should have been dealt with in partition proceedings.

Per MACLEOD, C. J. :—"Where a charge of negligence is brought by a party in a partition suit against a manager, that is a matter which should be dealt with in the suit when accounts are being taken. There is no warrant for such a question being left outside, leaving it to the option of the aggrieved party to file another suit if he so chooses."

FIRST Appeal against the decision of K. R. Natu, First Class Subordinate Judge at Dhulia.

Suit to recover a sum of money.

Plaintiffs' father Chhotiram and defendant No. 1 Goturam were undivided brothers. They traded in union and acquired moveable and immoveable properties. Chhotiram died on the 20th July 1905 and thereafter Goturam managed the properties and the joint business.

In 1909 plaintiffs' mother having got information that Goturam was misappropriating joint family funds, filed a Suit (No. 42 of 1909) for partition and to recover plaintiffs' share in the family estate. In the said suit, a preliminary decree for partition was passed in 1914. The trial Judge, in the course of his Judgment remarked as follows:—

"Now as to the remaining lands of the family. They are let to tenants.

the rent notes passed by the tenants. What rents defendants collected from 1905 to 1910 are entered in the account books of the above said family trade. These rents are included in the above said balance of Rs. 7,636. Plaintiff is alleging that defendants did collect much more rent than what has been credited in the account books. Defendants say that all the amounts collected by them are entered. Plaintiff has got the rent notes about all lands that have fallen to his share. He may sue the tenants and defendants on the rent notes in respect of which there are outstanding balances..... Plaintiff is stating that the following bonds have fallen to his share..... Defendants admit that these have fallen to the share of the plaintiff. Plaintiff says that the first three bonds were not given to him, but defendants say that they were given. Plaintiff may sue the defendants and debtors."

The result as shown in the final decree was:—

"The defendants shall pay to the plaintiff Rs. 4,626-10-0 as mesne profits of the Nipani lands for the years 1905 to 1909. They shall also pay Rs. 2,878-8-0 and Rs. 704 and Rs. 257."

The plaintiffs appealed, but their appeal was dismissed by the High Court on 21st August 1919. On the defendants' cross-objections, the High Court held that the trial Judge "was wrong in ordering that the plaintiffs should recover their shares of the mesne profits from the defendants". The decree of the lower Court was modified.

In the meanwhile, on the 15th June 1918, the plaintiffs brought another Suit (No. 426 of 1918) against the defendants to recover from them by way of damages rent of certain lands for 1905 to 1910 and the amount due in respect of certain bonds, both of which were referred to by the trial Judge in the earlier suit. The trial Judge dismissed the suit for the following reasons:—

"The tenants or the obligors of the bonds are not made parties to this suit. The plaintiffs sue the defendants for rent which the plaintiffs say that they (defendants) collected or ought to have collected for the years 1905 to 1910. Thus the claim against defendants for the said rent is virtually one for damages. The plaintiffs were allowed by this Court Rs. 7,636 which amount includes mesne profits of lands for the said years. But the High Court disallowed the claim for mesne profits. The plaintiffs sue defendants for

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damages in respect of certain bonds. The plaintiffs have not sued the executants of the bonds. From the remarks of the Court in the said Judgment it appears that the Court asked plaintiffs to file separate suits against the several lessees and debtors and the defendants were to be joined only as co-defendants in the said suits. A combined suit of the present nature was not allowed or contemplated by this Court."

The plaintiffs appealed to the High Court.

P. B. Shingne, for the appellants:—The cause of action in the present suit is different from that in the previous suit; it is contended that owing to the fraud and negligence on the part of the defendants, plaintiffs have got a different grievance, arising out of a different set of circumstances and it cannot be said that the grievance thus arising fell within the purview of the previous suit. Moreover, in the previous suit, the plaintiff's right of suing for the sums due on the basis of the present grievance was saved and liberty was given to file suits and so the plaintiffs have brought a consolidated suit and this suit cannot be rightly condemned as multifarious. Hence, the decree passed by the lower Court is erroneous.

B. G. Rao, for *G. S. Rao*, for the respondents was not called upon.

MACLEOD, C. J.:—In First Appeal No. 315 of 1916 we dealt with the decision of the lower Court in the Original Suit No. 42 of 1909, which was a partition suit. That suit had been proceeding for a very large number of years before a final decision could be arrived at; and the main question in that appeal was whether the lower Court was right in allowing the plaintiffs mesne profits of certain Nipani lands for the years 1905 to 1909, and we came to the conclusion that that order was wrong.

Now it appears that on the basis of certain remarks made in the judgment of the trial Court dated 12th September 1914, the plaintiffs filed this Suit No. 426

of 1918 claiming to recover Rs. 16,000 from the defendants as certain balances shown as due in the plaint Schedules A, B, C. These balances consist of certain amounts due on the bonds and certain amounts said to be outstanding as due against tenants for rents for the years 1905 to 1910.

Apart from anything that was said in that judgment, it would follow from what this Court said in the judgment in First Appeal 315 of 1916 that the plaintiffs were not entitled to any account of the mesne profits with regard to rents, and with regard to bonds which were divided amongst the members of the family, they had to take their chance whether the bonds were good or bad.

But certainly with regard to the question of any liability of the defendants with respect to these outstanding debts due on bonds it is a matter which fell to be decided in that suit, and not by a separate suit; and I do not think our attention, was drawn, when that appeal was before us, to the fact that this present Suit No. 426 of 1918 was pending. In any event the plaintiffs have not followed the instructions of the learned Judge. He said: "The plaintiff had got the rent notes about all lands that have fallen to his share. He may sue the tenants and defendants on the rent notes in respect of which there are outstanding balances. In case defendants are found to be negligent, he may sue them for negligence". In the first instance, the Judge said the plaintiff could sue the tenants making defendants parties, and presumably seeking to make the defendants liable for their neglect in not recovering the rents.

Again the Judge said: "The plaintiff says that the first three bonds were not given to him but defendants say that they were given. The plaintiff may sue the defendants and the debtors." It is said that there is

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a suggestion there that the defendants would be liable on the bonds. The defendants might be necessary parties as being the persons to whom the bonds were given. But certainly the present suit as framed in which the plaintiff seeks to recover from the defendants the amounts of the bonds could not possibly be entertained.

But apart from that this is a claim within a partition suit with regard to matters which certainly should have been dealt with in the partition proceedings, as it was intended that the partition suit should once and for all have disposed of all questions with regard to the family estate; and it is certainly undesirable, after the decision in the partition suit, which had been going on for so many years, that one party should file subsidiary suits against the other party on matters which in the ordinary course would be relevant questions in the partition suit. I think, therefore, that the decision of the learned Judge in the Court below was right and that the appeal must be dismissed with costs.

I should like to mention that my own opinion is that if a charge of negligence is brought by a party in a partition suit against a manager, that is a matter which should be dealt with in the suit when accounts are being taken. There is no warrant for such a question being left outside, leaving it to the option of the aggrieved party to file another suit if he so chooses.

SHAH, J.:—I entirely agree. The main part of the claim relates to the amount said to have been recovered by the defendants in respect of certain lands the rent notes whereof were assigned in the partition suit to the present plaintiffs' share. It is not disputed that the rent notes were assigned to the plaintiffs

in pursuance of the preliminary decree. Though the preliminary decree is not before us, the learned pleader for the appellants has conceded that fact. The present claim is in respect of the rents said to have been realized by the defendants partly prior to the partition suit of 1909, and partly after the suit was filed. It is difficult to understand how a suit of that character could be maintained now.

The only ground upon which the right to file a separate suit is claimed for the plaintiffs is based upon certain remarks which were made by the trial Court when the final decree was passed. If those remarks are considered in relation to the context, it is clear that practically the plaintiffs' claim for mesne profits in respect of those lands for the years 1905 to 1910 was not then allowed by the trial Court. Even assuming at the best in favour of the plaintiffs that the trial Court then thought that the plaintiffs might be able to recover them in a separate suit, when the matter came up in appeal before this Court, this Court disallowed mesne profits for that period in respect of the Nipani lands. The present suit in respect of the rents for the years 1905 to 1910 is nothing but a claim for mesne profits partly prior to the date of the partition suit, and partly after the date of the suit. It is clear that it was really a point arising in the partition suit; and having regard to the result of the appeal to this Court there could be no doubt that that claim would have been disallowed, even if it had been allowed by the lower Court. It follows that the plaintiffs cannot now maintain a suit in respect of the mesne profits which would have been disallowed if they had been claimed then as mesne profits. I do not think, therefore, that the remark in the judgment, which was rather unfortunate, enables the plaintiffs to maintain the present action

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which otherwise is clearly unmaintainable.

As regards the bonds also, it is an admitted fact that they were assigned to the plaintiffs in pursuance of the terms of the preliminary decree; and the mere fact that the claims under those bonds are time-barred is no reason whatever for the plaintiffs to sue the defendants now separately as if they were responsible to them for negligence. If there was any allegation against the defendants in respect of the claim relating to these bonds, it could have been and should have been made in the partition suit. But unfortunately the trial Court, while passing the final decree left it open to the plaintiffs to file a separate suit. It was quite open then to the plaintiffs to have objected to that course, as they did object to other items when they appealed to this Court. The judgment of this Court shows that all the objections that were raised were disallowed with respect to different items. There was nothing to prevent the plaintiffs from raising that point in the appeal to this Court. Apparently they did not do so at the hearing, though I am not at all sure that the point was not covered by the memorandum of appeal; and now they sue the defendants alleging negligence on their part. There is nothing said beyond this that the defendants allowed the bonds to be time-barred. That is hardly sufficient to support the claim. It appears to me that the plaintiffs' suit in respect of these bonds was rightly dismissed. It is not suggested before us that when the bonds and the rent-notes were assigned to plaintiffs' share, any provision was made in the preliminary decree reserving to them the right to make the claim which they have now made.

Decree confirmed.

J. G. R.