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doing to give the Small Cause Court jurisdiction, and we must say that in such a case as that the Small Cause Court has no jurisdiction. As the plaintiff has done that, and has taken the opinion of this Court on the doubts which arose in the minds of the Judges of the Small Cause Court, we must say that Mr. Kennedy's client must pay the costs of reversing this case for the opinion of this Court.

Attorney for the plaintiff: Baboo *Kallynauth Mitter.*

Attorney for the defendant: Mr. *Moses.*

APPELLATE CIVIL.

1872
Sept. 11

Before Sir Richard Couch, Kt., Chief Justice and Mr. Justice Ainslie.

NUTHOO LALL CHOWDHRY AND OTHERS (PLAINTIFFS) *v.* SHOUKEE LALL AND OTHERS (DEFENDANTS).*

See I. L. R. 3 Cal 353.

Res-judicata—Act VIII of 1859, *s.* 2.—*Suit on Joint Bond.*

D and *B* executed a bond, by which they mortgaged certain lands as security for a loan taken by them from the plaintiffs. A suit was brought, and a decree was obtained by the plaintiffs against *D* and *B* under which they recovered a portion of the amount due on the bond. The plaintiffs now sued *S.* and others, on the ground that they were joint proprietors of the land mortgaged, that the loan was taken by *D* and *B* as managers for the use of all the parties interested and for carrying on their joint business and trade, and that therefore they were all jointly liable. *Held*, that the suit could not be maintained.

Ramnath Roy Chowdhry v. *Chunder Sehkur Mohapattur* (1) dissented from.

ON the 11th of Jeit 1271 Fuslee (1st June 1864), the defendants, Domun Lall and Bhawani Pershad, borrowed from the plaintiffs at Mozufferpore Rs. 20,000 on a bond, which was as follows:—

We are, Domun Lall, son of the late Chummun Lall, and Bhawani Pershad, son of the late Beharry Lall, inhabitants, proprietors, and shareholders of Mouzah Jurooah, Pergunnah Hajeepore.

* Regular Appeal, No. 177 of 1871, from a decree of the Additional Judge of Tirhoot, dated the 19th of May 1871.

(1) 1 W. R., 50.

Whereas, having taken a loan of company's Rs. 20,000, a moiety of which is Rs. 10,000, bearing interest at the rate of Rs. 1-4 *per mensem*, from Baboo Chummun Lall Chowdhry and Baboo Nuthoo Lall Chowdhry, inhabitants and proprietors of Mouzah Sooriagunge, Chukla Naye, Pergunnah Bissaro, also proprietors and shareholders of Mouzah Cherowtha, Pergunnah Hajeepore, we have appropriated the same to our own use. We therefore validly declare and give in writing that we shall pay the above amount, principal with interest, in a lump sum, in cash, on the 30 Aghun 1272 F. S. (13th December 1864), to the Chowdhrys aforesaid, and take back this deed, and we shall raise no contentions and disputes regarding the same; until payment of the said amount, principal with interest, we pledge and hypothecate our proprietary share in Mouzah Cherowtha, and 11 annas and 9 dams in Mouzah Nowada Kullan, Pergunnah Hajeepore. We shall not overtly or covertly alienate or pledge the same during this period to any person; and should we do so, the same will be null and void. We therefore execute these few words as a bond, in order that the same may come of use when required.

In February 1865 the plaintiffs sued Down Lall and Bhawani on the bond, and obtained a decree *ex parte* against Bhawani Pershad on the 5th April 1865, by which Bhawani Pershad's share of the lands mortgaged was declared to be liable for the debt. Domun Lall was exonerated from the claim, but the order exonerating Domun Lall was reversed on appeal. When the plaintiffs took out execution of their decree, they did so against all the family property, including that of Shoukee Lall and others, who were not judgment-debtors under the decree. The property of these persons was therefore released from attachment, and the plaintiffs realized a portion of their decree by the sale of Domun Lall and Bhawani Pershad's property, and the balance remained unsatisfied. The plaintiffs, on the 3rd of December 1870 brought the present suit to have the shares of Shoukee Lall and others included in their decree, and declared liable to the plaintiff's claim, on the ground that the defendants formed one joint family, that the money had been borrowed for the purposes of the family, although only in the name of two of the members of the family who were carrying on the trade and zemindaree business of the family as managers, and that the plaintiffs were unable to proceed against the

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property of the whole family without a decree of Court obtained for that purpose. The officiating Judge of Tirhoot dismissed the suit.

The plaintiffs appealed to the High Court.

Mr. *C. Gregory* for the appellants. [COUCH, C. J.—Can such a suit lie? You ought to have sued all the defendants together. This is a second suit on the same bond.] The suit will lie. The plaintiffs have a very good claim in equity against all the members of this joint family; they were interested in the business which was carried on with their money Such a suit will lie—*Ramnath Roy Chowdhry* v. *Chunder Sekhur Mohapattur* (1). True, the plaintiff has obtained a decree already; but by this suit he is seeking to make other persons who have had the use of his money liable to that decree. As the decree now stands, it cannot be executed except against Domun Lall and Bhawani Pershad. The others are liable to the plaintiffs in equity and good conscience, although at law they might have a good defence on the ground that it is a second action on the same bond.

Mr. *Lingham* (with him Baboos *Unoda Pershad Banerjee* and *Romesh Chunder Mitter*) for the respondents. No second suit can be brought on the same bond—*King* v. *Hoare* (2). This is a second suit on the same bond.

Mr. *C. Gregory* in reply.

The judgment of the Court was delivered by

COUCH, C. J.—On the 11th of Jeit 1271 (1st June 1864), a bond was given by the defendants Domun Lall and Bhawani Pershad to the plaintiffs, the bond reciting that the parties had taken a loan of Rs. 20,000, and that they had appropriated that sum "to the use of all of us," and then going on to say, until payment of the said amount, principal with interest, we pledge and hypothecate our own share of the property in Mouzah Cherowtha, and 11 annas and 9 dams in Mouzah Nowada Kullan. In

(1) 4 W. R., 50. (2) 13 M. & W., 494.

the beginning of the bond, they describe themselves as proprietors and shareholders of Mouzah Jurooah. Whether that means some other mouzah or not does not appear ; brobably it means the one which is afterwards mentioned in the bond.

That was in June 1864. In February 1865, the plaintiffs instituted a suit against Domun Lall and Bhawani Pershad, the parties to the bond. In that they claimed to recover Rs. 22,250, principal with interest, by virtue of the bond. The defendants apparently did not appear , and evidence having been entered into as stated in the judgment, a decree was made in favor of the plaintiffs that they should recover the sum which they claimed from Bhawani Pershad, Domun being exonerated from the claim.

It is not, I think, without significance that, so soon after the bond was given, the plaintiffs put that construction upon it, treating it as a bond by the two only, Domun Lall and Bhawani Pershad.

It appears that the plaintiffs executed that decree, and according to the statement in the plaint in the present suit, they sold the right and interest of the two persons named in it ; still in the execution of the decree, treating it as an instrument which had pledged the shares of those two. They recovered the sum of Rs. 7,435, and now, instituting a suit on the 3rd of December 1870, they say :—" Since the decree was not against all the defendants, the whole of the mortgaged property in which second party, defendants, held a share was not put up to sale, but the fact is, that there being community of interest, the loan was taken and mortgage concluded alike by all defendants ; hence all of them are jointly liable to your petitioners, and the entire property ought to be held liable." So their case now is that this, instead of being a bond by the two and a mortgage of the shares of the two, was in reality a bond by all the members of the family jointly and a mortgage of the family property.

I will assume they might show that, although this bond purports to be made by two only of the family, the transaction really was a borrowing of money by the family through these two persons as the managers, and a pledging of the family

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property as a security for the money so borrowed. They might show that the transaction was one in which the persons whose names are in the bond, and who entered into the contract, were acting as agents for the family. But the bond must be one thing or the other; it must be either a bond by the two and a mortgage of the shares of the two only, or the joint bond of the family; it cannot be treated as two bonds. If it is only a bond by the two, the plaintiffs have no cause of action in the present suit, because they have already sued the two, and recovered a portion of the money from them, and they cannot sue other persons not bound by it; but if it is a joint bond by the members of the family, then they have already sued upon it. They have elected to sue some of the persons jointly liable, and not the others, and they have got a decree upon the bond, the cause of action being the non-payment of the money which the parties were jointly liable to pay. They now sue on the same cause of action the persons whom they might have joined in the former suit, but did not choose to do so. If there is a joint contract, not a joint and several, but a joint contract, and that is all this can be, and the party sues upon it and gets judgment, he cannot bring a fresh suit against the persons who were jointly liable, but were not included in the former suit.

Notwithstanding the authority of the case to which we have been referred, *Ramnath Roy Chowdhry* v. *Chunder Sekhur Mohapattur* (1), and with every respect to the learned Judges who held apparently to the contrary. I am of opinion that, if this is to be considered as a joint bond by all the members of the family, the present action cannot be maintained. It is a second suit on the same cause of action. It is expressly prohibited by s. 2 of Act VIII of 1859, as the defendants in the first suit must, if the other defendants insist upon it, be made parties to the second, and without that I should say on principle that it cannot be maintained.

Upon the merits of the case, also, it seems to me that the plaintiffs have failed to make out what they allege in their plaint, that it was a bond by which all the members of the family were

(1) 4 W. R., 50.

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bound, and that the mortgage was concluded alike by all of them. (His Lordships discussed the facts of the case and concluded,—)

It appears to me, therefore, that both on the question of law and on the merits, the plaintiff's case fails, and the appeal must be dismissed with costs.

[PRIVY COUNCIL.]

MUSSUMAT AZEEZOONNISSA AND ANOTHER (DEFENDANTS) *v.* BAQUR KHAN (PLAINTIFF).

P. C.* 1872 *Feby.* 24

[On appeal from the High Court of Judicature, North-Western Provinces, Agra.]

Evidence—Execution of Document by Purdah Ladies—Agency—Burthen of Proof.

The plaintiff sought to make two purdah ladies liable on a document which he alleged had been executed by a third person as their agent. *Held* (reversing the decision of the High Court), strict proof of the agency must be given.

IN this case the respondent brought his action against the appellants (who were sisters) to obtain possession of a village called Burehta. His plaint was not very intelligible, but in his deposition he stated that the ladies borrowed Rs. 8,000 from him, and executed to him a bond, whereby they mortgaged to him their village Nundsenee, which bond was registered through Mahomed Alee their attorney, and that subsequently in lieu of that bond, they executed a deed of conditional sale of the property now sought to be recovered, dated 28th March 1857, which was to become absolute on default in payment. Mahomed Alee was the husband of one of the appellants. The bond was produced and purported to be signed "in the handwriting of Mahomed Alee," and to have been registered by him as the attorney of the appellants on the oaths of two persons (who were not now called as witnesses), but no power-of-attorney was produced. The substituted document purported to be similarly

* *Present* :—THE RIGHT HON'BLE SIR JAMES COLVILE, SIR M. SMITH, SIR R. COLLIER, AND SIR L. PEEL.