of valuation, and for that purpose only proceedings under section 331 of the Civil Procedure Code, may be considered to be proceedings in continuation of the original suit. Moreover this decision has been dissented from in the cases of *Muttammal* v. *Chinnana Gounden* (1) and *Kalima* v. *Nainan Kutti* (2).

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We think, therefore, that this appeal fails and must be dismissed with costs.

S. C. G. *Appeal dismissed.*

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

HARAMONI DASSI AND OTHERS (PLAINTIFFS) *v.* HARI CHURN CHOWDHRY (DEFENDANT).*

1895 *April* 19.

Misjoinder—Civil Procedure Code (Act XIV of 1882), sections 26, 27 and 31—Joinder of plaintiffs—Persons jointly interested in a suit—Claims not antagonistic—Cause of action, Meaning of—Plaint, Amendment of—Parties.

The plaintiffs 1 to 4 were the daughter and daughter's sons of one *G*. They alleged that *G* died, leaving an infant son *X*, an infant daughter *H*, and a widow *C*; that the son died leaving *C* as heir, and that upon *C*'s death, the sons of *H* became entitled to the property of *X*, but that should it appear that *G* did not leave *X* as his heir, *H* would succeed to the estate of *G* as next heir; and that the plaintiffs jointly granted a *putni* settlement of the property to one *B* (plaintiff No. 5), but he was kept out of possession by the defendant who claimed it by purchase from the representatives of *P*, brother of *G*. The plaintiffs 1 to 5 joined in bringing the suit which was one for possession of the property upon establishment of title either of plaintiff No. 1 or of plaintiffs Nos. 2, 3 and 4. On the objection of the defendant under section 26 of the Code of Civil Procedure, that the suit was not maintainable for misjoinder of plaintiffs,

Held, that the expression "cause of action" occurring in section 26 of the Code is used, not in its comprehensive, but in its limited sense, so as to include the facts constituting the infringement of the right, but not necessarily also those constituting the right itself, so that the qualification implied in the words "in respect of the same cause of action" will be satisfied if the facts, which constitute the infringement of right of the several plaintiffs, are the same, though the facts constituting the rights upon which they base their claim to that relief in the alternative may not be the same; and that as the

* Appeal from order No. 98 of 1894, against the order of Babu Krishna Nath Roy, Officiating Subordinate Judge of Khulna, dated the 8th of March 1894.

(1) I. L. R., 4 Mad., 220. (2) I. L. R., 13 Mad., 520.

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plaintiffs in the case complained of the same wrongful act of the defendant constituting the infringement of their right, that was their cause of action, and as they all claimed the same relief, namely, possession, and further as they did not advance any antagonistic claim, such a case came within section 26 of the Code, and was not bad for misjoinder of plaintiffs.

Lingammal v. *Chinna Venkatammal* (1); *Nusserwanji Merwanji Panday* v. *Gordon* (2) dissented from. *Fakirapa* v. *Rudrapa* (3) followed.

THE facts of the case, as stated in the plaint, are shortly as follows:—

One Gadhadhur Bhunja Chowdhry and his brother Protap Narayan Bhunja Chowdhry were members of a joint Hindu family. Protap Narayan died in 1245 B. S., leaving him surviving two sons, Rajendra Narayan and Sital Nath. Gadhadhur died in the year 1246 B.S., leaving behind him his widow Chundramoni, an infant son, and an infant daughter Haramoni. On the death of the infant son of the deceased Gadhadhur, his widow Chundramoni inherited the share of his property. Chundramoni died in the year 1295 B.S. The plaintiff No. 1, Haramoni, on the death of her mother, demanded the possession of the property left by her father from the heirs of Protap Narayan, deceased, but it was refused, and in the month of Jeyt 1296 B.S. the properties were sold to one Kalidas Adak, who again sold the property in dispute to defendant No. 1, Rai Hari Churn Chowdhry. The plaintiff No. 1 and her sons, plaintiffs Nos. 2, 3 and 4, granted a *putni* settlement of the property to plaintiff No. 5, who however failed to get possession.

The plaintiffs accordingly brought this suit for recovery of possession of the property by establishment of title thereto, on the allegations that at the time of the death of the father of plaintiff No. 1 she was a mere infant, and the other plaintiffs Nos. 2, 3 and 4 were not then born, so it would be difficult for them to prove whether the father of plaintiff No. 1 left a son at the time of his death, and that the said son died in his infancy; that in the event of such a son being left by Gadhadhur, the plaintiffs Nos. 2, 3 and 4 would, as sister's sons, be his heirs, but if it be not proved that he left a son, the plaintiff No. 1

(1) I. L. R., 6 Mad., 239. (2) I. L. R., 6 Bom., 266.
(3) I. L. R., 16 Bom., 119.

would inherit as the daughter of Gadhadhur; and that on the death of Chundramoni, widow of Gadhadhur, plaintiff No. 1 or her sons, plaintiffs Nos. 2, 3 and 4, would in any event be entitled to the property by right of inheritance either from Gadhadhur or his son.

The defendant No. 1, who alone contested the suit, objected to it on various grounds, but the only objection material to this report was that the plaintiffs were not entitled to join in bringing one suit. The Court below held that such a suit was not maintainable; and that the plaintiffs must elect whether plaintiff No. 1 or plaintiffs Nos. 2, 3 and 4 should bring the suit, and ordered the plaint to be returned for amendment.

Against this order the plaintiffs appealed to the High Court.

The *Officiating Advocate-General* (Sir *Griffith Evans*) and Babu *Bhobany Churn Dutt* for the appellants.

Mr. *C. P. Hill* and Babu *Jogesh Chunder Roy* for the respondent.

Mr. *W. C. Bonnerjee* for Sir *Griffith Evans*.—The Subordinate Judge has misunderstood the meaning of "cause of action" in section 26 of the Code of Civil Procedure. He has understood it to be a bundle of rights, and also the infringement of such rights. The cause of action in this case is what the defendant has done with respect to the property left by Gadhadhur. The case of *Lingammal* v. *Chinna Venkatammal* (1) is clearly distinguishable. In that case only one of the two widows of a deceased Hindu and her adopted son sued for the recovery of the whole of the family property if the adoption was valid, if not, for one-half of the estate. In this case the plaintiffs, either one or the other, would be entitled to the entirety of the estate and not a share, smaller in one case and larger in the other, *i.e.*, if plaintiff No. 1 be the next heir, or if the plaintiffs Nos. 2, 3 and 4 be the next heirs. The case of *Fakirapa* v. *Rudrapa* (2) is entirely in my favor. In this case both sets of plaintiffs are interested in disproving the case set up by the defendant. It is to be considered in a case like this whether the defendant has been embarrassed in his defence by the joinder of causes of action. If that is so, they may be separately tried. It is essential to see who are

(1) I. L. R., 6 Mad., 239. (2) I. L. R., 16 Bom., 119.

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the necessary parties in the case. The cause of action on the part of plaintiff No. 1 and on the part of plaintiffs Nos. 2, 3 and 4 cannot be said to be different. "Cause of action" means the infringement of right, and does not include the right. In the Judicature Act the expression "cause of action" does not appear. In the case of *Smurthwaite* v. *Hannay* (1), it has been held that the rule of joining several plaintiffs with distinct causes of action in one suit applies only to those cases where the several plaintiffs claim the "same relief," or where it is doubtful in which of the plaintiffs or in what number of the plaintiffs, and whether jointly or severally, the legal right to relief exists. In this case the relief claimed is the same. If the words "same cause of action" mean right first and then invasion of it, then the word "severally" in section 26 of the Code is very inconsistently used.

Mr. *Hill* for the respondent.—It is to be seen in this case what is the meaning of the words "cause of action." In a suit for ejectment, it means (1) the right; (2) the infringement of such right. The expression, "cause of action," has been used consistently in the same sense throughout the Code. The law lays down that the plaint must state when and where it arose. The fact of the plaintiff No. 1 being dispossessed does not give any cause of action to the other plaintiffs. There is no allegation in the plaint when the other plaintiffs were dispossessed. There will be embarrassment to the defendant for that reason. In this case the *putni* has been created after dispossession. The cause of action is different for each of the sets of plaintiffs. There are distinct causes of action, although they may arise in the same transaction. It is not the relief that is to be looked to, but the cause of action. In the cases cited by the other side, there was no alternative statement of facts, and no distinct right was infringed; they are therefore distinguishable.

Sir *Griffith Evans* in reply.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

This is an appeal from an order of the Subordinate Judge of Khulna returning a plaint for amendment on the ground that

(1) L. R. App. Cas., (1894) 494.

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it is bad by reason of misjoinder of different plaintiffs having different causes of action.

The plaint alleges in substance that the properties mentioned in the schedule to it were owned and possessed in equal shares by Gadhadhur Bhunja Chowdhry, father of plaintiff No. 1, Haramoni, and his brother Protap Narayan Bhunja Chowdhry; that Protap died in 1245, leaving two sons, and Gadhadhur died in 1246, leaving an infant son, an infant daughter, the plaintiff Haramoni, and a widow Chundramoni; that Gadhadhur's son died in his infancy, leaving his mother Chundramoni as his heir; that Chundramoni and Haramoni, plaintiff No. 1, lived in commensality with the sons and grandsons of Protap; that on the death of Chundramoni in Falgun 1295, the plaintiffs Nos. 2, 3 and 4, sons of Haramoni, plaintiff No. 1, became entitled to the eight annas share of Gadhadhur, which had devolved on his infant son, as that son's sister's sons and next heirs; that if for want of evidence the plaintiffs fail to prove that Gadhadhur died leaving a son, plaintiff No. 1, Haramoni, would be entitled to Gadhadhur's eight-annas share as his daughter and next heir; that plaintiffs Nos. 1, 2, 3 and 4 have jointly granted a *putni* settlement of the said share to plaintiff No. 5; and that as the defendants have wrongfully kept possession of the said share, the plaintiffs Nos. 1 to 5 have jointly brought this suit for possession and mesne profits, upon establishment of the title of either plaintiffs No. 1 and No. 5, or of plaintiffs Nos. 2, 3 and 4 and No. 5.

The suit is brought against two persons, one of whom, defendant No. 1, is said to claim the properties in dispute by purchase from the representatives of Protap, and the other defendant No. 2 is said to hold the same in *putni* under defendant No. 1.

The defendant No. 1, who alone appears to have filed any written statement, denies that Gadhadhur ever had any interest in the properties in dispute; and he alleges that Gadhadhur died before his father, without leaving any son; that he does not know whether Chundramoni was the widow of Gadhadhur and plaintiff No. 1, Haramoni, was his legitimate daughter, nor whether plaintiffs Nos. 2, 3 and 4 are the legitimate sons of plaintiff No. 1; that by an ancient custom prevailing in the family to which Gadhadhur belonged, females and persons of a

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different *gotra* have always been excluded from inheritance; and that neither plaintiff No. 1, nor her sons the plaintiffs Nos. 2, 3 and 4, can have any right by inheritance to any property which was originally owned by Gadhadhar; that he is a *bona fide* purchaser of the properties in dispute for value without notice of plaintiffs' claim; that the plaintiffs' claim is barred by limitation; and that the plaintiffs are not entitled to join in bringing one suit.

The Court below, upon the last-mentioned objection of the defendant No. 1, held that the plaintiffs Nos. 1 to 4 cannot join together in bringing this one suit, but that they must elect whether plaintiff No. 1 or plaintiffs Nos. 2 to 4 should carry it on; and on the 8th of March 1894 it ordered that the plaint be returned for amendment accordingly.

Against that order the plaintiffs have preferred this appeal, and it is contended on their behalf that the Court below is wrong in holding that there has been any misjoinder of plaintiffs in this case, such as would necessitate an amendment of the plaint, when section 26 of the Code of Civil Procedure provides that persons may join as plaintiffs in whom the right to any relief claimed is alleged to exist "in the alternative in respect of the same cause of action." On the other hand, it is argued by the learned Counsel for the respondent, that though persons setting up a right to any relief claimed in the alternative may join as plaintiffs, it must, as section 26 of the Code requires, be in respect of the same cause of action, and as the phrase "cause of action" includes not merely the facts constituting the infringement of the plaintiffs' right, but also those constituting their title, and these last, in the present case, are different and conflicting, the plaintiffs cannot be said to be claiming relief in the alternative in respect of the same cause of action.

The point raised in this case is not free from doubt and difficulty. Its determination must depend upon the construction of section 26 of the Civil Procedure Code read with section 31.

Section 26 of the Code of Civil Procedure is taken word for word from Order XVI, Rule 1 of the Supreme Court of Judicature, with the addition of the words "in respect of the same cause of action" at the end of the first sentence. This qualification seems to have been added to avoid any difficulty that might arise from

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a literal construction of the English rule, namely, the joining of plaintiffs with distinct causes of action in one suit, as was held to be allowable in the case of *Booth* v. *Briscoe* (1). The doubts attending the construction of the English rule have been set at rest only recently by the decision of the House of Lords—*Smurthwaite* v. *Hannay* (2)—in which it has been held that the rule applies only to those cases where the several plaintiffs claim the same relief, or where it is doubtful "in which of the plaintiffs, or in what number of the plaintiffs, and whether jointly or severally, the legal right to relief exists." But though the addition of the words "in respect of the same cause of action" may have been intended to remove a difficulty of one sort, it has produced a difficulty of another sort, namely, that of construing the section so as to make the qualification implied by those words compatible with the case in which different plaintiffs claim the same relief in the alternative. For if the phrase "cause of action" be taken in its comprehensive sense as including the entire set of facts that gives rise to an enforceable claim, that is, the right and its infringement—see *Read* v. *Brown* (3)—it is difficult to imagine a case in which two plaintiffs can claim the same relief in the alternative in respect of the same cause of action, that is in respect of the same right and the same infringement thereof. From the very fact of their claiming the same relief in the alternative, the facts which constitute their right to it, as alleged by them, must be not only different, but also conflicting and mutually exclusive. The learned Counsel for the respondent sought to obviate this difficulty by putting forward the same view that was taken in the cases of *Lingammal* v. *Venkatammal* (4) namely, that the words "in the alternative" apply to cases in which there is a doubt as to who is the person entitled to sue upon the cause of action, as in the case of a sale to an agent, in which there may arise a difficulty as to whether the principal or the agent should sue, or in cases where parties have different and conflicting interests in the same subject matter, and an act is committed which gives the same cause

(1) L. R., 2 Q. B. D., 496.
(2) L. R., App. Ca., 1894, p. 494.
(3) L. R., 22 Q. B. D., 131.
(4) I. L. R., 6 Mad., 239.

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of action to either party according to the eventual determination of the Court as to which of the two is entitled to recover.

We feel, no doubt, that the cases here suggested are among those to which the words in the alternative are intended to apply; but what we feel some difficulty in understanding is as to how the principal and the agent in the one case, and the parties having different and conflicting interests in the other, can be said to have the same cause of action, if that expression be taken to include the facts which constitute the right and its infringement, when the facts which constitute their rights must be different.

Following the ordinary canon of construction that a clause in a statute should be construed, so as to give some meaning to every part of it, and bearing in mind that the expression "cause of action" has not been defined anywhere in the Civil Procedure Code, except indirectly for the purposes of section 17, and that so far as that section goes it is used in a restricted as well as in some respects in an elastic sense, we think the proper way to construe section 26, so as to give the words in the alternative some meaning, is to hold that the expression "cause of action" occurring in it is used, not in its comprehensive, but in its limited sense, so as to include the facts constituting the infringement of the right, but not necessarily also those constituting the right itself, so that the qualification implied in the words "in respect of the same cause of action" will be satisfied if the facts which constitute the infringement of right of the several plaintiffs are the same, though the facts constituting the right upon which they base their claim to that relief in the alternative may not be the same. We are aware that this view is opposed, not only to the Madras case already cited, but also to that of *Nusserwanji Merwanji Panday* v. *Gordon* (1), but we feel constrained to dissent from these decisions so far as the point now under consideration is concerned, as otherwise we find it impossible to make section 26 consistent with itself. Nor do we think that this view is opposed to the prohibition implied in section 31 of the Code against the joining of plaintiffs in respect of distinct causes of action.

But besides the restriction imposed upon the joinder of

(1) I. L. R., 6 Bom., 266.

plaintiffs under section 26 of the Code by the words "in respect of the same cause of action," there is a further restriction implied in the rule enunciated in the first sentence of the section, wholly irrespective of those words, as pointed out in the case of *Smurthwaite* v. *Hannay* (1) cited above, which limits the application of the rule to cases in which the relief claimed by the plaintiffs who are joined is "the same relief," or where "it is doubtful in which of the plaintiffs, or in what number of the plaintiffs, and whether jointly or severally, the legal right to relief exists."

Now let us see how the combined operation of these two restrictions to the joinder of plaintiffs affects the joinder of the plaintiffs in the present case. The plaintiffs here all complain of the same wrongful act of the defendants as constituting the infringement of their right, that is, their cause of action (in the restricted sense explained above), namely, the retaining of wrongful possession of the property in dispute to which the plaintiffs are entitled; they all claim the same relief, namely, possession and mesne profits; and they have joined in bringing their suit, because the fifth plaintiff has a derivative interest, namely, a *putni* interest in the property in dispute, and the other four plaintiffs, though they advance no antagonistic claims, and all admit that the right to the proprietary interest is in plaintiffs Nos. 2, 3 and 4 as the heirs of the son of Gadhadhur, are in doubt as to whether they will be able to prove that Gadhadhur died, leaving a son, or whether the Court will eventually hold that Gadhadhur was the last full owner; and that the right to the disputed property by inheritance was in his daughter, the plaintiff No. 1, and not in her sons, the plaintiffs Nos. 2, 3 and 4. The immediate legal right to the relief claimed is the right by inheritance, to take upon the death of Chundramoni, the property which originally belonged to Gadhadhur, though it is doubtful whether that right is in plaintiff No. 1 or in plaintiffs Nos. 2, 3 and 4, by reason of there being doubt as how certain facts antecedent to the succession of Chundramoni, and subsequent to the demise of Gadhadhur, happened. Such a case, in our opinion, comes clearly within section 26 of the Code of Civil Procedure,

(1) L. R., App. Ca. (1894), 494

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as explained above, as being a case in which the right to the relief claimed is alleged to exist jointly as between those claiming the proprietary and *putni* interests, and in the alternative as between those claiming the proprietary interest in respect of the same cause of action.

Again, another fair test to apply in order to ascertain the meaning and intention of the Legislature in cases like this is to compare the result of the two sets of plaintiffs suing jointly, as they have done, with that of their suing separately, each set putting forward that branch of the alternative which would vest the right to relief in them. In the former case, accepting, as we must do at this stage, their other allegations to be well founded, one of the two sets of plaintiffs must have the right to the relief asked for, but one *only can have it*, and as the two sets do not quarrel between themselves, the case may be disposed of without any determination (unless the defendants want it) of the doubtful issue of fact as to whether Gadhadhur did or did not die leaving a son. In the latter case, that is, where separate suits are brought, there, too, accepting the other allegations as true, one of them must be decreed, but *only one can be decreed*, and the doubtful issue of fact mentioned above must be determined to ascertain which of the two suits should be decreed, though if the plaintiffs had not been compelled to sue separately, there being no conflict between them, its determination would have been unnecessary. Thus, by the one course are avoided a multiplicity of suits, and the determination of an unnecessary issue which would be unavoidable in the other course, and the Legislature could never have intended the latter course in preference to the former. The object of the defendant in resisting the joinder of plaintiffs in this case is evident. He wants that they should be made to fight against each other, though they do not wish to do so, and thus each destroy the case of the other upon the point as to whether Gadhadhur did or did not leave a son; but he forgets that both the two alternatives cannot be false, and that one of them must be true. One fails to discover any reason based upon grounds of fairness and justice, or grounds of convenience to litigants, or to Courts for which the Legis-

lature could have prohibited the joining of plaintiffs in a case like this. We must, therefore, hold that they have been rightly joined, and that the frame of the suit is not bad on account of the misjoinder of plaintiffs. We may add that the case of *Fakirapa* v. *Rudrapa* (1) is very much in point, and fully supports the view we take.

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The result, then, is that this appeal must be allowed, the order appealed against set aside, and the case sent back to the Court below with direction to allow the plaintiffs to proceed with the suit upon the plaint as framed.

Appeal allowed.

S. C. G.

PRIVY COUNCIL.

BHAGABAN RAMANUJ DAS (PLAINTIFF) *v.* RAM PRAPARNA RAMANUJ DAS (DEFENDANT BY REVIVOR.)

P. C.* 1894 *November* 9, 15, 21 & 28. 1895 *February* 2.

[On appeal from the High Court at Calcutta.]

Hindu Law—Endowment—Succession as mohant of a muth at Puri—Customary rule—Right of a chelá—Alleged disqualification of mohant to take a chela by reason of being a leper.

Two rival claimants contested the right to succeed to the office of *mohant* of a *mourusi muth* under a customary rule of succession. Both the Courts below found that the *mohant* for the time being had power to appoint his successor from among his *chelas*; that in the absence of appointment, a *chela*, or, if there should be more than one, the eldest *chela*, would succeed; and that should there be no *chela* then a *gurúbhai* or *chela* of the same *guru* with the deceased *mohant*, would succeed.

The plaintiff's case was that he had been duly taken as a *chela* and appointed by the last *mohant* whose title was not disputed. The defendant, who was in possession, denied that the plaintiff had ever been such a *chela*, alleging that, even if the last *mohant* had attempted to take him as a *chela*, this act would have been invalid by reason of that *mohant* having been a leper. The defendant's title was that he had been taken as a *chela* by the *mohant* who had preceded the last, and had been in a position to dispute the right of succession, but had yielded it when the last *mohant* had taken office.

* *Present*: LORDS WATSON, HOBHOUSE, MACNAGHTEN and SHAND, and SIR R. COUCH.

(1) I. L. R., 16 Bom., 119.