

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and
Mr. Justice Ghose.

1893 DHUNPUT SINGH AND OTHERS (PLAINTIFFS) v. PARESH NATH
March 28. SINGH AND ANOTHER (DEPENDANTS).*

Parties—Suit by some of a class as representatives of class—Suit by numerous plaintiffs—Civil Procedure Code, 1882, s. 30—Leave to institute suit—Right of suit.

Section 30 of the Civil Procedure Code does not require an "express" permission to be recorded by the Court, but if such permission can be well gathered from the proceedings of the Court in which the suit was instituted, an Appellate Court may (where an objection that no permission was given is taken on appeal) infer from such proceedings that permission was really granted.

The dictum of Stuart, C.J., in *Hira Lal v. Bhairam* (1) dissented from.

THE only point material to this report was as to whether the permission of the Court under section 30 of the Civil Procedure Code to institute a suit must be one expressly given and recorded by the Court, or whether it may be a constructive permission. For this purpose the facts are sufficiently stated in the judgment of the Court.

Mr. Woodroffe, Dr. Rash Behari Ghose, Babu Dwarika Nath Chuckerbutty, and Babu Madhavanand Bysack for the appellants.

Mr. Jackson, Mr. T. A. Apear, Babu Taruk Nath Sen, Babu Molini Mohan Roy, Babu Rajendra Nath Bose, Babu Dwarika Nath Mukerjee; Moulvie Mahomed Yusuff, Babu Karuna Sindhu Mukerjee and Babu Jogendra Chandra Ghose for the respondents.

On the point of law as to section 30 of the Code, the following cases were cited:—*The Oriental Bank Corporation v. Gobind Lal Seal* (2); *Jan Ali v. Ram Nath Munda* (3); *Geereballa Dabee v.*

* Appeal from Original Decree No. 280 of 1890, against the decree of C. B. Garrett, Esq., District Judge of 24-Pergunnahs, dated the 8th of September 1890.

(1) I. L. R., 5 All., 602.

(2) I. L. R., 9 Calc., 604.

(3) I. L. R., 8 Calc., 32.

Chunder Kant Mookerjee (1); *Haradhone Dass v. Ramdoyal Rai* (2);
Nityanund Ghose v. Mohendro Kristo Ghose (3); and *Hira Lal v.*
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(1) L. L. R., 11 Calc., 213.

(2) Appeal from appellate decree No. 176 of 1889, decided on 25th February 1890, by Priusep and Trevelyan, JJ. It was a suit by two persons for possession of certain lands alleged in the plaint to be the common property of the residents of three villages, and the place where the remains of religious devotees were interred, and the plaint stated that the said land had been from a long time assigned for the performance by the people of the said villages of "*Harisankristan*," and for the making of offerings to *Mohaparbhu*; that the plaintiffs, and before them their ancestors, had been from time immemorial in open and uninterrupted enjoyment of the said rights, and that the defendants had prevented them from such enjoyment of their rights, and had thereby dispossessed the plaintiffs. The plaint prayed that the land might be declared to be the common property of the residents of the three villages. Both the Lower Courts held the suit to be not maintainable, inasmuch as the plaintiffs were suing as representatives of the residents of the three villages, and had not obtained the permission of the Court under section 30 of the Code to institute the suit. The High Court dismissed the appeal holding that the view of the Lower Appellate Court was correct.

(3) Appeal from order No. 368 of 1888, decided on 20th February 1889, by Pigot and Beverley, JJ. In this case the plaintiffs sued on behalf of themselves and other villagers for a declaration of their right to use a road running over a piece of land belonging to the defendants, and to remove an obstruction placed by the defendants on it. The first Court held that the suit was not maintainable with reference to section 30 of the Code, as the permission of the Court to sue had not been obtained. The Lower Appellate Court reversed this decision and made an order remanding the case to the first Court. On appeal from this decision the High Court said, "As we read the plaint, this is a claim arising out of a user extending over a period of 20 years by the inhabitants of a particular village to the right of way which is claimed; this is not a public road as stated in the plaint, though it may well be that, having regard to the special terms of section 133 of the Criminal Procedure Code, it might have come under the terms of that section, which is perhaps not confined to what are strictly highways in England; but although not, strictly speaking, a highway, it is a path in which a large class of persons specified in the plaint are interested, and under these circumstances we think that the claim having been stated, the right alleged, and the wrong asserted, as they are in the plaint, the suit must be considered to be a suit brought on behalf of the class of persons specified in the plaint, and as leave was not given under section 30 of the Civil Procedure Code, the suit cannot be properly maintained."

(4) I. L. R., 5 All., 602.

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The judgment of the Court (PETHERAM, C.J., and GHOSE, J.)

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was as follows :—

This appeal arises out of a suit instituted by five individuals, Roy Dhunput Singh Bahadur, Roy Boodh Singh Bahadur, Roy Budri Das Bahadur, Babu Hira Lal Johury and Babu Surbosukh Kootari, on behalf of the Jain Situmbary Society, against Rajah Paresh Nath Sing and Mr. R. H. Boddam.

The case made in the plaint is, that the Jains following the Situmbary faith from a very ancient time, held under the Mahomedan Government, and still hold, exclusive possession of the Paresh Nath hill and the plain below, in the district of Hazaribagh; that they used the said hill as a place of worship, devotion, and pilgrimage, and have constructed buildings and set up *thakurs* at their own cost. The plaint then goes on to refer to certain suits and proceedings in Courts between the Jains and the Rajah defendant, which will be noticed later on in detail, as also to an agreement by way of amicable settlement, which was entered into between the parties on the 19th May 1892; and to a further agreement on the 21st September 1878, confirming and ratifying the agreement of May 1872, and it (the plaint) then states that on the 14th October 1876, the Rajah, alleging that the hill Paresh Nath appertained to Godi-palgunj, unlawfully granted a lease to Mr. Boddam, conferring on him the right to select 2,000 acres of land on the said hill, and use the same for any purpose that he (Mr. Boddam) might choose; that the defendant Boddam took the lease with full notice of the agreement entered into between the Jains and the Rajah; that he has taken possession of the 2,000 acres of land on the hill and the plain below, and has set up a manufactory of hog's lard on the hill, thereby not only trespassing on the lands belonging to the Situmbary Jains, but also desecrating their place of worship, devotion, and pilgrimage, creating a nuisance, and wounding their religious feelings. The plaintiffs then proceed to state that under the terms of two imperial grants made to the Jain Situmbary sect, as well as in accordance with the agreements come to between the Jains and the Rajah defendant, Mr. Boddam is not entitled to carry on the manufacture of hog's lard on the hill. They, however, allege in one portion of the plaint that the said agreements

of 1872 and 1878 effected only an amicable settlement as regards the matter of the offerings made in the temples on the hill, and that Hurruck Chand Golecha, the executant of the agreement on behalf of the Jains, had no authority to bind the Jains by the concession of any other right in respect of the hill belonging to the Jains, and that, therefore, the Jains are not bound by any agreement except as regards the offerings. It is further alleged that the Rajah has, by the grant of the lease to Mr. Boddam, violated the terms of the agreement, and, therefore, they (the Jains) are no longer bound thereby. The plaint concludes by asking for a declaration that the Rajah had no right to grant the lease to Mr. Boddam; and that, therefore, the lease is invalid and ineffectual; for the ejection of Mr. Boddam from the land in his possession; and for a perpetual injunction to restrain him from carrying on the manufacture of lard, or any other trade offensive to the religious feelings of the Jains, upon the hill.

There is one paragraph in the plaint which it is necessary to refer to particularly, *viz.*, the 15th paragraph. In this it is stated that the Situmbary sect of the Jains, which consists of numerous persons having the same interest in the suit, crave leave to institute it on behalf of all persons so interested under section 30 of the Code of Civil Procedure, in the name of the aforesaid plaintiffs.

The suit was defended by the Rajah upon the ground that the Paresch Nath hill and the plain below did not belong to the Jains, but to him; that the place of worship on the hill was a place of worship not only of the Situmbary sect, but also of the Digumbary and other sects of Jains; and that therefore the plaintiffs, who represent only one section of the Jains, had no right to bring the suit; that the title deeds upon which the plaintiffs rely in support of their case were untrue; that by the *ikrarnamahs* of 1872 and 1878 he was not prohibited from granting this lease in favour of Mr. Boddam; that the claim was barred by limitation; that he (the defendant) had committed no improper act whatever, but that, on the contrary, he was a friend of the Jain community; and that if the defendant Boddam had committed any improper act on the hill, there could be no objection to the same being stopped by the Court; and lastly, that the plaintiffs were bound by the agreements come to between the parties in 1872 and 1878, Hurruck Chand Golecha having then been the manager.

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The other defendant, Mr. Boddam, supported generally the written statement of his lessor, the Rajah, and stated that the Rajah had, previous to the grant to him of the lease of 1876, executed, in favour of one Mr. Peppé, a lease on the 7th September 1874; that Mr. Peppé had assigned a moiety share to this defendant; that he obtained an assignment of the other moiety from the assignees of Mr. Peppé, and that then he received in October 1876 a *mokurrari patta* of 2,000 acres of land covered by Mr. Peppé's lease from the Rajah; that he was at liberty to use the said land in any manner he pleased; that he carried on the manufacture of hog's lard at a place very far removed from the temples on the Paresn Nath Hill; that this caused no nuisance to any pilgrim, and that it was no desecration of the holy place.

The suit was instituted in the Court of the Deputy Commissioner of Hazaribagh on the 1st October 1888; and on the plaint being presented, the Court made the following order:—"Plaint to recover possession of land held by defendant No. 2, praying that under section 30, Civil Procedure Code, the plaintiffs might be permitted to carry on the suit on behalf of the Jain Situmbary society, and further praying that a temporary injunction be issued to the defendant No. 2, restraining him from carrying on the manufacture of hog's lard and other trades offensive to the religious feelings of the Jain Situmbary society, and the plaint being duly stamped and verified by the plaintiffs, suit to be registered, summons be issued to defendants for first hearing on the 3rd December 1888. Notice to be published under section 30, Civil Procedure Code, at Madhoobun, in the *Calcutta Gazette* and the *Behar Herald*, calling for objections to the granting of the permission asked for under section 30, Civil Procedure Code, and an *ad interim* injunction to be issued on defendant No. 2, restraining him from carrying on the manufacture of lard or other trades offensive to the religious feelings of the Jain Situmbary society till the decision of the suit."

Against so much of the order as granted an injunction against him, Mr. Boddam presented a petition to this Court, and on the 12th February 1889, a Divisional Bench of this Court (PACOT and BEVERLEY, JJ.) set aside the said order and directed that the injunction be dissolved, and upon application made about the

same time by the same person, the case was ordered to be transferred from the Court of Hazaribagh to the Court of the District Judge of 24-Pergunnahs.

On the 29th June following, the District Judge laid down certain issues, and on the 4th July 1890 framed additional issues. It is only necessary to refer to some of them—(1) whether the plaintiffs had obtained the requisite permission under section 30, Code of Civil Procedure, and if not, can the suit proceed? (3) To whom does the hill Paresh Nath and the plain underneath it belong? (4) Was the defendant No. 1 competent to grant the *patta* dated 14th October 1876, and is the defendant No. 2 bound by the terms of the *ikrarnamahs* of 1872 and 1878? (5) Are the plaintiffs bound by the *ikrars* of 1872 and 1878? (9) Is Paresh Nath hill a holy place dedicated and sacred to and for the purposes and the observance of the religion of the Jain community? (12) Was the granting of the *patta*, dated the 14th October 1876, in favour of the defendant No. 2 a breach of such liability to the Jain community and in violation of the rights? Is it, as such, invalid and ineffectual? (13) Is the carrying on of the manufactory of the second defendant upon the Paresh Nath hill in the plaint referred to, repugnant injurious and offensive to the tenets and religious sentiments, and wounding to the feelings of the Jain community or the worshippers upon the said hill; and in violation of the rights of their community; and is the second defendant liable to be restrained by a perpetual injunction from carrying on the said manufactory? (14) Did the second defendant obtain the said *patta*, dated the 14th October 1876, with notice of the rights of the said community over and in respect of the said hill? (15) Does this suit lie in the absence of the Digumbary Jains? and (16) Is the suit barred by limitation?

On the same date as the additional issues were framed by the District Judge, a petition was presented on behalf of the plaintiffs that formal permission should be accorded under section 30, Civil Procedure Code, but the learned Judge declined to accede to the request, saying, "the Court sees no reason to pass an order on the application at this stage." Evidence was then gone into upon the issues raised in the case by the District Judge, and ultimately he practically decided all the issues in favour of the defendants and dismissed the suit.

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The present appeal is by the plaintiffs against the decree of the District Judge. The case was argued at great length before us by the learned Counsel on either side, and we took time to consider our judgment.

It will be convenient in the first place to dispose of the question that was discussed before us as to whether the requisite permission under section 30, Civil Procedure Code, was obtained by the plaintiffs to institute the suit on behalf of the Jains of the Situmbary sect.

The District Judge in dealing with this question, observes:—
“It is true that no such order appears to have been formally endorsed on the plaint, but I think that it is evident from the advertisement in the Gazette that such an order must have been given, and this issue must, I think, be decided in the plaintiffs’ favour.”
The advertisement that the Judge refers to was published on the 1st October 1888, and after giving the names of the parties it runs as follows:—Notice is hereby given that the plaintiffs above named have applied, under section 30 of Civil Procedure Code, for permission to sue, on behalf of the Jain Situmbary sect, the defendants named above for declaration that the defendant No. 1 has no right to grant the lease to defendant No. 2, or any other *patta*, for declaration that the *patta* granted by the defendant No. 1 to defendant No. 2 is invalid, and ineffectual for ejectment of defendant No. 2 from lands occupied by him on the Paresh Nath hill, and for perpetual injunction against defendant No. 2, restraining him from carrying on the manufacture of lard or any other trade offensive to the religious feelings of the Jains. If any person belonging to the Jain Situmbary society has any objection to the plaintiffs’ carrying on the suit on behalf of the society, he should appear before this Court and submit his objections within two months of the publication hereof.”

The Judge relies, we observe, upon this advertisement alone, but we are unable to take exactly the same view that he has taken; for the advertisement by itself does not show that any permission was actually given. We must, however, refer to the terms of the order itself, and what followed subsequently. It will be remembered that the plaintiffs in the 15th paragraph of the plaint distinctly asked for leave under section 30, Civil Procedure Code, to institute the suit; and the Court, on the 1st October 1888, in the

order already referred to, after referring to the leave asked for by the plaintiffs, and after stating that the plaint had been duly stamped and verified, ordered that the suit be registered, and directed that summons be issued against the defendants and notice published under section 30, Civil Procedure Code, calling for objections to the granting of the leave asked for. The difficulty that has arisen is in consequence of the last portion of the order of the Deputy Commissioner of Hazaribagh. That officer did not follow the directions given in the Code of Civil Procedure. The section runs thus: "Where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued, in such suit, on behalf of all parties so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such parties either by personal service or (if from the number of parties, or any other cause, such service is not reasonably practicable) by public advertisements, as the Court in each case may direct." It will be observed that the second portion of the section provides that in a case where such a suit is brought with the permission of the Court, the Court shall give notice of the institution of the suit to the parties concerned, by public advertisements, as the Court may in each case direct. What the section evidently intends is, that the Court, upon a proper case being made out for such permission, shall grant the permission, subject to any objection that might thereafter be raised by any party interested. We think that what the Deputy Commissioner really intended to do, by his order of the 1st October 1888, was to give permission, subject to such objection. The learned Counsel for the respondent, however, contended that no such permission was really given by the Court, and that the permission should have been an express permission, and he relied upon certain cases, especially upon the case of *Hira Lal v. Bhairon* (1) and also upon certain unreported decisions of this Court. It will be observed, however, that in these cases no permission to institute the suit was at all asked for, and there was no question that such permission was not granted; and all that these cases really lay down (with the exception perhaps of what Stuart, C.J., held in *Hira Lal v. Bhairon*) is that permission under section 30 is to be obtained

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before the suit is commenced, and that it cannot be granted subsequently. Stuart, C.J., in the case just referred to said, "No doubt the permission of the first Court may be inferred from the fact of the suit having been allowed to proceed before it, issues prepared, and the suit determined on such issues. But, however distinctly such procedure may show the Court's permission or sanction, it is, I fear, *express* and not *constructive* permission that the section requires, such express permission duly appearing on the record." But we observe that that was not the opinion of the two other Judges who sat with him, and that the order made by the Court on that occasion was to remand the case under section 562, for determination on the *merits*. We do not think that section 30 requires that an *express* permission should be recorded by the Court; we think that if permission can be well gathered from the proceedings of the Court in which the suit was instituted, the Appellate Court ought to hold that such permission was really granted. There can be no doubt in this case as to what the parties themselves actually understood by the order which was made on the 1st October 1888. The defendants, who must be taken to have been properly advised, did not raise any objection to the suit being proceeded with because permission had not been granted to the plaintiffs for instituting the suit. On the contrary, we find that the defendant, Mr. Boddam, by his application to this Court, got the case transferred from the Court of the Deputy Commissioner of Hazaribagh to the Court of the District Judge of 24-Porgunnahs, and we do not find any trace of any objection like this until we come to the date when the issues were framed. We think, upon the whole, we ought to hold that permission for the institution of the suit, on behalf of the Jain Situmbary sect, was given by the Deputy Commissioner of Hazaribagh to the plaintiffs.

Another objection was raised before us by the learned Counsel for the respondent, that the Jains of the Digumbary sect were also interested in the hill Parosh Nath, it being also their place of worship; and that the suit was bad, because it was not instituted on their behalf, nor were they made parties to it. It will be observed upon the plaint, that from the point of view of their rights, which they presented to the Court, the Jains of the Situmbary sect could not properly bring in the Digumbary

Jains into the suit, for they claim this hill as their property, and they rely upon the *ikrarnamahs* executed between themselves and the Rajah, and to which the Digumbary sect of Jains were no parties. No doubt, upon the evidence it does appear that this hill is a place of worship of the Digumbary Jains as well, but this fact does not entitle the defendants to have the suit thrown out. In the case in *Hira Lal v. Bhairon* (1), already referred to, Straight and Tyrrell, JJ., made certain observations which may well be referred to here, and they are as follows :—“ Now, though it is admitted that the other coparceners of the plaintiff have a coparcenary or ‘ joint ’ interest with him in the subject-matter of the suit, the *shamilat* lands, there is nothing to show that they have ‘ the same interest ’ as he has ‘ in the suit ’, that they are ‘ so interested ’, in like manner, as he is. It may be indifferent to them whether the defendants usurp exclusive rights in the *shamilat*, or it may be inconvenient to them at this moment to assert their own rights. We read the first part of the section ” (*i.e.* section 30, Civil Procedure Code) “ as implying that the plaintiff therein contemplated wishes to sue on behalf of other persons similarly interested in suing, they also wishing the same.”

Now in this case, it is quite plain that the five plaintiffs desired to sue on behalf of other persons, namely, the Situmbary sect of the Jains, similarly interested in suing. The Digumbary Jains are not so similarly interested. They do not claim any title to the hill itself, nor were they parties to the *ikrarnamahs* of 1872 and 1878, and they would not be bound by any decree which may be made in this case. It appears to us, therefore, that the case may well proceed without them.

[Their Lordships then proceeded to the consideration of the case on the other issues, and in the result came to the following conclusion] :—

The suit, so far as it prays for any relief or reliefs as against the Rajah defendant, must, we think, be dismissed.

The result is, that the decree of the Lower Court must be modified by decreeing that a perpetual injunction should be issued as against Mr. Boddam, restraining him from slaughtering pigs

(1) I. L. R., 5 All., 602.

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and carrying on the manufacture of lard on the hill. The suit of the plaintiffs as against the Rajah defendant having failed, they must pay his costs in this and in the Lower Court. But they will be entitled to their costs as against Mr. Boddam in both the Courts.

Decree varied.

J. V. W.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

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UDAI CHUNDER CHUCKERBUTTY AND ANOTHER (PLAINTIFFS) v. ASHUTOSH DAS MOZUMDAR (DEFENDANT).*

Hindu law—Widow—Alienation by Hindu widow—Legal necessity—Pilgrimage never carried out—Debt barred by limitation.

The payment by a Hindu widow of her husband's debts, though barred by limitation, is a pious duty for the performance of which a Hindu widow may alienate her property.

Chimnaji Gobind Godbole v. Dinkar Dhonev Godbole (1) and *Tarini Prasad Chatterjee v. Bhola Nath Mookerjee* (2) followed.

In the case of an alienation by a Hindu widow of her husband's property on the ground of legal necessity, the alienee is sufficiently protected if he

* Appeal from Appellate Decree No. 1540 of 1891, against the decree of Babu Nobin Chunder Gangooly, Subordinate Judge of Tippera, dated the 7th of July 1891, reversing the decree of Babu Huro Mohun Bose, Munsif of Kushba, dated the 31st of July 1890.

(1) I. L. R., 11 Bom., 320.

(2) Appeal from Appellate Decree No. 45 of 1890, decided by TOTTENHAM and GHOSE, JJ., on 28th August 1891.

The judgment of the Court was as follows :—

This was a suit brought by the reversioners to the estate of one Mahanand Chatterjee in respect of certain property alienated by Rohini Debi, who was the widow of Mahanand; Rohini Debi having died in the month of Aghran 1288 (November 1881), that is, 39 years subsequent to the death of her husband, who deceased in the year 1249 (1842).

The defence was that the alienation was made for legal necessity and to enable the widow to perform a pilgrimage to Gaya and also for her own maintenance. There was a further contention that the plaintiffs were estopped from bringing this suit by certain conduct of the plaintiff Tarini Prasad Chatterjee, who sues for himself with his minor brothers. The lower Courts have concurrently dismissed the plaintiffs' suit. The Court below found that the alienation was effected by the widow in order to