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HEMADRI NATH KHAN v. RAMANI KANTA ROY.

BEVERLEY, J. —The language used in the case of *Mukunda Lal Pal Chowdry* v. *Lehuraux* (1) may not be strictly accurate or very precise, but what was intended to be decided in that case was that mere unity of possession, or as I should prefer to term it mere joint possession, is not enough to entitle the persons so in possession to have the land partitioned by metes and bounds. The right to a partition can only, in my opinion, exist as between co-parceners holding similar interests in the property. How "similar interests" should be defined it may not be easy to say. They should probably be permanent transferable interests. A temporary lease-holder of an undivided portion of an estate ought not, in my opinion, to be allowed to put his lessor to the trouble and expense of a partition. But, however that may be, the question does not really arise in this case. Here it is practically the zemindar of a 10 annas share of the estate seeking partition as against himself as the 6 annas zemindar and the *putnidars* who hold that 6 annas share under him. I can see no objection to a partition in this case, and I would answer the question put to us accordingly.

F. K. D.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

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JOGENDRA NATH ROY BAHADUR (PLAINTIFF) *v.* J. C. PRICE (DEFENDANT.) *

Civil Procedure Code (Act XIV of 1882), section 424—Suit against public officer in respect of acts done by him in his official capacity—Notice of suit—Suit for damages against a public officer—Trespass—Joinder of causes of action—Amendment of plaint.

The plaintiff sued the defendant, a public officer, to recover damages for two distinct acts (*viz.*, wrongful arrest and trespass) alleged to have been illegally and maliciously done by the defendant on two different occasions, and claimed one lump sum as damages for both the acts; no permission to

* Appeal from Original decree No. 149 of 1896, against the decree of Babu Chandra Kumar Roy, Officiating Subordinate Judge of Rajshahye, dated the 17th of February 1896.

(1) I. L. R., 20 Calc., 379.

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amend the plaint was asked for in the lower Court. On the 21st of October 1895, the plaintiff instituted this suit, having, on the 18th of September 1895, served the defendant with a notice under section 424 of the Civil Procedure Code (Act XIV of 1882) :

Held,—That the former act (*viz.*, the plaintiff's arrest) was an act done by the defendant in his official capacity and was clearly of the kind contemplated by section 424 of the Civil Procedure Code, under which two months' notice to the defendant would be necessary previous to the institution of the suit ; and that the suit was rightly dismissed by the lower Court for want of such notice. *Shahunshah Begum* v. *Fergusson* (1) distinguished.

Quære—Whether the latter act (*viz.*, the trespass into the plaintiff's house) on the allegations in the plaint, was an act done by the Magistrate in his official capacity, and whether a notice under section 424 of the Civil Procedure Code would be necessary previous to suing for damages for such an act.

Held, further, that as the two acts were mixed up together in the plaint, and one lump sum claimed as damages for both, and as no permission to amend the plaint was asked for in the lower Court so as to convert the suit into one for damages with reference to the trespass only, the plaint ought not to be allowed to be amended on appeal to the High Court.

THE plaintiff instituted this suit in the Court of the Subordinate Judge of Rajshahye for recovery of Rs. 25,000 in one lump sum as damages from the defendant, alleging that the defendant, while District Magistrate of Rajshahye, after holding the usual preliminary inquiry in a criminal case (in which the plaintiff was one of the accused) committed the plaintiff, on the 21st July 1894, to take his trial before the Court of Session, enlarging him on bail, and after that, while the plaintiff was ill and under medical treatment in Calcutta, without giving the plaintiff any previous intimation of the cancellation of the former order for bail, illegally and maliciously caused him to be arrested by the police, on the 23rd of October 1894, under a warrant issued by the defendant, and had him taken to Rajshahye where the plaintiff was again enlarged by the Sessions Judge of that place on furnishing fresh security ; and that subsequent to the commitment of the plaintiff to the Sessions and during his absence from home, the defendant, together with others, unlawfully and without any just and reasonable cause trespassed into the plaintiff's house at Nattore without his knowledge and consent and against the protest of his servants ; and that by these illegal and malicious acts of the defendant the plaintiff suffered damages.

(1) I. L. R., 7 Calc., 499.

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The suit was instituted on the 21st of October 1895, and although it was set out in the plaint that the aforesaid acts having been done in bad faith and out of malice there was no necessity to serve a notice on the defendant under section 424 of the Civil Procedure Code, a notice under that section had been served on the defendant on the 18th of September 1895.

The defendant contended (*inter alia*) that the suit having been filed on the 21st of October 1895, *i.e.*, before the expiration of two months from the date of delivery (18th of September 1895) of the notice under section 424 of the Civil Procedure Code, and the acts complained of having been by the defendant in his official capacity and in good faith, it was not maintainable.

The Subordinate Judge dismissed the suit on the ground that the defendant was entitled, as a 'public officer,' to two months' notice under section 424 of the Civil Procedure Code, previous to the institution of the suit, the acts complained of having been done by the defendant in his official capacity.

The plaintiff appealed to the High Court.

Babu *Sri Nath Das* and Babu *Hara Prosad Chatterjee* for the appellant.

Babu *Hem Chunder Banerjee*, Babu *Ram Charan Mitter*, and Babu *Pramatha Nath Sen* for the respondent.

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

The question raised in this appeal is whether the suit could be instituted without the notice, or rather before the expiry of the period of notice, prescribed by section 424 of the Code of Civil Procedure. The case as set out in the plaint, is that the defendant who was the District Magistrate of Rajshahye committed the plaintiff to the Sessions on charges under sections 386 and 109 of the Indian Penal Code, and that the plaintiff was, under an order of the Magistrate, enlarged on bail. The trial at the Sessions Court did not take place on the date fixed, but was postponed on the application of the plaintiff. Subsequent to the postponement, the plaintiff says that, while he was in Calcutta, the defendant caused him to be arrested under a warrant and had him taken to Rajshahye where he was again enlarged on furnishing fresh security. He charges that this act was illegal and malicious.

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Then the plaint proceeds to state that, subsequent to the commitment of the plaintiff, the defendant, together with others, trespassed into the plaintiff's house at Nattore without his knowledge and consent and against the protest of his servants. On account of these two illegal acts, the plaintiff prays that a sum of Rs. 25,000 may be awarded to him as damages. It is set out in the plaint that, although no notice was necessary under section 424, a notice had been given.

The defendant admitted that a notice was given, but contended that the suit was not maintainable, as it had been brought before the expiry of the prescribed period, and there is no doubt that this was so. The Subordinate Judge has thrown out the case on that ground, and the plaintiff now appeals, contending that, under the circumstances stated in the plaint, a notice was not necessary, and that even if it was, the Subordinate Judge had no authority to dismiss the suit, section 424 being merely one of procedure. We think there cannot be the slightest doubt that, under the circumstances stated in the plaint, the first act of which the plaintiff complains, *viz.*, his arrest under the warrant, was an act purporting to have been done by the defendant in his official capacity. The defendant was admittedly the Magistrate of the District. In that capacity he had committed the plaintiff to trial, and in that capacity he thought it necessary to have the plaintiff arrested in order that fresh security might be given. We are not concerned with the question whether that was a legal or an illegal act, suffice it to say that it is an act, which, in our opinion, is clearly of the kind contemplated by section 424. The learned pleader for the appellant contends that as the act is said to have been done maliciously, section 424 does not apply, and that that section only applies to acts done inadvertently, and as authority he cites the case of *Shahunshah Begum* v. *Fergusson* (1). There certainly are some remarks of Mr. Justice Cunningham which would lend support to this contention, but that was a case of a very different description from this, and we think the remarks made must be taken in connection with the facts of that particular case, and not as of general application. There the Official Trustee was sued by the plaintiff who claimed a certain interest

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in a trust property which he had failed to get, and in the suit brought by the plaintiff against the Official Trustee, it was held that no notice was necessary. This is a case of a wholly different character, and we are not aware of any instance, certainly no such case has been cited to us, in which it has been held that the section does not apply to the case of a public officer charged with a tortious act done by him in his official capacity. The section does not seem to us to warrant the drawing of any distinction between acts of this kind done inadvertently or otherwise.

Then it is said that the Subordinate Judge had no authority to dismiss the suit. But if the law says that "no suit shall be instituted," we fail to see how it is to be tried or what other course than dismissing the suit could have been adopted.

Then as regards the second act in respect of which damages are claimed, *viz.*, trespass into the plaintiff's house, it may be a question whether, on the allegations in the plaint, that act was one done by the Magistrate in his official capacity. But we think it is unnecessary to go into that question. Assuming that as regards it, a notice was not necessary, the suit was not one which in respect of the first act charged could be instituted. The two acts are mixed up together in the plaint, and one lump sum is charged as damages for both. It may be that we could allow the plaint to be amended by striking out of it the cause of action and damages claimed in respect of the arrest so as to convert the suit into one for damages with reference to the trespass only. Even in that case the question would have to be tried whether the defendant in committing the act of alleged trespass was or was not acting in his official capacity, and evidence on that point would have to be taken. We do not think that this is a case in which we ought now to allow the plaint to be amended. The plaintiff persisted throughout that the suit, as framed, was maintainable, and permission to amend the plaint was never asked for in the lower Court. We therefore dismiss the appeal with costs.

B. D. B. *Appeal dismissed.*