Before Mr. Justice Banerjee and Mr. Justice Rampini.

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January 14.

MOHIMA CHANDRA ROY CHOWDHRY AND ANOTHER (PLAINTIFF)
v.
ATUL CHANDRA CHAKRAVARTI CHOWDHRY AND OTHERS (DEFENDANTS).*

Misjoinder of Causes of Action—Joinder of several plaintiffs in respect of separate causes of Action—Contribution—Civil Procedure Code (Act XIV of 1882), section 578—Irregularity affecting merits.

The plaintiffs, who were husband and wife, brought a suit to recover a certain sum of money, part of which was alleged to have been paid by plaintiff No. 1, who was a co-sharer with the defendants in two *putnis*, to save the *putnis* from being sold for arrears of rent; and the remainder by plaintiff No. 2, who alleged that she had a subordinate *miras taluk* under the two *putnis* granted to her by plaintiff No. 1, and that the sale would have resulted in the cancellation of her *miras taluk*. In second appeal it was contended by the respondents, in support of the decree made by the Court below dismissing the claim of plaintiff No. 2, that the claim was liable to dismissal by reason of its involving the misjoinder of plaintiffs with different causes of action. This objection had been raised in the written statement, and the Court was asked to raise an issue on the point. In answer to this contention it was urged by the appellants that, as the respondents went to trial upon the merits, it was not open to them to urge any objection like this to the frame of the suit on second appeal. *Held*, that the suit was bad for misjoinder of plaintiffs as the suit of plaintiff No. 2 ought properly to have been brought against all the holders of the *putnis*, including plaintiff No. 1, and not merely against the defendants in the suit.

Held, further, that it was open to the respondents to raise the objection as to misjoinder in second appeal.

Tarinee Churn Ghose v. *Hunsman Jha* (1) distinguished. *Smurthwaite* v. *Hannay* (2) referred to.

The facts of this case are sufficiently stated in the judgment.

Dr. *Rash Behari Ghose*, Babu *Dwarka Nath Chakravarti*, Babu *Gobind Chunder Das* and Babu *Chunder Kant Ghose* for the appellants.

Babu *Srinath Das*, Babu *Mohini Mohan Roy*, Babu *Baikant Nath Das*, and Babu *Grish Chandra Chowdhry*, for the respondents.

* Appeal from Original Decree No. 148 of 1894 against the decree of Babu Radha Gobind Sen, Subordinate Judge of Mymensingh, dated the 7th of March 1894.

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

This appeal arises out of a suit brought by the two plaintiffs (appellants) who are husband and wife, to recover a certain sum of money, part of which is said to have been paid by plaintiff No. 1, who is a co-sharer with the defendants in two *putnis*, to save the *putnis* from being sold for arrears of rent, and the remainder is alleged to have been paid by plaintiff No. 2, who says that she has a subordinate *miras taluk* under the two *putnis*, granted to her by plaintiff No. 1, and that she paid the sums to prevent the sale of the *putnis* for arrears of rent, as the sale of the *putnis* for arrears of rent would have resulted in the cancellation of her *miras taluk*.

The defence, so far as it is necessary to consider it for the purposes of this appeal, was to this effect, that the frame of the suit is bad for misjoinder of the two plaintiffs, whose causes of action were different ; that the *miras taluk* claimed by plaintiff No. 2 had no real existence ; that it was created by the plaintiff No. 1 only with a view to prevent the decree in a partition suit that was then pending from being operative in transferring the possession of certain *mouzahs* included in the *putni* from plaintiff No. 1 ; that plaintiff No. 2 had not paid any money to save the *putnis* from sale ; and that the amounts claimed against certain of the defendants, *viz.*, defendants 1 to 4, were larger than what they were liable for.

The parties went to trial on several issues of which it is important to notice the first, second, and fifth, which run as follows :—

(1) "Is the plaintiff No. 2 entitled to any of the properties in dispute, and can she maintain this suit."

(2) "Is the suit multifarious, and, as such, liable to dismissal."

(5) "Are the plaintiffs entitled to recover contribution. If so, from which of the defendants, and to what extent." * * *

The learned Subordinate Judge decided the first issue against plaintiff No. 2, holding that the *miras taluk* set up by her had no real existence, and that it had been created merely to prevent the decree in the partition suit that was then pending from being

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operative against her husband: and he accordingly held that the plaintiff No. 2 had no cause of action.

Upon the second issue he observed that the finding of fact arrived at in the adjudication of the first issue rendered it unnecessary to pronounce any opinion as to the second issue, and that it would have simplified matters if plaintiff No. 1 had not brought this suit jointly with his wife, who, according to his own showing, was a subordinate tenure-holder and not a co-sharer of the *putni taluks*. On the fifth issue, he apportioned the liability of the several defendants so far as the claim of the first plaintiff was concerned in a certain way. And he then made a decree in favor of the plaintiff No. 1 alone in respect of the greater portion of the amount which he is said to have paid.

Against this decree the present appeal has been preferred by plaintiffs 1 and 2 jointly. There are also objections under section 561 of the Code of Civil Procedure on behalf of defendants 1 to 4.

We shall consider the appeal of the plaintiffs first, and then the objections of the respondents 1 to 4.

In their appeal the plaintiffs urge that the Court below was wrong in dismissing the claim of the plaintiff No. 2 on the ground that the *miras taluk* set up by her is unreal and invalid; and that the evidence upon the question is altogether one-sided, and goes to shew that, at any rate, at the date when the payments alleged in the plaint were made, plaintiff No. 2 had a subsisting right in the *miras taluk* in question. It is further contended that upon the finding arrived at by the Court below, that the payment said to have been made by the plaintiff No. 2 had in fact been really made by plaintiff No. 1, it ought to have given plaintiffs a joint decree for the full amount they had asked for. And, lastly, it is contended that the Court below ought to have given effect to the petition of the plaintiff No. 1, dated 18th May 1893, by which he asked the Court to strike out the name of plaintiff No. 2 and to substitute his name in her place on the ground that he had obtained a transfer by gift of the amount claimed in this suit by the plaintiff No. 2. On the other hand, it is contended by the respondents in support of the decree made by the Court below dismissing the claim of the plaintiff No. 2 that that claim was liable to dismissal by reason of its involving the misjoinder of plaintiffs with different causes of action.

In answer to this contention of the respondents it is urged on behalf of the appellants that, as the respondents went to trial upon the merits, it is no longer open to them to urge any objection like this to the frame of the suit.

We are of opinion that, apart from the merits of the case, the frame of the suit was clearly bad, there being a misjoinder of two plaintiffs with two distinct causes of action. The plaintiff No. 1 says that he paid certain sums of money to save the two *putnis* in which he had a certain share from being sold for arrears of rent, and his suit was, no doubt, rightly brought against his co-sharers in the *putnis*.

The case of plaintiff No. 2, as stated in the plaint, is that she owns a subordinate tenure under the two *putnis*; that she paid certain sums on certain dates to save the *putnis* from sale, as the subordinate tenure which she held stood in danger of being cancelled if the *putnis* were sold for arrears of rent. Her suit, therefore, ought properly to have been brought against all the holders of the *putnis* including plaintiff No. 1, and not merely against the defendants in the suit. The two claims were as incapable of being joined together as any two claims by two different persons well can be.

It was argued that plaintiff No. 1 was not a necessary party to any suit that plaintiff No. 2 might bring if she were to bring a separate suit, as nothing was due from plaintiff No. 1. Whether that was so or not we do not know. The fact is not admitted by the defendants, and no finding has been arrived at on the point by the Court below. It was further argued that it might have been in anticipation of the objection of *benami* that was urged by the defendants that the two plaintiffs joined in one suit, but there is not the faintest trace of there being any such reason to be discovered in the plaint.

The case, therefore, does not come within the scope of section 26 of the Code of Civil Procedure, which is the only section authorizing different plaintiffs to join in one suit. And the only other express provision that we find relating to different plaintiffs is that in the second paragraph of section 31 which distinctly provides that nothing in that section shall be deemed to enable plaintiffs to join in respect of distinct causes of action.

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Nor can section 578 of the Code be invoked in aid of the appellants. Here no decree has been made in their favour such as might be held to be protected from interference by the Appellate Court by section 578, even if it were granted that an objection, like the one that the defendants raised, involves only a question of irregularity—a point which is by no means free from doubt, having regard to the observations of the Lord Chancellor and the Lord Chief Justice in the case of *Smurthwaite* v. *Hannay* (1). It was urged, as we have noticed above, that the fact found by the Court below that the sums alleged to have been paid by plaintiff No. 2 had in fact been paid by plaintiff No. 1, is sufficient to entitle the plaintiff No. 1 to a decree for the amount in dispute in this appeal.

There are two answers to this contention. In the first place the finding is not very clear and definite that all the sums that have been claimed as having been paid by plaintiff No. 2 had been paid by plaintiff No. 1. All that the lower Court says upon this point is this: "As to the money said to have been paid by Gnanoda Soondry, plaintiff's witness No. 18, Koonja Kishore Biswas says that he got Rs. 265 from Chandra Kishore Chowdhry, *naib* of Mohim Chandra Roy, that it was debited in the *jama-kharach* account of Mohim Baboo, and that it was only deposited in the name of Gnanoda. In fact Mohim Chandra Roy is all in all, and the name of his wife is only used as a cloak to disguise his pretension to the villages of which he wants to retain possession in some shape or other."

This is very different from a definite finding that all the sums in question were paid by plaintiff No. 1. But even if there were such a finding, it would be a finding contrary to the allegations of the parties. It is not alleged by the defendants that all the sums said to have been paid by plaintiff No. 2 had been paid by plaintiff No. 1, and it is the very reverse of the allegations of the plaintiffs, not only in their plaint, but also in the arguments before us. That being so, we cannot give any effect to this contention. Nor can we give any effect to the petition of the 18th May 1893, referred to in the course of the argument. The plaintiff No. 1, after the institution of the suit, and after the suit had made some progress, put in that petition stating that he had acquired by gift from plaintiff No. 2 her rights to these sums.

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This cannot remove the defect of form in the suit as originally brought, which we have already noticed. The substitution of one plaintiff for another can ordinarily be allowed only in a suit brought in proper form. Certain cases were relied upon as showing that where a party, notwithstanding that there may be objections to the form of the suit, allows the suit to proceed to trial on its merits, it is no longer open to him to ask a Court of appeal to dismiss the suit, or any part of it, on the ground of any defect of form. Of these cases the most important one is *Tarinee Churn Ghose* v. *Hunsman Jha* (1). The facts of that case, however, are quite distinguishable from those of the present. There, not only was the objection in point of form not pressed, but the Court was never asked to frame any issue on the point. Here, on the contrary, we find that the objection as to misjoinder was raised in the written statement. The Court was asked to frame an issue on the point; and, then at a still later stage, when the plaintiff No. 1 asked the Court to substitute his name in the place of plaintiff No. 2, the defendants opposed that application on the ground that they had raised an objection at the first hearing to the frame of the suit, and that that objection should be disposed of in their favour.

We are of opinion, therefore, that the plaintiffs are not entitled to ask us to give them a decree in respect of that portion of the claim which has been dismissed. Here the question arises as to the form of the order that should have been made in the Court below, and as to the form which the order we make in respect of the claim of plaintiff No. 2 ought to take. No doubt, if the claim of plaintiff No. 2 is disallowed as having been improperly joined in this suit, so much of the judgment of the Court below as determines the question whether the plaintiff No. 2 has any real *miras* right, must be struck out, and the dismissal of the claim of the plaintiff No. 2 must be made to rest purely on the ground that it has been improperly joined in the present suit. We do not think that our making an order to that effect now can prejudicially affect either plaintiff No. 1 or plaintiff No. 2, or any of the defendants in this case. As plaintiff No. 1 has obtained a decree in regard to that part of the claim which relates to monies paid by

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him, and as the defendants did not take exception to that decree on the ground of the frame of the suit being bad, we may take it that, if the plaintiffs had in the Court below been asked to elect, the election would have been made in a way such as would have enabled the Court to make the decree that it has made. At any rate nothing to the contrary has been urged before us. And then as regards plaintiff No. 2, it is true that if she had been put to her election she might have been in a position to bring a fresh suit earlier; but late as she now is, we may observe that her claim is not likely to be barred by any law of limitation. Therefore there is no prejudice to any of the parties resulting from the order that we now make; and that order is that the claim of plaintiff No. 2 be disallowed on the ground of its having been improperly joined with that of plaintiff No. 1.

[Their Lordships also held that the cross-appeal ought to be dismissed but on grounds not material to this report.]

The result is that the appeal and the cross-appeal both fail, and the decree of the Court below will be affirmed, subject to the modification indicated above in regard to the dismissal of the claim of the plaintiff No. 2.

F. K. D. *Appeal dismissed.*

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

1897
April 2.

PRAN NATH ROY (PLAINTIFF) *v.* MOHESH CHANDRA MOITRA AND OTHERS (DEFENDANTS.)*

Right of suit—Fraud—Suit to set aside ex-parte decree and sale in execution thereof, on the ground of fraud—Jurisdiction—Res judicata—Effect of not appealing against an appealable order—Remand—Civil Procedure Code (Act XIV of 1882), sections 13, 108, 244, 311.

The plaintiff having applied unsuccessfully under sections 108 and 311 of the Civil Procedure Code to set aside an *ex-parte* decree against him and the sale of his property in the execution thereof on the ground of fraud, and without preferring an appeal against the order rejecting his said application under section 108 of the Code, instituted this suit praying for the same relief. The Subordinate Judge dismissed the suit as not maintainable.

* Appeal from Original Decree No. 354 of 1895, against the decree of Babu Krishna Chandra Das, Subordinate Judge of Pubna and Bogra, dated the 4th of September 1895.