Before Mr. Justice Markby and Mr. Justice Prinsep.

1877
June 21.

BOYDONATH BAG (DEFENDANT) *v.* GRISH CHUNDER ROY AND ANOTHER (PLAINTIFFS).*

Co-Sharers—Suit for Enhancement of Rent—Non-joinder of Parties—Suit barred by limitation as to added Parties—Act IX of 1871, *s.* 22—*Beng. Act VIII of* 1869, *s.* 29.

In a suit for the recovery of rent at an enhanced rate, brought by two of four brothers, joint and undivided owners of the tenure, the other two brothers, on an objection taken by the defendant that they ought to have been parties to the suit, presented a petition signifying their assent to the institution of the suit, and were thereupon treated as parties to the suit. This application was, however, made after the period of limitation prescribed for such a suit had expired. *Held* by Markby, J., that although the rights of such added parties were absolutely barred, yet the Court could proceed to adjudicate upon and declare the rights of the remaining plaintiffs who had originally filed the suit, and that, as the claim for rent was indivisible, the decree in their favour should be for the whole amount.

By PRINSEP, J.—The objection as to the defect of parties after the case had passed through two Courts, is not one affecting the merits of the case so as to be a ground of special appeal.

THIS was a suit for the recovery of rent for the year 1279 B. S. (1872-73), calculated at an enhanced rate in accordance with a notice previously served. The suit was instituted by two of four brothers, the joint and undivided owners of the tenure. At the hearing of the case objection was taken by the defendant to the non-joinder of the other brothers of the plaintiff in the suit, whereupon the two brothers, not originally made parties, put in a petition signifying their assent to the suit. The petitioners were thereupon not formally made parties, but the suit proceeded on the supposition that they were to be considered plaintiffs in the suit. The petition, however, was presented more than three months after the end of the Bengal year

* Special Appeal, No. 2058 of 1875, against a decree of L. R. Tottenham, Esq., Officiating Judge of Zilla Midnapore, dated 17th June, 1875, reversing a decree of Moulvie Enamul Huq, Munsif of Chouk Ghatal, dated 8th December, 1874.

for which the enhanced rent specified in the suit was claimed. Before the lower Appellate Court it was contended by the defendant, appellant, that the original defect of parties could not be cured by the petition put in by brothers of the original plaintiff; and that the prior omission of the four brothers to sign the notice of enhancement was also a fatal defect. In overruling these objections the Judge said—"I do not think the defect of parties is material to this case. For the remaining two co-sharers with the plaintiff filed a petition assenting to the suit, and the lower Court ought to have added them as plaintiffs. The defendant does not seem in any way to be prejudiced by the omission of their names from the plaint. I think, therefore, that the suit could proceed by virtue of the assent given by the co-sharers. And, similarly, I think that the absence of the signatures of the two co-sharers does not invalidate the notice of enhancement." The defendant preferred a special appeal to the High Court.

Baboo *Mohesh Chunder Chowdhry* for the appellant.

Mr. *C. Gregory* and Baboo *Nobo Kissen Mookerjee* for the respondents.

Baboo *Mohesh Chandra Chowdhry*.—The defect of parties was material, and could not be cured by the petition of the other co-sharers assenting to the suit. The defect (if cured at all) was not cured until the time prescribed in s. 29, Beng. Act VIII of 1869, for the institution of the suit had expired. The right of the assenting co-sharers at any rate is absolutely barred—see s. 22, Act IX of 1871; and this being so, the Court cannot disassociate the interest in the tenure of the four brothers who form a joint and undivided Hindu family, and therefore no decree can be made in respect of the rights of the brothers who were the original plaintiffs in the suit.

Baboo *Nobo Kissen Mookerjee* for the respondents.

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BOYDONATH BAG v. GRISH CHUNDER ROY.

The following judgments were delivered :—

MARKBY, J.—As regards the question of the tenure being protected from enhancement, I do not think that there is any ground for interfering. As regards the other point, the facts seem to be that several persons, members of a joint family, were the owners of this tenure. Some of these persons brought a suit for rent at an enhanced rate. It was objected in the course of the suit that it was wrongly framed, because all the members of the family interested in the tenure were not joined; thereupon the other members of the family came in and expressed their assent to the suit. I take it that what was then done amounts to this,—that although no formal order was then drawn up, still the suit was from that time a suit by all the members of the family. That is how the lower Appellate Court treats it, and that is how we treat it. Now this being a suit for which a very short period of limitation is provided, it turned out that those parties who were subsequently added as plaintiffs were so added after this period of limitation had expired; and under the provisions of s. 22, Act IX of 1871, if after institution of a suit a new plaintiff is added, the suit, as regards him, must be deemed to have been commenced when he was made a party. Therefore, there is no resisting the argument that, as regards the persons who were subsequently added, the suit was commenced after the period of limitation had expired. But then it is said, that for that reason the suit should be dismissed altogether. That really amounts to this, that because two of the parties who joined were barred, therefore the whole are also barred. The law does not say that; and it is not at all a reasonable construction of the statute to hold that. No doubt, it is difficult to see in what cases of a joint claim s. 22 could have any application at all. But I can see no more difficulty in drawing up the decree in this case than there would be in the case in which some of the holders of the tenure, who had refused to join in the suit, might be made defendants. In that case the decree could not be in favor of any person except the plaintiff, nor can there be a decree here in favor of the plaintiffs who are barred; but, nevertheless, the other plaintiffs are entitled to a decree for the rent at the rate

fixed by the Court. The claim for rent not being divisible, the decree must be for the whole rent.

It seems to me, therefore, that the decree of the lower Appellate Court is right, and this special appeal ought to be dismissed with costs.

PRINSEP, J.—As far as I understand the case, the landlords of the defendants are four brothers. Two of them sued the defendants for arrears of rent. An objection was then raised that all the brothers ought to have sued jointly. Thereupon the other two brothers signified to the Court that they had consented to this action having been brought by two plaintiffs. And I understand from that, that the two plaintiffs intended to represent the entire estate, and brought the suit as managers of a Hindu family for themselves and their brothers; and that it was only when they became alarmed on an objection raised by the defendants that the other two thought it necessary to come in and signify their consent. The objection as to defect of parties, after the case had passed through two Courts, would not in my opinion be one affecting the merits of the case so as to be a point to be taken in special appeal under s. 372.

As regards the other objection on the point of limitation, I cannot see how a claim of two of the brothers for rent at an enhanced rate could be separated from the claim of the two others. The Limitation Act does not appear to have contemplated such a case as that; and it would be impossible to specify the particular shares of joint owners in such a case. The proper course, in such a case, would have been for the first Court to have thrown out the case for defect of parties. The first Court did not do so, but proceeded to decide it. That being so, I think, in special appeal, we cannot do otherwise than dismiss the appeal.

Appeal dismissed.