Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

1879 *August* 29.

CHUNDER COOMAR ROY AND ANOTHER (DEFENDANTS) *v.* GOCOOL CHUNDER BHUTTACHARJEE (PLAINTIFF).*

Civil Procedure Code (Act X of 1877), s. 32—Adding Parties as Plaintiffs—Act XXVII of 1860, s. 2—Holder of Certificate of Administration.

A sued as only son and heir of his father *B*. *C*, the widow of *B*, having, with the concurrence of *A*, taken out letters of administration to *B*'s estate, was, on the application of *A* at the hearing of the suit, made a co-plaintiff under s. 32 of the Civil Procedure Code.

Held, that *C* ought not to have been joined as a plaintiff in the suit, inasmuch as *A* had no right at all to sue.

Section 32, as far as the addition of plaintiffs is concerned, only applies to those cases in which the original party who brought the suit had some title to sue.

Per PONTIFEX, J.—The power given by s. 27 of the Code ought to be exercised before the first hearing of the case.

Held also, that s. 2 of Act XXVII of 1860 prohibited *A* from suing alone, for although he was, no doubt, beneficially entitled to recover it, yet there was no vexatious or fraudulent withholding of the debt within the meaning of that section.

Per GARTH, C. J.—A debt cannot be said to be "vexatiously withheld" within the meaning of that section, simply because the debtor omits to pay it.

APPEAL from a decision of WILSON, J.

This suit was brought by Gocool Chunder Bhuttacharjee, as the only son and heir of his father Sibchunder Bhuttacharjee, to recover from the defendants the amount of principal due on a joint and several promissory note executed by the defendants in favor of Sibchunder, and dated the 6th of June 1875, together with the balance of interest thereon from March 1878, the whole sum sued for being Rs. 6,736.

Sibchunder died on the 24th May 1878, and the plaint was filed on the 5th of June 1878. On the 6th of June, letters of administration of the estate of Sibchunder were granted to his widow Kisto Kaminee Dabee.

When the case came on for hearing, an application was made that the administratrix should be added as a plaintiff under s. 32 of the Civil Procedure Code. This application was

* This case was inadvertently omitted, but being important is now inserted.

granted, and a decree was given by Wilson, J., to the two plaintiffs, for the full amount of the claim, with interest and costs.

From this decision the defendants appealed.

Mr. *Phillips* and Mr. *J. G. Apcar* for the appellants.

Mr. *Bonnerjee* and Mr. *Mitter* for the respondent.

The following judgments were delivered :—

GARTH, C. J.—I think that the Court below had no power, under the circumstances, to add the name of the administratrix as a co-plaintiff, or to give a decree in favor of both the plaintiffs.

The amendment was made at the trial under s. 32 of the Civil Procedure Code, which allows the Court "to order that the name of any person who ought to have been joined in the suit, either as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate and settle all questions involved in the suit, should be added." That section, so far as the addition of plaintiffs is concerned, appears to me to apply to those cases only where the plaintiff who has brought the suit is one of the right parties to sue, but some other person, either as being his co-contractor, or otherwise jointly interested with himself, ought to have been joined as a co-plaintiff. I do not think that the section is intended to enable a plaintiff who has brought a suit without having any right to do so, to add the name of a person who has the right to sue, and to obtain a decree in right of that person; and I rather think that the learned Judge in the Court below was of that opinion, because he goes into the question of whether the original plaintiff in this case had a right to sue, and decides that he had, because the defendants were vexatiously withholding the debt from the plaintiff, and so the case came within the exception in s. 2 of Act XXVII of 1860.

Now it appears to me that, in this case, there is no ground whatever for saying that the defendants "vexatiously withheld" the debt from the plaintiff. The plaintiff, of course, could have no claim whatever to the money till the death of his father Sibchunder on the 24th of May 1878. Within twelve days of

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that time,—namely, on the 3rd of June 1878,—the plaintiff brings this suit. It does not appear that Sibchunder ever required payment of the debt in his lifetime, nor that the plaintiff ever asked for it before he brought this suit. There certainly was no refusal on the defendants' part to pay it; and so far from the debt being withheld vexatiously or fraudulently, it appears from the answers to the interrogatories which have been put in by the plaintiff himself, that the defendants have been trying to make an arrangement to pay whatever was due from them to the plaintiff as well as to the other creditors.

The real reason why the suit was brought so soon after Sibchunder's death, was very candidly admitted by the plaintiff's counsel to have been, because the promissory note bore date the 6th of June 1875, and the plaintiff's advisers filed their plaint on the 5th June 1878 to prevent the claim being barred by limitation.

But then Mr. Bonnerjee for the plaintiff contends, that where there is no real doubt as to the person entitled to receive a debt, the payment of it must be considered to be withheld vexatiously if the debtor simply omits to pay it. But this, in my opinion, is not the meaning of the section. If it were, I think the object of the Act would be entirely defeated. The heir of a deceased Hindu or Mahomedan might then always sue for a debt due to his ancestor without even asking for it; and unless the defendant could show at the trial that he had any reasonable doubt as to the party entitled to receive the money, the plaintiff would be entitled te recover. This would not be affording to the debtor the protection which the Act intended to give him, and it would be giving no meaning, except perhaps a very strained and unnatural one, to the words "withheld from fraudulent or vexatious motives."

I consider the intention of the Act to be, that, as a general rule, no Court shall compel any debtor of a deceased Hindu or Mahomedan to pay his debts to any person unless such person shall either have obtained a certificate under the Act, or probate of the deceased's will, or administration to his effects. The only exceptions to this rule are cases where not only there is no reasonable doubt as to the person entitled to receive the

money, but where also the debtor withholds the debt from fraudulent or vexatious motives. The mere nonpayment of the debt when it has never been asked for, or where the debtor is doing his best to pay it, is to my mind clearly not a withholding it from fraudulent or vexatious motives.

I am strongly disposed to agree with what fell from my learned colleague during the argument, that if the heir of a deceased Hindu sues for a debt without having obtained a certificate or probate or administration, upon the ground that his case is within the exception,—that is to say, that there is no reasonable doubt that he is the person entitled to receive the debt, and that the defendant is withholding it from fraudulent or vexatious motives;—if he does not make this statement, it ought to be a good answer on the part of the defendants that the plaintiff has not obtained a certificate or probate or letters of administration, and consequently that he has no right to sue.

The Madras High Court has held in *Govindappa* v. *Kondappa Sastrulu* (1), that it is sufficient for the plaintiff to be prepared at the trial with proof of his certificate when he has stated in his plaint that he has applied for it, and possibly it might be right (in analogy to cases in England, where a party sues as executor or administrator, and obtains his probate or letters of administration before the trial) to hold that this would be sufficient.

But that is not the plaintiff's case here. He has neither obtained nor intended to obtain administration, and the defendants raised the point by a direct plea that administration had not been granted to the plaintiff, but had been granted with the plaintiff's consent to a third person. The plaintiff, therefore, having no right whatever to sue, and the Court having no power to compel the defendants to pay him the money, he applies at the trial to add the name of the administratrix as a co-plaintiff with himself. He does not apply to substitute her name for his;—that he must have done under s. 27 of the Code, and the Court could not have granted the application unless it had been satisfied that the plaintiff had sued in his own name under some *bonâ fide* mistake. Here it is not pretended that there was any mistake. Nor was the application made upon the ground that

(1) 6 Mad. H. C. R., 131.

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the plaintiff and the administratrix claimed the right to this debt in the alternative (see s. 26). Mr. Bonnerjee does not attempt to put his case upon that ground. He contends, that the plaintiff and the administratrix had a joint interest in the debt, the one as the person beneficially entitled, the other as the person who had the legal right to sue.

But even assuming that in some cases it might be proper that a trustee and his *cestui que trust* should join as co-plaintiffs, that could only be in a case where the Court was at liberty, if it thought proper, to make a decree in favor of the *cestui que trust*. But here the Court is expressly prohibited by s. 2 of the Act of 1860 from ordering the defendants to pay the debt claimed to the plaintiff, and it is equally prohibited, as it seems to me, from ordering the defendants to pay the debt to the plaintiff conjointly with some one else who has a better title. If this were permitted, creditors would be deprived of the very protection which Act XXVII of 1860 was intended to afford them. A party, claiming as heir to a Hindu, but having no title as such, might always sue with impunity for a debt due to the estate, and then by bringing into the suit at the last moment the party who is really entitled, they might obtain a joint decree.

In this case the party who had no right to sue brought the suit. The party who had the right did not sue, and yet by making these two persons co-plaintiffs at the trial, the Judge not only places them in a position to obtain a joint decree, but obliges the defendants, who had at any rate an answer to the suit up to the time when the administratrix was joined, to pay the costs of it *ab initio*.

The plaintiff had really no excuse then for the course which he adopted. He might, if he pleased, have taken out administration himself, or when he waived his right in favor of his mother, he might have withdrawn his suit at little or no expense within three days after he had filed his plaint, and allowed another suit to be brought at once in the name of the administratrix. There was no difficulty as regards limitation, because interest had been paid up to March 1878, and the plaintiff had full notice of the mistake he was making, because the point was directly raised in the defendants' written statement. . . . . .

In order to avoid further delay and expense, I am prepared, if both parties will assent to that course within a fortnight from this date, to allow the decree of the lower Court to stand in favor of the administratrix only, Mr. Bonnerjee's clients paying the costs in both Courts on scale 2. In that case the name of the original plaintiff will be omitted, and the amount of the defendants' taxed costs will be deducted from the amount of the decree.

If the parties do not consent to these terms within a fortnight from this date, the judgment of the Court below will be reversed, and the plaintiff's suit will be dismissed with costs in both Courts on scale 2.

PONTIFEX, J.—The plaintiff in this case sued as only son and heir of his father to recover the principal and interest, moneys secured by a promissory note granted by the defendants to the plaintiff's father. The plaint was filed on the 5th of June 1878, within twelve days after the death of the father; but the summons was not served on the defendants until the 18th of June. In the meantime, on the 8th of June, an order for a grant of letters of administration to the father's estate was made in favor of his widow. This order could only have been made with the concurrence of the plaintiff, who must have been aware before filing his plaint that it would be applied for.

The defendants, in their written statement, took the objection that letters of administration had been granted to the widow, which precluded the plaintiff from recovering in this suit. The plaintiff, however, elected to go to trial, and filed interrogatories, which the defendants were obliged to answer. But at the hearing the plaintiff's counsel asked the learned Judge in the Court below to add the administratrix as a co-plaintiff, which application, though opposed, was granted, as if authorized by s. 32 of the Code, and thereupon a decree was at once made for payment to the plaintiff and co-plaintiff, not only of the moneys secured by the promissory note, but also of all the costs of suit.

Against that decree the defendants have appealed, insisting that the learned Judge in the Court below had no authority to add the administratrix as co-plaintiff at the hearing, and at all events ought not to have directed the defendants to pay the

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costs of the suit; for if the addition of the co-plaintiff was necessary, then no costs should have been given up to the hearing; and if her presence was unnecessary, then, at least, the defendants ought not to have been directed to pay her costs, or the costs incidental to making her a party.

Technically I am of opinion that the Court below did not have power to add at the hearing the administratrix as a co-plaintiff; and of course, if the judgment of the Court below is technically wrong, the whole case of costs is open in appeal. In my opinion s. 32 of Act X of 1877 applies to a suit which is to some extent properly instituted, though partially defective; in other words, there is no jurisdiction at the hearing to add a plaintiff, unless the original plaintiff had some title to sue. It was strongly urged before us, that the original plaintiff, as sole heir of his father, was entitled to sue alone for the debt, or at least had some title to sue. But s. 2 of Act XXVII of 1860 enacts, that "no debtor of any deceased person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person, or any part thereof, except on the production of a certificate, to be obtained in manner hereinafter mentioned, or of a probate or letters of administration, unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled."

In this case the plaintiff has not attempted to prove, nor is there any ground for saying, that the defendants withheld payment from fraudulent or vexatious motives. No demand was proved to have been made before suit, and before service of the summons an order for administration had been granted with the plaintiff's concurrence to another person. No offer of obtaining the concurrence of the administratrix was made before the hearing, and it appears that so far from evading payment, the defendants were taking steps to raise the money.

Section 27 of Act X of 1877 authorizes the Court to substitute or add the proper plaintiff when the suit has been instituted by a wrong person under a *bonâ fide* mistake; but even if there were a *bonâ fide* mistake in this case, it appears to me that, as the section does not contain the words "on or before the first hear-

ing," which appear in s. 32, the power given by the section ought to be exercised before the first hearing; and as the objection was taken in the written statement, it was mere perversity of the original plaintiff to wait until the hearing before he asked for the administratrix to be made a co-plaintiff.

The order of the Court below being in my opinion technically wrong, the appellants would be entitled to have the decree reversed with costs in both Courts. But inasmuch as substantial justice was in fact done by the decree in ordering payment to the administratrix, I also should be willing, if the parties consent, and for the purpose of saving expense, to allow the decree to stand so far as it directs payment to the administratrix. But whether the parties consent or not, I think the plaintiff must pay the whole costs of suit and appeal, to be set off against the decree, if the parties elect to let the decree with the proposed modification stand.

Appeal allowed.

Attorneys for the appellants: Messrs. *Beeby* and *Rutter*.

Attorney for the respondent: Baboo *Brojonath Mitter*.

APPELLATE CIVIL.

Before Mr. Justice Pontifex and Mr. Justice McDonell.

DOOLEE CHAND AND OTHERS (DECREE-HOLDERS) *v.* OMDA KHANUM, *alias* BABU SHUBIBU AND OTHERS (JUDGMENT-DEBTORS).*

1880 *June* 3.

Mortgage Decree for Account and Sale—Taking of Accounts—Withdrawal of Execution-Proceedings—Principle on which Accounts are to be taken.

A mortgagee, who has obtained a decree for an account and sale, is not entitled to withdraw from the taking of accounts in his execution-proceedings, when those accounts appear to be going against him.

THE appellants in this case had obtained a decree for an account and for the sale of certain property mortgaged to

* Appeal from orders, Nos. 174 and 175 of 1879, against the order of G. E. Porter, Esq., Officiating Judge of Gya, dated 7th June 1879, affirming the order of Baboo Matadin, Subordinate Judge of that district, dated the 30th August 1878.