

ALLAHABAD HIGH COURT

Biri Singh

Vs

Nawal Singh

(John Stanley, C.J. Burkitt, J.)

16.01.1898

JUDGMENT

John Stanley, C.J. and Burkitt, J.

1. This is an appeal from a decree of the Subordinate Judge of Mainpuri dismissing the plaintiff's suit, which was brought to recover the amount due to them upon a mortgage, dated the 25th of September, 1875, and to redeem, if necessary, any prior mortgages. The mortgagees in the mortgage-deed are Lachman Singh and Zalim Singh. The plaintiff Biri Singh is the son of Lachman Singh, and Nita Ram is admittedly entitled to the interest of Zalim Singh in the mortgage. The plaintiffs made parties as defendants to the suit, four persons, who are members of their family, namely, Bhup Singh, Bijai Singh, Badan Singh and Kanchan Singh. One of the issues which was framed was an issue as to whether or not the suit could be proceeded with against these defendants, or was it necessary to make Lachman Singh a party to it, the parties at the time the issue was framed being under the impression that Lachman Singh was then alive. As a matter of fact Lachman Singh was then dead, so there was an end to this issue. The learned Subordinate Judge, however, thought fit to consider whether or not, under the circumstances of this case, the plaintiffs could succeed in establishing their claim without having arrayed the four persons above mentioned as plaintiffs instead of as defendants. He found that they and the plaintiffs were members of a joint Hindu family, and relying on the decision in the case of *Dwarka Nath Mitter v. Tara Prosunna Roy*¹ determined that the members of the family, who were arrayed as defendants, ought to have been joined as plaintiffs, and, accordingly, that the suit could not proceed. The decision upon which the learned Subordinate Judge relied has been overruled by a Full Bench of the Calcutta High Court, consisting of the Chief Justice and four judges, in the case of *Pyari Mohun Bose v. Kedar Nath Roy*² in which it was decided, with the concurrence of both of the Judges who decided the earlier case of *Dwarka Nath Mitter v. Tara Prosunna Roy* that where two parties contract with a third party, a suit by one of them making the other a co-defendant ought not to be dismissed merely because the plaintiff has not proved that the co-defendant had refused to join as a co-plaintiff. This case disposes of the authority upon

which the learned Subordinate Judge relied. We may observe, however, that it was quite apparent from the written statement which was filed by three of the defendants in question that they disclaimed all interest in the subject-matter of the suit, and would not willingly have been made plaintiffs to it. We therefore must allow the appeal, set aside the decree, and, as the case has been decided on a preliminary point, we remand it under Section 562 of the Code of Civil Procedure to the lower Court, to be replaced on the file of pending cases under its original number in the register, for the determination of the issues which have been left undecided. The costs of this appeal must abide the event.

Cases Referred.

1(1889) I.L.R. 17 Calc. 160

2(1899) I.L.R. 26 Calc. 409