CALCUTTA HIGH COURT

Ramsebuk

Vs

Ramlall Koondoo

(Richard Garth, C.J. Pontifex, J.)

28.02.1881

JUDGMENT

Richard Garth, C.J.

1. Before answering seriatim the questions referred to us, I think it necessary to explain what I consider to be the law with regard to the non-joinder of plaintiffs in actions of contract. This explanation will of itself afford an answer to most of the questions referred. In actions of contract, it is the right of the defendant, if he takes the objection in proper time, to insist upon all the persons with whom he contracted being joined as plaintiffs; and if, after the objection has been raised, the plaintiff proceeds with the suit without taking steps to add the person or persons whose nonjoinder has been objected to, and the Court finds that the objection is well founded, the suit must be dismissed. It is for this reason that the nonjoinder of plaintiffs in an action of contract has always been a plea in bar; and the justice of the rule is manifest. If a defendant is sued by one only of two persons with whom he has contracted, he may have a set-off, or any other defence against the two, of which he could not avail himself as against the one only; and, besides this, the defendant ought always to be in a position to recover his costs, if he succeeds, as against all the parties with whom he contracted. In the present case the two original plaintiffs yielded at once to the defendant's objection and the Court very properly, upon their application, allowed the two other plaintiffs to be added. But then the 22nd section of the Limitation Act presented a new difficulty to the plaintiff's, and upon this the main question in the case depends. In England, since the passing of the Common Law Procedure Act of 1852, the amendment might have been made, if the Court thought proper, so as to protect the claim of the plaintiffs from limitation, because, after the amendment, the suit would be considered as having been commenced by all the plaintiffs at the time when it was first instituted. If the Court had reason to believe that all the plaintiffs had not been joined for some improper motive, the amendment would be refused; but if it considered that the nonjoinder was a bond fide mistake, the amendment would be made, for the express purpose of protecting the plaintiffs' rights, and of preventing the Limitation Act from working injustice. (See *Lakin v. Watson*[1] *Brown v. Fullerton*[2] and cases there cited at p. 556 of the Report). But the policy of the Legislature in this country has

been to make the law of limitation much more strict than in England, and to take away, as far as possible, any discretion from the Courts to modify its strictness. The provisions of Section 22 of the Limitation Act seem to have been passed with the avowed object of preventing such amendments being made in such a way as to relieve the plaintiffs from limitation; and the effect of those provisions in such a case as the present is to render the amendment virtually useless to the original plaintiffs. If those plaintiffs cannot enforce their claim without joining the additional plaintiffs, and the additional plaintiffs are barred from enforcing it by the law of limitation, it is obvious that the suit must fail. The lower Court seems to have supposed that the original plaintiffs ought in equity to succeed, although their co-contractors may be barred. But this would be directly at variance with the rule of law, which requires that all co-contractors should join in such a suit, and it would place it in the power of one or more of several plaintiffs (co-contractors) to render any objection by the defendant on the ground of nonjoinder ineffectual; because, by bringing their suit at the very last moment, to save limitation, they might always prevent their co-contractors being usefully joined, and so secure the judgment of the Court themselves to the exclusion of their co-contractors. We have been referred in the course of the argument to the case of *Boydonath Bag v. Grish Chunder Roy*[3] in which Mr. Justice Markby appears to have held, that, under circumstances similar to the present, the two original plaintiffs would be entitled to a decree, though their co-contractors were barred. I confess I cannot understand, nor agree with that decision; and if Mr. Justice Prinsep had concurred in that view, I should have thought it right to refer the question to a Full Bench. But as I understand, Mr. Justice Prinsep decided the appeal upon another ground. Of course, if in this case it had been found in the Court below as a fact, that the contract was made between the defendant and the two original plaintiffs only, there would be no difficulty in deciding in their favour, because then the joinder of the two other plaintiffs would only have been a misjoinder, which by Section 31 No suit shall be defeated by reason of the misjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it. Nothing in this section shall be deemed to enable plaintiff (sic) join in respect of distinct couses of action. of the Code of Civil Procedure is never now fatal to a suit (Section 31 of the Civil Procedure Code has, however, not been extended to the Presidency Small Cause Courts---Rep. note). That section is a reproduction of Section 19 of the Common Law Procedure Act, 1860, and applies (for good reasons) to cases of misjoinder only. There can never be any injustice in allowing too many plaintiffs to sue together, or in allowing them to frame their suit either jointly or severally, or in the alternative, because the defendants in such a case can always set up different defences against different plaintiffs, and is in a position to obtain his costs from all or any of them against whom he may succeed. The Court can always dismiss a suit against one or more plaintiffs without difficulty or injustice, and without incurring any of the objections which are applicable to the case of nonjoinder. Thus, for instance, suppose that three persons, A, B, and C, sued D upon a contract, and D's defence was, that he made the contract with A and B alone, and that as against them he has a setoff. Then, if all the three plaintiffs succeeded in proving their case against the defendant, he would be defeated, because, as against the three, he would have no right of set-off. But if, on the other hand, the defendant proved that he made the contract with A and B only, the suit would

be dismissed as against C, and D would probably get his costs against him; but as regards A and B the question of set-off would be tried, and the defendant would succeed or not according as he proved that plea. This is the reason why both by the Common Law Procedure Act of 1860 and the Indian Code of Civil Procedure, misjoinder of plaintiffs can never be fatal to a suit, though nonjoinder of plaintiffs may. Now, as I understand, the lower Court has found in this case, that all the four plaintiffs were partners in the concern, and that the defendants contracted with all jointly, and it is difficult to see how upon the facts the Judges could have come to any other conclusion. The assets of the firm were the joint property of all the partners; the firm was conducted with their joint moneys; and the business appears to have been carried on by the acting partners on behalf of all the four. If I considered that there was any room for doubt as to this point, I should be disposed to send the case back to the Court below to have it reconsidered; but as the original plaintiffs declined to raise that question upon the defendant's objection, I think, that if the case went back, it could only be at the plaintiffs' cost. Having thus explained what I consider the law to be as applicable to the case, I will proceed to answer the question referred to us seriatim:

1. I think that the claim of the original plaintiffs is barred, because they can only enforce their claim in conjunction with the other plaintiffs, and the other plaintiffs are barred by Section 22 of the Limitation Act.

2. It was in the discretion of the Court to add the names of the third and fourth plaintiff's, and I think that, under the circumstances, they were right in so doing.

3. The suit, in my opinion, would have been in time if all the plaintiffs bad joined in the first instance. I quite agree with the learned Judges of the Small Cause Court that the word "prescribed period " in Section 20 means, not the period prescribed for the payment of the debt, but the prescribed period of limitation. We were referred to the case of *Tariney Churn Nundy v. Shaikh Abdur Rohoman*[4] in which a contrary view appears to have been entertained; and if it was necessary for the purpose of this case, we should refer the point to a Pull Bench. But having regard to our judgment upon the other point, it is not necessary.

4. For the reasons already given, I think that the first and second plaintiffs are not entitled to the judgment of the Court.

5. There is no equity, in my opinion, but often much injustice, in allowing one joint contractor out of many to sue the defendant, notwithstanding an objection duly made by the latter; and the Court has no right to allow one eontractor to recover under such circumstances, though he may no doubt afterwards adjust the sum which he recovers with his co-contractors.

6. As between the members of the joint family, any one or more may, of course, be authorized by the rest to act as their agent or agents in any business transaction; but when a joint family, or any members of it, carry on a trade, in partnership, and contract with the outside public in the course

of that trade, they have no greater privileges than any other traders. If they are really partners, they must be bound by the same rules of law for enforcing; their contracts in Courts of law as any other partnership. The defendant will have the costs of this reference.

Cases Referred.

1(2 Cr. & M. 685)
213 M. & W. 556
3(I. L. R. 3 Cal. 26)
42 (C. L. R., 346)