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Court : Allahabad

Decided On : May-07-1909

Reported in : 2Ind.Cas.306

Judge : Karamat Husain, J.

Appellant : Ram Bakhsh

Respondent : Chanda and ors.

Judgement :

Karamat Husain, J.

1. The plaintiff brought an action against the defendant for ejectment. In the eighth paragraph of his plaint he said: 'Defendants Nos. 2 and 3 are the plaintiff's co-sharers but they did not join in the suit, on the other hand it appears that they avoid the suit to some extent. Hence they have been made pro forma defendants and the plaintiff is also legally entitled to do so.' The first relief sought by the plaintiff was a decree for absolute possession of the house against defendant No. 1 subject to the rights of defendants Nos. 2 and 3. The pro forma defendants Nos. 2 and 3 made no appearance before the Court of first instance which decreed the suit against defendant No. 1. The defendant No. 1 appealed to the lower appellate Court. The first plea in the memorandum of appeal was that the Court below was in error in decreeing the claim when the co-sharers who admittedly had let in the defendant did not join in the suit. The first contention urged in lower appellate

Court was that as the other co-sharers did not join in the suit, the suit for ejectment cannot lie. That Court gave effect to this plea and reversed the decree on the authority of *Gholam Mohiuddin Hossein v. Khairan* 31 C. 786. The plaintiff comes here in second appeal and it is argued by his learned advocate that as pro forma defendants Nos. 2 and 3 were impleaded as defendants the suit is maintainable. There was no section in the Code of Civil Procedure Act XIV of 1882 which entitled the plaintiff to make defendants such persons as had a joint interest with him in the subject-matter of the suit but were not willing to join with him as plaintiffs. But that has been the practice in these Provinces and is sanctioned by the practice in England. In *Wilkins v. Fry* (1816) 1 Mer. 244 at p. 262 it is remarked 'All persons who have a joint interest must join in an action at law; but in equity it is sufficient that all parties interested in the subject of the suit should be before the Court either in the shape of plaintiffs or defendants.' In *Guru Prashad Roy v. Rasmohun Mukhopadhyaya* (1878) 1 C.L.R. 431 the first paragraph in the head-note is in these terms : 'Where a sum of money is due to a joint Mitakshara family one of whom refuses to join in seeing the debtor the proper procedure for the other co-sharers is to sue the debtor for the whole amount making the dissenting co-sharers a defendant.' It is thus evident that there was no non-joinder of necessary parties and that the suit should not have been, dismissed on that ground. Assuming that the necessary parties were not before the Court but as no objection as to want of parties was taken in the written statement and before the first hearing such objection under the provisions of Section 34 of the Code of Civil Procedure Act XIV of 1882 must be deemed to have been waived by the defendant. The case in *Gholam Mohuid-din Hussein v. Khairan* 31 C. 786 relied on by the lower appellate Court has no application to the facts of this case. In that case the suit was for what has been described as the partial ejectment of the principal defendant, that is to say, the plaintiffs asked for khas possession to the extent of their shares in the land jointly with the principal defendants.' Under those circumstances the learned Judges held that a co-sharer landlord is not competent to obtain a partial ejectment of the tenants to the extent of his share unless the tenancy has been determined by all the co-sharers.' The learned Counsel for the respondents argues that the real meaning of the first plea in the memorandum of appeal to the lower appellate Court is that under the Indian Contract Act when a

tenancy is created by three persons jointly as landlords one of them alone as a matter of substantive law is entitled to eject. With this contention I am not concerned at this stage of the appeal. What I hold is that as a matter of procedure there was no non-joinder of necessary parties, that all the necessary parties were before the Court, and the lower appellate Court was in error in setting aside the decree of the Court of first instance on the ground of non-joinder. I, therefore, allow the appeal, set aside the decree of the lower appellate Court and remand the case under Order 41 Rule 23, of the present Code of Civil Procedure to the lower appellate Court with directions to re-admit the appeal under its original number in the register and to proceed to determine it according to law. The appellant will get the costs of this appeal including fees on the higher scale. Other costs will abide the event.

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