

**(1930) 12 BOM CK 0020**

**Bombay High Court**

**Case No:** First Appeal No. 508 of 1928

Dattatraya Govind Shaligram

APPELLANT

Vs

Gopal Sakharam Pandhare

RESPONDENT

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**Date of Decision:** Dec. 5, 1930

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 3

**Citation:** (1931) 33 BOMLR 624

**Hon'ble Judges:** Patkar, J; Broomfield, J

**Bench:** Division Bench

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### **Judgement**

Patkar, J.

In this case the plaintiffs sued to recover possession of the plaint property situate at Bhamburda revision survey No. 268, pot hissa No. 1, on the allegations that the plaintiff was entitled to six annas share in the land, and that defendant No. 1 was entitled to the remaining ten annas share, that in the year 1894 the plaintiff leased the land to the defendant on twenty years" lease and the lease having expired in the year 1914 plaintiff was entitled to recover possession of the land. The plaintiff alleged in the plaint that defendant No. 1 was his tenant and the other defendants were the sub-tenants of defendant No. 1 or claiming through him.

2. Defendant No. 1 in his written statement admitted the correctness of the allegation made by the plaintiff in the plaint. Some of the defendants, however, stated that they did not claim through defendant No. 1 and claimed in their own right. The other defendants did not put in any written statement and some of the defendants stated that they had no connection with the land.

3. The learned Subordinate Judge relying on the case in Afzal Shah v. Lachmi Narain ILR (1917) All. 7 held that the plaintiffs" suit was bad for misjoinder of causes of action, and directed the plaintiffs to confine their suit against defendant No. 1 only, and ordered that the names of the other defendants and the causes of actions

against them should be struck off, and the plaint should be amended accordingly within ten days. The plaintiffs not having complied with the order the suit was dismissed.

4. The only question arising in this appeal is, whether the plaintiffs' suit is bad for misjoinder of causes of action. The provisions of the CPC relating to this point are Order I, Rule 3, and Order II, Rule 3, corresponding to Sections 28 and 45 of the old Civil Procedure Code. Though there is not much difference between Section 45 and Order II, Rule 3, there is considerable difference between Section 28 of the old CPC and Order I, Rule 3, of the present Code. Under Order I, Rule 3--

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise.

5. In the present case the plaintiff sues to recover possession which is a relief arising out of the transaction of the lease passed in favour of defendant No. 1 and alleged to exist against all the defendants severally, and it would appear that if separate suits were brought against the defendants common questions of law and fact would arise. The common questions of facts which would arise are whether the plaintiffs are the owners of the land, and whether the period of the lease has expired, and plaintiffs are entitled to immediate possession. The common question of law arising against all the defendants would be whether the plaintiffs' suit is within time. I think, therefore, that the terms of Order I, Rule 3, are sufficiently complied with in the present case. Order I, Rule 3, not only refers to parties to actions but also to causes of action as held by the Calcutta High Court in *Ramendra Nath Roy v. Brajendra Nath Dass* ilr (1917) Cal. 111. The mere fact that there are several defendants in the suit is not decisive. A person can sue for partition and join as defendants several alienees or mortgagees from different members of the family. So also a reversioner or an adopted son can bring a suit to recover property to which he is entitled notwithstanding the alienations made by the widow in favour of different persons. The defendants may be claiming under different titles, but if the plaintiff is entitled to a relief in respect of an act or transaction or series of acts or transactions against the defendants jointly, severally or in the alternative, and if common questions of law or fact are likely to arise, the suit would not be liable to be dismissed on the ground of misjoinder of causes of action.

6. It has been held in several cases that in a suit for possession all persons claiming by derivative titles from a trespasser as a common source may be joined as defendants, The learned advocate on behalf of the appellant has relied on several cases of which the following are pertinent on this point: *Nundo Kumar Nasker v. Banomali Gayan* ilr (1902) Cal. 871, *Ishan Chunder Hazra v. Rameswar Mondol* ILR (1897) Cal. 831, *Parbati Kunwar v. Mahmud Fatima* ILR (1907) All. 267, *Umabai v.*

Vithal ILR (1908) 33 Bom. 293, 11 Bom. L.R. 34, Raghunath Mukund v. Sarosh K.B. Kama ILR (1898) 23 Bom. 206, and Govindaraja Mudaliar v. Alagappa Thambiran ILR (1926) Mad. 836 The lower Court has relied on the case in Afzal Shah v. Lachmi Narain ILR (1917) All. 7, where it was held that the suit was bad for misjoinder of causes of action on the ground that several trespassers unconnected with each other were sued in one suit, and the suit was allowed to be withdrawn with liberty to bring separate suits, It is not necessary in the present case to go into that question for we have to decide on the allegations made in the plaint whether the suit is liable to be dismissed for misjoinder of causes of action. The plaintiffs in their plaint stated that defendant No. 1 was his sub-tenant, and that the plaintiffs were entitled to possession after the expiry of twenty years of the lease and that the other defendants were either the sub-tenants of defendant No. 1 or claiming through him. In deciding the preliminary point like the present one of misjoinder of causes of action the admissions of the plaintiff if made in the plaint may be taken as true. If there are no admissions made by the plaintiff the allegations in the plaint may be assumed to be true. The learned Judge has held that the plaintiffs' suit is liable to be dismissed for misjoinder of causes of action on the ground of the allegations made in the defendant's written statement which are not proved by any evidence. It would not be unfair to dismiss the plaintiff's suit on the assumption of the truth of the allegations in the plaint if they justify that course ; but it would be manifestly unjust to dismiss the plaintiff's suit on allegations in the written statement which are not proved by the defendant. The position that the allegations made by the plaintiff in the plaint must be assumed to be true is supported by the wording of Order I, Rule 3, which says: "All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist". Having regard to the allegations made by the plaintiff in the plaint, I think that the present suit is not bad for misjoinder of causes of action. Further, the test in the present case is that the plaintiff is suing for the whole land and not in bits, and the plaintiff is entitled to relief in respect of the whole land. The relief which he claims in respect of the transaction of lease is in respect of the whole land, and the allegation that the defendants are claiming different bits of the land among themselves is not a sufficient basis for holding that the suit is bad for misjoinder of causes of action. The same view was taken by the Allahabad High Court in Parbati Kunwar v. Mahmud Fatima ILR (1907) All. 267, and is consistent with the view taken by the Madras High Court in the full bench decision in Govindaraja Mudaliar v. Alagappa Thambiran ILR (1926) Mad. 836

7. It would be necessary to send the case back to the lower Court to decide the case on the merits. But in considering the case on the merits as against the several defendants we leave it to the discretion of the learned Judge to follow the provisions of Order II, Rule 6, if he considers it necessary to do so, by successive trial of issues separately affecting different defendants according to the view taken in Umabai v. Vithal ILR (1908) 33 Bom. 293, 11 Bom. L.R. 34.

8. We would, therefore, reverse the decree of the lower Court and remand the suit to the First Class Subordinate Judge for decision on the merits.

9. The appellants are entitled to their costs from the respondents.

Broomfield, J.

10. This is an ejectment suit which has been dismissed by the trial Court on a preliminary objection as to misjoinder of parties and causes of action.

11. It is alleged in the plaint that the land in dispute was leased by plaintiffs' predecessor to defendant No. 1 in the year 1894 under a lease for twenty years, expiring, therefore, in 1914. At the time of the suit it appears that the land was no longer in the possession of the lessee defendant No. 1 but was in the possession of a large number of other defendants Nos. 2 to 58. The plaintiffs' allegation as regards those defendants in possession is that the suit land was sub-leased to them at different times by defendant No. 1. Defendant No. 1 in his written statement has stated as follows:--

Some of the present defendants are the aforesaid sub-tenants of defendant No. 1 and the remaining defendants are making vahiwat of the aforesaid land through the sub-tenants of defendant No. 1.

12. But in the written statements put in by some of these other defendants it is asserted that they have nothing to do with the plaintiffs or defendant No. 1 and are entitled to the land in their own right. In view of these allegations the trial Judge raised a preliminary issue: "Is the suit not bad for misjoinder of causes of action and person"? His finding was in the affirmative. He thereupon ordered the plaintiffs to confine their suit to the claim against defendant No. 1 only, and to amend the plaint accordingly by striking out the names of the other defendants. The plaintiffs declined to amend their plaint in this way and the suit was then dismissed.

13. Mr. Patwardhan on behalf of the plaintiffs-appellants has argued firstly, that in order to decide the question whether there is misjoinder of parties and causes of action what is to be looked at is the allegations in the plaint; secondly, that if this be done then under the provisions of Order I, Rule 3, of the Civil Procedure Code, the plaintiffs are entitled to include all these defendants in one suit. In my opinion both these contentions are correct. We were referred, in support of the contention that the question of misjoinder depends upon the plaintiffs' allegations, to *Mussamat Ackjoo Bibee v. Lallah Ramchunder Lall Sahai* (1875) 23 W.R. 400, [Kanhaya Lal Vs. The National Bank of India Limited](#), and *Govindaraja Mudaliar v. Alagappa Thambiran* ILR (1926) Mad. 836. But, apart from any authority, it is sufficiently clear from the language of the rule itself, that is to say, from the use of the words "is alleged to exist", that what the Court has to consider in this connection is the allegations in the plaint and not the defences that may be put forward by the defendants. Order I, Rule 3, is as follows:--

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise.

14. Applying this rule in the light of the averments in the plaint, the twenty years' lease of 1894 was a transaction which entitles the plaintiff on the expiry of that lease to recover possession not only from the original lessee himself but from all persons who have obtained an entry on the land through him. It is hardly necessary to cite authorities, because Mr. Fradhan on behalf of the respondents has admitted that, once we hold that the allegation in the plaint is to be accepted for the purpose of this issue, and hold, therefore, that defendants Nos. 2 to 58 are claiming under defendant No. 1. then there is no question of misjoinder. I may mention, however, *Ishan Chunder Hazra v. Rameswar Mondol* ILR (1897) Cal. 831 and *Nundo Kumar Nasker v. Banomali Gayan* ILR (1902) Cal. 871, which cases were followed by the Bombay High Court in *Umabai v. Vithal* ILR (1908) 33 Bom. 293, 11 Bom. L.R. 34, and also the full bench decision of the Madras High Court in *Govindaraja Mudaliar v. Alagappa Thambiran*. The case in fact becomes one of the kind discussed in Mulla's Commentary on the Code at page 452 under the heading "Suit for ejectment by real owner against holders under derivative titles from a trespasser as the common source." The learned commentator has suggested that the position may be different where the defendants do not all claim under the same trespasser, and has cited the case of *Afzal Shah v. Lachmi Narain* ILR (1917) Mad. 7, which was referred to, at any rate without disapproval, in *Govindaraja Mudaliar v. Alagappa Thambiran*. It is unnecessary to consider that question in view of the fact that the allegation in the plaint here is that defendants Nos. 2 to 58 are all claiming under defendant No. 1. The trial Judge, therefore, was mistaken in holding that there was any misjoinder of parties or causes of action. He had no power under the circumstances to call upon the plaintiffs to amend their plaint in the manner directed nor to dismiss the suit when they failed to do so. I agree with the order proposed by my learned brother.