
(1899) 01 CAL CK 0009
In the Calcutta High Court

Pyari Mohun Bose

APPELLANT

Vs

Kedarnath Roy and Others

RESPONDENT

Date of Decision : 31-01-1899

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 32

Citation : (1899) ILR (Cal) 409

Hon'ble Judges : W. Maclean, J; Prinsep, J; O'Kinealy, J; Hill, J; Banerjee, J

Bench : Full Bench

Judgement

Francis W. Maclean, K.C.I.E., C.J.—The question raised on this reference is whether, where two parties contract with a third party, a suit by one of them, making the other a co-defendant, ought to be dismissed because the plaintiff has not proved that the co-defendant had refused to join as co-plaintiff. Upon this question, there is some diversity of opinion in the decisions of this Court. In the case of Tarini Kant Lahiri v. Nund Kishore Patronovis (1882) 12 C.L.R., 588, it was held that such non-joinder was not sufficient ground to justify the dismissal of the suit, and that view has been given effect to by another Division Bench of this Court in the case of Bissesswar Roy Chowdhry v. Brojo Kant Roy Chowdhry (1897) 1 C.W.N., 221. It has been considered that the opposite view was taken by another Division Bench of this Court in the case of Dwarka Nath Mitter v. Tara Prosunna Roy I.L.R.(1889) ., 17 Cal., 160, and in the case of Soshee Shekhareswar Roy v. Giris Chandra Lahiri (1897) 1. C.W.N., 659. The case of Dwarka Nath Mitter v. Tara Prosunna Roy I.L.R (1889) ., 17 Cal. 160, was a case of an exceptional nature, and upon a minute examination of its facts, it is at least questionable whether it intended to lay down any such general proposition as that for which it has been cited as an authority governing the present case. As a general rule all co-contractors ought to be joined as plaintiffs, but at the same time where, as here, there are three co-contractors, say three co-sharers, two of them co-plaintiff's, and the other a co-defendant (being all the parties interested under the contract), the suit ought not in my opinion to be dismissed simply because it has not been shown that the co-sharer defendant has refused to join

as a co-plaintiff. If so, in each such case there would have to be a preliminary issue as to such refusal, and the inconvenience of that is shown by the proceedings in the present case, where one Judge has decided there was such refusal, and another Judge has decided the very opposite. In cases of this class the defendant--the active defendant, not the co-sharer defendant--should, as soon as the trial is commenced, direct the Court's attention to the supposed non-joinder; the Court would then call upon the defendant co-sharer to say whether he was willing to be a co-plaintiff: if he say "yes," he can then be shifted from the ranks of the defendants to the side of the plaintiffs and be made a co-plaintiff; and if, as the result of that shifting, the active defendant satisfy the Court that he ought to have an opportunity of considering the new position, the Court can adjourn the trial, upon such terms as to payment of any costs thrown away, as it may deem just: but if the co-sharer defendant decline to be made a co-plaintiff then the trial can proceed with him as a co-defendant. I certainly do not think the suit ought to be dismissed, simply by reason of such nonjoinder when at any rate, all the parties interested are before the Court, which has ample power to do what I have said u/s 32 of the Code of Civil Procedure. In order to avoid the throwing away of costs, and to ensure the saving of time, an objection as to non-joinder ought to be taken in the written statement, and when so taken the plaintiff should use his best endeavours to get the other co-sharer to join, and if successful, apply at once to have him joined as a co-plaintiff, and if unsuccessful, he would then be in a better position to satisfy the Court, when the objection is raised at the trial, that he has done his best to have him made a co-plaintiff.

2. We are asked, however, what is to happen if the co-sharer defendant be not represented, or present, at the trial? I think the answer is simple. His absence would indicate that he took no real interest in the dispute, and would raise a strong inference that he did not wish to be made a co-plaintiff, in which case the trial could proceed with him as a co-defendant.

3. As regards the other question whether the point in relation to Section 188 of the Bengal Tenancy Act has been decided by the Lower Appellate Court, looking at the first judgment of the Subordinate Judge, it is so very doubtful, that in my opinion that question ought to be regarded as still open, and as one to be dealt with on the remand.

4. The case must be remanded to the Subordinate Judge, and the costs will abide the result.

Prinsep, J.

5. I agree in the judgment which has just been delivered.

O'Kinealy, J.

6. I agree.

Banerjee, J.

7. I agree with the learned Chief Justice in the view taken by him in this case.

Hill, J.

8. I also agree.