

## CIVIL REVISION.

*Before U Aung Tha Gyaw, J.*

MAUNG MAUNG GYI (a) M. K. NANJI (APPLICANT)

*v.*

NOORALLY JOOMABHAI AND ONE  
(RESPONDENTS).\*

H.C.  
1948  
Aug. 30.

*Code of Civil Procedure, Order 1, Rule 3—Misjoinder of parties.*

*Held* : Where plaintiff alleges that a sum of money was paid to two defendants for the purchase of goods on his behalf and the defendants were to bring them to Rangoon and defendants failed to do so and that it was later agreed as between the defendants that each one should pay a particular sum towards the claim—one suit against both the defendants is not bad for misjoinder of parties. Order 1, Rule 3 of the Code of Civil Procedure covers such a case.

*Payne v. British Time Recorder Company*, L.R. (1921) 2 K.B. 1 ; *Harendra Nath Singh Ray v. Purna Chandra Goswami*, 55 Cal. 164 at 171, followed.

*P. K. Basu* for the applicant.

*R. K. Roy* for the respondents.

U AUNG THA GYAW, J.—This is an application in revision brought under section 25 of the Rangoon City Civil Court Act questioning the legality and propriety of the order passed by the 3rd Judge of the City Civil Court in his Civil Regular No. 2156 of 1947, returning the plaint to the applicant with the direction for its amendment on the ground of multifariousness.

The applicant brought a suit against the two respondents claiming recovery of two separate sums of Rs. 939 from the one and Rs. 1,000 from the other as monies due by them as their respective shares of an agreed liability towards satisfaction of a

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\* Civil Revision No. 59 of 1948 against the order of the 3rd Judge, City Civil Court of Rangoon in Civil Regular No. 2156 of 1947, dated the 31st May 1948.

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debt of Rs. 2,578 alleged to have been jointly due by them in the following circumstances.

In about June 1946, the applicant sent to the respondents in India a sum of Rs. 12,000 for them to buy goods for the applicant. They failed to send the goods as promised but returned to the applicant a sum of Rs. 9,422 in two instalments leaving a balance of Rs. 2,578. As this sum had been jointly spent by them, the two respondents agreed between themselves that they would each pay to the applicant Rs. 1,289 and towards the satisfaction of this agreed liability, the 1st respondent had paid in a sum of Rs. 350 leaving a balance of Rs. 939 and the second respondent had paid in a sum of Rs. 289 leaving a balance of Rs. 1,000. These two sums the applicant sought to recover from the respondents by bringing the present suit in which the two respondents were joined as party-defendants.

The 1st respondent denied the allegations made by the applicant in his plaint and contended that the suit was bad for multifariousness. An issue to that effect was framed by the learned trial Judge along with the other issues involved in the pleadings and without the preliminary issue as to the defect of multifariousness being first enquired into the whole suit was tried on the merits and only at the date fixed for delivery of the judgment, the learned Judge tried the issue on the question of misjoinder of causes of action and held that the suit was bad for multifariousness and directed the applicant-plaintiff to make the necessary amendment.

It is now contended that there was no question of any misjoinder of defendants and causes of action in the case, that the failure of the respondents to press for a decision of the preliminary issue as to misjoinder had the effect of a waiver of their plea, that there was no

novation of contract as held by the learned trial Judge to justify the applicant being driven to file separate suits against the respondents and that the view adopted by the trial Judge was highly technical and had no merit in law.

The objection raised by the applicant regarding the plea of waiver cannot be sustained. In his written statement the 1st defendant-respondent had set out clearly that the suit was bad for misjoinder of causes of action and parties and on this objection raised on the respondent's behalf a definite issue was framed in the suit as to whether the suit was bad for multifariousness. The subsequent conduct of the proceedings was a matter resting entirely in the discretion of the Court. Where the remaining issues of fact would not involve a protracted hearing the Court should, as a general rule, try the preliminary issue along with the remaining issues fixed in the case. The Court's exercise of discretion in the matter must, however, depend on the circumstances of the case before it; where as in the case before him, it was considered that the defect could be cured by mere amendment, the trial Court was justified in trying the whole case at the same time.

The applicant appears to stand on surer ground when he raises the next objection that the allegations made by him in the plaint could not result in misjoinder of defendants and causes of action. Reliance in this regard is placed on the terms of Order 1, Rule 3, namely :

“ 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.”

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According to the applicant a sum of money was paid to the two respondents for the purchase of goods on his behalf and that the respondents failed to keep their promise but had each appropriated part of the sum received by them and that in regard to their liability for the return of these sums spent by them, they had between themselves agreed to share this liability in an equal share. The issues fixed on the pleadings would cover the question as to whether one or both of the defendants had received the money from the applicant, whether the stated sum was due by both of them to the applicant and whether in regard to the mode of repayment of the sum they had agreed to incur separate liabilities. If separate suits were brought against them, there is no doubt that, these common questions of fact would arise in the attempt to determine the applicant's right to relief as against them. The applicant's right to relief arose out of the same transaction by which he had advanced a sum of money to both the respondents. Quoting the English case of *Payne v. British Time Recorder Company* (1), Mukerji, J. in *Harendra Nath Singh Roy v. Purna Chandra Goswami* (2) said :

"Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried."

In the present case in view of the common question of facts alleged against the two respondents as to their liability for the different sums claimed against them, separate trial of the claims would result in the

(1) (1921) 2 King's Bench, p. 1.

(2) 55 Cal, 164 at 171.

applicant being put to additional trouble and expense, a disadvantage which Order 1, Rule 3, is intended to prevent. Accordingly, the order of the lower Court directing the applicant-plaintiff to amend his plaint will be set aside with the direction that the suit be further disposed of on the merits. Costs, 5 gold mohurs.

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