Special Appeal No. 274 of 1869.

1869
Sept. 15.

Sayad Miya Gulam Nabi *et al* ... ... *Appellants.*
Kharanbibi, widow of Hafizulah *et al* ..... *Respondents.*

Misjoinder of plaintiffs—Error not affecting merits of case—Procedure—Civ. Proc. Code, Sec. 350.

The misjoinder of plaintiffs, which does not produce error in the decision of the case on its merits, is not a ground for the reversal of a decree on special appeal.

Semble, that such misjoinder is not a ground for the reversal of a decre in regular appeal.

Where the widow of H., a Muhammadan, and his two daughters brought a joint suit for their respective shares of the estate of H. which were awarded to them jointly.

Held, that this was an error of procedure which did not affect the merits of the case.

This was a Special Appeal from the decision of C. G. Kemball, District Judge of Surat, in Appeal Suit No. 58 of 1869, affirming the decision of the Sadr Amin of Broach.

The suit was instituted by Kharanbibi, widow of Hafizulah, on behalf of herself, and as guardian of her minor daughter, and by Begambibi, an adult daughter of Hafizulah, to recover half of certain properties, together with mesne profits, from the defendants, the sons of Gulam Nabi, the brother of Hafizulah.

Gulam Nabi and Hafizulah were sons of Doramiya, to whom the entire property had belonged, and from whom it descended to them. Hafizulah died in 1861 ; and after his death the property, including the half share of Hafizulah, was managed by Gulam Nabi, and after him by the present defendants, his sons. That half share the plaintiffs, Hafizulah's widow and daughters, claimed to recover in the present suit.

The defendants answered that Kharanbibi had no authority to sue as guardian of her minor daughter, and that the suit could not be maintained, as the mother and the

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daughters had not sued separately for their respective shares. They also pleaded limitation, want of possession, &c.

The Sadr Amin found that the claim was not barred; that as Kharanbibi had obtained a certificate of guardianship subsequent to the institution of the suit, there was no objection to her suing in respect of the minor's share; and that joint claims, such as formed the subject of this suit, could be allowed; and decreed in favour of the plaintiffs for the half share of Hafizulah and portion of the mesne profits claimed.

The defendants appealed from his decree to the District Judge of Surat.

The District Judge held that the action was not barred either in respect of the property or of the mesne profits; that the entire property had belonged absolutely to the common ancestor of the parties to the suit, and that the objection that the certificate of guardianship had not been produced by Kharanbibi before the suit commenced, could not be considered in appeal. He accordingly confirmed the decree of the Sadr Amin.

From this decision the defendants appealed, and the appeal was argued before COUCH, C.J., and GIBBS, J., on the 25th of August 1869.

Nanabhai Haridas for the Appellants: The Judge has not recorded a finding on all the points raised before him, as he has ommitted to determine the objection relating to misjoinder. Sec. 8 of the Civil Procedure Code declares that causes of action by and against the same parties may be joined in the same suit, thereby implying that when causes of action are not by and against the same parties, such causes may not be joined in the same suit. The widow by Muhammadan law takes an eighth of her husband's estate when there are children, and the daughters, when more than one, take two-thirds of their father's property in the absence of sons. The widow and the daughters are thus claimants of distinct shares and must sue separately. The widow besides is always a legal sharer only, the daughters, though, in this case

they are legal sharers, may become residuaries also. Not only are the shares distinct and separate, but here they even claim in separate rights. The Calcutta High Court has held that Secs. 8 and 9 of the Code forbid, by implication, the joinder of causes of action not be ween the same parties : *Romoona v. Manicka Moyee Chowdhrain* (a). In the case of *Mussamut Ameerun* v. *Mussamut Wuseehun* (b) Mr. Justice Glover was of opinion that a misjoinder of causes of action was not a mere irregularity, but an illegality barring the hearing of a suit.

Cur. adv. vult.

15th Sept.—Couch, C. J. :—The only objection raised in the special appeal is, that the claims of the plaintiffs ought not to have been joined in the same suit, as they are entitled to distinct shares of the property. We are of opinion that the objection ought not to be allowed. Sec. 372 of Act VIII. of 1859 requires that to afford a ground of special appeal the error in the procedure shall be a substantial one which may have produced error or defect in the decision of the case upon its merits. The misjoinder of plaintiffs is only an error in procedure, and frequently may not effect the trial of the suit on its merits. It always is so considered in Courts of Equity. Thus, in Story's Equity Pleadings, Sec, 544, it is said—"and in cases of misjoinder of plaintiffs the objection ought to be taken by demurrer, for if not so taken, and the Court proceds to a hearing on the merits, it will be disregarded, at least, if it does not materially affect the propriety of the decree ;" and several authorities are there referred to in support of this. And by Sec. 49 of the the 15th and 16th Vict., c. 86, the Act for the Amendment of the Practice of the Court of Chancery, it is enacted that a suit is not to be dismissed by reason only of the misjoinder of persons as plaintiffs therein.

When in the present suit the objection of misjoinder was taken before the Sadr Amin he might either have dismissed the suit, leaving the plaintiffs to bring the separate suits, or

(a) Calc. W. Rep. Civ. R. 525. (b) 12 Calc. W. Rep. Civ R. 11.

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have allowed the plaint to be amended by striking out the name of the infant plaintiff on whose behalf a separate suit might then have been brought by the first plaintiff as her guardian. If a new suit by the widow would, in that case, have been barred by the law of limitation, an amendment of the plaint ought to have been allowed (*c*). The Sadr Amin's not doing so, would not, we think, be a ground for reversing his decree on regular appeal. If the investigation of the case on the merits had not been affected by it. It would be an error not affecting the merits of the case, and Sec. 350 would apply. But supposing that the District Judge ought to have allowed the objection, and that his not doing so is an error in his proceedings, still the Court of Special Appeal must see that the irregularity is a substantial one, which may have produced error or defect in the decision of the case on its merits; for otherwife a special appeal is not allowed. We are unable to concur in the opinion of the Court in the case which has been cited (*d*), that the Court is bound in special appeal to give effect to this objection, even although it may not be satisfied that the decision in the suit is such as involves any substantial error or defect in regard to the merits of the case; and in this case it appears to us that no error or defect in the decision of the case on the merits can have been produced. The decree must, therefore, be confirmed.

(*c*) 1 Moo. Ind. App. 475. (*d*) 9 Calc. W. Rep. Civ. R. 525.

Decree confirmed with costs.