17 B. 29.

1892
JAN. 11.

APPELLATE CIVIL.

17 B. 29.

[29] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

RAMKRISHNA MORESHWAR AND OTHERS (*Original Plaintiffs*), *Appellants* v. RAMABAI AND ANOTHER (*Original Defendants*), *Respondents*.*
[11th January, 1892.]

Practice—Parties—Non-joinder of parties—Application to join necessary parties refused by Court of first instance—Appeal—Application granted by Court of appeal—Order to add parties operating nunc pro tunc*—Delay the act of the Court—Limitation.*

The plaintiffs, as sharers in certain rent alleged to be due by the defendants, sued to recover their share. The defendants contended that all the co-sharers were necessary parties. At the hearing on the 24th January, 1889, the plaintiffs' co-sharers applied to be made co-plaintiffs, and to be allowed to adopt what the plaintiffs had done in the suit. The application was rejected, and the suit was dismissed for want of parties. On appeal, the District Court in July, 1890, holding that the lower Court ought to have joined the co-sharers, passed an order making them co-plaintiffs, and then confirmed the lower Court's decree on the ground that at the time (3rd July, 1890) the co-sharers were made plaintiffs the suit was barred by limitation. On appeal to the High Court,

Held, remanding the case, that the order of the lower appeal Court of the 3rd July, 1890, allowing the co-sharers' application, which had been made on the 24th January, 1889, but had been refused by the Court of first instance, should be treated as operating *nunc pro tunc*, and that the co-sharers should be regarded as having been made parties to the suit when their application was made. The delay was attributable to the act of the Court, and the plaintiffs should not suffer from it.

[R., 19 B. 807 (809); 127 P.R. 1906=10 P.W.R. 1907.]

THIS was a second appeal from the decision of Khan Bahadur M. N. Nanavati, First Class Subordinate Judge of Ratnagiri with appellate powers.

The plaintiffs, Ramkrishna Moreshwar Kanvinde and others, as co-sharers in rent due from defendants for a certain *thikan*, sued the defendants to recover the said share.

Defendant No. 1, Ramabai, did not appear.

Defendant No. 2, Krishnaji Ramchandra Thakur, admitted his liability to pay half the amount of rent to all the Kanvinde sharers, but contended that, as the plaintiffs' co-sharers were not joined, the suit was not maintainable.

[30] At the hearing of the suit in January, 1889, the plaintiffs' co-sharers came in and applied to be made parties and to be allowed to adopt what the plaintiffs had done therein. The Court of first instance rejected the application, and dismissed the suit for want of parties. In his judgment the Subordinate Judge made the following remarks:—

"The application for the joinder of parties has been made at a very late stage, and their joinder is likely to involve a question of limitation as regards a part of the claim. As no satisfactory cause was assigned for the omission to join them in the plaint itself, or at the proper time, it became the duty of the Court to reluctantly reject the application."

The plaintiffs appealed to the District Court, which having held that the plaintiffs' co sharers ought to have been joined in the suit on their application, passed an order for their joinder, and confirmed the Subordinate

* Second Appeal No. 798 of 1890.

1892 JAN. 11. — APPELLATE CIVIL. — 17 B. 29.

Judge's decree, on the ground that, at the time the co-sharers were joined as co-plaintiffs, the claim was time-barred.

Against the decree of the District Court the plaintiffs appealed to the High Court.

Maneksha Jehangirsha Taleyarkhan, for the appellants:—The lower Court was wrong in dismissing our claim on the ground that it was time-barred when the other co-sharers were joined as co-plaintiffs. First of all, we contend that there was no necessity to join them in the suit. Defendant No. 2 had, no doubt, in his written statement, objected to the maintenance of the suit on account of non-joinder, but no issue was raised on that point in the Court of first instance, and, therefore, the objection must be deemed to have been waived—*Trimbak Vithal* v. *Vishnu Maheshwar* (1). Next we contend that, even supposing that there was no waiver, the application was originally made within the period of limitation, and if it had been granted, and the parties had been joined when it was made, our claim would not have been time-barred. Our application was made in time, but the Court delayed the consideration of the matter, and [31] when it came to the conclusion that the application should be granted, our suit was time-barred. We, therefore, submit that the order of the Court allowing the application should be treated as made *nunc pro tunc*. The Court ought to have joined the co-sharers as parties at the time when we made the application. The delay on the part of the Court should not be allowed to prejudice our interest. We could do nothing more than make the application. The joinder of a party is the act of the Court for which a party cannot be held responsible. The application being made in time, we submit that the co-sharers should be considered to have been joined in time also.

Ganesh Krishna Deshamukha, for the respondents.—In the first place, we do not admit that the application was made within time.

[SARGENT, C.J.—But the Court seems to have assumed that it was made in time.]

According to the deposition of the plaintiff, the whole claim was barred when the application for joinder was made. One of the reasons given for the rejection of the application is that it was made at a very late stage of the suit,—that is, five days before judgment. Moreover, the application was not made by the original plaintiffs; it was made by the co-sharers themselves, and when the Court rejected it, the plaintiffs ought to have presented another application to bring their co-sharers on the record. We, therefore, submit that there was no proper application for joinder. It seems, as remarked by the District Judge in appeal, that the original plaintiffs acquiesced in the application, because it was their own pleader who made the application after receiving a *vakalatnama* from the co-sharers.

With respect to the point of limitation, we contend that the co-sharers cannot be considered to have been parties to the suit prior to their joinder; and, as they were joined after the statutory period for the suit had expired, the suit was time-barred.

There was no waiver of the objection as to want of parties. It is true that in the Court of first instance there was no distinct issue raised on the point; still the objection was taken in our [32] written statement, and the judgment of that Court shows that there was argument on the point.

(1) P. J. 1887, p. 6.

1892
JAN. 11.
APPELLATE CIVIL.
17 B. 29.

JUDGMENT.

SARGENT, C.J.—The lower appeal Court has held that the plaint was barred because the co-sharers in the rent were not made parties until they were made so by its decree on the 3rd July, 1890. But we think that, as the co-sharers made their application during the hearing of the suit, as far back as 24th January, 1889, to be allowed to adopt what the plaintiff had done, and to be made co-plaintiffs, its order allowing the application, which had been refused by the Court of first instance, should be treated as operating *nunc pro tunc*, and that the other sharers should be regarded as having been made parties to the suit when that application was made. The delay between 24th January, 1889, when the application was made, and the decision of the Court of appeal, was attributable to the act of the Court, and the appellants should, therefore, not suffer from it (Broom's Legal Maxims, 6th ed., page 117).

We must, therefore, reverse the decree and send back the case for a fresh decision, having regard to the above remarks. Costs to abide the result.

Decree reversed.

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17 B. 32.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

SIDU (*Plaintiff*) v. BALI AND OTHERS (*Defendants*).*
[12th January, 1892.]

Mortgage—Redemption suit—Costs due by mortgagee to mortgagor—Set off against the mortgage debt—Balance remaining due to mortgagor—Liability of mortgagee—Civil Procedure Code (Act XIV of 1882), s. 221.

The mortgagor is entitled to set off or deduct the amount of costs payable to him under the decree against or from the mortgage debt payable by him. If the amount of the costs be larger than the mortgage debt, the mortgagor is entitled to obtain possession at once of mortgaged property and to recover the balance against the mortgagee.

[R., 16 C.P.L.R. 73 (74).]

[33] THIS was a reference made by Rao Saheb Anant Gopal Bhave, Subordinate Judge of Khatav in the Satara District, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The facts which gave rise to the reference were as follows:—

The plaintiff, Sidu, having obtained a decree for redemption of certain immoveable property on payment of Rs. 20 to the defendant Bali within six months, paid the said amount into Court within the appointed time, and recovered possession of the property through Court. Before the amount was paid to the defendant, the original decree was reversed by the Special Judge, and consequently on the application of the defendant the property was delivered back into his possession, and the redemption money paid by the plaintiff into Court was returned to him. Subsequently the High Court, reversing the decree of the Special Judge, restored that of the Court of first instance, and ordered the defendant to pay costs

* Civil Reference No. 15 of 1891.