A

KUSHRO S. GANDHI & ORS.

v.

N. A. GAJDAR & ORS.

November 27, 1968

B [S. M. SIKRI AND R. S. BACHAWAT, JJ.]

Tort—Suit against several tort-feasors for conspiracy—Unconditional apology by one—Accepted by plaintiff and decree passed—If operates as release of other joint tort-feasors.

Code of Civil Procedure (5 of 1908), ss. 24 and 115—Revisional Jurisdiction—Revision against order regarding payment of court fee—
C *If High Court could decide other issues—Consent of parties—Effect of—S. 24, scope of.*

A suit for damages was filed on the allegations that the plaintiffs and defendants were all members of an association and that the defendants committed a tort against the plaintiffs by conspiring and preventing the plaintiffs from being elected to the office of trustees of the association. One of the defendants tendered an unconditional apology which was ac-
D cepted by the plaintiffs and a decree was passed in terms of the compromise. The other defendants, thereafter, filed written statements contending that the release of one of the defendants from his joint liability as a tort-feasor extinguished the plaintiff's rights against the remaining defendants and raised questions regarding valuation and court-fees. The trial court took up the issue regarding court-fees, held there was a deficiency and granted time to the plaintiffs to make good the deficiency.
E The plaintiffs, instead, applied for amendment of the plaint and the trial court allowed the application. The High Court, in revision filed by the defendants gave appropriate directions regarding payment of court-fee. The High Court, also decided, with the consent of both sides, that the decree against one of the defendants namely, the compromise decree, was complete accord and satisfaction and that the cause of action against all the defendants being one and indivisible, the decree operated as a bar against further proceedings against the remaining defendants.

F

In appeal to this Court, it was contended that the subject matter of revision before the High Court being only the order of the trial court regarding court-fee, the High Court had no jurisdiction to decide any other point.

HELD : (1) The High Court had no power to decide any other issue even if the parties had consented. The order of the High Court could
G not be justified under s. 24, Civil Procedure Code, because, it was not a case of the High Court withdrawing the case to itself and trying the same. [963 D—E]

(2) The High Court having decided the question of maintainability of the suit against the other defendants, the trial court would feel handicapped if the matter were to be remitted to it. The appropriate procedure is for this Court to decide the question. [963 E—F]

H (3) The rule which is in consonance with equity, justice and good conscience and which also recognises that the liability of tort-feasors is joint and several, is that, before the other joint tort-feasors can rely on accord and satisfaction, a plaintiff must have received full satisfaction or

what the law must consider as such from one of the tort-feasors. What is full satisfaction would depend on the facts and circumstances of each case. [970 C—E] A

In the present case, the apology which was embodied in a decree could not be treated as full satisfaction for the tort alleged to have been committed by the defendants. But it must be treated as an election on the part of the plaintiffs to pursue their several remedy against the defendant tendering the apology. [970 E—F] B

Ram Kumar Singh v. *Ali Husain,* (1909) I.L.R. 31 All. 173, *Makhanlal Lolaram* v. *Panchamal Sheoprasad,* A.I.R. 1934 Nag. 226; *Har Krishna Lal* v. *Haji Qurban Ali,* (1942) I.L.R. 17 Luck. 284 and *Shiva Sagar Lal* v. *Mata Din* A.I.R. 1949 All. 105; and English and American Law, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 632 of 1962. C

Appeal by special leave from the judgment and order dated January 5, 1960 of the Allahabad High Court in Civil Revision No. 325 of 1957.

G. N. Kunzru, B. C. Misra, P. K. Chakravarti and *Om Prakash,* for the appellants. D

J. P. Goyal and *S. P. Singh,* for the respondents.

The Judgment of the Court was delivered by

Sikri, J. This appeal by special leave is directed against the judgment of the Allahabad High Court (Dhavan, J.) allowing the revision under s. 115, C.P.C., and dismissing the suit brought by the appellants—hereinafter referred to as the plaintiffs. E

The relevant facts for the purpose of appreciating the points raised before us are as follows : The four plaintiffs, out of which three are appellants before us the fourth having died, brought a suit for damages against the six defendants (one defendant had in the meantime died and four are respondents before us). The allegations in the plaint, in brief, were that the plaintiffs and the defendants were members of an association called Parsi Zoroastrian Anjuman; that the defendants, alongwith some other members of the association, formed a group and each of them conspired among themselves to injure and harass the plaintiffs and a few others in various ways; that at a meeting held on May 5, 1954, in connection with the election of Trustees, when defendant N. A. Guzder occupied the chair, he gave a ruling that the plaintiffs Kershasp S. Gandhi and B. T. J. Shapoorji, since deceased, were unfit candidates for the office of Trustees and thus prevented them from seeking election, and contrary to the rules of the Anjuman and without taking votes declared the defendant, F. J. Gandhi, and one A. F. Cama duly elected. It was further alleged that on F G H

A July 3, 1954, another meeting of the Anjuman was held when the plaintiffs Khushro S. Gandhi and Framroze S. Gandhi were candidates for election to the office of the trustees, and defendant F. J. Gandhi gave a perverse ruling rejecting the nominations of the above plaintiffs and after taking votes declared G. T. Shappoorjee as duly elected trustee; that by the aforesaid rejections the B plaintiffs had suffered an injury for which defendants Nos. 1 to 6 were jointly and severally liable and the plaintiffs were entitled to recover damages from the defendants.

The plaint was filed on January 21, 1955. Before any written statement was submitted, on February 13, 1955, the sixth defendant S. Rabadi, entered into a compromise with the plaintiffs. C The terms of the compromise were :

> "1. I, Shavak Dorabjee Rabadi, defendant No. 6 have considered the subject matter of the suit and am sincerely sorry and apologise to the plaintiffs unconditionally for whatever I have done. I realise that I was in error and was misguided. D
>
> 2. The plaintiffs above named accept the apology tendered by Shri Shavak Dorabjee Rabadi defendant No. 6 and the suit against him may be disposed of treating the aforesaid apology and its acceptance by the plaintiffs as a settlement of the dispute between the plaintiffs and the defendant No. 6. E
>
> 3. The plaintiffs do not claim any costs against the defendant No. 6 and defendant No. 6 will bear his own costs.
>
> It is therefore prayed that the claim against defendant No. 6 may be disposed of in terms of the above settlement." F

A decree was passed in terms of this compromise against defendant No. 6.

On May 14, 1955, the other defendants filed a written statement and *inter alia* alleged : G

> "That the release of defendant No. 6 Sri S. Rabadi, an alleged joint tort feasor and the compromise entered into behind the back of the answering defendants with him in full settlement of their suit for damages, appears to be collusive and dishonest and the release by the plaintiffs of defendant No. 6 from his joint liability as H a tort feasor has in law extinguished the plaintiffs' rights to sue the others remaining defendants and claim damage from them."

It was further alleged that "the four plaintiffs could not be legally allowed to totalise the sum of their individual damage, alleged to have been suffered, and thereby procure the trial of the suit in the court of higher jurisdiction," and that the suit had been purposely over valued.

In a statement dated March 17, 1956, the plaintiffs clarified that the "damages are being claimed by the plaintiffs in respect of all the facts mentioned in the plaint and particularly as a result of the facts that have been mentioned in paragraphs 17 and 19 of the plaint", and further "that on account of all the facts complained of each plaintiff is entitled to claim Rs. 10,100 as damages but the plaintiffs have claimed only Rs. 10,100 and have given up rest of the claim."

Two of the issues framed by the Civil Judge, may be set out :

> "Issue No. 5. What is effect of the compromise between plaintiffs and defendant No. 6, as against rights of the other defendants ? Is the suit not maintainable against other defendants ?
>
> Issue No. 11. Is the court-fee paid by the plaintiffs insufficient ?"

By order dated September 18, 1956, the Civil Judge held that the court-fee paid by the plaintiffs was insufficient and that there was a deficiency of Rs. 905/12/- in the court-fee which the plaintiffs had to make good. The plaintiffs were given 15 days time to make good the deficiency. Instead of paying the money the plaintiffs applied under O.VI, r. 17, C.P.C., for amendment of the plaint. The plaintiffs stated in this application that they would in consideration of the order of the Court split the amount of Rs. 10,100/- into two portions claiming Rs. 5,050/- each in respect of the two separate incidents dated July 3, 1955, and May 5, 1955, respectively. The defendants filed an application contending that as the plaintiffs had failed to make good the deficiency in the court-fee within the time given, the plaint should be rejected in view of the provisions of the O. VII, r. 11, C.P.C. and s. 6, U.P. Court Fees Act. By order dated November 28, 1956, the Civil Judge allowed the plaintiffs' application for amendment on payment of Rs. 30/- as costs, and also rejected the defendants' application. Against this order the defendants filed a revision.

Dhavan, J., first dealt with the point whether the plaintiffs could renounce a part of the claim instead of making good the deficiency in court-fee. He came to the conclusion that the suit contained four causes of action, and that the plaintiffs had to pay court-fee on four separate causes of action of the value of Rs. 2,525/- each. As the learned counsel for the plaintiffs had

A given an undertaking to make good any deficiency in court-fee, Dhavan, J., directed the plaintiffs to pay court-fee on the four separate causes of action valued at Rs. 2525/- each. He also directed an amendment to be made in the plaint.

The learned Judge felt that it would be in the interest of justice that the question covered by issue No. 5 being one of law should B be decided by him in the revision. It appears that the counsel for both parties conceded that the Court had power to decide the issue as the entire record was there, although the learned counsel for the plaintiffs felt that the decision should be left to the Trial Court.

C The learned counsel for the appellants contends before us that the High Court had no jurisdiction to decide issue No. 5 in a revision. He says that the subject-matter of the revision was the order of the Civil Judge dated November 28, 1956, and the High Court could not decide any other point and convert itself into an original court. The learned counsel for the respondents tried to justify the decision regarding jurisdiction of the High Court under D s. 24, C.P.C. This section *inter alia,* provides that the High Court may withdraw any suit, appeal or other proceeding pending in any Court subordinate to it and try and dispose of the same. We are unable to appreciate how the order of the learned Judge can be justified under s. 24. He has not purported to withdraw any suit and try the same. What he has done is to try an issue E arising in a suit in a revision arising out of an interlocutory order. It seems to us that the High Court, even if the parties conceded, had no power to decide the issue. But if we set aside the order of the High Court and remit the case to the Civil Judge to try it according to law, the Civil Judge would feel handicapped in deciding the case properly because he will feel bound to follow F the opinion given by the learned Judge on issue No. 5. Under the circumstances we heard arguments on the issue.

Dhavan J., following the English Common Law, held that the decree against Rabadi was complete accord and satisfaction and the cause of action against all the defendants being one and indivisible, the decree operated as a bar against further proceed- G ings against the remaining joint wrong-doers.

Winfield on Tort (8th edn.) p. 661 states the English Law thus :

> "The liability of joint tort feasors is joint and several, each may be sued alone, or jointly with some or all H the others in one action; each is liable for the whole damage, and judgment obtained against all of them jointly may be executed in full against any one of them. At common law, final judgment obtained against one

joint tort-feasor released all the others, even though it was wholly unsatisfied. This was established in *Brinsmead* v. *Harrison*(1) and the reason put by Blackburn J., was *Interest reipublicae ut sit finis litium.* Kelly C. B. urged that if the rule were otherwise, then in a second action the second jury might assess an amount different from that in the first action and the plaintiff would not know for which sum he should levy execution. The rule was abolished by the Law Reform (Married Women and Tortfeasors) Act, 1935.

. . . . . .

It has long been settled that the release of one joint tortfeasor releases all the others, because the cause of action is one and indivisible. This rule has not been affected by the Act of 1935. It applies to a release under seal and to a release by way of accord and satisfaction, and probably to nothing else. A mere covenant or agreement not to sue, as distinguished from an actual release, does not destroy the cause of action, but merely prevents it from being enforced against the particular tortfeasor with whom it is made."

That was not the law in England in the beginning. The history of the law on this point is set out in William's 'Joint Torts and Contributory Negligence' (p. 35 footnote) as follows :

"In Y.B. (1305) 33-35 E. 1, R.S. 7, it was apparently held that in trespass against four, a verdict against two did not of itself prevent continuance against the other two. The verdict may not, however, have been embodied in a judgment. The former rule appears more clearly from Y.B. (1342) 16 E. 3, 1 R.S. 171, where judgment against one did not bar the action against the others. That the parties were joint tortfeasors appears plainly from the note from the record, *ibid,* 175 n. 7. *See* also Y.BB, (1370) P. 44 E. 3. 7b, pl. 4; (1412/13) H. 14 H. 4. 22b, pl. 27; in the latter it is said that in trespass against two, if one be condemned and the plaintiff has execution against him with satisfaction, he shall be barred against the others—thus implying that the mere judgment would not bar. Cp. *Hickman* v. *Machin* (1605) 1 Ro. Ab. 896 (F) 4, 7, from which case, however (sub. nom. *Hickman* v. *Payns*), a different inference is drawn in *Broome* v. *Wooton* (1605) Yelv. 67, 80 E.R. 47. The first discussion of the question in the Year Books is in Y.B. (1441) M. 20 H. 6, 11a, pl. 24, where X had first sued A, B, and C in trespass and

(1) (1871-72) L.R. 7 C.P. 547.

A obtained judgment against A, who alone appeared to the writ; later X, not having levied execution under this judgment, sued B. Paston and Fulthorpe expressed opinions that he was not barred by the first judgment, but Newton C.J. thought that he was. In Y.B. (1495)M. 11 H. 7. 5b, pl. 23 (Bro. Trespas 428) it was said that B one can release one joint tortfeasor after judgment against another without affecting that other; such a release would have been unnecessary if the judgment had discharged all other joint tortfeasors. Cp. Y. BB. (1474) T. 14 E. 4. 6a, pl. 2; (1475) T. 15 E. 4. 26b, pl. 3. The rule was not settled in 1584, for it was C then made a question whether even satisfaction following on judgment would discharge the others (above 9 n. 2); and see *Cocke* v. *Jennor* (n.d.) Hob. 66, 80 E.R. 214, where it was said that if joint tortfeasors be sued in several actions, satisfaction by one would discharge the others; it was not said that judgment against one would discharge." D

The common law rule was first established by the case of *Broome (Brown)* v. *Wooton*(1) and the only reason given was that *transit in rem judicatam.*

In *Goldrel Foucard & Sons* v. *Sinclair and Russian Chamber of Commerce in London*(2) Sargant, J. regarded the rule in *Brinsmead* v. *Harrison*(3) highly technical. E

The rule was changed in England by legislation *vide* The Law Reform (Married Women and Tortfeasors) Act, Pt. II *(25 & 26* Geo. 5, c. 30). Section 6(1)(a) and (b) of that Act read as follows :

F "Where damage is suffered by any person as a result of a tort (whether a crime or not)—

(a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in G respect of the same damage;

(b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors H or otherwise) the sums recoverable under the

(1) 80 E.R. 47. (2) [1918] K. B. 180, 192.
(3) (1871-72) L.R. 7 C.P. 547.

judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action."

This provision has been adopted in other parts of the Commonwealth.

Recently in *Egger* v. *Viscount Chelmsford*(1) Lord Denning M.R., observed :

"I cannot help thinking that the root of all the trouble is the tacit assumption that if one of the persons concerned in a joint publication is a tortfeasor, then all are joint tortfeasors. They must therefore stand or fall together. So much so that the defence of one is the defence of all; and the malice of one is the malice of all. I think this assumption rests on a fallacy. In point of law, no tortfeasors can truly be described solely as *joint tortfeasors*. They are always *several tortfeasors* as well. In any joint tort, the party injured has his choice of whom to sue. He can sue all of them together or any one or more of them separately. This has been the law for centuries. It is well stated in Serjeant Williams' celebrated notes to Saunders' Report (1845 ed.) of *Cabell* v. *Vaughan* [(1669) 1 Saund. 291 f-g.]. 'If several persons jointly commit a *tort*, the plaintiff has his election to sue all or any number of the parties; because a *tort* is in its nature the separate act of each individual'. Therein lies the gist of the matter. Even in a joint tort, the tort is the separate act of each individual. Each is severally answerable for it; and, being severally answerable, each is severally entitled to his own defence. If he is himself innocent of malice, he is entitled to the benefit of it. He is not to be dragged down with the guilty. No one is by our English law to be pronounced a wrongdoer, or be made liable to be made to pay damages for a wrong, unless he himself has done wrong; or his agent or servant has done wrong and he is vicariously responsible for it. Save in the case where the principle *respondeat superior* applies, the law does not impute wrongdoing to a man who is in fact innocent."

(1) [1965] 1 Q.B.D. 248, 264.

A Gatley on 'Libel and Slander' (Sixth Edition), in a footnote at p. 367, remarks regarding the approach of Lord Denning in *Egger* v. *Chelmsford*(1) :

> "His approach is also not easy to reconcile with the law on the release of joint tortfeasors".

B In the United States of America, in an early decision, *Lovejoy* v. *Murray*(2), the United States Supreme Court refused to follow the English Common Law. Miller J., speaking on behalf of the Court, observed, after referring to *Broome* (*Brown*) v. *Wooten*(3) and other cases :

> "The rule in that case has been defended on two
> C grounds, and on one or both of these it must be sustained, if at all. The first of these is, that the uncertain claim for damages before judgment has, by the principle of *transit in rem judicatam*, become merged into a judgment which is of a higher nature. This principle, however, can only be applicable to parties to the judgment; for as to the other parties who may be liable, it
> D is not true that plaintiff has acquired a security of any higher nature than he had before. Nor has he, as to them, been in anywise benefited or advanced towards procuring satisfaction for his damages, by such judgment.
>
> E This is now generally admitted to be the true rule on this subject, in cases of persons jointly and severally liable on contracts; and no reason is perceived why joint trespassers should be placed in a better condition. As remarked by Lord Ellenborough, in *Drake* v. *Mitchell*, 3 East, 258, 'A judgment recovered in any form of action, is still but a security for the original
> F cause of action, until it be made productive in satisfaction to the party; and, therefore, till then, it can not operate to change any other collateral concurrent remedy which the party may have.'
>
> The second ground on which the rule is defended is,
> G that by the judgment against one joint trespasser, the title of the property concerned is vested in the defendant in that action, and therefore no suit can afterwards be maintained by the former owner for the value of that property, or for any injury done to it.
>
> This principle can have no application to trespassers
> H against the person, nor to injuries to property, real or personal, unaccompanied by conversion or change of

(1) [1965] 1 Q.B.D. 248. (2) 18 L. ed. 129, 132--133, 134.
(3) 80 E.R. 47.

possession. Nor is the principle admitted in regard to conversions of personal property. Prior to *Brown* v. *Wootton,* Cro. Jac. 73, the English doctrine seems to have been the other way, as shown by Kent, in his Commentaries, 2 Kent, Com. 388, referring to Shepherd's Touchstone, Title, Gift; and to Jenkins, p. 109, case 88.

. . . . . .

We have already stated the only two principles upon which it rests. We apprehend that no sound jurist would attempt, at this day, to defend it solely on the ground of *transit in rem judicatam.* For while this principle, as that other rule, that no man shall be twice vexed for the same cause of action, may well be applied in the case of a second suit against the same trespasser, we do not perceive its force when applied to a suit brought for the first time against another trespasser in the same matter.

. . . . . .

But in all such cases, what has the defendant in such second suit done to discharge himself from the obligation which the law imposes upon him, to make compensation ? His liability must remain, in morals and on principle, until he does this. The judgment against his co-trespasser does not affect him so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his co-trespasser, or a release to his co-trespasser do this; and that is true. But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected, until he has received full satisfaction, or that which the law must consider as such.

We are, therefore, of opinion that nothing short of satisfaction, or its equivalent, can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser, who was not party to the first judgment."

In India the English Law has been generally followed. The learned counsel for the appellant relies on *Ram Kumar Singh* v. *Ali Husain*(1). The facts in that case in brief were as follows. The plaintiff sued several defendants jointly to recover damages (Rs. 325/-) in respect of an alleged assault committed on him by

(1) (1909) I.L.R. 31 All. 173, 175.

A the defendants but entered into a compromise with one defendant and accepted Rs. 25/- representing his proportionate share of damages. The High Court held :

> "The fact that one of several tortfeasors in the progress of a suit admits his liability as well as that of the other defendants and agrees to pay a sum of money in satisfaction of his liability does not exonerate the other defendants, who may be found responsible for the acts complained of, from liability. In the case of *Brinsmead* v. *Harrison*(1), one of the tort feasors was sued for damages for trover of a piano and damages were recovered as against him. In that case it was held that a suit against the other tortfeasor could not be sustained for the same cause of action, notwithstanding the fact that the judgment already recovered remained unsatisfied. That is a very different case from the case before us. In the case before us all the tortfeasors were sued in one and the same suit and judgment was not recovered only against the party who had admitted his liability in the progress of the suit and had agreed to pay a sum of money in satisfaction of his liability."

This case was followed in *Har Krishna Lal* v. *Haji Qurban Ali*(2). But in these cases the decree was not passed first against the tortfeasor admitting liability.

The learned counsel for the respondent relies on *Makhanlal Lolaram* v. *Panchamal Sheoprasad*(3). It was held in that case that "an accord and satisfaction in favour of one joint tortfeasor operates in favour of them all." Vivian Bose, A.J.C., observed :

> "An accord and satisfaction in favour of one joint tortfeasor operates in favour of them all; 9 QB 819, 11 A & E 453 and 6 Bing (N.C.) 52, Odgers on Libel and Slander, Edn. 6, p. 521, Ratanlal on Torts, Edn. 10, p. 71. The basis of these decisions is that where the injury is one and indivisible it can give rise to but one cause of action. Consequently if satisfaction is accepted as full and complete and against one person it operates with respect to the entire cause of action."

In *Shiva Sagar Lal* v. *Mata Din*(4) the facts as stated in the head-note, in brief, were :

> "Plaintiff filed a suit to recover damages for malicious prosecution against five defendants of whom defendant 1 was a minor. It was alleged that the other defendants had instigated defendant 1 to make a complaint against

(1) (1871-72) L.R.7 C.P. 547.
(2) (1942) I.L.R. 17 Luck. 284.
(3) A.I.R. 1934 Nag. 226, 227.
(4) A.I.R. 1949 All. 105.

the plaintiff. Subsequently, the plaintiff filed an application that there had been a settlement between him and defendant 1 and he had consequently released him. The application was allowed and defendant 1 was discharged."

Following *Duck* v. *Mayeu*(1) it was held that the discharge of defendant 1 amounted merely to a covenant not to sue him and not to a release of all the joint tortfeasors. The English Courts adopted this line of reasoning in order to soften the rigour of the common law, but in the present case it cannot be said that the compromise amounted to a covenant not to sue, as a decree was passed.

It seems to us, however, that the rule of common law prior to *Brown* v. *Wooton*(2) and the rule adopted by the United States Supreme Court is more in consonance with equity, justice and good conscience. In other words, the plaintiff must have received full satisfaction or which the law must consider as such from a tortfeasor before the other joint tortfeasors can rely on accord and satisfaction. This rule would recognise that the liability of tortfeasors is joint and several.

What is full satisfaction will depend on the facts and circumstances of the case. For example, the acceptance of Rs. 25/- in the case of *Ram Kumar Singh* v. *Ali Hussain*(3) would not be a case of full satisfaction.

In this case an apology was received from the defendant Rabadi and accepted and embodied in a decree. This cannot be treated to be a full satisfaction for the tort alleged to have been committed by the respondents-defendants. But this must be treated as an election on the part of the plaintiffs to pursue their several remedy against the defendant Rabadi.

The learned counsel for the respondents urges that if a decree is passed against them for damages, the defendant Rabadi, who compromised, would be liable to contribute in accordance with the rule laid down in *Dharni Dhar* v. *Chandra Shekhar*(4) in which it was held that the rule in *Merryweather* v. *Nixon*(5) did not apply in India. It is not necessary to decide whether the Full Bench decision of the Allahabad High Court lays down the law correctly, because even if it is assumed that this is the law in India it would not affect the rights of the plaintiffs.

In the result the appeal is allowed, the judgment and decree of the High Court set aside and the case remitted to the Trial Court. He shall dispose of the suit in accordance with this judgment and law. No order as to costs.

V. P. S. *Appeal allowed.*

(1) [1892] 2 Q.B.D. 511.
(2) 80 E.R. 47.
(3) (1909) I.L.R. 31 All. 173
(4) I.L.R. [1952] 1 All. 759 (F.B.).
(5) (1799) 8 T.R. 186.