Jahar Roy (Dead Through L.Rs) And Anr vs Premji Bhimji Mansata And Anr on 3 November, 1977

Equivalent citations: 1977 AIR 2439, 1978 SCR (1) 770, AIR 1977 SUPREME COURT 2439, 1978 (1) SCR 770, 1977 4 SCC 562, 1978 (1) SCWR 356, 1978 (1) RENTLR 144, 1977 U J (SC) 19

Author: P.N. Shingal

Bench: P.N. Shingal, N.L. Untwalia

PETITIONER:
JAHAR ROY (DEAD THROUGH L.Rs) AND ANR.

Vs.

RESPONDENT:
PREMJI BHIMJI MANSATA AND ANR.

DATE OF JUDGMENT03/11/1977

BENCH:
SHINGAL, P.N.
BENCH:
SHINGAL, P.N.
UNTWALIA, N.L.

CITATION:
1977 AIR 2439 1978 SCR (1) 770
1977 SCC (1) 562

ACT:
Parties to suits-Persons who may be arrayed as Plaintiffs-Joint Promisee refused to join as a Co-plaintiff-and hence made a proforma co-defendant with the specific plea that no relief is claimed against him-Whether suit is non-maintainable Civil Procedure Code, (Act V), 1908-Order I Rule. 1, Contract Act, (Act 9) 1872, S.45 and specific Relief Act S. 42.

HEADNOTE:
Appellants, Jahar Roy and Smt. Sarjubala Devi were the sub-lessees of "Rangmahal Theatre" Calcutta as per the agreement dated 17-3-1962 entered into between the respondents (Original lessees) and themselves as "Artistes". As per Clause I of Agreement, they were entitled to the use of

threatre as the Licencees thereof, including the stage, Theatre Hall, the dressing rooms used in connection therewith, the existing scenes and dresses for the purpose of public performance and shows thereat of Bengali dramas, for a period of one year from 17-2-1962, for one evening show on each Thursday and each Saturday, and one matinee show, one evening show on Sunday and other holidays and also one whole night performance on the occasion of "Shivratri" and Janmashtami". It was expressly agreed that the appellants would be entitled to continue with the shows of the drama that they would be actually staging during the week before the expiry of one year until the same was closed by them after a normal run. A sum of Rs. 5275/- was agreed to be paid to the respondents. Though the one year period expired on 16-1-1963 the Artistes were exhibiting the Bengali Drama called "Kathakao" which continued its "normal run" upto October 10, 1963 as per the express agreement. Since the appellants staged the drama "Adarsh Hindu Hotel" on October 12 and 13, 1963 and "Nishkriti" on October 25 and 26, 1963, the respondent sent a letter on October 23, 1963 informing the appellants that they had no right to stage any other play in terms of the agreement as their licence had already expired on October 10, 1963 after the "normal run" of "Kathakao". The respondents, however, permitted the appellants, as a special case, to stage "Kathakao" during Puja holidays upto October 27, 1963. Since the appellants staged "Kathakao" on November 14, 1973 and "Nishkriti" from November 15 to 17, 1963 and issued advertisements that they would stage "Svikriti" on December 21 and 22, 1963, respondent No. 1 Premji Bhimji Mansata, filed a suit for (a) a declaration' that the plaintiff & defendant 3 were entitled to the exclusive use and enjoyment of Rangmahal Theatre, (b) a permanent injunction restraining the defendants/appellants from exhibiting any dramatic or other performance in that Theatre and (c) compensation or damage @ Rs. 600/- per day w.e.f. 1-11-63, in the Calcutta High Court, on December 20, 1963, making his partner as proforma defendant No. 3 on his refusal to join as a co-plaintiff. The defendants/appellants contested the suit on the grounds that (a) the suit by one partner was not maintainable u/s 42 of the Specific Relief Act, as defendant No. 3 had refrained to join as plaintiff, (b) they were not mere licensees, (c) their licence had not expired, (d) they were entitled to stage any other drama along with, "Kathakao" which did not therefore come to an end after its "normal run' on or about October 10, 1963 and (e) "Kathikao" was being ran lawfully every Thursday while another drama "Svikriti" was being run on other days. The trial judge decreed the suit with costs, granted them declaration and permanent injunction, sought for, and also allowed the plaintiff compensation and damages at the rate of Rs. 5275/- p.m. with effect from November 1, 1963. The appeal preferred against the judgment was dismissed.

Dismissing the appeal by certificate, the Court
HELD : (1) Section 45 of the Contract Act deals with devolution of joint rights in the case of joint promisees, but it does not deal with a case where a
771
joint promisee does not want to join as a co-plaintiff and is arrayed as a proforma defendant with the specific plea that no relief is claimed against him. [775 A, E]
(2)Where two parties contract with a third party, a suit by one of the joint promisees, making the other as co-defendant is maintainable even if the plaintiff does not prove that the other joint promisee has refused to join him as a co-plaintiff Order I Rule I of the Code of Civil Procedure is a general rule which takes care of the interests of the defendant, in the case of a suit like this in having all the lessors as parties to the suit so that he may not be subjected to further litigation. A person cannot be compelled to be a plaintiff for, as is obvious, he cannot be compelled to bring an action at law if he does not want to do so. Nor can a person be prevented from bringing an action by any rule of law or practice, merely because he is a joint promisee and the other promisee refuses to join as a co-plaintiff. The proper and the only course in such cases is to join him as a proforma defendant. [775 F-H, 776 A]
Biri Singh and Anr. v. Nawal Singh, ILR XXIV All. 226, Pravi Mohan Bose, v. Kedarnath Ray, ILR XXVII Cal. 409, Menghibai v. Cooverji Umersey, LXVI I.A., 210 @ 219 and Pramadha Nath Roy v. Ramani Kanta Roy, I.L.R. XXXV 3 3 1, Approved.
Vyankatesh Oil Mill Co. v. N. V. Valmabomed, A.I.R. 1928 Bom. 191, Vagha Jesing v. Manilal Bhogilal Desai, A.I.R. 1935 Bom. 262, Hari Singh v. Firm Karam Chand Kanshi Rant, A.I.R. 1927 Lahore 115, Sobhanadri Appa v. Parthasarathi Appa Rao Savai Aswa Rao Bahadur, A.I.R. 1932 Mad. 583 and Nathanial Urson v. Mahadeo Uraon, A.I.R. 1957 Patna 511; Held not applicable.
(3)In the instant case, the two contesting defendants became tenants at sufferance or trespassers on the termination of their licence. A co-owner could, in the case of indivisible property,. well have maintained a suit for the recovery of the whole from persons holding unlawful possession thereof. [778 B]
Mahabola Bhatta v. Kunhanna Bhatta etc., I.L.R. XXI Mad. 373, Chandri v. Daji Bhau I.L.R. XXIV Bom. 504; Gopal Ram Mehuri v. Dhakeshwar Parshaa Narain Singh, I.L.R. XXXIX Mad. I.L.R. XXXV Cal 807, Syed Ahmad Sahib Shutari v. The Magnesite Syndicate Ltd., I.L.R. R.XXIX Mad. 501 and Maganlal Dulabhdas v. Bhadar Purshottam and Ors. A.I.R. 1927 Bom. 192; approved.
(b)The judgment and the decree having in fact enured to the benefit of defendant No. 3, the rule that "without the tender of indemnity against costs it would not be permissible for one joint promisee to make the other co-defendant", does not in fact enure to the benefit of the

contesting defendant.

[777 D-E]

Gulien v. Knowles [1898] 2 Q.B. 380 and Birka and Johnson v. Stephens and Carter Ltd. Colding, [1923] 2 K.B. 857, Burnside v. Harrison Marka Productions Ltd., [1968] 2 All. E.R. 286 referred to.

(c)As no other drama besides "Kathakaon' was being staged in the week preceding the expiry of the period of the licence, the benefit of the proviso, on a reading of para I of the agreement, could enure only for "Kathakao" and not for "Sviratri" or any other drama. As the defendants staged, "Adarsh Hindu Hotel", "Nishkriti" and "Sviratri" along with "Kathakao" after the expiry of the period of the licence, there is nothing wrong with the concurrent finding that the "normal run" of "Kathakao" came to an end when the defendants started staging the other dramas three times a week and relegated "Kathakao" to one show in the week. [778 H, 779 A-B]

(d)The plaintiff and defendant No. 3 being joint promisee are equally entitled to the said compensation @ Rs. 5275/- per month. [779H, 780A]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2055 of 1970.

From the Judgment and Decree dated 21-5-1970 of the Calcutta High Court in Appeal No. 190 of 1964.

S. C. Majuindar and Mrs. Laxmi Arvind for the Appellants. Sankar Ghose and D. P. Mukherjee for Respondent No. 1. A. K. Mitter and Mrs. Laxmi Arvind for Respondent No. 2. The Judgment of the Court was delivered by SHINGHAL J., The first two defendants, who lost in the trial court as well as on appeal, came to this Court on a certificate granted by the high Court under Article 133(1) of the Constitution as it stood before the Constitution (Thirtieth Amendment) Act, 1972. Jahar Roy, defendant No. 1, died a day after the commencement of the hearing of this appeal. On that date, when we were informed about his death by Mr. Mazumdar who was his Advocate-on-record also, we gave him the option of continuing the arguments so that they may be concluded without any break and file a petition for substitution of the legal representatives of Jahar Roy before the delivery of the Judgment, or to resume the hearing of the appeal after the substitution. Mr. Mazumdar was good enough to choose the former course as the substitution of the legal representatives of Jahar Roy was to be a formal affair and nothing special or new was likely to be argued in the appeal on their behalf. We accordingly heard the arguments at length. Later, alongwith an application for substitution, a prayer was made on behalf of the legal representatives of Jahar Roy for the rehearing of the appeal. In all fairness, and to avoid any future objection, we acceded to the request and posted the appeal for further hearing.

We have heard Mr. Mazumdar on behalf of all the legal representatives also. He has however not argued any new point beyond inviting our attention to a suit filed by the plaintiff on February 25, 1970, during the pendency of the appeal in the High Court, claiming a declaration that the partnership between him and defendant Jitendra Nath Bose stood dissolved on and from February 24, 1970, and the order of appointment of Receivers in that suit. We shall refer to Mr. Mazumdar's argument in that behalf in due course. Plaintiff Premji Bhimji Mansata and Jitendra Nath Bose defendant No. 3 carry on business in partnership in the name and style of "Rungmabal Threatre", in Calcutta of which they are joint lessees. They pay a monthly rent of Rs. 2,500/- including the rent of fixtures and furniture. They also pay Municipal rates and taxes, electric charges and the cost of maintenance of machinery, fittings and furniture. Both of them have been described in the plaint as "the Management"

> of the Runginahal Theatre. Jahar Roy, defendant No. 1, and Smt. Sarjubala Devi, defendant No. 2, hereinafter referred to as the defendants, entered into an agreement with the plaintiff and defendant No. 3, on January 17, 1962. The agreement, in which the defendants were described as "the Artistes" provided, inter alia, as follows :-
>
> "1. The management agree to allow the Artistes the use of "Rungmahal Theatre" as the Licensees thereof including the stage, Threatre-hall, the Dressing rooms used in con- nection therewith, the existing scenes and dresses for the purpose of public performances and shows there at of Bengali Dramas for a period of one year from the date hereof on the days and in the manner following
>
> (a) One Evening show on each Thursday.
>
> (b) One Evening show on each Saturday.
>
> (c) One Matinee and one evening shows on each Sunday and other public holidays and also one whole night performance on the occasion of Sivratri and Janmastami each. All the extra expenses including the Corporation charges and extra remuneration payable to staff for such whole night performances will be borne and paid by the Artistes. They would also obtain necessary permission from the authorities con-

cerned :

> Provided always and it is hereby expressly agreed that the Artistes would be entitled to continue with the shows of the drama that they would be actually staging during the week before the expiry of one year until the same is closed by the Artistes after a normal run." It was further agreed that defendants would be entitled to all box office ,collections, but they would contribute a sum of Rs. 5,275/- every month towards the expenses mentioned in paragraph 5 of the agreement and would pay that sum to the Management within the 7th day of each month succeeding the month for which it became due.

> The period of one year for which "the Artistes" were allowed the, use of the Rungmabal Theatre and its equipment, as its licencees, expired on January 16, 1963, while "the Artistes"
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> were, according to the plaintiff, exhibiting the Bengali drama called "Katha Kao", which continued its "normal run"

upto October 10, 1963. On that date (according to the plaintiff) the agreement referred to above, came to an end, but the defendants staged the drama "Adarsh Hindu Hotel" on October 12 and 13, 1963 and "Nishkriti" on October 25 and 26, 1963. The plaintiff therefore sent a letter to the defendants on October 23, 1963, informing them that they had no right to stage any other play in terms of the agreement as their licence had already expired on October 10, 1963, after the "normal run" of "Katha Kao". The plaintiff however permitted the defendants to stage "Katha Kao" during the Puja Holidays, upto October 27, 1963, without prejudice to the rights and contentions of the lessees. Even so the defendants issued advertisements in the newspapers on October 30, 1963, announcing the exhibition of "Katha Kao"

> on November 14, 1963 and of "Nishkriti" from November 15 to 17, 1963, and staged it. They also announced in a Bengali newspaper on December 18, 1963, that they would stage "Swikriti" on December 21, and 22, 1963. The plaintiff therefore filed the suit in the Calcutta High Court on December 20, 1963, for a declaration, inter alia, that the defendants, their agents, servants or assigns had no right, title or interest to, hold any theatrical performances or any performance in the Rungmahal Theatre in any manner whatsoever and that the plaintiff and defendant No. 3 were entitled to its exclusive use and enjoyment. He also prayed for a permanent injunction restraining the defendants from exhibiting any dramatic or other performance in that theatre or from using it. He claimed compensation or damages at the rate of Rs. 600/- per day with effect from November 1, 1963. It was specifically stated in paragraph 15 of the plaint as follows,-
>
> "Although the plaintiff called upon the defendant No. 3 to join the plaintiff in instituting this suit, the defendant No. 3 is not willing to join the plaintiff. In the circumstances, the defendant No. 3 has been made a defendant in this suit. The plaintiff states that no relief is claimed against the defendant No. 3."

The defendants filed a joint written statement in which they denied that they were mere licensees and the licence had expired. They claimed that they were entitled to stage any other drama along with "Katha Kao" which, according to them, did not come to an end after its "normal run" on or about October 10, 1963. They pleaded that "Katha Kao" was being run lawfully every Thursday, while another new drama "Swikriti" was being run on other days. They claimed fur- ther that they were entitled to stage any other drama along with "Katha Kao" and denied that they had committed any breach of the agreement. As regards Jitendra Nath Bose who was arrayed as defendant No. 3 in the suit, the defendants contended that he had not only refrained from joining the, plaintiff in the suit but was opposing it and was supporting the defendants so that the suit was not maintainable by

one partner and it was also barred under section 42 of the, Specific Relief Act.

A number of issues were framed by the trial judge, including a specific issue as to the maintainability of the suit because of the non-joinder of defendant No. 3 as plaintiff, and also on the question whether the two defendants were entitled to stage any other play after "Katha Kao" one week before the expiry of period of one year from the date of the agreement.

Defendant Jahar Roy examined himself as the sole witness on behalf of the defendants. In his judgment dated July 14/15, 1964, the trial judge found all the issues in favour of the plaintiff and passed a decree granting a declaration that the defendants, their agents, servants or assigns had no right, title or interest to hold any theatrical or other performance in the Rungmahal Theatre in any manner whatsoever or to use it in any manner whatsoever and that the plaintiff and defendant Jitendra Nath Bose were entitled to its exclusive use and enjoyment. The trial judge granted a permanent injunction restraining the defendants from exhibiting any dramatic performances or any performance in the theatre, or from using it. He allowed the plaintiff compensation and damages at the rate of Rs. 5,275/- per month also with effect from November 1, 1963, along with the costs of the suit.

The defendants filed an appeal, but it was dismissed with costs by the Calcutta High Court on May 21, 1970, except for the correction of a "slight mistake" in the judgment and the decree.

As has been stated, the defendants have filed the present appeal on a certificate granted by the High Court. They have however been staging their dramas in the theatre in question for a period of some 14 years since the institution of the suit on account of the stay orders obtained by them from time to time.

It has been argued by Mr. Mazumdar on behalf of the appellants that as the licence was given by the plaintiff and Jitendra Nath Bose as joint promises of the property, the suit was not maintainable under section 45 of the Contract Act, hereinafter referred to as the Act, by one of the joint promisees without joining Jitendra Nath Bose as a co-plaintiff.

Section 45 and the illustration thereunder read as follows,-

> "45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any one of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representative of all jointly.
>
> Illustration A, in consideration of 5,000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim per- formance rests with 'B's representative jointly with C during C's life, and, after the death of C, with the representatives of B and C jointly."

The section thus deals with devolution of joint rights in the case of joint promisees, but it does not deal with a case where, a joint promise, does not want to joint as a co- plaintiff and is arrayed as a proforma defendant with the specific plea that no relief is claimed against him. The judgment and the decree in this case have in fact enured to his benefit also.

It is Order I rule I of the Code of Civil Procedure, which deals with the procedure in civil actions of this nature and it provides as follows,-

> " 1. All persons may be joined in one suit as plaintiffs in 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 such persons brought separate suits, any Common question of law or fact would arise."

This is a general rule which takes care, of the interests of the defendant who is interested, in the case of a suit like this, in having all the lessors as parties to the suit so that he may not be subjected to further litigation. But the rule is not without an exception. The reason is that a person cannot be compelled to be a plaintiff for, as is obvious, he cannot be compelled to bring an action at law if he does not want to do so. At the same time, it is equally true that a person cannot be prevented from bringing an action, by any rule of law or practice, merely because he is a joint promisee and the other promises refuses to join as a co- plaintiff. The proper and the only course in such cases is to join him as a proforma-defendant. As would appear from Biri Singh and another v. Nawal Singh(1) and Pyari Mohun Bose v. Kedarnath Roy(2), it has consistently been held by courts in this country that where two parties contract with a third party, a suit by one of the joint promisees, making the other as codefendant. is maintainable even if the plaintiff does not prove that the other joint promisee has refused to join him as a co-plaintiff. Reference in this connection may also be made to Monghibai 'v. Cooverji Umersay(3), where it has been observed as follows,-

> "It has long been recognized that one or more of several persons jointly interested can bring an action in respect of joint property, and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs, if they will consent, or as co-defendants if they will not."

In Pramada Nath Roy v. Bameni Kanta Roy(4), it was held by the Privy Council that, in the event of rent being unpaid, the owners of the zanmindari interest were entitled, by a suit, to bring a "putni" to sale, with the consequences prescribed by the Bengal Tenancy Act. Their Lordships specifically observed in that case as follows,--

> "And it is a general rule a rule not derived from the Bengal Tenancy Act, but from quite another branch of law, namely, the general Principles of legal procedure-that a sharer, whose co-sharers refuse to join him as plaintiffs, Can bring them into the suit as defendants, and sue for the whole rent of the tenure."

We see no reason for taking a different view and find no merit in the argument of Mr. Mazumdar to the contrary. He no doubt invited our attention to Vyankatesh Oil Mill Co. v. N. V. Velmahomed(5),

vagha Jesing v. Manilal Bhogilal Desai(6), Hari Singh v. Firm Karam Chand Kanshi Ram(7), Sobhanadri Appa V. v. Parthasarathi Appa Rao Savai Aswa Rao Bahadur(8) and Nathaniel Uraon v. Mahadeo Uraon(9), but they were cases in which one or the other joint promisee was left out altogether from the frame of the suit, or the case was by way of an action in tort. Learned counsel was in fact unable to refer to any case where it has been held that one joint promisee cannot maintain a suit by making the co- promisee a proforma-defendant.

(1) I.L. R. XXIV All. 226 which was decided in 1898. (2) I.L.R. XXVII Cal. 409 which was decided in 1899. (3) LXVI Indian Appeals 210 at p. 219.

(4) I.L.R. XXXV Cal. P. C. 331.

(5) A.I.R. 1928 Bom. 191. (6) A.I.R. 1935 Bom.262. (7) A.I.R. 1927 Lahore 115. (8)-A.I.R. 1932 Mad. 583. (9) A.I.R. 1957 Patna 511.

Mr. Mazumdar tried to place reliance on the following observations in Lindley on the Law of Partnership, thirteenth edition, page 303,-

> "With respect to other simple contracts, whether written or verbal, where a contract is entered into with several persons jointly, they should all join in an action upon it."

This passage occurs under the rubric "Actions by and against partners where no change in the firm has occurred," and is subject to the general observations stated by Lindley under the earlier rubric "Actions by and against partners." While making those general observations, it has been stated as follows at serial No. 5 (at pages 290-291),-

> "5. Where a plaintiff claims any relief to which any other person is entitled jointly with him, every such other person must, except with the leave of the court, be made a co- plaintiff or (if he refuses) a defendant."

It cannot therefore be urged with any justification that a contrary view has been stated by Lindley.

Before leaving this aspect of the matter we may as well refer to an ancillary argument of Mr. Mazumdar that even if it were held to be permissible for one joint promisee to make the other a co-defendant, that would not be permissible without the tender of indemnity against costs, which was not done in this case. That rule finds a mention in Halsbury's Laws of England, third edition, at page 61, and appears to be based on Gullen v. Knowles and Birks(1) and Johnson v. Stephens and Carter Limited and Golding(2). But the rule does not in fact enure to the benefit of the contesting defendant. When the matter came up for specific consideration in Burnside v. Harrison Marks Productions, Ltd.(3) the position obtaining in England was set out by Lord Denning, M.R. in the following words,-

> "I think that the judge's decision proceeds on a misunderstanding of Johnson v. Stephens and Carter, Ltd.(4) That case shows that, when a promise made is to two

> persons jointly then one of them cannot ordinarily require the other to join as plaintiff, and cannot add him as a defendant, unless he offers him an indemnity against costs. This, however is a rule made for the protection of the joint contractor whom it is sought to add as plaintiff or defendant. It is not made for the benefit of the other contracting party who is the defendant to the action. He cannot insist on the indemnity or the offer of it; for it is no concern of his. All that he can require is that both the persons, with whom he made his contract, are before the court. So long as they are both there, even if one is a defendant, he cannot complain."

It would thus appear that there is no force in the argument of Mr. Mazumdar to the contrary.

(1) [1898] 2 Q. B. 38O (3) (1968) 2 All E.R. 286.

(2) [1923] 2 K. B. 857.

(4) [1923] All E.R. 701.

It may be mentioned here that Mr. Ghosh tried to raise the argument that section 45 of the Act deals with a case relating to "the right to claim performance" of a contract and not a case like the present. The argument could not, however, be examined as it was not based on any such plea in the written statement and was not urged for consideration in the High Court.

Moreover, as has rightly been held in the impugned judgment of the Calcutta High Court, the two contesting defendants in this case became tenants on sufferance or trespassers on the termination of their licence. A co-owner could in the case of indivisible property, well have maintained a suit for the recovery of the whole from persons holding unlawful possession thereof. Reference in this connection may be made to the decisions in Mahabala Bhatta v. Kunbanna Bhatta etc.(1) Chandri v. Daji Bhau (2) , Gopal Ram Mohuri v. Dhakeshwar Pershad Narain Singh(3), Syed Ahmad Sahib Shutari v. The Magnesite Syndicate Ltd(4), and Maganlal Bulabhadas v. Bhadar Purshiottam and others(5).

The remaining argument of Mr. Mazumdar relates to the ques- tion whether the defendants were entitled to stage any play other than "Katha Kao" which was actually staged during the week before the expiry of one year from January 17, 1962 as that was the date of the agreement. The trial judge found on evidence of defendant Jahar Roy that that play was actually staged one week before the expiry of the period of one year stipulated in the agreement. Jahar Roy has also admitted that the same play is being run only once a week thereafter, and that other plays are. being staged on other dates. On this basis Mr. Mazumdar has argued that as "Katha Kao" has not closed down, it is having its "normal run" and the defendants are entitled to the benefit of the proviso to paragraph 1 of the agreement between the parties which has been extracted 'in an earlier part of the judgment. A reading of paragraph 1 shows that the defendants, as the licensees, were allowed to use the theatre and the equipment for a period of one year, for one evening show on each Thursday and each Saturday, and one matinee show, one evening show on each Sunday and other holidays, and also one whole night performance on the occasion of Sivaiatri and Janmashtmi. The controversy in this

case does not relate to the performances on public holidays other than Sundays or on the occasion of Sivaratri and Janmashtmi. So for all practical purposes the defendants were entitled to four shows in a week, including two shows on Sundays. It is not in dispute before us that they were only staging "Katha Kao"

> during the week before the expiry of the period of one year from the date of the agreement, so that that was its "normal run". It follows therefore that as no other drama was being staged in the week preceding the expiry of the period (1) I.L.R. XXI Mad 373.
>
> (3) I.L.R. XXXV Cal. 807.
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> (5) A.I.R. 1927 Bom. 192.
>
> (2) I.L.R. XXIV Bom. 504.
>
> (4) I.L.R. XXIX Mad, 501.

of the licence, the benefit of the proviso could ensure only for "Katha Kao" and not for "Swikriti" or any other drama. As the defendants staged "Adarsh Hindu Hotel", "Nishkriti" and "Swikriti" along with "Katlia Kao" after the expiry of period of the licence, there is nothing wrong with the concurrent finding that the "normal run" of "Katha Kao" came to an end when the defendants started staging the other dramas three times a week and relegated "Katha Kao" to one show in the week. This is the plain and simple meaning of the paragraph bearing on this aspect of the controversy, and we arc unable to agree with Mr. Mazumdar that it was permissible for the defendants to continue with the licence merely because they continued to play "Katha Kao" once a week and the other plays on other days, at their option. Such a course could not be said to be; the "normal Tun" of "Katha Kao" and was clearly abnormal. Learned counsel has not been able to point out how the finding of fact of the High Court that the "normal run" of "Katha Kao" came to an, end when the defendants started performing another drama along with' it after the %expiry of one year's period of the licence could be said to have been vitiated by any error of law or procedure.

Mr. Mazumdar tried to argue that the agreement dated January 17, 1962 could not be said to have been validly terminated by the plaintiff as "the Management" did not refund the sum of Rs. 10,000/or any part thereof in accordance with the requirement of paragraph 16 of the agreement. The argument was however found to be untenable as no such plea was taken in the written statement and it was not the subject matter of any issue during the course of the trial.

This leaves for consideration the argument which Mr. Mazumdar has advanced on behalf of the legal representatives of Jahar Roy (defendant No. 1). As has been stated, he has invited our attention to the suit which is said to have been filed by the plaintiff as far back as February 25, 1970 for a declaration that the partnership between him and defendant Jitendra Nath Bose stood dissolved on and from February 24, 1970 and for some other reliefs. Our attention has also been invited to the trial court's order for the appointment of joint Receivers in that case. It has been argued on that

basis that as the joint Receivers took possession on April 16, 1970, the plaintiff was not entitled to claim any relief in the' suit which is the subject matter of the controversy before us, that the Receiver were necessary parties and that the plaintiff no longer had any right to claim any of the reliefs in this suit because of the total failure of his cause of action. It would be sufficient for us to say that none of these arguments was advanced in the appeal before the High Court and we do not find it possible to allow them to be raised in this second appeal for the first time. Even otherwise, the arguments have no bearing on the appeal before us.

There is thus no merit in this appeal and it deserves to be dismissed. It may however be mentioned that the High Court, perhaps by inadvertence, confined the decree for compensation at the rate of 13-951 SCI/77 Rs. 5,275/- per month to the plaintiff who was, however, not the sole licensor. The plaintiff and defendant No. 3 being joint promisees are equally entitled to the said compensation. Except for this modification in the impugned judgment and the decree of the High Court, the appeal fails and is dismissed. There will however be no order as to the costs of this Court in the circumstances of the case. S.R. Appeal dismissed, modifying the decree-