

APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and
Mr. Justice Wilkinson.*

§THIRTHASAMI (DEFENDANT No. 5), APPELLANT,

v.

GOPALA AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 AND 3),
RESPONDENTS.*

Civil Procedure Code, s. 32—Joinder of new defendant.

Suit upon a bond of which the obligor was therein described as the manager of a certain mutt. The defendants, who were the sons of the obligor (since deceased) pleaded that the debt was contracted by their father for the benefit of the mutt and as manager of the mutt. The Judge ordered that the representative of the mutt be joined as defendant in the suit under s. 32, and subsequently a decree was passed against him :

Held, that the order under s. 32 was right, although the plaint had prayed for no relief against the mutt.

SECOND APPEAL against the decree of J. W. Best, District Judge of South Canara, in appeal suit No. 176 of 1886, affirming the decree of A. Venkataramana Pai, District Munsif of Mangalore, in original suit No. 296 of 1884.

Narayana Rau for appellant.

Ramachandra Rau S'heb, Ramasami Mudaliar and Subba Rau for respondents.

The facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court.

JUDGMENT.—This was a suit upon a bond—exhibit A—executed by one Appayachari, since deceased, who was *parpathegar* or manager of the Pejevar Mutt in South Canara. The plaint, as originally framed, prayed for a decree against property left by Appayachari. But defendants Nos. 2 and 3, his sons, contended that the debt was contracted by their father for the benefit of the mutt and in his capacity as manager or agent. The District

* Second Appeal No. 652 of 1888.

Munsif decreed the claim against Appayachari's property in the hands of defendants Nos. 2 and 3, but, on appeal, the District Judge directed that the fourth defendant, the representative of the mutt, be made a party, and that the suit be retried. At the retrial, the District Munsif exonerated defendants Nos. 1 to 3 from all liability and passed a decree in plaintiff's favor against the fifth defendant as the representative for the time being of the Pejevar Mutt. It is urged in appeal that the Judge was in error in directing that the fourth defendant be made a party and that the plaint prayed for no relief against the Pejevar Mutt. But it appears to us that the procedure followed by the Judge was warranted by section 32 of the Code of Civil Procedure. Though the plaint did not pray for a decree against the mutt, yet the question whether the debt was one binding on Appayachari's assets in the hands of his sons was distinctly raised by them in their written statement. Under the provisions of section 32 the Judge was entitled to make the representative of the mutt a party in order that he might be able effectually and completely to adjudicate on that question which arose on the pleadings so as to avoid a multiplicity of suits. The decision *Eshan Chunder Singh v. Shama Churn Blutto*(1) proceeded on the ground that the High Court relied on a state of facts different from and opposed to what was alleged in the plaint and to what was attempted to be proved. But the case before us is not similar to it, and the decision under appeal rests on a state of facts which formed the subject of an issue and which was pleaded by the second and third defendants. In dealing with the question of variance between what is alleged and proved, regard should always be had not only to the averments in the plaint, but also to the questions arising for decision on the pleadings, and on which the parties proceed to trial. Though the plaint was not formally amended at the settlement of issues with reference to the question raised by the second and third defendants, yet it was a mere omission which occasioned no failure of justice. Further, it does not appear that the plaintiff insisted in the Courts below on his right to proceed against Appayachari's property, on the ground that document A did not show on its face that he borrowed only as agent of the mutt.

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(1) 11 M.I.A., 7.

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Another objection urged upon us is that the debt sued for did not appear in the accounts of the mutt, and that the Judge was not entitled to pass a decree against the mutt. The absence of an entry in the accounts was only a fact in evidence, and the Judge has considered it together with the other evidence in the case in coming to a finding on the question whether the debt was contracted by Appayachari on his own account or on account of the mutt. Nor do we consider that the Judge was in error in holding that upon the facts found, the recital in document A in regard to Rs. 200 raised a presumption that "the sundry expenses" mentioned therein were those of the mutt. If the documents were executed, as is found by the Judge, on account of the mutt and by its agent, the recital was clearly *prima facie* evidence against the principal in the circumstances of this case.

On these grounds we are of opinion that the decision of the Judge is right, and that the second appeal must be dismissed with costs. There will be two sets of costs, one in favor of the first respondent and the other in favor of the second and third respondents.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Wilkinson.*

SOUTH INDIAN RAILWAY COMPANY
(DEFENDANTS), APPELLANTS,

v.

RAMAKRISHNA (PLAINTIFF), RESPONDENT.*

*Defamation—Expression of suspicion—Slander by a railway guard—Suit against
Railway Company—De minimis non curat lex.*

Suit for damages for defamation. A railway guard, having reason to suppose that a passenger travelling by a certain train from Madras to Chingleput had purchased his ticket at an intermediate station, called upon the plaintiff and others of the passengers to produce their tickets. As a reason for demanding the production of the plaintiff's ticket, he said to him in the presence of the other passengers "I suspect you are travelling with a wrong (or false) ticket," which was the defamation complained of. The guard was held to have spoken the above words *bona fide*:
Held, the plaintiff was not entitled to a decree for damages.

* Second Appeal No. 1742 of 1888.

1889.
March 25.
May 1.