SESHAMMAL v. MUNUSAMI MUDALI.

therefore, no authority for the counter-petitioner's contention. Indeed in every one of them it is assumed that, of a new trial had been granted, the reference to the High Court could properly have been raised, and we have no doubt, but that that assumption is correct.

We must, therefore, set aside the revised decree of the Small Cause Court with costs, and direct that the suit be restored to its file, and be dealt with in accordance with law as laid down in section 69 of the Presidency Small Cause Courts Act. As the Chief Judge who was a party to the decree now set aside is absent on leave, but will shortly return, it is desirable that the case should not be taken up for reference until his return.

APPELLATE CIVIL.

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

1896. October 9.

SINGA REDDI OBALA REDDI (PLAINTIFF), APPELLANT,

v.

MADAVA RAU (DEFENDANT No. 1), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 32, 45, 46—Dismissal of suit against one defendant without trial after first hearing.

The plaintiff sued for damages for the infringement of certain hereditary rights claimed by him in connection with a temple. The first defendant was a magistrate and it was alleged as the cause of action against him that he had disobeyed the instructions of his superiors and played into the hands of the other defendants by passing an illegal order. After issues had been framed the Judge without trial dismissed the suit with costs against the first defendant:

Held, that the order was illegal.

APPEAL against the order of W. G. Underwood, District Judge of Cuddapah, in Original Suit No. 4 of 1895.

The plaintiff claimed that he had hereditary rights connected with the festivals of a certain temple, and he sued for damages for the infringement of those rights.

Paragraphs 2, 3, 4 and 5 of the plaint were as follows:—

"The second and third defendants who are Komatis induced "the fourth defendant to acquiesce in their attempts to break the "abovementioned time-honoured custom and invented, after their

* Appeal against Order No. 34 of 1896.

"recent accession to the office of Dharmakartaship of the temple, "frivolous and flimsy pretexts for disgracing the plaintiff."

"The first defendant, who was directed by the Deputy Magis- "trate of Jammalmadugu Division to hold the scales evenly in "this contentious state, disobeyed the plain instructions issued to "him on 21st May 1894 and played himself into the hands of the "other defendants by passing an illegal order on 25th May 1894 "authorising the conduct of the festivals interdicted in spite of the "fact that no reconciliation had taken place."

"When the minor plaintiff and his next friend appeared on "the night of the abovesaid 25th May 1894 at the Papagni river- "bed on the occasion of Garudotsavam and claimed the customary "honours of Tomalai, the first defendant abused his official authority "and had them dragged by sheer force and thereby disgraced and "lowered them immensely in the eyes of the assembled multitude "besides wounding their feelings.

"The wanton, malicious and vindictive refusal on the part of "all defendants to render the customary honours to the plaintiff, "was further aggravated by the high-handed, arbitrary and illegal "proceedings of the first defendant and has resulted in the extreme "disgrace to the highly respectable and wealthy family of the "plaintiff."

Defendant No. 1 filed a written statement denying the plaintiff's allegations as far as they affected him, and the District Judge, after issues were framed between the plaintiff and all the defendants, made the order now appealed against by which the suit was dismissed against the first defendant in the following terms:—

"I think I am right in dismissing K. Madava Rau from this "suit with costs. I do so accordingly. If he violated his powers "as a magistrate, a case will undoubtedly lie against him. But "that has nothing to do with the present cause of action. The "suit is wholly on the rights in the ceremonies, and it remains for "the Court to decide if the dispute is wholly religious or a matter "in which a secular Court can take cognizance and decide the issues "raised or whether the matter should be settled in the caste."

The plaintiff preferred this appeal.

Tiagarajayyar for appellant.

Mr. *J. G. Smith* for respondent.

JUDGMENT.—We do not understand under what provision of law the District Judge passed the order appealed against. Section

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32, Civil Procedure Code, gives the Court power to strike out the name of any defendant who has been improperly joined as a party, but that must be done on or before the first hearing. In the present case the order was not made until some time after the issues were settled. Again if it appeared to the Court that the cause of action alleged against first defendant alone, and that alleged against him jointly with the other defendants, could not be conveniently tried together, the Court might have proceeded under section 45, Civil Procedure Code, and have ordered the several causes of action to be tried separately; but (unless the parties otherwise agreed, which was not alleged in the present case) this power also could only be exercised before the first hearing.

Lastly the first defendant might have applied under section 46, Civil Procedure Code, to confine the suit to such cause or causes of action as could be conveniently tried together. The District Judge does not appear to have acted under this section, for he has not confined the suit as contemplated by that section, but has dismissed it all together with costs as against the first defendant.

The District Judge has assigned no legal grounds for making such an order, and we can discover none in the papers before us.

We must, therefore, set aside the order of the District Judge and direct him to restore the suit as against this first defendant to his file, and proceed to dispose of it in accordance with law. Costs will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

1897. February 25. March 4.

KOLLANTAVIDA MANIKOTH ONAKKAN (PLAINTIFF), APPELLANT,

v.

TIRUVALIL KALANDAN ALIYAMMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 317—*Execution sale—Right to prove purchase benami.*

Certain property was mortgaged in 1881 and again in 1882. In 1883 the interest of one of the mortgagors in the property was brought to sale subject

* Second Appeal No. 1731 of 1895.