

JUDGMENT.—The appellant has failed to join as parties to his second appeal the second defendant and eight others, who represent the mortgagee. In their absence, the decree of the Lower Court cannot be varied, and we see no sufficient reason for allowing the appellant at this stage to bring them on the record. On this ground we must dismiss the second appeal with costs.

As to the memorandum of objections, it was contended for the appellants that it cannot be heard inasmuch as the appeal has not been heard on the merits, and therefore there has been no hearing of the appeal within the meaning of section 561, Code of Civil Procedure. We cannot accept this contention, as we consider that the question of non-joinder is one that arises in the appeal itself, and is not extraneous to it, as would be a question as to whether it was presented in proper time or not (*Ramjiwan Mal v. Chand Mal* (1)). Upon this question of non-joinder the appellant was heard, and it follows that there was a sufficient hearing of the appeal to entitle the respondent to be heard on his objections.

As to the merits of the objections themselves they turn on questions of fact and accordingly we dismiss them also with costs.

KOMBI
ACHEN
v.
KUCHUNNI.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

SETHURAYAR (PLAINTIFF), APPELLANT,

v.

SHANMUGAM PILLAI AND ANOTHER (DEFENDANTS

Nos. 1 AND 2), RESPONDENTS.*

1897.
August 19, 24.

Specific Relief Act—Act I of 1877, s. 56, cl. (b)—Trusts Act—Act II of 1882, ss. 91, 95—Civil Procedure Code—Act XIV of 1882, s. 232—Decree obtained on a benami mortgage by benamidar—Suit by real mortgagee—Declaration—Injunction.

A mortgaged land to B as either agent or benamidar for C. B sued on the mortgage and obtained a decree. C now sued A and B for a declaration that he was entitled to the benefit of the decree and had the right to execute it, and for an injunction restraining A from paying the money to B and B from receiving the money from him :

Held, that the plaintiff was entitled to the declaration, but not to the injunction.

SETHURAYAR
v.
SHANMUGAM
PILLAI.

SECOND APPEAL against the decree of H. T. Ross, District Judge of Tinnevelly, in Appeal Suit No. 161 of 1895, reversing the decree of A. David Pillai, District Munsif of Ambasamudram, in Original Suit No. 213 of 1894.

The material allegations in the plaint were as follows :—

“ For the sum of Rs. 163-8-6 due for paddy and for Rs. 3 due in ready cash, both amounting to Rs. 166-8-6, payable by the second defendant to the said zamin according to the custom of the said zamin and as per terms of the patta for fasli 1296, a registered hypothecation deed was obtained for the plaintiff from the second defendant on the 7th September 1888 in the name of the first defendant, who was at that time the sampirathi of the said zamin on the security of the property mentioned in the list, with stipulations that, out of the said sum, Rs. 83 and the interest due on the whole (principal) sum at the rate of 1 per cent. per mensem should be paid on the 14th October 1888 (corresponding to 30th Perattasi of Andu 1064), and that the remaining sum of Rs. 83-8-6 should be paid with interest at the same rate on 10th April 1889 (corresponding to 30th Panguni of the said Andu), and that, if there be default in paying on the first instalment, the whole amount should be paid in a lump with interest at the said rate without regard to subsequent instalment, and with some other stipulations. The said deed was kept among the said zamin records.

“ It is come to be known that the first defendant had, before being dismissed from the said post of sampirathi, fraudulently taken away the said hypothecation deed and has, concealing the truth, fraudulently instituted a suit as plaintiff against the said second defendant in Original Suit No. 152 of 1892 on the file of the District Munsif of Ambasamudram as if the said document was only executed for his own benefit; that he has obtained a decree, and that, on his application for a public auction-sale of the said property, the sale of the said property is fixed for the 29th instant.”

The plaintiff claiming that defendant No. 1 had no right to the amount secured by the hypothecation deed or to the benefit of the decree obtained thereon, prayed for a decree as follows :—

“ (1) Declaring that, as the amount of the decree in Original Suit No. 152 of 1892 on this Court's file referred to above, namely, Rs. 338-5-3, together with subsequent interest thereon,

“belong to the plaintiff, and as the first defendant has no right
 “whatever therein, the plaintiff has the right to be in the position
 “of the first defendant in the said decree in Original Suit No. 152
 “of 1892 and to take out execution and to recover the amount.

SETHURAYAR
 ?
 SHANMUGAM
 PILLAI.

“(2) Issuing a permanent injunction against the first
 “defendant prohibiting him from ever recovering the amount,
 “&c., of the said Original Suit No. 152 of 1892, and against the
 “second defendant prohibiting him from paying the said amount,
 “&c., to the first defendant.

“(3) Granting such further relief as the nature of this suit
 “may demand and as the Court may deem proper.”

The District Munsif held that the bond in question in Original
 Suit No. 152 of 1892 was executed for the benefit of the plaintiff
 and not for that of the first defendant, and that the former and
 not the latter was entitled to the benefit of the decree. He accord-
 ingly passed a decree as follows:—“That plaintiff is declared to
 “be entitled to the amount of the decree in Original Suit No. 152
 “of 1892 and to apply for execution of the said decree; that first
 “defendant is restrained from receiving the said amount from
 “second defendant and the second defendant from paying the said
 “amount to first defendant.”

The District Judge reversed the decree and dismissed the suit
 on the ground that it was not maintainable by the plaintiff.

The plaintiff preferred this second appeal.

Pattabhirama Ayyar and *Sivarama Ayyar* for appellant.

V. Krishnasami Ayyar for respondent.

JUDGMENT.—Upon the allegations of the plaintiff, his case
 may be considered on the footing either that the first defendant
 was his agent, or that he was his benamidar. If first defendant was
 an agent, the plaintiff is entitled to obtain the advantage gained by
 the first defendant in securing a decree upon the bond. Whether
 first defendant's action in obtaining the decree was rightful or
 wrongful is immaterial. This has long been established law
 (*Taylor v. Plumer*(1)).

If first defendant was a benamidar, the result would be the
 same, for he would be in the position of a trustee (sections 91 and
 95 of the Indian Trusts Act, 1882).

SETHURAYAR
v.
SHANNUGAM
PILLAI.

The only remaining question is as to the relief to be given. The injunction prayed for cannot be granted under section 56, clause (b) of the Specific Relief Act; but, if the plaintiff's case be true, he is entitled to the declaration granted by the Munsif subject to the plaintiff reimbursing the first defendant the costs incurred by him in obtaining the decree.

It was contended that such declaration would be fruitless and should not be granted, but we do not agree in this view. Such a declaration being binding on the parties would entitle the plaintiff to apply for the execution of the decree under section 232 of the Code of Civil Procedure, which has been held applicable to a case like the present (*Umasondury Dassj v. Brojonath Bhattacharjee*(1)).

The Judge was therefore wrong in holding that this suit was not maintainable. We accordingly reverse his decree and remand the appeal for disposal on the merits in the light of the above observations. Costs will abide and follow the result.

No order is necessary on the memorandum of objections as the Lower Court's decree has been reversed.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

RAMAYYAR (COUNTER-PETITIONER-PLAINTIFF), APPELLANT,

v.

RAMAYYAR (PETITIONER-DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1852, ss. 244, 258, 311—Uncertified adjustment out of Court with a decree-holder—Subsequent execution—Fraud of decree-holder.

An adjustment was made out of Court between a decree-holder and a judgment-debtor in August 1893, but it was not certified to the Court. The decree-holder falsely stated to the judgment-debtor's agent that the requisite petition certifying the adjustment had been presented: but nevertheless he proceeded with execution, applied for and obtained leave to bid at the Court-sale and himself purchased the property in September. The judgment-debtor preferred petitions in September and November praying that the sale be set aside.

Held, that the judgment-debtor was entitled to prove the adjustment, and to have the sale set aside.

(1) I.L.R., 16 Cal., 347.

* Appeal against Appellate Order No. 23 of 1896.