

APPELLATE CIVIL,

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

1897.
August 17.

KOMBI ACHEN AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

KOCHUNNI (DEFENDANT No. 20), RESPONDENT.*

Civil Procedure Code—Act XLV of 1882, s. 561—Appeal dismissed for want of necessary parties—Memorandum of objections.

The plaintiffs sued to recover possession of lands demised on kanom in Malabar. The defendants were the representatives of the mortgagee, and one (defendant No. 20) who claimed title to part of the land sought to be recovered. As to the last-mentioned part of the land, the plaintiffs obtained a decree for a portion of it only. The plaintiffs preferred an appeal bringing on to the record only defendant No. 20 who preferred a memorandum of objections. The appeal was dismissed for the reason that the mortgagee's representatives were not joined :

Held, that the appeal had been heard within the meaning of Civil Procedure Code, section 561, and accordingly that the memorandum of objections should be heard.

SECOND APPEAL against the decree of R. S. Benson, District Judge of South Malabar, in Appeal Suit No. 14 of 1892, modifying the decree of V. P. DeRozario, Subordinate Judge of South Malabar, in Original Suit No. 4 of 1889.

This was a suit to recover certain property demised on kanom together with arrears of purapad. The defendants were the representatives of the kanomdars and other persons claiming to be interested in the land in question and included defendant No. 20 who stated that certain land which was his property had been fraudulently included in the plaint. The Subordinate Judge passed a decree for the plaintiff which was modified on appeal by the District Judge in favour of defendant No. 20.

The plaintiffs preferred this second appeal, bringing on to the record as respondent only defendant No. 20, whose claim to the land, they contended, should have been entirely overruled. Defendant No. 20 preferred a memorandum of objections.

Bumachandra Rau Sahib and Ranga Ramamujachariar for appellants.

Sundara Ayyar for respondent.

* Second Appeal No. 351 of 1896.

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.