APPELLATE—CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

1921, August 25.

SHANMUKA NADAN, BY GUARDIAN SWARNAMMAL AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

ARUNACHELAM CHETTY AND OTHERS (SEVENTH DEFENDANT AND OTHERS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), O, I, rr. 3 and 10—Suit for partition—Money decree-holders, whether proper parties to the suit—Misjoinder of parties and causes of action—Plaint containing allegations that such decrees were not binding on plaintiffs—Order of lower Court, striking out names of decree-holders joined as defendants—Appeal—Revision.

Where in a partition suit the plaint contained allegations that money decrees obtained by certain creditors were not binding on the plaintiffs, the joinder of such decree-holders as defendants along with members of the family and their alienees, is proper under Order I, rule 3, Civil Procedure Code. *Tara Chand* v. *Reeb Ram* (1866) 3 M.H.C.R., 177, referred to

APPEAL against the order of C. R. VENKATESWARA AYYAR, Acting Subordinate Judge of Rāmnād at Madura, in Original Suit No. 90 of 1918.

This was a suit for partition in a joint Hindu family, instituted by plaintiffs 1 to 4, who are the minor sons of the first defendant, claiming four-fifths share of the family properties; the fifth plaintiff, the minor daughter of the first defendant, claimed an allowance for her marriage and maintenance, and the sixth plaintiff, the wife of the first defendant, claimed maintenance, and acted as the next friend of the other plaintiff; the second defendant was the mother of the first defendant; defendants 3 to 5 are vendees from the first defendant, and

* Appeal No. 30 of 1920.

the sixth defendant is a mortgagee from him. Defendants 7 to 18 were joined in the suit as they had obtained money-decrees on debts incurred by the first defendant; some of the defendants had obtained decrees against the first defendant alone, while the others had obtained decrees against him and the plaintiffs. Some of the decree-holders had attached family properties situate within the jurisdiction of the Sub-Court in which this suit was brought, although their decrees had been passed in a different Court. The defendants pleaded, *inter alia*, that the joinder of defendants 7 to 18 in their suit was improper and that the suit was bad for misjoinder of parties and cause of action. A preliminary issue was raised "whether defendants 7 to 18 are proper parties to this suit." The Subordinate Judge held that the defendants 7 to 18 were not proper parties to the suit, and that the suit was bad for misjoinder of parties and causes of action, and he passed an order declaring as above stated and awarding costs as payable by the plaintiffs. The plaint contained allegations to the effect that the first defendant had been leading an immoral life and had been wasting the family properties by selling and mortgaging them for immoral purposes, and that the decrees obtained by defendants 7 to 18 against him, or against him and the minor plaintiffs, with him as their guardian, were fraudulent and collusive and were based on debts incurred by him for immoral purposes, and that they were not binding on the plaintiffs. The plaintiffs preferred this Appeal against the order of the Subordinate Judge on the preliminary issue.

K. V. Venkatasubrahmanyam for respondents 1 to 6 took a preliminary objection that no Appeal lay against the order of the lower Court passed under Order I, rule 10, Civil Procedure Code. The order is not a decree under section 2, clause (11), nor an order appealable under

SHANMUKA NADAN v. ARUNACHELAM CHETTY.

Order XLIII, rule 1, Civil Procedure Code. In *Rama Rao* v. *The Raja of Pittapur*(1), the suit was dismissed not merely under Order I, rule 10, but the whole suit was dismissed on the ground that there was no cause of action.

K. Raja Ayyar, for appellant.—The order is a decree under section 2, Civil Procedure Code. This suit has really been dismissed as against defendants 7 to 18, though the suit goes on as against the other defendants. Here the plaintiffs ask for specific reliefs against defendants 7 to 18, which have been refused. The order is virtually a dismissal of the suit against them. The joinder of defendants 7 to 18 in this suit for partition is proper: see Rules of Practice (Mufassal), rules 226 to 229, which contemplate joinder of creditors. In a partition suit the joint family assets have to be ascertained and liabilities determined: see Trevelyan's Hindu Law, page 255, *Tara Chand* v. *Reeb Ram*(2). Where a creditor of the family has obtained a decree against the joint family property or threatens to proceed against such property he should be joined as a defendant in the partition suit. The creditors are proper, if not necessary, parties. Just as a mortgagee-decree-holder of the joint family property is a necessary and proper party, so also is a money-decree-holder.

K. V. Venkatasubrahmanyam, for respondents 1 to 6.—The decrees were obtained against the first defendant and his sons (the plaintiffs); the ground of impeaching the decrees is not the liability or otherwise under the Hindu Law, but a ground of fraud, which is foreign to a partition suit. Debtors of the joint family cannot be joined in a partition suit: *Ramkrishna Aiyar* v. *Krishna Aiyar*(3). The cause of action in a partition suit against the first

(1) (1918) I.L.R., 42 Mad., 219. (2) (1866) 3 M.H. C.R., 177.
(3) (1909) 18 M.L.J., 85.

defendant is different from the cause of action against defendants 7 to 18: see Order II, rules 3 and 4, Civil Procedure Code, and *Venkanna* v. *Sarayya*(1).

A. Krishnaswami, for respondents 7 and 8.—As regards creditors who have obtained decrees against father and sons, they cannot be joined in the suit. After all, this is a matter of discretion with the lower Court; the High Court cannot interfere in Revision: see Order II, rules 3 and 4, Civil Procedure Code, and *Rangayya Reddy* v. *Subramania Ayyar*(2).

Vinayaka Rao, for respondent 8.—Eighth defendant has a compromise decree, sanctioned by Court. Debt is extinguished by the decree. Rule of Practice No. 279 does not apply to decree-debt but only to ordinary contractual debt. Creditors ought not to be made parties, but only alienees. Rule 221 (Rules of Practice, Mufassal) applies to alienees and creditors, but Rule 225 only directs notice to creditors: see *Ramkrishna Aiyar* v. *Krishna Aiyar*(3).

The Court delivered the following JUDGMENT:

The decision under appeal was passed in a suit brought for partition by four minors against the first defendant their father, certain females whose positions it is not necessary to specify, and the seventh to eighteenth defendants, persons who held money decrees, some of them against the first defendant alone, others against the first defendant and the plaintiffs, all obtained on debts incurred by the first defendant. The decision of the lower Court is in terms that the suit is bad for misjoinder of causes of action and that defendants Nos. 7 to 18 are not proper parties. There is

(1) (1909) 19 M.L.J., 102. (2) (1917) I.L.R., 40 Mad. 361 (F.B.).
(3) (1909) 18 M.L.J., 85.

SHANMUKA NADAN v. ARUNACHELAM CHETTY.

nothing else. The lower Court does not say that it removes them from the record; it does not say that the suit is dismissed as against them. But it is agreed before us and from the tenor of the remainder of the order it is clear that under Order 1, rule 10, the names of these defendants were struck out as being improperly joined.

It is objected that no Appeal lies against such a decision and certainly none is provided directly in the Code, and as the lower Court's decision, understood in the manner in which we understand it, is not a decree and is not a conclusive determination of the rights of the parties with regard to any of the matters in controversy and does not come within the definition of "decree" in section 2 (2), there can be no Appeal against it directly. In these circumstances the Appeal as such must fail.

In view, however, of the facts of the cases to which further reference will be made, we have felt it our duty to consider whether we should not interfere in the exercise of our powers of Revision. No doubt we should not be justified in such interference on the sole ground that the lower Court had made a mistake in law; but here we think that it has done more than that. For it has entirely misunderstood the nature of the judicial discretion, which it was called upon to exercise. This is clear, when reference is made to the grounds of its order; for it has held firstly that as on the authority of *Ramkrishna Aiyar* v. *Krishna Aiyar*(1) debtors to a family should not be made parties to a suit for partition, therefore creditors also should not. On the assumption that the decision cited is correct, the consequence in our opinion does not follow. Then secondly it has relied on the fact that none of the defendants Nos. 7 to 18 has any interest in

(1) (1909) 18 M.L.J., 85.

the cause of action, which the plaintiffs have against any other of those defendants, as though thatwere sufficient to exclude the case from Order I, rule 3. The real question we have to decide is in fact whether Order I, rule 3, is applicable to such pleadings as those before us, and we first have to bear in mind what the lower Court appears to have entirely disregarded, that partition is the occasion for a comprehensive settlement of the extent of the family estate available for division and of the deductions which have to be made from that estate on account of family liabilities. This is clear with reference to the definition of the scope of partition suits to be gathered from rules 221, 223 and 234 of the Civil Rules of Practice. Next, another fact of which the lower Court has lost sight, is that the claims of all of these defendants have been subjected to objection in the plaint on general and similar grounds. In paragraph 7, there is the allegation that the first defendant, the father, has ruined himself in immoral ways by concubines and the use of intoxicants and for that purpose he has been wrongfully wasting the family properties. In paragraph 8, it is alleged that some of the alienations are fraudulent transactions brought about by the first defendant in collusion with defendants Nos. 3 to 18, who are his intimate friends in connexion with his immoral acts. And in paragraph 8 (*a*), reference is made to decrees obtained by the ninth and tenth defendants against the first defendant and by defendants Nos. 11 to 18 against the first defendant and the plaintiffs and there is an allegation that as the minor plaintiffs were not properly represented in the connected suits those decrees are fraudulent and cannot bind the said minors, and the debts claimed by the aforesaid persons are not genuine, and even if they were genuine were not contracted for family necessity or benefit but were contracted only for

SHANMUKA NADAN v. ARUNACHELAM CHETTY.

the first defendant's immoral expenses. In these circumstances, it is clear that the attack on the debts apparently due to these defendants must proceed to a large extent, if not entirely, on one basis as against all of them. We think that the lower Court ought to have considered these aspects of the case; and having considered them, we think that Order I, rule 3, is applicable and that, if the lower Court had considered them, it would have been bound to apply Order I, rule 3. We may observe that the joinder of such pleas is in our experience usual in this Presidency. Certainly, it is entailed by compliance with the Rules of Practice already referred to, and the inadvisability of a partition suit being disposed of in the absence of creditors who might reopen the whole question on the morrow of a decision that certain debts and charges were not properly charged upon the whole family estate with the result that the same question would have to be tried twice over, with results probably discordant, is recognized in *Tara Chand* v. *Reeb Ram*(1).

Two other points have been suggested on behalf of one or other of the creditors. Firstly, it is urged that the suit offends against Order II, rule 4, because it is a suit in effect for the recovery of immoveable property and no other cause of action, such as is involved in the claim for the setting aside of the seventh to eighteenth defendants' decrees as collusive, should be joined with it. One possible answer is that these are claims in which the reliefs sought are based on the same cause of action and another possible answer is that in case the leave of the Court is asked for, as the wording of the rule implies that it can be asked for, that leave may be given. The other point taken was that the relief, consisting in

(1) (1866) 3 M.H.C.R., 177.

the setting aside of decrees of Court, could not be asked for in the present suit, which was filed in the Court of the Subordinate Judge of Rāmnād, because one at least of these decrees was obtained in the Tinnevelly District Court, and in any case that decree could be set aside on the ground of fraud only by the Court in which it was passed. This was not considered or apparently put forward in the lower Court and it may be necessary for the lower Court to deal with it, after framing a proper issue on it. We do not wish to anticipate the conclusion which the lower Court may come to, and we will only point out that in some cases at least the defendants concerned have attached property within the jurisdiction of the Rāmnād Subordinate Judge's Court and it may be a question whether that Court will not in the circumstances be entitled to deal with the present claim in respect of the decrees under which those attachments have been made.

The result is that in the exercise of our powers of Revision we set aside the lower Court's order and direct it to proceed with the trial of the suit with defendants Nos. 7 to 18 as parties. Costs in this Court will be costs in the cause, and will be provided for in the decree to be passed by the lower Court. The costs will be calculated only on the scale appropriate to a Revision Petition.

K.R.