C.R.P. No. 2 of 1921.

PRESIDENT OF THE DISTRICT BOARD, SOUTH KANARA v. GOPALA KRISHNA BHATTA.

SCHWABE, C.J.—This Civil Revision is on the same matter just disposed of (Second Appeal No. 1 of 1921). It is suggested that the Court that heard the case had no jurisdiction by reason of section 6 of the Tolls Act XXI of 1901. By that section provisions are made for compensation to certain persons who sustain loss by reason of that Act. It is argued that loss had been sustained by the present respondent by reason of that Act. It is not at all so. Even if it were so, that section does not in my judgment exclude the jurisdiction of the Small Cause Court to hear cases such as this.

It is further suggested that this action did not lie because it was against the President and not against the District Board itself. That is not a question, as I understand it, going to the jurisdiction, and I see no ground for interfering in this case on revision.

This Civil Revision Petition will be dismissed. There will be no costs.

ODGERS, J.—I agree.

ODGERS, J.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

DHARMARAJA (2ND DEFENDANT), APPELLANT,

v.

PETHU RAJA AND THREE OTHERS (PLAINTIFF AND DEFENDANTS 1, 6 AND 7), RESPONDENTS.*

1923 March 16

Practice—Appeal—Withdrawal of suit in appellate Court as against appellant alone—Withdrawal in appeal discretionary with Court—O. XXIII, r. 1, Civil Procedure Code.

There is no provision of law allowing a respondent in an appeal to withdraw as of right his suit as against the appellant.

* Second Appeal No. 553 of 1921.

DHARMARAJA v. PETHU RAJA.

It is discretionary with the appellate court to allow such a withdrawal and a Court of Appeal cannot allow a respondent to withdraw his suit as against the appellant alone when the result of such allowance will be to prejudice the appellant and other respondents who have not appealed; the proper course in such a case is to hear the appeal on the merits.

SECOND APPEAL against the decree of P. S. SITARAMA AYYAR, Additional Subordinate Judge of Rāmnād at Madura in Appeal Suit No. 29 of 1919 preferred against the decree of A. SESHAGIRI RAO, Additional District Munsif of Srivilliputtur, in Original Suit No. 257 of 1917.

The facts are given in the judgment.

T.R. Venkatarama Sastri (with *A. Swaminatha Ayyar*) for appellant.

Government Pleader (*C. V. Ananthakrishna Ayyar*) (with *A. S. Visvanatha Ayyar*) for respondents.

The JUDGMENT of the Court was delivered by

AYLING, J.

AYLING, J.—This dispute which has given rise to the present litigation is in connexion with a channel which is claimed by the appellants to be a poramboke channel feeding the Karisalkulam tank which irrigates their lands, but which the respondents, who were plaintiffs in the first Court, claim to be a portion of their patta lands and to have no connexion at all with Karisalkulam tank. The suits were brought to establish the rights of the plaintiffs in the channel and to prevent interference by Government, who are impleaded under the designation of the Secretary of State as the first defendant as well as by the other defendants, who are pattadars holding lands irrigated by the Karisalkulam tank. In the first Court, the plaintiffs were successful and were granted the reliefs prayed for by them. Government did not appeal, holding, as is now explained by the learned Government Pleader, that their interests were not sufficiently involved in the matter to make it worth their while to

contest the decrees of the first Court in appeal. The defendants however did appeal. When the appeals came on for hearing, the plaintiffs-respondents claimed that they were entitled as of right to withdraw their suits as against the present defendants-appellants, and to content themselves with the decrees against Government, who have not appealed. The learned Subordinate Judge accepted this plea and allowed the suits to be withdrawn and dismissed as against the present defendants-appellants and the decrees against the Secretary of State were confirmed.

It is now contended on behalf of the appellants that the Subordinate Judge was wrong and that the plaintiffs could not claim as of right to be allowed to withdraw their suits at the stage which the litigation had reached, that they were prejudiced by the decrees of the first Court, even supposing the latter to be confined to a decree against Government, and that their appeals should have been heard and decided on their merits. We think these contentions are justified. The provision of law relied on by the plaintiffs-respondents is Order XXIII, rule (1) of the Code of Civil Procedure, which provides for the withdrawal of a suit by a plaintiff and abandonment of part of his claim. This the rule gives as a matter of right and it is not disputed that a similar privilege is inherent in an appellant as regards his appeal; but we have not been referred to any ruling or provision of law which would extend this privilege to a plaintiff-respondent, nor can we see any reason why when the litigation has reached the stage of an appeal the respondent should be allowed the right to defeat the appeal and prevent its being heard by the simple process of withdrawing his suit as against the appellant. It may of course be argued that, although this is not a right of the appellant, nevertheless it is in the discretion

DHARMARAJA v. PETHU RAJA. AYLING, J.

of the Court to allow him to do so, but that will depend on considerations which, we think, have not been appreciated by the Lower Appellate Court. The Lower Appellate Court has held that the appellants in these cases have no right of appeal because they are not prejudicially affected by the decrees in so far as they are decrees against Government. We do not think this is so. The defendants represented themselves as holders of lands under a Government tank and the irrigation of their lands as depending on the supply of water allowed to them by Government. The effect of the decrees is to declare that a certain channel claimed by them as a supply channel to the Government tank is not such a supply channel and to prevent Government from using it as such and exercising its paramount right of distributing the water-supply therefrom. We think that they clearly are materially prejudiced by the decrees against Government and that they should have a right of appeal against them. This is in accordance with the decision in *Sivasailam Iyer* v. *Ramakrishna Iyer*(1). It has been argued on behalf of the respondents that this is not so, because the appellant's rights have been negatived by the decision of this Court in another litigation terminating in Second Appeal No. 1198 of 1913. To what extent the decision in that appeal is conclusive of the rights of the parties in the present cases is a matter for argument: but, it is a question which must be decided in the course of the hearing of these appeals. We are most anxious to express no opinion on a point which would have to be determined by the Lower Appellate Court, but it is argued on behalf of the appellants that the points for decision in that case are not identical with those which may arise for consideration in these cases and in effect that the

(1) (1914) M.W.N., 788.

rights claimed by the plaintiffs in that case were more extensive than those which are prejudicially affected by the decrees in these cases. This is a point which we must leave to the Lower Appellate Court to determine.

The decrees of the Lower Appellate Court must therefore be set aside and the appeals remanded to the Lower Appellate Court for rehearing and disposal on their merits. The plaintiffs—respondents will pay the defendants—appellants their costs in this Court. The costs of Government in this Court will be provided for in the final decrees. The Court-fee paid on the present appeals will be refunded to the appellants.

N. R.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Venkatasubba Rao.

1923, March 21.

RAMASAMI AIYAR AND OTHERS (DEFENDANTS), APPELLANTS,

v.

A. S. VENKATARAMA AYYAR (PLAINTIFF), RESPONDENT.*

Hindu Law—Coparcener—Alienation of an item of joint family property without necessity—Suit by surviving coparcener against alienee—Right of alienee to enforce partition in such suit—Whether a separate suit by alienee necessary—Property sold less in value than share of alienor in all the family property—Right of alienee to be allotted such item from his alienor's share—Equity—Right of other members.

Where a member of a joint Hindu family sued to recover a certain item of family property alienated by another member on the ground that the alienation was not binding on him, and it appeared that the plaintiff was the only surviving coparcener and that the value of the property alienated was less than that

* Appeal Suit No. 14 of 1922.