

1930  
 SHIAM LAL  
 v.  
 NAND RAM.

he thereby binds the court and at the same time protects himself against a fine for bringing a false and frivolous or vexatious accusation. The criterion is in my opinion to be the form of the proceedings, i.e., whether they were conducted under chapter XVIII or chapter XXI, but it is frequently difficult to decide under which chapter the proceedings were conducted, because, as I have already remarked, there is very little difference at any rate in the stages before the charge is drawn. In the present case it must be allowed that there are indications that the Magistrate, although he caused summonses to be issued under section 307 believed himself to be conducting a trial and not an inquiry, and that he took no particular notice of the complainant's allegation that there had been an offence under section 307 of the Indian Penal Code. The law however is not quite clear on the point, and the learned Sessions Judge was certainly following authority in allowing the appeal. In these circumstances I do not think that I should be justified in interfering in revision with the order, and I must therefore dismiss the application.

### REVISIONAL CIVIL.

1930  
 December,  
 16.

*Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Sen.*

SHER ALI (PLAINTIFF) *v* JAGMOHAN RAM AND ANOTHER  
 (DEFENDANTS)\*

*Civil Procedure Code, order I, rule 10 (2)—Order striking out the name of a defendant—Whether amounts to a decree—Appeal—Revision—Civil Procedure Code, section 115—Other remedy available—Revision refused.*

In a suit for damages for malicious prosecution against two defendants the court, after considering the pleadings, written and verbal, was of opinion that the plaint did not disclose any cause of action against the second defendant.

\*Civil Revision No. 318 of 1930.

He passed an order under order I, rule 10(2), of the Civil Procedure Code that the name of the second defendant be struck off the plaint and that he should get his costs from the plaintiff. The plaintiff went up in revision against this order.  
*Held—*

1930

---

 SHER ALI  
 v.  
 JAGMOHAN  
 RAM.

Where a cause of action against a defendant has been specifically pleaded and a distinct relief has been claimed against him, an order under order I, rule 10(2), of the Civil Procedure Code, directing the removal of his name from the array of parties is in substance, although not in form, a decree, and is open to appeal as such : because the effect of the order is the refusal to grant the relief to the plaintiff which he had prayed for against him.

The right to file a civil revision under section 115 is dependent upon the fulfilment of the condition that no other remedy by suit, by application or by appeal is available to the applicant. As the applicant did not pursue the right remedy, namely appeal to the lower appellate court, he could not be permitted to invoke the special and extraordinary remedy afforded by the exercise of revisional powers.

*Dr. M. Wali-ullah and Nizam-uddin Ahmad Siddiqui*, for the applicant.

*Mr. U. S. Bajpai*, for the opposite parties.

MEARS, C. J., and SEN, J. :—This is an application for revision of an order passed by the City Munsif of Azamgarh on the 12th of March, 1930, directing that the name of Babu Janki Nath Sahai be struck off the plaint under order I, rule 10, clause (2), of the Code of Civil Procedure.

The applicant had instituted a suit for damages for malicious prosecution against two defendants, viz. Jagmohan Ram, the complainant, and Babu Janki Nath Sahai, the trying Magistrate, upon allegations which appear to us to be somewhat curious.

Jagmohan Ram, defendant No. 1, and Sher Ali plaintiff are residents of Baragaon, a village within the jurisdiction of the Sub-Divisional Magistrate of Ghosi. On the 12th of October, 1928, Jagmohan Ram

1930

SHER ALI  
v.  
JAGMOHAN  
RAM.

lodge a complaint against Sher Ali, the plaintiff, Ziauddin, his father, Alimuddin, and Barhu Bhar in the court of Babu Janki Nath Sahai, who was the Sub-Divisional Magistrate of Ghosi, under sections 447 and 323 of the Indian Penal Code. During the pendency of the complaint, Babu Janki Nath Sahai was transferred from Tahsil Ghosi and was put in charge of Tahsil Sagri in the same district. On the application of the complainant, the District Magistrate transferred the case to Babu Janki Nath Sahai presumably upon the ground that he had heard the case in part. Upon a consideration of the evidence Babu Janki Nath Sahai discharged Barhu and Alimuddin. It is not known if the case proceeded against Ziauddin at all or what orders were passed about him. It is not improbable that Ziauddin might not have appeared before the Pargana Officer because of his alleged illness. The Magistrate convicted the plaintiff Sher Ali on the 15th of January, 1929, and sentenced him to six weeks' rigorous imprisonment and a fine of Rs. 50 and further ordered that in default of payment of fine, Sher Ali was to be imprisoned for a further period of six weeks. The Magistrate also ordered that Sher Ali should pay to Jagmohan Ram complainant and to Barhu and Alimuddin the sums of Rs. 20, Rs. 10 and Rs. 10 as court fee, process fee and compensation respectively.

On appeal by Sher Ali, the learned Sessions Judge reversed the conviction and sentence on the 28th of February, 1929, and directed his acquittal on the ground that the charge under section 451 of the Indian Penal Code had not been proved.

The present suit for malicious prosecution was commenced by the plaintiff on the 12th of February, 1930, against the two defendants and the relief claimed was in the following terms:—"That a decree may be passed in favour of the plaintiff and against the *defendants* for the recovery of Rs. 1,000 as detailed on

account of the expenses incurred by the plaintiff in the criminal case, for loss in business and for physical and mental suffering."

Plaintiff describes the defendant No. 1 as a highly litigious person and a great mischief monger who bears a bitter *animus* against the Mussalmans in general and against the plaintiff in particular. Defendant No. 2 is also a hater of Mussalmans, whose tenure of office as Sub-Divisional Officer of Ghosi was characterised by a policy which was distinctly anti-Muslim. The plaintiff avers that the complaint dated the 12th of October, 1928, was instigated and inspired by the defendant No. 2, who during the progress of the trial harassed and persecuted the plaintiff in a variety of ways, the details of which are set out in the plaint.

The allegations in the plaint were supplemented and developed by further statements recorded under order X, rule 2 of the Code of Civil Procedure.

[Certain facts and details, not material to this report, have been omitted.]

It is not within our province to go into the merits of these allegations.

It is clear from the plaint that the suit instituted by Sher Ali is not under section 79 of the Code of Civil Procedure against the Government or against the Secretary of State for India in Council. It is not clear whether the defendant No. 2 was being sued as a public officer in respect of any act purporting to be done by him in his official capacity and as to whether the provision of section 80 of the Civil Procedure Code was complied with. We are inclined to think that the suit was not intended to be filed against the defendant for acts purporting to be done in his official capacity.

The Local Government undertook to defend the suit on behalf of the defendant No. 2. It is curious

1980

---

SHER ALI  
v.  
JAGMOHAN,  
RAM.

1930

SHER ALI  
v.  
JAGMOHAN  
RAM.

however that no written statement was filed by the defendant No. 2 personally, or on his behalf by a duly constituted agent. A written statement on behalf of defendant No. 2 was filed by Mr. V. Mehta, Collector of Azamgarh. The document was verified by "V. Mehta, Collector Azamgarh" on the 11th of March, 1930. We are of opinion that this procedure was not regular. It is not sanctioned by the Code of Civil Procedure. No rule having the force of law has been brought to our notice to justify this procedure and we are aware of none. As, however, the learned Judge took no exception to this irregularity nor did the plaintiff, we think that we should not remit the case for the irregularity to be cured but should decide the case on the record as it has come to us.

One of the pleas taken in the written statement was to the following effect:—"The acts of the defendant on which the plaintiff has based this claim were done or ordered to be done by him as a Magistrate acting judicially in discharge of his judicial duty within the limits of his jurisdiction; and the defendant at the time in good faith believed himself to have jurisdiction to do and order the acts complained of. The defendant is therefore protected from any liability to the plaintiff by the Judicial Officers' Protection Act, 1850". The Government Pleader appears to have pleaded in demurrer that on the facts alleged, no cause of action had accrued against the defendant No. 2 and that the latter was protected by Act XVIII of 1850.

On the 12th of March, 1930, the learned Munsif took up this preliminary issue. He held in view of the pleadings (written and verbal) that the complaint had not been filed at the instigation or with the connivance of defendant No. 2 and the plaint did not disclose any cause of action against him. He therefore ordered as follows:—"I therefore order under order I, rule 10, clause (2) that the name of the defendant

No. 2 be struck off the plaint and that the register be amended accordingly. The defendant No. 2 is to get his costs if he has incurred any". A formal order was drawn up which directed that the plaintiff do pay to defendant No. 2 the sum of Rs. 51, the amount of costs incurred by him on account of this application.

Sher Ali has filed a revision to this Court from the aforesaid order. We do not propose going into the question whether the order in question *on the merits* fulfils the requirements of section 115 of the Code of Civil Procedure.

The right to file a civil revision under section 115 is dependent upon the fulfilment of the condition that no other remedy by suit, by application or by appeal is available to the applicant. It is a recognized rule of procedure that the special and extraordinary remedy by invoking the revisional powers of this Court should not be exercised unless as a last resource for an aggrieved litigant: *Sundar Das v. Mansa Ram* (1), *Shiva Nathaji v. Joma Kashinath* (2), *Sheo Prasad Singh v. Kastura Kuar* (3), *Gopal Das v. Alaf Khan* (4), and *J. J. Guise v. Jaisraj* (5).

If the order dated the 12th of March, 1930, was in effect and substance a decree in favour of defendant No. 2 and against the plaintiff, the remedy of the plaintiff was by an appeal to the District Judge of Azamgarh within the time provided by law. The application for revision appears to have been presented to this Court on the 26th of May, 1930, when the period for filing an appeal to the District Judge had already expired.

Order I, rule 10, clause (2), of the Code of Civil Procedure provides that the court may at any stage of the proceedings order that the name of any party

(1) (1884) I.L.R., 7 All., 407.

(2) (1883) I.L.R., 7 Bom., 341.

(3) (1887) I.L.R., 10 All., 119.

(4) (1889) I.L.R., 11 All., 338.

(5) (1893) I.L.R., 15 All., 405.

1930

SHER ALI  
v.  
JAGMOHAN  
RAM.

improperly joined, whether as plaintiff or defendant, be struck out. An order striking out the name of a party is not necessarily a decree. Where the plaintiff had impleaded a person merely upon the ground of convenience and the plaint discloses no cause of action against him and the plaintiff has claimed no relief against him, the order of the court directing the removal of the name of such a defendant does not operate as a decree, for, it has not the effect of an adjudication, and the integrity of the original claim remains unbroken. Where however a cause of action against a defendant has been specifically pleaded and a distinct relief has been claimed against him, the order directing the removal of his name from the array of parties is in substance, although not in form, a decree; because the effect of the order is the refusal to grant the relief to the plaintiff which he had prayed for against him. The defendant No. 2 was not impleaded only for the sake of convenience. The plaintiff had sued him because of an alleged cause of action against him and the plaintiff had prayed for a decree against him for Rs. 1,000 as damages. The effect of the order passed by the Munsif is the virtual dismissal of the suit against him and the latter has been awarded his costs from the plaintiff. We are clearly of opinion that the order sought to be revised was in substance a decree and was open to appeal as such.

In *Rama Rao v. Raja of Pittapur* (1), it was held that an order in a suit striking out from the array of parties a defendant as an unnecessary party under order I, rule 10, clause (2) and thus dismissing the suit against him was in effect a decree and was appealable as such. *Seshagiri Ayyar*, J., is reported to have said as follows at page 225: "In a way, the conclusion of the Subordinate Judge may be said to come within order I, rule 10. But what we have to

(1) (1918) I.L.R., 42 Mad., 219.

1930

---

 SHEER ALI  
 v.  
 JAGMOHAN  
 RAM.

see is the substance of the order and not the form of it. In his order the Subordinate Judge examines the right of the plaintiffs to bring a suit like the present one and concludes, having regard to certain authorities which he has quoted, that such a suit would not lie. In my opinion this is an adjudication determining the rights of the plaintiffs to bring a suit of this nature; and his order is a 'decree' as defined in section 2, clause (2), of the Code of Civil Procedure.

... I am disposed to agree with Mr. C. P. Ramaswami Ayyar who appeared for the appellants that unless the removal of the plaintiff or defendants leaves the suit intact, order I, rule 10, clause (2) cannot apply'.

It may be conceded that technically speaking the proper form of the order in the present case ought to have been the dismissal of the claim against the defendant No. 2 and not merely the striking off of his name. It is patent however that the effect of the order is the dismissal of the claim and that fact is emphasised by the order that the plaintiff is to bear the costs of defendant No. 2. The decision of *Rama Rao v. Raja of Pittapur* was followed by DAS and ROSE, JJ., in *Ramji Pandey v. Alaf Khan* (1), who held that where in a suit for partition, on the application of the plaintiff an order was passed dismissing two persons, viz. Bichan and Ritubhajan, from the suit and striking out their names under order I, rule 10, that order must be looked upon as a decree, as it amounted to a refusal to adjudicate upon the claim of these two persons.

In *Ayya Mudali Velan v. Veerayee* (2) it was held that a refusal to implead a person as a legal representative of a deceased plaintiff, on the ground that the cause of action did not survive, was a decree, because it had the effect of finally depriving the person refused

(1) (1924) I.L.R., 3 Pat., 859.

(2) (1920) I.L.R., 43 Mad., 812.



1930  
 SHER ALI  
 v.  
 JAGMOHAN  
 RAM.

of all his rights in the suit and practically putting an end to the litigation altogether. The principle underlying this decision is clearly in accord with the cases already referred to.

The following three cases have been cited on behalf of the applicant in support of his contention that the order in question was not a decree and therefore not appealable as such: *Shanmuka Nadan v. Arunachalam Chetty* (1), *Linga Aiyar v. Lakshmanan Chettiar* (2), and *Ratnachalam Iyer v. Sivachidambaram Pillai* (3). The first and the third cases are distinguishable; the second is irrelevant. In the first mentioned case the suit was one for partition brought by four minor sons against their father. The defendants Nos. 7 to 18 were 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. On the objections of the defendants, the names of defendants Nos. 7 to 18 were struck out as being improperly joined. "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. . . 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". It does not appear from the report that any relief had been claimed against the defendants Nos. 7 to 18. If the plaintiffs had asked for no relief against them and the defendants were impleaded simply for the sake of convenience, the view

(1) (1921) I. L.R., 45 Mad., 194. (2) A.I.R., 1926 Mad., 687.

(3) A.I.R., 1923 Mad., 690.

taken in this case was justified. It is in this sense that the case was understood in *Ratnachalam's* case (1) and we also understand it in that sense.

In *Linga Aiyar's* case (2), the plaintiff had sued to recover certain money due from the widow of Subharapa Aiyar and his brother. The District Munsif directed that the name of the brother be struck off: "By consent I strike off the second defendant's name. Plaintiff will pay by consent half of his costs". The only point which was in issue in second appeal was whether the second defendant was to be considered to be still a party to the suit under section 47 of the Code of Civil Procedure, in spite of his name having been struck off. It was held that in spite of his name being struck off, the brother continued to be a party to the suit within the meaning of section 47, Explanation. There was no issue nor any decision on the point whether the order operated as a decree under section 2(2) of the Code.

*Ratnachalam's* case (1) was an application for revision under section 115 of the Code of Civil Procedure and 107 of the Government of India Act, and arose out of a suit for possession, partition and mesne profits. There was a large array of defendants. Defendants Nos. 43 to 99 were tenants at will, who with the consent of the heads of the Chetties were joined as parties in order that possession may be given to the plaintiff. The plaintiff had asked for no relief against them and they were impleaded only for convenience. No substantial right had been determined between the plaintiff on one side and these defendants on the other and the effect of deleting their names did not operate to terminate the litigation altogether. Upon these grounds it was held that the matter did not fall within the principle of the cases reported in I. L. R., 42 Mad., 219 and I. L. R., 43 Mad., 812.

1930

---

 SHEER ALI  
 v.  
 JAGMOHAM  
 RAM.

(1) A.I.R., 1923 Mad., 690.

(2) A.I.R., 1926 Mad., 687.

1930

SHER ALI  
v.  
JAGMOHAN  
RAM.

We are in complete accord with the view expressed at pages 691 and 692 of the report and with the reasons set out there.

Both upon principle and authorities, we have no doubt that the order in controversy was in substance a decree as defined in the Code of Civil Procedure and was appealable as such.

As the applicant did not pursue the right remedy, he cannot be permitted to come up to this Court in revision and challenge the order under section 115 of the Code of Civil Procedure. We dismiss this application with costs.

### APPELLATE CIVIL.

*Before Mr. Justice Banerji and Mr. Justice King.*

1930  
December,  
16.

MOHAN LAL (APPLICANT) v. MADHAVA PRASAD AND OTHERS (OPPOSITE PARTIES)\*

*Provincial Insolvency Act (V of 1920), section 35—Annulment of adjudication—Grounds on which an annulment order can be passed.*

The only grounds upon which an adjudication of insolvency can be annulled are those mentioned in section 35 of the Provincial Insolvency Act, and the court has no jurisdiction to annul the adjudication of an insolvent on the ground that he was dishonest in his dealings, that he was entering recklessly into transactions and incurring debts which he never hoped to repay, that he had destroyed his account books, and that he showed certain debts as due to him although he had already realised them, as none of these facts would have furnished a ground for dismissing the insolvency petition.

Mr. K. Verma, for the appellant.

Mr. Gadadhar Prasad, for the respondents.

BANERJI and KING, JJ. :—This is an appeal against an order passed by the learned District Judge of Benares on the 25th of October, 1929, annulling an order of adjudication passed in respect of one Mohan Lal under the Provincial Insolvency Act, 1920.

\*First Appeal No. 28 of 1930, from an order of Harish Chandra, District Judge of Benares, dated the 25th of October, 1929.