APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

VA'SUDEV BA'LKRISHNA, (ORIGINAL PLAINTIFF), APPELLANT, *v.* SA'LUBA'I, WIDOW OF SA'KHO BALLA'L, AND ANOTHER, (ORIGINAL DEFENDANTS), RESPONDENTS.*

1885. *September* 7.

Appeal—Appellant—Addition of party—Civil Procedure Code (Act XIV of 1882), Secs. 32 and 582.

There is no power in the Code of Civil Procedure (Act XIV of 1882) to make a party to the suit a co-appellant. Sections 32 and 582 of the Code give to an Appellate Court power only to strike out the name of a party, or to direct new parties to be added to the suit, whether as plaintiffs or defendants.

THIS was a second appeal from the decision of E. H. Moscardi, Assistant Judge of Thána, reversing, on remand, the decree of the Subordinate Judge of Pen.

The plaintiff sued the respondents, Sálubái and her adopted son, Krishnáráv Sakhárám, upon a mortgage executed by the former alone on the 7th of December, 1865.

Sálubái denied the execution of the mortgage bond. Krishnáráv did not appear.

The Subordinate Judge found the bond proved, and allowed the plaintiff's claim.

Sálubái alone appealed at first, and Krishnáráv afterwards applied to the District Court to join him as a co-appellant, and his application was granted. At the hearing of the appeal, Mr. C. E. G. Crawford, the Assistant Judge, was of opinion that Krishnáráv ought not to have been joined as co-appellant, and found the mortgage not proved, and that Sálubái had no authority to execute it. He rejected the plaintiff's claim.

In second appeal the decree of the Assistant Judge was reversed, and the cause remanded for a new trial.

On retrial by Mr. E. H. Moscardi he agreed with Mr. Crawford that Krishnáráv should not have been joined as co-appellant, but held that the mortgage bond was proved. He, however, went into the question as to whether it was executed under legal necessity, and he held that it was not, and that, therefore, no one

* Second Appeal, No. 41 of 1884.

1885.

VÁSUDEV BÁLKRISHNA v. SÁLUBÁI.

was bound by it, except the widow, Sálubái. He also, therefore, rejected the plaintiff's claim.

The plaintiff appealed to the High Court.

Mánekshá Jehángirshá Táleyárkhan for the appellant:—Both Mr. Crawford and Mr. Moscardi held that Krishnáráv should not have been joined as a co-appellant with Sálubái. Mr. Moscardi having held that the mortgage bond was executed by Sálubái, he ought to have at once awarded the claim, for she could not say she was not authorized to execute it. He ought to have disregarded the existence of Krishnáráv as a co-appellant, and not to have gone into any question as to the legal necessity, which he alone could properly raise.

Vishnu Krishna Bhátvadekar for the respondents:—Krishnáráv was rightly made an appellant—*Ranjit Singh* v. *Sheo Prasád Rám*(1). The plaintiff could not succeed on the strength of an alienation by a Hindu widow, unless he proved that the alienation was made for the purposes which the Hindu law recognized as necessary—*The Collector of Masulipatam* v. *Cavaly Venkata Narainapah*(2); *Dhondo Rámchandra* v. *Bálkrishna Govind Nágvekar*(3).

SARGENT, C. J.:—This was a suit by a mortgagee on a bond passed by the first defendant, Sálubái, widow of one Sákho Ballál, against the mortgagor and the second defendant, who is a son adopted by the widow subsequent to the date of the mortgage. The second defendant did not appear or defend the suit at the hearing. The Subordinate Judge found the bond proved; and as no evidence was given to show that the widow had not authority to mortgage the land, he passed judgment in September, 1878, for the plaintiff.

Defendant No. 1 appealed in January, 1879, and the second defendant applied to be joined as appellant on 10th February, 1879, which application was granted by the District Judge. This decree was reversed by the Assistant Judge, Mr. Crawford, on the ground that the bond was not proved; but, on special

(1) I. L. R., 2 All., 487. (2) 8 Moo. I. Ap., 529.
(3) I. L. R., 3 Bom., 100.

appeal to this Court, the case was sent back for retrial, in order that the plaintiff's books might be taken into consideration in determining as to the execution of the bond. The Assistant Judge ultimately found the mortgage-bond, sued on, proved, and also that the defendant No. 2 could not be joined as co-appellant, and remanded the case to have three issues proved:—the first, as to the source from which the mortgage property came to the widow; second, whether the widow mortgaged for a lawful purpose, supposing the land to have been her husband's; third, whether defendant No. 2 had been adopted by her or her husband previously to the execution of the bond. No further evidence was given before the Subordinate Judge, and he found that the land was acquired by inheritance from her husband, and also the other two issues in the negative. The Assistant Judge, on the case being returned, found that the mortgage was executed without lawful necessity, and reversed the decree of the Subordinate Judge, and rejected the plaintiff's claim.

We agree with both the Assistant Judges, that there is no power in the Code to make a party to the suit a co-appellant. The power given to the appeal Court, by combining sections 32 and 582 of the Code of Civil Procedure (Act XIV of 1882), would be to strike out the name of a party, or to direct new parties to be added to the suit, whether as plaintiffs or defendants. Where the words "plaintiff," "defendant" and "suit" are intended, as in Chapter XXI, to include "appellant," "respondent" and "appeal," the Code expressly provides for it. But if the second defendant was improperly made a co-appellant, as the widow herself could not take the objection that her own mortgage-deed was passed without authority, the result of the appeal by the widow alone rested entirely upon the question whether the deed was proved, and that having been found in the affirmative, the Assistant Judge should have confirmed the decree of the Subordinate Judge.

Decree reversed and decree of Subordinate Judge restored. Plaintiff's costs in this Court and the lower Appellate Court to be paid by the first defendant. The second defendant to pay his own costs in the two appeal Courts.