APPELLATE JURISDICTION (a)

Referred Case No. 37 *of* 1867.

KATTAPERUMÁL PILLAI.

versus

PANCHANADAM PILLAI.

Plaintiff sued for Rs. 31-2-3½, money paid for the use of defendant his undivided brother. The defence was that plaintiff held family property, defendant's share of which exceeded in value the debt sued for, as also the amount for which a suit would lie before a Munsif under Act IV of 1863.

Held that, provided it was proved in evidence that the money was paid out of plaintiff's self-acquired property, the suit was cognizable by the Munsif under Act IV of 1863.

Held also, that the share of the defendant being both in nature and amount beyond the District Munsif's Small Cause jurisdiction, it was not available as a defence, even if it formed a fit object of set off.

1867. *November* 13. *R. C. No.* 37 *of* 1867.

THIS was a case referred for the opinion of the High Court by R. Vassudeva Ráu, the District Munsif of Mannargudi, in Suit No. 431 of 1867.

The Suit was brought for Rs. 31-2-3½, defendant's alleged share of the amount of the decree in a former suit in the same Court. It appeared that plaintiff and defendant were brothers, who became jointly indebted to one R. in the sum of Rs. 42-2-11, for which R. sued and got judgment. The plaintiff paid the full amount of the debt, and in this suit sued for the amount paid by him on account of defendant.

Defendant pleaded—1st, non-division, therefore no right to sue without claiming a share of the family property. 2nd, No jurisdiction, under cl. 2, sec. 6, Act XI of 1865, 3rd, Set-off, in that plaintiff possessed paternal personal property of the value of Rs. 450, to a share of which defendant is entitled, the same being a question which must necessarily be decided before pronouncing as to whether the plaintiff is entitled to recover the amount sued for, which question the Court has no jurisdiction to try because the amount exceeds the pecuniary jurisdiction, and because the same is part of a share under an intestacy.

The fact of non-division was admitted.

The Munsif referred the question.—"Whether a District Munsif invested with Small Cause jurisdiction under Madras Act IV of 1863, can try a suit for Rs. 31-2-3½ between undivided brothers, under the circumstances above described."

No Counsel were instructed.

(a) Present : Scotland, C. J. and Holloway, J.

1867.
November 13.
R. C. No. 37 *of* 1867.

The Court delivered the following

JUDGMENT :—The legal relation of coparceners does not preclude individual liability 'interse,' and the present suit appears to be for the portion of the loan received by the defendant for his separate use, on the joint security of himself and his undivided brother. The suit therefore was cognizable by the District Munsif under Madras Act IV of 1863, and the point for consideration is the effect of the defence put forward.

In substance it is that the plaintiff held joint family property, the defendant's share of which far exceeded in value the debt sued for, and the plaintiff could only reimburse himself by a credit in account in a suit for a division, and that such suit was not within the Small Cause jurisdiction of the District Munsif.

The statement as to the possession of the family property and the value of defendant's share appears to be true. But there is nothing stated in the case as to the fund from which the plaintiff paid the judgment-debt. The prima-facie presumption is that it was paid out of the joint family means, and if this is not rebutted by evidence, we are of opinion that the plaintiff had no separate cause of action for the defendant's portion of the judgment-debt. He can only claim it as a payment on account of the defendant out of the joint property. On this view of the case the suit is not maintainable.

But if the payment is proved to have been made out of the plaintiff's self-acquired means, then the defence amounts simply to a set-off of the undivided share—that is, a claim to recover by way of defence what would otherwise be a good cause of action against the plaintiff, and if a suit for the claim could not have been maintained on the Small Cause side of the District Munsif's Court, neither can the set-off.

Now assuming the share to be an admissible object of set-off to the plaintiff's claim (as to which it is unnecessary to give our opinion) it was both in nature and amount beyond the District Munsif's Small Cause jurisdiction, and consequently not available as a defence any more than as a cause of suit. We, are therefore, on this view of the case of opinion that the District Munsif had jurisdiction to determine the Suit under Madras Act IV of 1863.

Referred Case No. 5 of 1867.

A suit cannot be maintained for costs incurred by the plaintiff in resisting a claim made by the defendant under Section 246 of the Code of Civil Procedure, the greater part of which was disallowed.

It is only when the costs are made a part of the order, and then by execution under it, that a party can in such cases enforce the payment of costs.

1867. *April* 1. *R. C. No.* 5 *of* 1867.

THIS was a case referred for the opinion of the High-Court by A. Tiruvengada Pillay, the Officiating District Munsif of Palmanair, in the Zillah of Chittoor, in Suit 197 of 1866.

From the facts stated it appeared that the plaintiff was a decree-holder in a suit instituted in the District of Cuddapah, and, in execution of the decree, caused certain moveable and immoveable property of the judgment-debtor to be attached. The defendant preferred a claim to the property as a purchaser.

Upon an investigation of the defendant's claim the Court found that part of the property claimed was not liable to attachment and directed its release, but the claim of the defendant to the greater part of the property attached was refused. No order was made as to costs.

The plaintiff now brought a suit to recover Rupees 59, being the amount of costs alleged to have been incurred by him in his successful opposition to the claim of the defendant in respect of the greater portion of the property under attachment. The suit was brought more than a year after the order upon defendant's claim.

The question submitted to the High Court were, 1st, whether the suit was maintainable, and, if so, 2ndly, whether the suit was barred under Clause 5, Section I of Act XIV of 1859, (the Limitation Act.)

No Covnsel were instructed.

The Court delivered the following

(*a*) Present : Scotland, C. J., and Innes, J.

1867. April 1. R. C. No. 5 of 1867.

JUDGMENT:—We are of opinion that the suit is not maintainable. The consideration of the plaintiff 's right to the costs of the proceeding under Section 246, Act VIII of 1859, was an incident to the determination of the principal question and within the discretion of the Judge by whom the claim to the property in dispute was heard and determined. It is only when the costs are made a part of the order (which is not subject to appeal) and then by execution under it, that a party can in such cases enforce the payment of costs. The Judge might, on review, have extended the order to the granting of the plaintiff's costs ; but, unless included in the order, the plaintiff can have no right to them. The plaintiff therefore cannot recover in the present suit.

APPELLATE JURISDICTION (a)

Regular Appeal No. 94 *of* 1866.

CHEDAMBARAM CHETTY, and another.........*Appellants.*
(Plaintiffs.)

KARUNALYAVALANGAPULY TAVER............*Respondent*
(Defendant.)

In a suit upon a razinama, the execution of which was admitted by the defendants, which purported to create an interest in immoveable property, the Civil Judge dismissed the suit because the document had not been registered in accordance with Act XVI of 1864, Section 13.

Held (reversing the decree of the Civil Judge) that, the existence of the agreement not having been disputed, its production was not necessary, and that the plaintiff was entitled to whatever relief the effect of the plaint and answer taken together would entitle him on the admission of the defendant.

1867. June 3. R. A. No. 94 of 1866.

THIS was a regular appeal from the decree of F. S. Child, the Civil Judge of Tinnevelly, in Original Suit No. 11 of 1866.

The original suit was brought to recover Rupees 4,13,470-8-4, due on a razinama filed on the 9th of January 1865 in the Civil Court of Tinnevelly, in Original Suit No. 5 of 1864, wherein Ponnuswami Taver was plaintiff

(a) Present :—Holloway and Ellis, J.J.