

1936

Present: Dalton S.P.J. and Soertsz A.J.

KUMARIHAMY v. DISSANAYAKE *et al.*

106—D. C. Kandy, 43,639.

Party—Party added against whom no relief is claimed—Presence unnecessary—Answer filed by added party—Motion to strike off added party—Order made without jurisdiction—Civil Procedure Code, s. 18.

Where a person was added as a party to an action against whom no relief is claimed and whose presence as a party is unnecessary to settle all the questions involved in the action, any steps taken by the party after notice of the order will not disentitle him to have the order set aside on the ground that it was made without jurisdiction.

¹ (1925) *Income Tax Cases (Indian) vol. II., p. 119.*

A PPEAL from an order of the District Judge of Kandy.

H. V. Perera (with him *G. E. Chitty*), for added party, appellant.

January 15, 1936. DALTON S. P. J.—

The appellant here is a person who had been added as a party to the action, the Court purporting to act under the provisions of section 18 of the Civil Procedure Code. There is no appearance for the respondents in support of the order appealed from.

The action is brought by the plaintiff against two defendants. The first defendant is sued on a mortgage bond as mortgagor and the second defendant as purchaser from the first defendant of one of the mortgaged lands subsequent to the mortgage. The first defendant pleaded payment to one T. B. Dissanayake as agent of the plaintiff to receive payment. In his answer the second defendant pleaded that at the time of the purchase by him, the plaintiff by deed released the land purchased from the mortgage. It appears therefore to have been quite a simple and straightforward case. Issues were framed and a considerable amount of evidence was led thereon on the first day of trial, July 16, 1934, in the course of which the second defendant left his defence in the hands of the first defendant. T. B. Dissanayake was on the second defendant's list of witnesses. I am unable to find on record the first defendant's first list, but having regard to his answer, presumably Dissanayake must have been his most important witness. On a subsequent date, October 15, the first defendant moved to have T. B. Dissanayake added as a party, under the provisions of section 18 of the Civil Procedure Code. The grounds for this application set out in the motion paper are "the issues framed" and "the evidence already recorded". On that day, without any notice to the proposed added party, the plaintiff and the second defendant consenting thereto, the learned trial Judge allowed the motion, the first defendant undertaking to pay the added party's costs, if found to have been unnecessarily added. Summons was ordered to issue to the added party with a copy of plaintiff and answers filed. No attempt seems to have been made to amend the plaintiff in any way (cf. remarks of Withers J. on this point in *Wiraratne v. Ensohamy*¹), apart from the addition of the added party's name to the caption, and no amended plaintiff was filed. Even if the Court had power to make the order, the procedure followed was also quite irregular (see *Banda v. Dharmaratne*²).

Service was duly effected upon the added party on November 5. His proctor filed a proxy on November 23, empowering him "to move for and obtain time to file answer and thereafter to file my answer in the action No. 43,639 wherein I am added defendant, and to do all things necessary therein on my behalf, and generally to defend me in the same action". Before filing answer, the proctor moved on December 3, on behalf of the added party, for an order on the first defendant to produce for the inspection of the added party all receipts and other documents in his possession in proof of the payments alleged to have been made by him to the added party, before the latter filed his answer. This was

¹ 2 C. L. R. 157.

² 24 N. L. R. 210.

allowed and the record shows that the documents were produced on December 13 and handed to the added party's proctor. Thereafter on December 20 his answer was filed.

The first plea in the answer is that the order making him an added party was wrongly obtained, and that such addition was contrary to law and to the provisions of the Code, the plaintiff and replication and the first defendant's answer disclosing no cause of action against him, and no remedy being claimed as against him. This plea in the ordinary course would only come on to be disposed of at the trial, since at that stage the added party did nothing but raise it in his answer.

On March 15, 1935, the plaintiff then moved that the defendants and the added party produce documents for inspection. In reply to this motion the added party filed an affidavit on March 29, objecting to declare what documents he had relating to the action on the ground that the validity of the order adding him as a party should be first adjudicated upon. The Court then on April 8 proceeded to deal with his objection, treating his affidavit as an application for an order declaring his addition as a party to the action was contrary to law and to the provisions of the Code. On April 16 the learned Judge delivered his judgment dismissing the application. He held that the added party was a necessary party to enable the Court once and for all to decide and settle all the matters in dispute arising out of the plaintiff's claim on the bond. From that order the added party appeals.

It is clear that the appellant has not moved the Court to have the order of October 15, 1934, set aside on the grounds he alleges in his answer, within a reasonable time after knowledge of the order made against him. It is admitted, also, that after receiving notice of the order, he took at least two steps as a party to the action, namely, his motion of December 3 and his answer filed on December 20, before applying to the Court on March 29 to have his name struck off as a party. There is authority also to show that assuming the Court had power to make the order against him, it was irregular inasmuch as it was made without notice to him. If the order he complains of was only an irregular one, I should hold that in the circumstances I have set out he was not entitled to the relief he now claims.

The order of October 15, however, appears to be more than irregular. I have no difficulty in holding that, on the material before the Court, the presence of Dissanayake as a party was quite unnecessary for the purpose of enabling the Court effectually and completely to adjudicate upon and settle all the questions involved *in the action*. He was clearly on the pleadings an important witness, so far as the first defendant was concerned, but no right to any relief against him is claimed by the plaintiff in his plaint or by the defendants in their answers, and no right to any such relief is even alleged to exist in the pleadings or issues. As I have pointed out, there were in effect two simple questions of fact to be answered.

That being so, it would seem that the matter was not a question of the discretion of the learned Judge in making the order of October 15, 1934, but one of jurisdiction (see *Moser v. Marsden*¹). We were referred

¹ (1892) 1 Ch. 487.

also to the decision of this Court in *Punchirala v. Punchirala*¹. If he had no jurisdiction to make the order, the steps taken by the added party after notice of the order will not disentitle him to the relief he now seeks. On the ground therefore that the order was one made without jurisdiction, it must be set aside and the appellant's name deleted from the action as an added party. He must, however, pay the wasted costs (if any) incurred by the other parties, as a result of his delay in applying to the Court to have his name struck off as a party in the action, after November 5, 1934, up to, but not including, April 8, 1935. He must also return to the first defendant all the documents referred to in the minutes of the Court of December 6 and 12, 1934. He will pay his own costs of the inquiry of April 8, and in all the circumstances I would make no order as regards the costs of this appeal.

SOERTSZ A.J.—I agree.

Appeal allowed.

