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whatever that, in these circumstances, it would not be right to direct a retrial and afford a possible opportunity for the manufacture of perjured evidence. As regards the sentence, we are of opinion that it does not err, by any means, in the direction of severity. The offence committed was very serious. The complainant is a respectable woman, and though she occupies a humble station in life, she is entitled to the full protection of the law. The accused, on the other hand, is said to be well-connected and is a person of means and some position, but that is a good reason why he should not be treated with misplaced leniency. Unless exemplary sentences are passed in these cases, persons who are inclined to run the risk of detection in the commission of such offences are not likely to be deterred. We accordingly decline to interfere in the exercise of our revisional jurisdiction, and direct that the accused be called upon to surrender, so that he may serve out the remainder of the term of imprisonment.

E. H. M.

APPELLATE CIVIL.

Before Sanderson C. J. and Newbould J.

KALI PRASANNA SIL

v.

PANCHANAN NANDI.*

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March 17.

Jurisdiction—Leave to withdraw suit by the Appellate Court—Subsequent Suit—Res Judicata—Civil Proceaure Codes (Act XIV of 1882), s. 373 (Act V of 1908), O. XXXIII, r. 1.

The plaintiff brought a suit for the declaration of his title in respect of certain rights and for other reliefs. This suit was dismissed by the Court

* Appeal from Appellate Decree, No. 1354 of 1913, against the decree of Ashutosh Banerjee, Subordinate Judge of Burdwan, dated Sep. 12, 1912, confirming the decree of Benode Behari Mukerjee, Munsif of Kalna, dated Jan. 16, 1912.

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of first instance on the merits after the evidence had been gone into. The plaintiff, thereupon, preferred an appeal. At the hearing of the appeal he made an application for leave to withdraw from the suit under section 373 of the Code of Civil Procedure, 1882, on the grounds of a formal defect and of his inability to produce the necessary evidence in time, and obtained an order in the presence of the defendants to the effect that the appeal be dismissed with costs and the plaintiff's suit be allowed to be withdrawn with leave for fresh action for the same subject-matter, if not barred. Subsequently, the plaintiff brought a fresh suit against the same parties on the same cause of action as in the previous suit.

Held, that the ground on which the order was made by the Appellate Court was not a ground which was contemplated by section 373 of the Civil Procedure Code and that, therefore, the order was without jurisdiction.

Kharda Co., Ld. v. *Durga Charan Chandra* (1) and *Mabulla Sardar* v. *Rani Hemangini Debi* (2) referred to.

SECOND APPEAL by Kali Prasanna Sil, the plaintiff.

In 1905, Kali Prasanna Sil brought a suit against Panchanan Nandi Chowdhury and others for the declaration of his rent-free title in respect of a two-third share in certain fishery rights, for *khas* possession of the same and for *wasilat*. At the trial, this suit was contested on the merits and the Court of first instance dismissed it after hearing the evidence. The plaintiff then preferred an appeal and on the 18th May, 1906; at the hearing of the appeal, he applied under section 373 of the Code of Civil Procedure, 1882, for leave to withdraw from the suit, on the grounds that the suit must fail by reason of a formal defect and that he was unable to produce the necessary evidence in time at the trial before the Court of first instance. The Appellate Court in the presence of the defendants made the following order:—"The appeal is dismissed with costs and the plaintiff's suit allowed to be withdrawn with leave for fresh action for the same subject-matter, if not barred." On the 19th April, 1910, Kali Prasanna Sil brought the present suit

(1) (1909) 11 C. L. J. 45. (2) (1910) 11 C. L. J. 512.

against the same parties in respect of the same property and asked for the same relief as he had asked for in his previous suit. It was contended by the defendants that the order of the Appellate Court under section 373 of the Code of Civil Procedure was without jurisdiction and that, consequently, the second suit was *res judicata* by reason of the decision which was given by the Court of first instance in the previous suit. Both the Courts below dismissed the suit. The plaintiff, thereupon, appealed to the High Court.

Babu Mahendra Nath Roy (with him *Babu Jadu Nath Mandal* and *Babu Manmatha Nath Roy*), for the appellant The sole question in this case was whether or not the order of the Judge in the Court of Appeal, dated the 18th May, 1906, was made without jurisdiction. It could not be urged that a formal defect had been proved before the Appellate Court, entitling the plaintiff to the benefit of section 373 of the Civil Procedure Code, 1882. The only ground upon which the plaintiff now relied in support of the order was his inability to produce the necessary evidence in time at the trial before the Court of first instance. It was settled law that the power given under section 373, which corresponded with O. XXIII, r. 1 of the new Code, could be exercised by an original as well as by an Appellate Court. This order was made in the presence of both parties. It might have been appealed against or corrected in revision, if the defendants thought that it was not a proper order and had been wrongly made. But as no steps had been taken to set it aside, this order must be held to have been accepted by the parties and to have become final and binding upon them: *Rajib Sarkhel* v. *Rajah Nil Monee Singh Deo* (1), *Chhajjua* v. *Khyali Ram* (2).

(1) (1873) 20 W. R. 440. (2) (1912) 9 All. L. J. 378.

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There was nothing in section 373 of the Code, which deprived the Court of its jurisdiction in any case where there was sufficient reason to permit the plaintiff to withdraw from his suit. The power conferred by this section should be properly exercised by the Court and not upon frivolous grounds. The case of *Watson* v. *The Collector of Rajshahye* (1) had no bearing on this case. The Court of Appeal, therefore, had jurisdiction to make the order of the 18th May 1906.

Babu Baranasibasi Mukherjee and *Babu Biraj Mohan Majumdar*, for the respondents, were not called upon.

SANDERSON C. J. This is an appeal from the judgment of the learned Subordinate Judge of Burdwan given on the 12th of September 1913, in which he dismissed the suit of the plaintiff on the ground that the matter was *res judicata*. It appears that the plaintiff brought a suit in the year 1905 in respect of the same property which was the subject-matter of this suit asking for the same relief which he asked for in the present suit. That suit was contested, evidence being called on both sides, and the Court of first instance which heard that evidence dismissed the plaintiff's suit. Then on appeal to the lower Appellate Court and at some stage of that hearing, he applied under section 373 of the old Civil Procedure Code for leave to withdraw from the suit alleging, first of all, a formal defect, and, secondly, his inability to produce the necessary evidence in time. It was admitted by the learned vakil who argued this case for the appellant that, as far as he knew, there was no formal defect proved before the Appellate Court, and that the only ground which could be relied upon by the petitioner

(1) (1869) 13 Moo. I. A. 160.

in that case was the second one, namely, that he had not been able to produce the necessary evidence in time at the trial before the Court of first instance. Thereupon, the Appellate Court made an order to this effect: "The appeal is dismissed with costs and the plaintiff's suit allowed to be withdrawn with leave for fresh action for the same subject-matter, if not barred." Thereupon, this suit was brought, and the point was taken by the defendant that the order of the Appellate Court of the 18th of May 1906 had been made without jurisdiction and that, consequently, the subject-matter of the present suit was *res judicata* by reason of the decision which was given by the Court of first instance in the previous suit in 1905. The learned Subordinate Judge has upheld that view, and has consequently dismissed the plaintiff's suit, and this appeal has been lodged against the judgment of the Subordinate Judge. In my judgment, the Subordinate Judge was right.

The whole question depends upon whether the order of the 18th May 1906 was made without jurisdiction. If it was within the learned Judge's jurisdiction to make it, but it was a wrong order, then I can quite understand that the learned vakil for the appellant had something to say, inasmuch as the order had been allowed to stand, and the defendant against whom the order was made had taken no steps to attack that order. But if it was made without jurisdiction and it is brought to our notice now that it was made without jurisdiction and if we are satisfied that it was made without jurisdiction, then we are bound to say so and also to say that as a matter of consequence all proceedings taken in consequence of that order failed on that ground. Therefore, the only question is whether the order was made without jurisdiction. I think it was. I need not read the section n full. The section says, " . . . If the Court is

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satisfied on the application of the plaintiff (*a*) that the suit must fail by reason of some formal defect, or (*b*) that there are sufficient grounds for permitting him to withdraw from the suit or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit . . . ." Now the words, as they stand in the section, are of course of general application, namely, "that there are sufficient grounds for permitting him to withdraw from the suit:" but there are decisions of this Court which, in my opinion, are binding upon us. It is quite true they are not upon the same section, but they are upon Order XXIII, rule 1 of the Civil Procedure Code which is now in operation, but the learned vakil, who argued the case for the appellant, admitted that there is no substantial difference between this Rule and section 373 of the old Code. In the first case, *Kharda Co., Ld.* v. *Durga Charan Chandra* (1), it was held by my learned brother Mr. Justice Mookerjee that clauses (*a*) and (*b*) of sub-rule (*2*) have to be read together and that the intention is that a ground included in clause (*b*) must be of the same nature as the ground specified in clause (*a*), that is to say, it must be something of the same nature as *formal defect*, and, inasmuch as in that case the ground for allowing the suit to be started afresh was not because there was a formal defect but for some other reason, the order was illegal. Then again the learned Chief Justice Sir Lawrence Jenkins in *Mabulla Sardar* v. *Rani Hemangini Debi* (2), says: "The decision in *Kharda Co., Ld.* v. *Durga Charan Chandra* (1) shows that clause (*b*) of sub-rule (*2*) must be read in connection with clause (*a*) and with the limitations clause (*a*)

(1) (1909) 11 C. L. J. 45. (2) (1910) 11 C. L. J. 512.

suggests, and so reading it, it is clear that it is not within the jurisdiction of a Court of Appeal to grant the permission on the terms which have been approved by the Court in this case. In my opinion, this rule should be made absolute." Therefore, in the present case, inasmuch as the only ground that can be suggested for the order of the 18th of May 1906 was that the plaintiff had not been able to adduce all the evidence which he would have liked to adduce at the first hearing, I am of opinion that that was not a ground which is contemplated by section 373 of the old Civil Procedure Code; and, therefore, the order which was made by the Appellate Court was made without jurisdiction. Consequently, that order having been made without jurisdiction a fresh suit should never have been brought, and the defendant was perfectly competent and was within his rights when he raised the point that the matter was *res judicata*. I am of opinion that the lower Appellate Court was right in coming to the conclusion that it did, and this appeal must be dismissed with costs.

NEWBOULD J. I agree.

O. M. *Appeal dismissed.*