QUEEN-EMPRESS v. POTADU.

he shall make over the person arrested to a police officer without unreasonable delay is sufficiently complied with by his being forwarded in the custody of a servant or of the village servant in this case. The intention is to prevent arrest by a private person on mere suspicion or information, and *not* to impose on him the obligation of taking the party arrested in person to a police station. The original custody continued and did not terminate. This case is distinguishable from *The Queen* v. *Bojjigan*(1). We set aside the order of discharge made by the joint magistrate in Revision Case No. 144 of 1888, but having regard to the lapse of time, we will not direct any further proceedings.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

1888. July 23. August 2.

YACOOB (PLAINTIFF), APPELLANT,

and

MOHAN SINGH (DEFENDANT No. 2), RESPONDENT.*

Civil Procedure Code, s. 57—Return of plaint when Court has no jurisdiction.

An Appellate Court is not bound to return the plaint under all circumstances where defect of jurisdiction appears.

APPEAL from the decree of C. S. Crole, District Judge of North Arcot, modifying the decree of V. Subramanya Sastri, District Munsif of Vellore, in suit No. 417 of 1886.

The facts necessary for the purpose of this report appear from the judgments of the Court (Muttusami Ayyar & Wilkinson, JJ.).

Bhashyam Ayyangar, *Sadagopacharyar*, and *Subramanya Ayyar* for appellant.

The Acting Advocate-General (Mr. *Spring Branson*) and *Seshagiri Ayyar* for respondent.

WILKINSON, J.—In his plaint plaintiff prayed for a decree declaring his right to grant pattas to, and to collect rent from,

(1) I.L.R., 5 Mad., 22.

* Second Appeal No. 1072 of 1887.

the raiyats of Virdampet, for possession and for a declaration that the lease of defendant No. 2 was inoperative against him.

The defendants demurred to the jurisdiction of the District Munsif's Court urging that the suit should have been filed in the District Court. Thereupon plaintiff's vakil maintained that the suit was one for specific performance. Defendant's vakil accepted this contention, and as remarked by the Munsif, "the suit" in his Court "was all along treated as one for specific performance." He gave plaintiff a decree for possession against both the defendants. Defendant No. 2 alone appealed to the District Court on the ground *inter alia* that the suit was not "wholly" a suit for specific performance. The District Judge reversed the decree of the Munsif so far as defendant No. 2 was concerned, holding that the suit as a suit for specific performance would not lie. Defendant No. 2 was no party to, and had no notice of, the contract, specific performance of which was sought, and that, if it had been a suit for possession, the District Munsif would have had no jurisdiction. Plaintiff appeals. It is admitted by his pleader that the suit was not a suit for specific performance of a contract and that the District Munsif had no jurisdiction to try the suit for possession, but it is contended that the plaint should be returned for presentation in the proper Court.

I have no doubt that the suit was one for possession, that it was not rightly valued, and that had it been, it would not have been cognizable by the District Munsif.

But in order to wrest jurisdiction plaintiff's pleader elected to treat the suit as one for specific performance and the suit was tried as if it had been so framed. The plaintiff is bound by the statement of his pleader and this second appeal must therefore fail as it is conceded that the contention of the pleader for plaintiff in the Court of first instance cannot be maintained.

With reference to the question whether or not the plaint should be returned for presentation to a Court having jurisdiction, I remark that the question does not really arise. The plaintiff may have the right now to institute in the proper Court a suit for possession, but I cannot treat the present suit as such. I do not agree with the contention of the learned pleader for the plaintiff that s. 57 of the Civil Procedure Code is *imperative* at this stage of the case. No doubt it is so at the institution of a suit. If on presentation of plaint the Court finds that it has no jurisdiction,

YACOOB v. MOHAN SINGH.

it is bound to return the plaint. But this is before the issue of process to the defendant.

This Court has no doubt in many cases returned the plaint for presentation to the proper Court, even in second appeal, but the principle on which it has acted is that laid down by the Privy Council in the case of *Mohummud Zahoor Alikhan* v. *Mussumat Thakooranee Rutta Koer*(1), viz., that this Court has the power to do what the Judge of the Court of first instance might, under the Civil Procedure Code, have done at an earlier stage of the case.

Had the Legislature disapproved of the practice, a rule would have been introduced into the Code when it was recast by Act XIV of 1882. The absence of any provision for the return of a plaint at the later stages of a case seems to me to indicate that the Legislature desired to leave the matter to the discretion of the Court, so that where, as in the present case, the suit may have been persisted in with full knowledge that as a suit for possession it would not lie in the Court of a District Munsif, the Court might refuse to exercise the power it undoubtedly has of returning the plaint.

Moreover in the present case there is the decree of the District Munsif against defendant No. 1 still subsisting so that the Court having acted judicially upon the plaint, it must be retained as part of the record.

This second appeal therefore fails and is dismissed with costs.

MUTTUSAMI AYYAR, J.—I am also of opinion that this appeal must be dismissed with costs. As a suit for specific performance, this action must fail, for, it is found that the respondent had no notice of the lease in favor of the appellant. As a suit by a lessee to recover possession of the property demised, the District Munsif, it is conceded, had no jurisdiction to entertain it. The question then for consideration is whether the plaint should be returned to the appellant for presentation to the proper Court. The appellant's pleader refers to s. 57, Civil Procedure Code, and contends that it is imperative and applicable in all stages of the suit. That section is inserted in the chapter on the institution of suits and it prescribes the procedure to be followed on the presentation of plaints and before the issue of summons. If the plaint is returned at a later stage of the suit, it is returned not because

(1) 11 M.I.A., 486.

s. 57 is in terms applicable, but because the Court *may* do at any stage of the suit what it might have done at an earlier stage. On this principle the plaint is ordinarily returned at whatever stage defect of jurisdiction may appear. But it is not correct to say that the Court has not only the power but is bound to order the return of the plaint though there was craft in the mode in which the appellant conducted the suit in the Court of first instance and though there was no appeal from its decree so far as it affected one of the defendants. In the case before us the District Munsif directed defendant No. 1 to pay the plaintiff's costs: and as he preferred no appeal, the District Judge reversed the decree only so far as it related to defendant No. 2 who was the appellant before him. As the case stands before us the suit cannot be treated as if it were never instituted, and the plaint must be on the record because the original decree is operative so far as it relates to the first defendant in respect of costs.

It is no doubt true that as the plaint was originally framed, the suit was one for possession of the land demised, but when the respondent pleaded to the jurisdiction of the Court, the appellant's vakil contended that it was a suit for specific performance and therefore was not governed by s. 7 of the Court Fees Act. Thereupon the respondent's pleader withdrew his plea and both parties proceeded to trial on the footing that the suit was one brought for specific performance. It is not clear whether the appellant's vakil misled the respondent's vakil from an erroneous belief that he was at liberty to alter the frame of the suit at or before the first hearing or from a desire to induce the latter to give up the plea of jurisdiction : but there is no doubt that the respondent was misled. It is not in my opinion fair to allow the appellant to say in second appeal that he is not bound by the election made by his vakil even for the purposes of this suit. The principle on which the Courts follow the procedure prescribed by s. 57 after issues are settled and evidence is recorded and in appeal is discussed by the Full Bench of the Bombay High Court and the limitations subject to which it is to be applied are also discussed there. *Prabhakarbhat* v. *Vishwambhar Pandit*(1).

The appellant's pleader appears to me to overlook the fact that during the progress of a suit, special circumstances may

(1) I.L.R., 8 Bom., 313.

Yacoob v. Mohan Singh.

supervene which might render it impossible to treat the suit as if it was never instituted at all or unfair to the respondent to permit the appellant to ignore the basis on which the parties proceeded to trial in the Court of first instance.

PRIVY COUNCIL.

P. C. & J. C. 1888. Mar. 1, 2, 3, 8. April 21.

SRI AMMI DEVI (Plaintiff)

and

SRI VIKRAMA DEVU, a Minor, by the Agent to the Court of Wards (Defendant).

[On appeal from the High Court at Madras.]

Failure to prove alleged authority to widow who had purported to adopt to her deceased husband. Query; as to effect upon an adoption of an adopted child being the only son of his father.

Whether an elder widow who had purported to adopt a son to her deceased husband under his authority had received such authority orally or by will, was disputed by a junior widow, the Courts below differing as to the question of fact. Upon the evidence, the finding of the Subordinate Judge that no such authority had been given, was maintained.

The Courts below also differed as to whether the adoption if authorized was validly effected, the boy adopted having been the only son of his natural father. Whether this is a disqualification invalidating an adoption, is a question that has not come before Her Majesty in Council for decision.

Appeal from a decree (20th December 1884) of the High Court reversing a decree (17th March 1882) of the Subordinate Judge of Vizagapatam.

As to the fact of an authority to adopt having been given orally or by will, and as to the legal competency of the subject of an alleged adoption, the Courts below had differed in opinion.

The suit was brought by the appellant's mother, Sri Nilamani Patta Maha Devi, the junior widow of Krishna Bhupati Devu, zamindar of Madgole, in the Vizagapatam District, deceased, on the 25th December 1875.

The defendants were Sita Patta Maha Devi, the senior widow of the deceased raja, and Vikrama Devu, whom she had purported to adopt. The plaint alleged that the late zamindar who left no

---

Present: Lord Macnaghton, Sir B. Peacock and Sir R. Couch.