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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

ETAKKOTT MANMOD KUTTI'S SON MOYAN (PLAINTIFF), APPELLANT,

v.

ETAKKOTT KUTHAYI'S DAUGHTER PATHUKUTTI AND OTHERS (DEFENDANTS NOS 1 TO 8 AND 10), RESPONDENTS.*

1907. October 29.

Oaths Act—Act X of 1873, ss. 11, 12—Where plaintiff agreeing to take oath subsequently refuses, Court cannot dismiss suit but must record the fact of refusal under s. 12 and proceed with the suit.

The defendant in a suit agreed in the course of the trial to be bound by the statement on oath of the plaintiff as to certain facts. By an agreement in writing between the parties the plaintiff agreed to take the oath as required on a certain date; that if he failed to do so the suit should be dismissed; and that if the defendant prevented the taking of the oath, there should be a decree for plaintiff. Before the appointed day, the plaintiff applied to withdraw from the agreement, but the Court refused the application. The plaintiff failed to take the oath and the Court declined to allow the plaintiff to adduce further evidence and dismissed the suit:

Held, that the Court ought not to have dismissed the suit, but should have recorded the refusal and the reasons therefore under section 12 of the Oaths Act and proceeded with the trial.

The agreement did not amount to an adjustment of the suit so as to bar further proceedings in the trial.

Umayammai v. *Muthiah Nadar*, (17 M.L.J., 99), distinguished.

Vasudeva Shanbog v. *Narain Pai*, (I.L.R., 2 Mad., 356), followed.

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* Second Appeal No. 157 of 1905, presented against the decree of L. G. Moore, Esq., District Judge of South Malabar, in Appeal Suit No. 622 of 1904, presented against the decree of M.R.Ry. M. R. Narayanaswami Ayyar, District Munsif of Parapangadi, in Original Suit No. 588 of 1905.

MOYAN v. PATHUKUTTI.

Per MILLER, J., *obiter*: If by the act of the party refusing to take the oath, the other party has lost evidence which was available to him, the Court may be justified in refusing to allow the former to adduce evidence.

THE facts necessary for the report of this case are sufficiently set out in the judgment.

K. Naraina Rau for appellant.

Mr. *T. Richmond* for second to ninth respondents.

JUDGMENT.—Sir ARNOLD WHITE, C. J.—Whilst the plaintiff was being examined as a witness, the defendants challenged him to make statements on oath as to certain specified facts. By a written agreement the plaintiff agreed to take the oath on a certain date, and the parties agreed that if the plaintiff failed to take the oath the suit should be dismissed, and if the taking of the oath was stopped by the defendants' negligence there should be a decree for the plaintiff. The plaintiff subsequently applied for leave to withdraw from this agreement and leave was refused. It has not been contended that there were good grounds for allowing the plaintiff to withdraw. No oath was taken. The Court refused to allow the plaintiff to adduce any further evidence and dismissed the suit. It was argued before us that the evidence which had been adduced by the plaintiff before he agreed to take the oath was sufficient to warrant a decree being given in his favour. But this point does not seem to have been taken in the Court of First Instance or before the lower Appellate Court. I do not think the decree of the lower Appellate Court, which affirmed the decree of the Munsif dismissing the suit can be upheld. The agreement between the parties is of a twofold character. It is, first, an undertaking by the plaintiff to make an oath, and, secondly, an agreement by him that if he fails to do so the suit may be dismissed. As regards the undertaking by the plaintiff to make the oath, it seems to me that the provisions of the Indian Oaths Act, 1873, are conclusive upon the question whether the fact that he afterwards refused to make the oath entitles the defendants to insist that the suit shall be dismissed. Section 8 provides that if a party offers to make the oath contemplated by the section the Court may administer it. Section 9 provides that if a party offers to be bound by such an oath, if it is made by the other party, the Court may ask the other party if he will make the oath Section 10 provides that if the other party agrees to make the oath the Court may administer it. Section 4 provides that the

evidence so given (that is, the evidence under the oath by which the other party agreed to be bound under section 9) as against the person who offered to be bound, shall be conclusive proof of the matter stated. Section 12 enacts that if the party refuses to make the oath referred to in section 8 (as I read the section this means either the party who offered to make the oath under section 8 or the party who agreed to make the oath in response to the offer of the other party to be bound thereby under section 9) he shall not be compelled to do so, and then makes provision for what is to be done in that event. It directs the Court to record as part of the proceedings the nature of the oath proposed, the fact that the party was asked to make oath and refused, together with any reason assigned for the refusal. This section seems to contemplate that the Court shall give such weight as it may think fit to the fact that a party has offered to make an oath and has afterwards refused to make it, whilst it negatives the view that the refusal to make the oath is in itself a ground for dismissing the suit or giving the plaintiff a decree as the case may be. I do not think the undertaking by the plaintiff that if he failed to make the oath the suit should be dismissed can be regarded as an adjustment of the suit. I agree with the decision in *Vasudeva Shanbog* v. *Naraina Pai*(1). The case of *Umayammai, minor by his next friend, Anaikutti Ayyakannu Nadar* v. *Muthiah Nadar and another*(2) may be distinguished upon the ground that in that case there was no refusal to make the oath by the party who had offered to make it, and section 12 of the Oaths Act did not apply. In that case the plaintiff's guardian agreed to be bound by the defendant's oath to be made in a certain form which required something to be done by the plaintiff's guardian. The defendants attended for the purpose of making the oath in the form agreed to, but the plaintiff's guardian declined to perform his part of the ceremony and the oath as agreed on was not made for his reason.

I think the decision of the lower Courts must be set aside and the case remanded to the Court of First Instance to be dealt with according to law. Costs in this and the lower Appellate Court will abide the event.

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(1) I.L.R., 2 Mad., 356. (2) 17 M.L.J., 99.

MOYAN v. PATHUKUTTI.

MILLER, J.—I have arrived at the same conclusion. It may be doubted whether section 12 of the Oaths Act was intended to apply to a case in which the parties have arrived at an agreement that one of them shall take an oath, but whether that be so or not, it would clearly not be right, and it was not suggested before us that we ought to compel a man against his will to take an oath by which he is to allege the existence of particular facts.

The District Judge has treated the agreement here as an agreement that neither party shall call any evidence other than that which the plaintiff is to give upon the special oath That is not an agreement by which the suit is adjusted, and I do not see how the Court trying the suit is to enforce it, if one of the parties breaks it. It is not contemplated by the Oaths Act nor is it provided for by the Code of Civil Procedure. The Court must, so far as I can see, proceed with the suit. It is not necessary to consider what course would be open if the plaintiff's action had resulted in loss of evidence to the defendants: for it is not suggested that the defendants were, after the plaintiff's refusal to take the oath, unable to secure any evidence which was available to them at the time of the agreement. It is obviously a different case where the Court trying the suit proceeds, in spite of the withdrawal of the party who has offered to be bound by the oath, to administer the oath to the opposite party who is willing to take it. The case in *Umayammai, minor son by his next friend Anaikutti Ayyakannu Nadar* v. *Muthiah Nadar and another*(1) is an instance in point though it has peculiar features. There, the person offering the oath was not allowed to withdraw because the person accepting the oath was ready to take it. That procedure is, it may well be, contemplated by the Oaths Act, but the agreement here is outside the scope of that Act, which is designed to render conclusive evidence taken by consent in a particular way.

It must be borne in mind too that in cases like that with which we are dealing, the defendant *primâ facie* sustains no injury by the refusal of the plaintiff to take the oath. In most of the cases the parties are remitted to their former position with this difference that the defendant has on his side the additional evidence offered by the conduct of his adversary. In the present case if the District Judge is right in stating that the facts to

(1) 17 M. L. J., 99.

which the plaintiff undertook to swear were sufficient to dispose of the suit, the defendant must, if the oath had been taken, have had a decree made against them. MOYAN v. PATHUKUTTI.

Unless then by the action of the plaintiff, evidence which would have been available for the defendants has been lost to them (and that is, as I have said, not here alleged) I do not think the Court, subject, of course, to its discretion to refuse an adjournment of the trial, is entitled to refuse to receive the evidence for the plaintiff, and I therefore concur in the order proposed by my Lord, the Chief Justice.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

SARALA SUBBA RAU (PLAINTIFF), APPELLANT,

v.

KAMSALA TIMMAYYA AND OTHERS (DEFENDANTS AND LEGAL REPRESENTATIVES OF FIRST DEFENDANT), RESPONDENTS.*

1907 October 24.

Civil Procedure Code, Act XIV of 1882, ss. 278, 283—Limitation Act, Act XV of 1877, sched. II, art. 11—Order dismissing claim for default not an order made after investigation and need not be set aside within one year under art. 11 of sched. II of the Limitation Act.

An order dismissing a claim presented under section 278 of the Code of Civil Procedure for default is not an order made after investigation within the meaning of that section and is not conclusive under section 283 of the Code of Civil Procedure. Article 11, schedule II, of the Limitation Act does not apply to such orders; and the party against whom the order is made can maintain a suit to established his right within the ordinary period of limitation applicable to such suit, although he has not had the order set aside within one year.

Koyyana Chittemma v. *Doosy Gavaramma*, (I. L. R., 29 Mad., 225), referred to.

Sarat Chandra Bisu v. *Turivi Prosad Pal Chowdry*, (11 C. W. N., 487), approved.

SUIT to establish plaintiff's right to and to recover possession of plaint property from defendants.

* Second appeal No. 210 of 1905, presented against the decree of A. M. Slight, Esq., District Judge of Kurnool, in Appeal Suit No. 121 of 1903, presented against the decree of M. B. Ry J. S. Theagaraja Ayyar, District Munsif of Nandyal, in Original Suit No. 41 of 1903.