

1879
August 13.

FULL BENCH.

*Before Sir Robert Stuart Kt., Chief Justice, Mr. Justice Turner, Mr. Justice Spankie,
and Mr. Justice Oldfield.*

DARBO (PLAINTIFF) *v.* KESHO RAI (DEFENDANT).*

Act VIII of 1859 (Civil Procedure Code), s. 7.

D, being able to sue for the possession of certain property, omitted to do so, and sued in the first instance only for a declaration of her right to such property. The Court refusing to make any such declaration on the ground that she could sue for possession, *D* then sued for possession. *Held* that the second suit was not barred by s. 7 of Act VIII of 1859 (1).

THE plaintiff in this suit had, on her husband's death, sued one Kesho Rai for a declaration of her title to succeed as her husband's heir to certain property, and for a declaration that the defendant was not the adopted son of her deceased husband. The Court of first instance dismissed this suit on the ground that the plaintiff was not in possession of a large portion of the property, and should therefore have sued for possession. On appeal by the plaintiff the High Court, on the 23rd July, 1874, held that the plaintiff was entitled for the protection of the property in her possession to a decree that the defendant was not the adopted son of her deceased husband, and in respect of the property of which she was not in possession referred her to a suit for possession. The plaintiff subsequently brought the present suit against Kesho Rai for the possession of this latter property. The Court of first instance held that the claim was barred under the provisions of s. 7 of Act VIII of 1859.

The plaintiff appealed to the High Court contending that the claim was not barred under the provisions of s. 7 of Act VIII of 1859

The Court (STUART, C.J., and OLDFIELD, J.) referred to the Full Bench the question whether the suit was or was not so barred.

Mr. *Chatterji*, Pandit *Ajudhia Nath*, and Babu *Oprokash Chandar Mukarji*, for the appellant.

* Regular Appeal, No. 96 of 1875, from a decree of Rae Shankar Das, Subordinate Judge of Saharanpur, dated the 5th August, 1875.

(1) See also *Tulsi Ram v. Ganga Ram*, I. L. R., 1 All. 252.

Mr. Conlan, Pandit *Bishambhar Nath*, and Munshi *Hanuman Prasad*, for the respondent.

The judgment of the Full Bench, so far as it related to this question, was as follows :

JUDGMENT.— In so far as the appellant now claims possession of property to which she formerly claimed a declaration of title, we are of opinion that the suit is clearly not barred ; she is seeking a different relief, and the relief she formerly sought was refused her in respect of this property, on the ground that the Court ought not to exercise its discretionary power of awarding a declaration of title when relief can be obtained by an ordinary suit for possession.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Straight.

ABDUL SAMAD AND ANOTHER (PLAINTIFFS) *v.* RAJINDRO KISHOR SINGH
(DEFENDANT).*

Return of Plaintiff—Appeal—Act X of 1877 (Civil Procedure Code), ss. 57(c), and 588 (e)—Act XII of 1879, s. 2.

Although s. 57 of Act X of 1877 contemplates the return of the plaintiff should err or be patent, when it is first presented, yet there is nothing in the wording of that section which forbids the return of the plaintiff at a later stage in the suit.

Where, therefore, after the issues in a suit were framed, the Court decided that it had no jurisdiction and returned the plaintiff to be presented in the proper Court, *held* that in so doing the Court acted under s. 57 of Act X of 1877, and its decision, not coming within the definition of a “decree” in s. 2 of Act XII of 1879, was not appealable as such, but was appealable under s. 588 of Act X of 1877 as an order.

THE facts of this case, so far as they are material for the purposes of this report, were as follows: The Court of first instance held on an issue which it added of itself at the hearing of the case, after the issues had been framed by a former Subordinate Judge, that it was not competent to try the suit, inasmuch as the cause of action did not arise, neither did the defendant reside within the local limits of its jurisdiction. The decision of the Court ended in these terms: “The plaintiffs’ suit is therefore dismissed: the plaintiff is to be returned to the plaintiffs.”

* First Appeal, No. 91 of 1879, from an order of Babu Ram Kali Chaudhri, Subordinate Judge of Benares, dated the 27th June, 1879.

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