

1887
February 16.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

ZAHUR-UN-NISSA (DEFENDANT) *v.* KHUDA YAR KHAN (PLAINTIFF).*

Withdrawal of suit—Act X of 1877 (Civil Procedure Code), s. 373—Plea taken for the first time at the hearing of second appeal.

The plea that the plaintiff had improperly been permitted to withdraw from a former suit with liberty to bring the present one, which had not been taken in the lower Courts, and was not taken in the memorandum of second appeal, was not permitted to be urged at the hearing of the second appeal.

Quere.—Whether under s. 373 of Act X of 1877 the Court ought to permit the plaintiff to withdraw from the suit with liberty to bring a fresh suit on the ground that the defence to the suit was such that the suit must fail if proceeded with.

THE plaintiff in this suit claimed possession of a share in a landed estate called Dam Khoda and an account of the profits of such estate. It appeared that one Mohabbat Khan died leaving as his heirs defendants No. 1, his widow, defendant No. 2, his son, and defendant No. 3, his daughter. On the 18th and 20th April, 1873, defendant No. 3 conveyed to the plaintiff her share in the moveable and immoveable estate of her deceased father. On the 29th January, 1879, the plaintiff brought a suit against the three defendants for possession of the defendant No. 3's share in Dam Khoda, claiming by virtue of such conveyance. Defendant No. 1 set up as a defence to this suit that she was in possession of Dam Khoda in lieu of a dower-debt of Rs. 15,000. The plaintiff thereupon, on the 19th March, 1879, applied for permission to withdraw the suit, with liberty to institute a fresh one. This application was granted on that same date. The plaintiff subsequently brought a fresh suit, the present one, for possession of defendant No. 3's share in Dam Khoda. In this suit, alleging that, assuming that a dower of Rs. 15,000 had actually been settled on defendant No. 1, and had not been paid, defendant No. 1 had realized the amount out of the profits of Dam Khoda and the other properties of her deceased husband, he prayed that an account might be taken from the date of Mohabbat Khan's death of the profits of his estate in the possession of defendant No. 1. The Court of first instance dismissed the

* Second Appeal, No. 1004 of 1880, from a decree of W. Tyrrell, Esq., Judge of Bareilly, dated the 7th April, 1880, modifying a decree of Maulvi Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 11th October, 1879.

suit. On appeal by the plaintiff the lower appellate Court gave him a decree for a portion of the property claimed.

On second appeal by defendant No. 1 it was contended on her behalf, for the first time, at the hearing of the appeal, that the former suit between the parties had been allowed to be withdrawn with liberty to institute a fresh one, contrary to the provisions of the law.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the appellant.

Mr. *Conlan* and Mir *Zahur Husain*, for the respondent.

The judgment of the Court (SPANKIE, J., and OLDFIELD, J.), so far as it is material for the purposes of this report, was as follows:—

SPANKIE, J.—We were pressed by the pleader for appellant to consider another plea to the effect that the power to dismiss a suit with liberty to bring a fresh one for the same matter was limited to cases which fail by reason of some point of form, whereas when the plaintiff withdrew the former suit he did not do so on a point of form, but because the defence was such that he could not have succeeded in his suit had he gone on with it. The case of *Watson v. The Collector of Rajshahye* (1) was cited in support of this contention. But the plea was one which was never taken here in the memorandum of appeal and not as far as we can discover was it taken below. Moreover the wording of s. 373, Act X of 1877, is different from that of s. 97 of Act. VIII of 1859, which permitted withdrawal for sufficient grounds. But s. 373 of the new Act, whilst providing permission to withdraw a suit where it must fail by reason of some formal defect, enlarges the discretion of the Court and adds “or where there are sufficient grounds.” We think it too late now to consider whether the discretion has been exercised rightly, though it may be that we could not say that it was otherwise exercised. It is sufficient to observe that the plea was never taken in either of the Courts below and was not taken here until the case came on for hearing.

(1) 3 B. L. R., P. C., 48.

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