1908.

NANU v. SHEKU.

If authority be needed for this, then we think it is to be found in the decision pronounced by Mr. Justice Wilson in *Hurrosundari Dabi* v. *Bhojohari Das Manji*[1] which closely resembles in its circumstances the present case. What was there sought was to take advantage of a power of appeal given after the suit had been commenced. After referring to *Ratanchand Shrichand* v. *Hanmantrav Shivbakas*[2] and two other similar cases, it was said: "These cases are on all fours with the present case, with this exception, that there an appeal was given under the repealed Act, and it was held that the repealing Act did not take away the appeal. Here the repealed Act excluded an appeal. It follows, on the same principle, that the repealing Act cannot give an appeal."

In the same way here we hold that the repealing Act cannot give the right of revision in respect of proceedings commenced under the Mámlatdárs' Courts Act of 1876.

In our opinion the Collector took the correct view and we must therefore discharge this rule with costs.

Rule discharged.

G. B. R.

(1) (1886) 13 Cal. 86. (2) (1869) 6 Bom. H. C. R. (A. C. J.) 166 at p. 169.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

1908.

January 30.

MAHANT BIHARIDASJI GURU GOVINDDASJI (ORIGINAL PLAINTIFF), APPLICANT, *v.* PARSHOTAMDAS RAMDAS AND ANOTHER (ORIGINAL DEFENDANTS), OPPONENTS.*

Civil Procedure Code (Act XIV of 1882), sec. 373—Withdrawal from suit—Application for withdrawal with liberty to bring fresh suit—Costs.

Section 373 of the Civil Procedure Code (Act XIV of 1882) contemplates a withdrawal not of the suit, but, from the suit, and such a withdrawal may be either with or without liberty to bring a fresh suit. If a party desires to with-

* Application under extraordinary jurisdiction No. 138 of 1907.

1908.

MAHANT BIHARIDASJI v. PARSHOTAM-DAS.

draw from the suit with such liberty, then he must apply to the Court for permission to so withdraw.

Where a plaintiff does not desire to withdraw from the suit, unless with liberty to bring a fresh suit, and the Court considers that such liberty ought not to be granted, the proper course is simply to dismiss the application.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of J. E. Modi, First Class Subordinate Judge of Surat, in Suit No. 259 of 1903.

The plaintiff sued the defendants in the Court of the First Class Subordinate Judge of Surat for the recovery of certain ornaments, clothes or their value, account books and valuable documents relating to a temple and costs.

The evidence in the case was being recorded in another suit in the same Court and that other suit was dismissed for default. The plaintiff, thereupon, applied to have the present suit withdrawn with permission to bring a fresh suit. The Subordinate Judge recorded the following order upon the application :—

Suit may be withdrawn.

No permission need be granted as the amount in dispute is very small as compared with the main *corpus* of the endowment. The plaintiff is to bear all costs and to pay all costs. No special reason is shown to depart from the usual rule.

Against the said order the plaintiff preferred an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882), urging *inter alia* that the Subordinate Judge had no jurisdiction to pass the order as he did and that he should either have rejected the application and proceeded with the suit or have allowed the suit to be withdrawn with permission to bring a fresh suit. A *rule nisi* was issued requiring the defendant to show cause why the said order should not be set aside.

L. A. Shah appeared for the applicant (plaintiff) in support of the rule :—We applied for leave to withdraw from the suit with permission to bring a fresh suit and the Subordinate Judge refused to grant the permission to bring a fresh suit. So far he had jurisdiction to deal with the matter under section 373 of the

Civil Procedure Code. But he proceeded to make an order disposing of the suit as if the suit was withdrawn. He had no jurisdiction to make such an order. We had not withdrawn the suit and no order was called for under the second paragraph of section 373. The application was under the first paragraph of the section and it may have been granted or rejected, and, if rejected, the suit must be proceeded with.

Manubhai Nanabhai appeared for the opponents (defendants) to show cause:—The plaintiff made an application to withdraw from the suit with permission to bring a fresh suit. It was competent to the Subordinate Judge to grant or refuse the permission asked for. The permission having been refused without any objection on the part of the plaintiff he must be deemed to have withdrawn from the suit. The report of the Subordinate Judge gives the reasons why he refused the permission and his order should not be interfered with under section 622 of the Civil Procedure Code.

JENKINS, C. J.:—The application is made to us under section 622 of the Code of Civil Procedure, and it arises out of an application made to the Subordinate Judge under section 373 of the Code.

The whole difficulty arises from the omission to observe what are the provisions of section 373. It contemplates a withdrawal not of the suit but from the suit, and such a withdrawal may be either with or without liberty to bring a fresh suit. If a party desires to withdraw from the suit with such liberty, then he must apply to the Court to permit him so to withdraw. If he does not desire to have that liberty, then he can withdraw of his own motion and no order of the Court is necessary.

Now, in this case the Subordinate Judge has passed an order in these terms: "The suit may be withdrawn. No permission need be granted as the amount in dispute is very small compared with the main *corpus* of the endowment. Plaintiff is to bear all costs and to pay all costs. No special reason is shown to depart from the usual rule."

It is contended before us by the opponents, and the applicant accepts the contention, that the reference to costs is to the costs

1908.

MAHANT BHARIDASJI v. PARSHOTAM-DAS.

mentioned in the second paragraph of section 373. The plaintiff did not require leave to withdraw from the suit unless accompanied with liberty to bring a fresh suit, and, as the Subordinate Judge considered that he ought not to give that liberty, he ought simply to have dismissed the application. Now it is clear that he had no power to make the order he did as to costs unless plaintiff had withdrawn from the suit. But the plaintiff had not withdrawn from the suit. All he did was to apply to the Court for the permission to withdraw from the suit with liberty to bring a fresh suit. The Judge had no right to assume that the plaintiff had withdrawn from the suit when he refused to him the liberty which was the sole purpose of his application.

The rule accordingly will be made absolute with costs, and the order will be varied by substituting therefor an order in these terms: The application for permission to withdraw from the suit with liberty to bring a fresh suit for the subject matter of the suit is dismissed with costs.

The result will be that the case must be restored to the file.

Rule made absolute.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Knight.

1908. *February* 3.

DURBAR KHACHAR SHRI ODHA ALA (ORIGINAL PLAINTIFF), APPELLANT, *v.* KHACHAR HARSUR OGHAD (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu Law—Debt—Son's liability to pay father's debts—Decree for damages resulting from a wrongful act committed by the father—Ancestral estate in the hands of the son not liable under the decree.

The plaintiff obtained a decree against the defendant's father for damages to the plaintiff's property caused by a dam erected by the latter which obstructed the passage of water thereto. On the latter's death the decree was sought to be enforced against his son with respect to the ancestral estate in the hands of the son,

* Second Appeal No. 445 of 1907.