1930

VRIJLAL MANSUKHRAM v. CHUNILAL FATECHAND

Baker J.

remarks at page 1176 of that judgment and the English cases referred to therein, it will appear that the principle is that a distribution which has already taken place should not be disturbed. This has been held in the leading cases already referred to, viz., *Harrison* v. *Kirk*[1] and *In re McMurdo; Penfield* v. *McMurdo*.[2] In this state of the authorities and in view of the practice obtaining in England, I think that the view taken by Mr. Justice Madgavkar is correct and that the appeal should be dismissed.

Appeal dismissed.

B. G. R.

[1] [1904] A. C. I. [2] [1902] 2 Ch. 684.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Baker.

1930

September 9.

SHIDRAMAPPA MUTAPPA BIRADAR, MINOR, BY HIS GUARDIAN NAGAWA KOM MUTTAPPA (ORIGINAL DEFENDANT No. 5), APPELLANT *v.* MALLAPPA RAMCHANDRAPPA BIRADAR, MINOR, BY GUARDIAN SHIDRAMAPPA GOUDAPPA BIRADAR AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 1), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Order XXIII, rule 1—Withdrawal of suit—Leave granted to withdraw suit and bring fresh suit on condition of payment of defendant's costs—Second suit instituted without paying defendant's costs—Second suit allowed to be withdrawn with liberty to file fresh suit—Second suit bad ab initio*—Third suit after payment of costs of first suit not maintainable.*

Under Order XXIII, rule 1 of the Civil Procedure Code, 1908, where a plaintiff is allowed to withdraw a suit and leave is granted to bring a fresh suit on condition that the plaintiff paid the defendant's costs, the plaintiff is precluded from bringing a second suit unless the costs are paid before the institution of the second suit. If a second suit is instituted without paying the costs of the first suit and leave is granted to withdraw that suit with liberty to bring a fresh suit such leave will not be valid in law and the fresh suit will not be maintainable even if the costs of the first suit are paid before the institution of the fresh suit.

Ambubai v. *Shankarsa*,[1] applied.

Seshayya v. *Subbayya*[2]; *Fischer* v. *Nagappa Mudaly*[3] and *Raokhpal Singh* v. *Sheo Ratan Singh*,[4] approved.

*Appeal from Order No. 2 of 1929.

[1] (1924) 27 Bom. L. R. 243. [3] (1909) 33 Mad. 258.
[2] (1924) 47 Mad. L. J. 646. [4] [1929] A. I. R. (All.) 692.

Shital Prosad v. *Gaya Prosad*[1] and *Syed Qazi Muhammad Afzal* v. *Lachman Singh*,[2] dissented from.

SECOND appeal against the order of K. B. Wassoodew, District Judge at Bijapur, reversing the decree passed by G. A. Balse, Joint Subordinate Judge at Bijapur.

The facts are fully stated in the judgment.

G. N. Thakor, with R. A. *Jahagirdhar*, for the appellant.

H. C. Coyajee, with *H. B. Gumaste*, for respondent No. 1.

No appearance for respondent No. 2.

PATKAR, J.:—This appeal raises an important question as to the effect of non-observance of the condition under which a suit is allowed to be withdrawn with liberty to bring a fresh suit under Order XXIII, rule 1, of the Civil Procedure Code.

On August 28, 1920, a suit based on substantially the same cause of action as the present one in which the second appeal arises, was allowed to be withdrawn. The order was as follows:—

"The plaintiff is allowed to withdraw from the suit with liberty to bring a fresh suit in respect of the same cause of action. The plaintiff to pay the defendants' costs. The plaintiff will not be allowed to bring a fresh suit unless he pays the defendants' costs of this suit."

On June 25, 1925, a second Suit No. 154 of 1925 was brought on the same cause of action without payment of the costs, and therefore, without fulfilling the condition attached to the permission given to bring a fresh suit. The order passed in that suit was as follows:—

"The plaintiff is a minor. In view of this and the defects mainly formal which are apparent I order the plaintiff to withdraw with liberty to bring a fresh suit for the same cause of action. Plaintiff to pay the defendants' costs, and bear his own."

Three days after the suit was withdrawn, that is, on June 24, 1926, the costs in the first suit were paid to the defendants, and, on June 29, 1926, the present suit

[1] (1914) 39 Cal. L. J. 529. [2] (1925) 5 Pat. 306.

1930

SHIDRAMAPPA MUTAPPA v. MALLAPPA RAMCHAND-RAPPA

Pathak J.

was instituted without paying the costs of the second suit.

The learned Subordinate Judge held that the second suit, which was instituted without paying the costs of the first suit the payment of which was a condition precedent to the filing of the suit, was void *ab initio*, and that the permission granted to the plaintiff to bring a fresh suit upon which the present suit was based was not valid in law.

On appeal, the learned District Judge, relying on the decision in the case of *Shital Prosad* v. *Gaya Prosad*,[1] held that a suit which was instituted without fulfilment of the condition imposed by the withdrawal order could not be dismissed but ought to be stayed under section 10 of the Civil Procedure Code inasmuch as the permission was not operative until the costs were paid and so there was no withdrawal with liberty to bring a fresh suit, and that until there was such withdrawal the former suit was still pending, and held that the second suit was not bad *ab initio*, and that the order of withdrawal in the second suit could not be disregarded, and that the plaintiff fulfilled the condition precedent in the first suit and its withdrawal was complete, and therefore set aside the order of dismissal and remanded the case for trial according to law.

There is a conflict of decisions on the question as to the result of non-observance of the condition attached to the permission to bring a fresh suit under Order XXIII, rule 1. In *Abdul Aziz Molla* v. *Ebrahim Molla*[2] it was held that where a suit was withdrawn under section 373 of the Civil Procedure Code, corresponding to Order XXIII, rule 1, of the present Code, with liberty to bring a fresh suit on payment of costs, a subsequent suit in respect of the same cause of action was not *ab*

[1] (1914) 19 Cal. L. J. 529. [2] (1904) 31 Cal. 965.

initio void if the costs were not paid before its institution, and that the subsequent payment of costs cured the irregularity. It was held that the only persons who were *prima facie* precluded from bringing a fresh suit were those who withdrew from the former suit without permission to bring a fresh suit. A reference was made to Order XXVI, rule 4, of the Supreme Court Rules, 1883, and it was considered to be a fair rule for the Courts to follow in the absence of a statutory enactment in the matter. In *Shital Prosad* v. *Gaya Prosad*,[1] where a suit was allowed to be withdrawn by the plaintiff with liberty to bring a fresh suit on the same cause of action on condition of paying costs to the defendant, it was held that the second suit could not be dismissed for non-payment of the costs, and that inasmuch as the permission to withdraw and bring a fresh suit was made conditional on a certain payment, the original suit could not be deemed to be withdrawn until those costs were paid, and therefore it must be deemed to be a pending suit which became disposed of as soon as the payment was made. It was observed (p. 531) :—

"When a plaintiff has obtained leave to withdraw upon payment of costs, it is his duty to pay the costs at once, for until they are paid there is no withdrawal with the permission of the Court. In that view when the case came before the Munsiff he was not entitled to dismiss it. All he could do was to regard section 10 as a bar to his proceeding with the trial of the suit."

The view of the Calcutta High Court was followed by the Patna High Court in *Syed Qazi Muhammad Afzal* v. *Lachman Singh*.[2]

The High Court of Madras has in *Seshayya* v. *Subbayya*[3] dissented from the view taken by the Calcutta High Court. Under Order XXIII, rule 1, sub-rule (1), a plaintiff may withdraw his suit at any time without the permission of the Court, and under sub-rule (3) if

(1) (1914) 19 Cal. L. J. 529. (2) (1925) 5 Pat. 306.
(3) (1924) 47 Mad. L. J. 646.

1930

SHIDRAMAPPA MUTAPPA v. MALLAPPA RAMCHANDRAPPA

Patkar J.

the plaintiff withdraws from a suit without the permission given under sub-rule (2), he would be precluded from instituting a fresh suit in respect of such subject-matter, and under sub-rule (2) the Court may grant the plaintiff permission to withdraw from the suit with liberty to institute a fresh suit in respect of the subject-matter of such suit. In *Seshayya* v. *Subbayya*,[1] it was held that as the withdrawal of the suit does not require the permission of the Court, it must be taken that the first suit is withdrawn when the order is passed and that the permission granted refers only to the filing of the subsequent suit on certain conditions, and that if the first suit was considered as pending, it would be open to the plaintiff, instead of complying with the condition of the permission, to go to the Court and demand that the trial on the first suit should be proceeded with however long the interval might be.

I am inclined to agree with the view of the Madras High Court and most respectfully dissent from the view of the Calcutta High Court. When once a suit has been withdrawn, it is no longer pending, and the permission given by Court relates to the bringing of the fresh suit.

In *Shivappa* v. *Balappa*[2] and *Shivappa* v. *Andaneppa*,[3] the condition in the order allowing the suit to be withdrawn with liberty to bring a fresh suit was to pay the costs of the defendant without specifying the time within which the payment was to be made, and it was held that the payment of costs during the pendency of the second suit was not in contravention of the condition imposed by the first suit as the same Subordinate Judge who ordered the withdrawal held that the payment of costs before the institution of the second suit was not a condition precedent

[1] (1924) 47 Mad. L. J. 646. [2] (1928) Civ. Rev. No. 53 of 1928.
[3] (1928) Civ. Rev. No. 54 of 1928.

to the filing of the second suit, and it was not necessary to go into the question whether the view in the case of *Seshayya* v. *Subbayya*,[1] or that in the case of *Shital Prosad* v. *Gaya Prosad*,[2] was the correct view to take.

The conditions attached to the permission to bring a fresh suit after the withdrawal of the first suit may fall under different categories according to decided cases, (1) that the plaintiff shall pay the costs before a certain date specified in the order, (2) that the plaintiff shall pay the costs before the institution of the second suit, and (3) that the plaintiff shall pay the costs without specifying the time of the payment. The present case falls under the second category as the condition imposed by the permission allowing the bringing of the second suit after the withdrawal of the first was to pay the costs before the institution of the second suit. In *Fischer* v. *Nagappa Mudaly*,[3] where leave was granted to the plaintiff to bring a fresh suit on payment of the defendant's costs on or before the specified date and he failed to do so, it was held that he was precluded from bringing a second suit and if such a suit is brought it should be dismissed. The case in *Abdul Aziz Molla* v. *Ebrahim Molla*[4] was distinguished but was not dissented from, and reference was made to *Peria Muthirian* v. *Karappanna Muthirian*[5] where time for payment was extended by the Court which made the order for payment. In *Seshayya* v. *Subbayya*,[1] where leave was granted to bring a fresh suit on payment of the defendant's costs without specification of any date and therefore fell under the third category, the plaintiff was held precluded from bringing a second suit unless the costs were paid before the institution of the second suit. In *Abdul Aziz Molla* v. *Ebrahim Molla*,[4] where the

[1] (1924) 47 Mad. L. J. 646.
[2] (1914) 19 Cal. L. J. 529.
[3] (1909) 33 Mad. 258.
[4] (1904) 31 Cal. 965.
[5] (1906) 29 Mad. 370.

1930

SHIDRAMAPPA MUTAPPA v. MALLAPPA RAMCHANDRAPPA

Patkar J.

payment of costs was not expressly made but was assumed to be a condition precedent to the institution of the second suit, it was held that the non-payment of costs before the institution of the second suit did not render the fresh suit bad *ab initio*, and the payment of costs before the trial of the first suit cured the irregularity. In *Ambubai* v. *Shankarsa*,[1] where the plaintiff was allowed to withdraw his suit with liberty to institute a fresh suit on payment of the defendant's costs before the filing of the fresh suit, and filed a second suit which was dismissed on the ground of his failure to fulfil the condition on which liberty was given to bring a fresh suit, and brought a third suit after fulfilling the condition, it was held that the permission granted by the Court in the original suit would only extend to the filing of one fresh suit and not to the filing of any number of fresh suits which might be dismissed each in its turn without any trial on the actual merits of the case between the parties for failure to pay the costs of the first suit. The ground of the decision in *Ambubai's* case[1] would be opposed to the view taken by the Calcutta High Court in *Shital Prosad* v. *Gaya Prosad*.[2] The present case would be clearly governed by the decision in *Ambubai* v. *Shankarsa*[1] but for the fact that the second suit was not dismissed but permission was given therein to bring a fresh suit.

The decisions in the cases of *Hriday Nath Roy* v. *Ram Chandra Barna Sarma*[3] and *Raj Kumar Mahton* v. *Ram Khelawan Singh*,[4] support the proposition that an order for withdrawal of a suit with leave to institute a fresh suit but in circumstances not within the scope of the rule cannot be treated as an order made without jurisdiction, and a fresh suit instituted upon leave so

[1] (1924) 27 Bom. L. R. 243.
[2] (1914) 19 Cal. L. J. 529.
[3] (1920) 48 Cal. 138.
[4] (1921) 1 Pat. 90.

granted is not incompetent, but do not bear on the point under consideration. The order in the second suit allowing withdrawal of the suit with liberty to bring a fresh suit cannot be considered to affect the order in the first suit which imposed the condition that the costs of the first suit were to be paid before the institution of the fresh suit. The question, therefore, in this case is whether that condition has been fulfilled. The order in the first suit was that the plaintiff would not be allowed to bring a fresh suit unless he paid the defendants' costs in the first suit. The costs were not paid before the institution of the second suit as it was incumbent on the plaintiff to do according to the condition imposed in the first suit, and they were not paid even during the pendency of the second suit. It is difficult to hold that the payment of the costs before the institution of the third suit and after the withdrawal of the second suit fulfilled the condition, imposed by the order passed in the first suit, as a condition precedent to the filing of the second suit. The question has been considered in the case of *Rachhpal Singh* v. *Sheo Ratan Singh*,[1] in which the view of the Calcutta High Court in *Shital Prosad's* case was not accepted, and it was held that once the plaintiff has accepted the terms imposed by the Court, the case is declared to be withdrawn and is no longer pending, and the plaintiff must comply with those terms strictly or take the consequences of being barred from filing a second suit.

The costs ordered to be paid in the first suit ought to have been paid before the institution of the second suit, and it cannot be said that the condition imposed in the first suit is fulfilled by payment of the costs after the disposal of the second suit when the costs ought to have been paid before the institution of the second suit.

[1] [1929] A. I. R. (All.) 692.

1930

SHIDRAMAPPA MUTAPPA v. MALLAPPA RAMCHAND-RAPPA

Patkar J.

I think, therefore, that the view taken by the learned District Judge based on the decision in *Shital Prosad's* case[1] is not correct.

I would, therefore, reverse the order of the lower appellate Court and restore that of the Subordinate Judge with costs throughout on the respondent.

BAKER, J. :—This appeal raises a point of law on which the rulings of the various High Courts are conflicting and which does not appear to have been decided in Bombay. The facts, which are simple, are that the plaintiff brought a suit on June 11, 1919, and withdrew it in 1920 with permission to bring a fresh suit on condition of paying the costs of the defendant. The plaintiff did not pay the costs, but he brought a fresh suit in 1925, which he withdrew on June 21, 1926, also with permission to bring a fresh suit. On June 24, 1926, he paid the costs of the first suit, and on June 29, 1926, he brought the present suit. The Joint Subordinate Judge of Bijapur held that the second suit of 1925, which was brought without paying the defendants' costs of the previous suit as required by the order in the first suit, was bad, and the second suit was barred. This being so, the permission granted to the plaintiff in that suit to bring a fresh suit was not valid. The suit was, therefore, untenable, and was dismissed. On appeal, the District Judge of Bijapur, relying on *Shital Prosad* v. *Gaya Prosad*,[1] held that the Judge was wrong in holding that the suit was bad *ab initio*, and held that the second suit was good, and that the order of withdrawal in that suit, which was binding on the parties, could not be disregarded in these proceedings. The plaintiff had fulfilled the condition precedent in the first suit, and therefore its withdrawal was complete. He, therefore, set aside the order of

[1] (1914) 19 Cal. L. J. 529.

dismissal and remanded the suit for trial on the merits. Defendants make this second appeal.

The view of the Calcutta High Court in *Shital Prosad* v. *Gaya Prosad*[1] has been dissented from by the Madras High Court in *Seshayya* v. *Subbayya*[2] and *Fischer* v. *Nagappa Mudaly*.[3] The Calcutta High Court view was followed by the Patna High Court in *Syed Qazi Muhammad Afzal* v. *Lachman Singh*,[4] and the Madras view has been followed in the recent case reported in *Rachhpal Singh* v. *Sheo Ratan Singh*,[5] in which all the decisions are reviewed. The question is discussed in Mulla's Code of Civil Procedure, 9th Edition, p. 812, in which the position is summarised as follows :—

"The High Court of Madras has held that where leave is granted to a plaintiff to bring a fresh suit on payment of the defendant's costs *on or before a specified date*, and he fails to do so, he is precluded from bringing a second suit, and if such suit is brought, it should be dismissed."

That is the ruling in *Fischer* v. *Nagappa Mudaly*,[3] but that will not apply to the facts of the present case, as no date was fixed for payment of the costs in the order of the first suit allowing its withdrawal. In *Seshayya* v. *Subbayya*[2] the Madras High Court held that if leave is granted to bring a fresh suit on payment of the defendant's costs (without specifying any date), the plaintiff is precluded from bringing a second suit unless the costs are paid before the institution of the second suit. The payment of the costs after the close of the trial in the second suit is not a compliance with the condition. The Calcutta High Court has taken a different view in *Abdul Aziz Molla* v. *Ebrahim Molla*,[6] where leave was granted to the plaintiff to bring a fresh suit on payment of the defendant's costs, and it was held that though the payment of costs was a condition precedent to the

(1) (1914) 19 Cal. L. J. 529.
(2) (1924) 47 Mad. L. J. 646.
(3) (1909) 33 Mad. 253.
(4) (1925) 5 Pat. 306.
(5) [1929] A. I. R. (All.) 692.
(6) (1904) 31 Cal. 965.

1930

SHIDRAMAPPA MUTAPPA v. MALLAPPA RAMCHANDRAPPA

Baker J.

institution of a second suit, non-payment of costs before the institution of the second suit did not render the fresh suit bad *ab initio*, and, further, that payment of costs before the trial of the fresh suit cured the irregularity. In *Shital Prosad* v. *Gaya Prosad*,[1] Sir Lawrence Jenkins, while agreeing with the result of the ruling in *Abdul Aziz Molla* v. *Ebrahim Molla*,[2] based his decision on somewhat different grounds. In that case also permission was granted to the plaintiff to institute a fresh suit on payment of the defendant's costs. The plaintiff did not pay the costs and brought a second suit. The suit was dismissed by the Munsiff for non-payment of costs. The plaintiff appealed to the Subordinate Judge. Pending the appeal the plaintiff paid the defendant's costs. The Subordinate Judge thereupon sent back the case to the Munsiff for trial on the merits. It was held that inasmuch as the permission to withdraw and bring a fresh suit was made conditional on a certain payment, the original suit could not be deemed to be withdrawn until those costs were paid, and it must, therefore, be deemed to be a pending suit which became disposed of as soon as payment was made. In the judgment it is stated (p. 531):

> "When a plaintiff has obtained leave to withdraw upon payment of costs, it is his duty to pay the costs at once, for until they are paid there is no withdrawal with the permission of the Court. In that view when the case came before the Munsiff he was not entitled to dismiss it. All he could do was to regard section 10 (of the Code) as a bar to his proceeding with the trial of the suit. . . On the payment of those costs there was the withdrawal complete under section 373 of the Code or Order XXIII."

Reference has been made by the learned counsel for the appellant to *Ambubai* v. *Shankarsa*.[3] The facts of that case, however, are different. There the plaintiff withdrew the suit with permission of the Court and was ordered to pay defendant's costs before filing a fresh suit. Without paying the defendant's costs he filed

[1] (1914) 19 Cal. L. J. 529. [2] (1904) 31 Cal. 965.
[3] (1924) 27 Bom. L. R. 243.

a fresh suit. He paid the costs three days before the day fixed for the hearing of evidence. The Court dismissed the suit on the ground that the suit being filed without previous costs having been paid was bad *ab initio*. The plaintiff, however, considering the permission given him by the Court in the original suit as still surviving in spite of the second suit being dismissed, filed this third suit on the same cause of action. It was held that the permission granted by the Court in the original suit would only extend to the filing of one fresh suit, and not to the filing of any number of fresh suits, which might be dismissed each in its turn, without any trial on the actual merits of the case between the parties, for failure to pay the costs of the first suit. When the plaintiff had refused to comply with the condition on which alone he could file a second suit, he could not avail himself of the original permission of the Court for filing a third suit. That permission no longer remained in force. If the decisions of the lower Courts were upheld, it would be illegally extending the provisions of Order XXIII, rule 1, in favour of the plaintiff, who would thus be allowed to harass the defendants with a succession of suits. The point, therefore, in that case was whether the permission originally granted to withdraw and file a fresh suit on payment of the costs would extend only to the subsequent suit filed or to a third suit, and the second suit in that case was dismissed. In the present case the second suit was not dismissed, but was allowed to be withdrawn with permission to file another suit. The case, however, is an authority for the proposition that permission granted under Order XXIII, rule 1, extends only to the filing of one suit, and not to a succession of suits, and it is admitted in the present case that the plaintiff relies not on the permission originally given in the first suit, but on the

1930

SHIDRAMAPPA MUTAPPA v. MALLAPPA RAMCHANDRAPPA

Baker J.

permission given in the second suit filed in 1925. The question, therefore, is whether we should adopt the view taken by the Calcutta High Court in *Shital Prosad* v. *Gaya Prosad*,[1] or the view of the Madras High Court in *Seshayya* v. *Subbayya*.[2] Under Order XXIII, rule 1, clause (1), the plaintiff has an absolute right to withdraw his suit if he likes, and the permission granted under Order XXIII, rule 1, clause (2), relates not to the withdrawal but to the right to bring a fresh suit. With respect, I am unable to follow the reasoning in *Shital Prosad* v. *Gaya Prosad*.[1] I do not see how where permission is given to withdraw from the suit with liberty to bring a fresh suit on condition of payment of costs, the former suit can be held to be pending until the costs are paid. In my opinion the permission relates not to the withdrawal but to the bringing of the fresh suit, and with respect I agree with the view of the Madras High Court in *Seshayya* v. *Subbayya*[2] that the latter part of Order XXIII, rule 1, clause (2) (*b*), must be read as referring not to permission to withdraw a suit as well as permission to institute a fresh suit, but merely as allowing the Court to give permission to institute a fresh suit in place of the one which has been withdrawn. Inasmuch as the withdrawal of the suit does not require the permission of the Court, it must be taken that the first suit is withdrawn when the order is passed and that the permission granted refers only to the filing of the subsequent suit on certain conditions. In my opinion, it would be inconvenient to consider a suit which has been withdrawn as still pending, and with respect, the reasoning in the Madras cases commends itself to me rather than the reasoning in the Calcutta case. The whole question has been discussed in detail in *Rachhpal Singh* v.

[1] (1914) 19 Cal. L. J. 529. [2] (1924) 47 Mad. L. J. 646.

Sheo Ratan Singh,[1] and I agree with the view taken in that case as to the suit being withdrawn and ceasing to be a pending suit, and with respect, I agree with the view of the learned Judge who tried that case that there is no reason why if the permission to file a second suit had been granted subject to a condition, the plaintiff should not be held strictly to that condition and his second suit dismissed if he attempts to file it without having fulfilled the condition on which he secured permission. That judgment refers to all the authorities, and his conclusion, with which I agree, is that once the plaintiff has accepted the terms imposed by the Court the case is declared to be withdrawn and is no longer pending, and the plaintiff must comply with those terms strictly or take the consequences by being barred from filing a second suit. No doubt, it is desirable, as has been laid down in most of these cases, that a date should be fixed within which the costs should be paid, but in the present case the order was in effect that the costs should be paid before a second suit was filed, and this condition was not complied with, the costs not being paid until the second suit had been withdrawn. It has been argued by the learned counsel for the appellant that his client did not accept the costs which were paid into Court. I do not think there is anything in this point, as if the defendant had the right to refuse to accept the costs, he could, even if they were paid in time, prevent the plaintiff from bringing a fresh suit.

However, in the present case, I am of opinion that the condition on which the plaintiff was allowed to bring a second suit not having been complied with, the plaintiff had no right to bring a second suit, which should have been dismissed, and therefore the permission in that suit is of no avail.

[1] [1929] A. I. R. (All.) 692.

1930

SHIDRAMAPPA MUTAPPA v. MALLAPPA RAMCHANDRAPPA

Baker J.

I would therefore restore the decree of the First Court and set aside the order of the lower appellate Court, with costs throughout on the plaintiff.

Decree reversed.

J. G. R.

APPELLATE CRIMINAL.

Before Mr. Justice Madgavkar and Mr. Justice Barlee.

EMPEROR *v.* SAKINABAI BADRUDDIN LUKMANI.*

1930 *September* 29.

Prevention of Intimidation Ordinance (V of 1930), sections 3 and 4—Liquor shop—Persuading would-be customers not to drink—Loitering—Molestation—Intimidation.

On July 4, 1930, the accused, a Mahomedan lady aged 59 and belonging to a respectable family, was standing at a distance of 25 to 30 paces from a country liquor shop from 10-30 a.m. till midday, with the object of dissuading would-be customers from drinking liquor. There was no evidence to show that the conduct of the accused in any way interfered with the business of the shop-keeper or was vexatious. She was convicted under section 4 of the Prevention of Intimidation Ordinance, 1930. On a reference to the High Court :—

Held, (1) that the accused was not guilty of the offence of molestation under section 4 of the Prevention of Intimidation Ordinance;

(2) that the attempts of the accused to persuade people of the evils of drink and to dissuade them from visiting the liquor shop cannot be said to be with a view to cause the shop-keeper to close his shop within the meaning of section 3 of the Ordinance;

(3) that the words 'such other person' in section 3 of the Ordinance mean that the person molested must be the same person as the person to whose legal rights obstruction is to be caused.

Per *Madgavkar J.* :—"If the section [section 3] is analysed and applied, the result is as follows :—

(1) B, namely, the shop-keeper, has a legal right to keep his shop open; (2) A must intend to interfere with the exercise of such legal right by the shop-keeper; and (3) A must obstruct or intimidate or use violence to him or loiter near his place of business. If all three are proved, A is guilty of molestation."

Per *Barlee J.* :—"The section does not penalize loitering with a view to cause loss to another. It speaks of loitering with a view to causing another to abstain from some lawful act, and the difference is material. The word 'abstain' conveys the idea that the abstainer has an opportunity of doing or not doing an act. . . . It seems, then, to follow that the offence aimed at is the attempt to dominate another's will so as to prevent him from doing an act which he has an opportunity of doing. In other words the section, as the preamble shows, aims at intimidation."

*Criminal Reference No. 85 of 1930.