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[849] APPELLATE CIVIL.

Before Mr. Justice Geidt and Mr. Justice Mookerjee.

AKLEMANNESSA BIBI *v.* MAHOMED HATEM.*

[29th June and 7th July, 1904.]

Restitution of conjugal rights—Jurisdiction of munsif—Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887) ss. 18, 19, 21—Suits Valuation Act (VII of 1887) ss. 9, 11—Valuation of Suit - Jurisdiction—Mahomedan marriage, requirements of.

A suit for restitution of conjugal rights is not triable by a Munsif under s. 19, sub-section (1) of Act XII of 1887, but is triable by a District Judge or a Subordinate Judge under s. 18 of that Act.

Matra Mondal v. *Hari Mohun Mullick* (1), *Golam Rahman* v. *Fatima Bibi* (2), *Mowla Newas* v. *Sajidunnissa Bibi* (3), and *Shire* v. *Shire* (4) referred to.

Where a Court of first instance exercised jurisdiction with respect to a suit by reason of an arbitrary valuation, and no objection to jurisdiction was taken in that Court :—

Held, that the suit ought not to be dismissed by an Appellate Court on the ground of want of jurisdiction, regard being had to section 11 of the Suits Valuation Act.

Semble : When a Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process.

Ledgard v. *Bull* (5), *Meenakshi Naidoo* v. *Subramania Sastri* (6) and *Raja Har Narain Singh* v. *Chaudhurain Bhaqwant Kuar* (7) referred to.

The formal requirements of a valid Mahomedan marriage discussed.

Badal Aurat v. *Queen-Empress* (8) referred to.

[Dist. 34 Cal. 352=5 C. L. J. 400=11 C. W. N. 458. Foll. 9 N. L. R. 161 ; 21 I. C. 918. Diss. 28 All. 545 F. B.=3 A. L. J. 266=A. W. N. 1906, 99. Ref. 31 Mad. 89 F. B.=17 M. L. J. 573=3 M. L. T. 73 ; 15 C. W. N. 991=11 I. C. 215 ; 34 Mad. 286 ; 39 All. 767.]

SECOND APPEAL by the defendants, Aklemannessa Bibi and others.

[850] The plaintiff, Mahomed Hatem, claimed the defendant No. 1, Aklemannessa Bibi, as his wife and brought this suit in the Court of the Munsif of Atia in the district of Mymensingh. The suit was valued at Rs. 49. The defendants contested the suit on the ground that there was no valid marriage according to the Mahomedan law, but they did not take exception to the jurisdiction of the Court, nor to the valuation of the subject-matter of the suit.

The suit was for restitution of conjugal rights after a declaration by the Court that Aklemannessa was the lawfully married wife of the plaintiff.

The Munsif held that there was no valid marriage, and he dismissed the suit. But, on appeal, the Subordinate Judge held that the plaintiff did marry the defendant No. 1 in the *nika* form, and he accordingly allowed the appeal reversing the decision of the first Court, and decreed the suit with costs. The defendants appealed to the High Court.

Moulvi *Shamsul Hudu* (Dr. *Rash Behary Ghose* with him), for the

* Appeal from Appellate Decree, No. 1575 of 1903, against the decree of Hari Prosad Das, Subordinate Judge of Mymensingh, dated June 30, 1903, reversing the decree of Kedar Nath Chowdhry, Munsif of Atia, dated March 20, 1902.

(1) (1889) I. L. R. 17 Cal. 155.
(2) (1886) I. L. R. 13 Cal. 232.
(3) (1891) I. L. R. 18 Cal. 378.
(4) (1845) 5 Moo. (P. C.) 81.
(5) (1886) I. L. R. 9 All. 191 ; L. R. 13 I. A. 134.
(6) (1887) I. L. R. 11 Mad. 26 ; L. R. 14 I. A. 160.
(7) (1891) I. L. R. 13 All. 300 ; L. R. 18 I. A. 55.
(8) (1891) I. L. R. 19 Cal. 79, 81.

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appellant. A Munsif has no jurisdiction to try suits for restitution of conjugal rights. Can it be said of the present suit that its value does not exceed Rs. 1,000? The Suits Valuation Act does not provide for valuation of suits of this description. A suit for restitution of conjugal rights is incapable of being valued: see *Golam Rahman* v. *Fatima Bibi* (1) and *Mowla Newaz* v. *Sajidunnissa Bibi* (2).

[GEIDT, J. What do you say to s. 11 of the Suits Valuation Act?]

This is not a case of over-valuation or under-valuation, but a case to which no money-value can be attached. Section 11 of that Act contemplates suits on which money-value can be put.

[GEIDT, J. Do you say these suits have no value?]

I say that these suits are not capable of being valued. It cannot be said of these suits that they do or do not exceed the value of Rs. 1,000, as no money-value can be put on them; and therefore a Munsif has no jurisdiction to try them.

[851] Moulvi *Mahomed Yusoof* (Moulvi *Habibullah* with him), for the respondent. If it is impossible to attach any money-value to suits for restitution of conjugal rights, a Munsif has jurisdiction to try them. The valuation of a suit must be taken from the statement in the plaint; and no exception having been taken to the valuation of this suit in the Court of first instance, the jurisdiction of the Munsif cannot be disputed now: *Hamidunnissa Bibi* v. *Gopal Chandra Malakar* (3). If such a suit has no money-value, it cannot be said that its value is more than Rs. 1,000, and then it follows as a necessary consequence that such suits should be brought in the Courts of the lowest jurisdiction: ss. 7, 9, and 11 of the Suits Valuation Act. It has been held in *Mowla Newaz* v. *Sajidunnissa Bibi* (2) that a money-value cannot be put on such a suit for the purpose of giving an appeal to the Privy Council, although that suit had been originally valued at Rs. 25,000. In the present case the suit was valued at Rs. 49, and no objection was taken by the defendant to that valuation; he cannot take that objection now before this Court, nor can the question of jurisdiction be raised now for the first time.

[MOOKERJEE, J. Do you rely upon s. 11 of the Suits Valuation Act?]

As the other side practically says that there has been an under-valuation in this case, it comes under s. 11 of that Act.

It has always been the practice with the Munsifs to try these suits, and no objection was ever taken to such trials before. I submit, therefore, the Munsif has jurisdiction to try this suit.

Moulvi *Shamsul Huda*, in reply.

Cur. adv. vult.

GEIDT AND MOOKERJEE, JJ. The plaintiff instituted the suit, out of which this appeal arises, in the Court of the Second Munsif at Atia upon the allegation that the first defendant was his lawfully married wife, that the other defendants had brought her under their influence and prevented her from coming to his house and that he was accordingly entitled to a decree for restitution of conjugal rights. The relief claimed in the plaint was **[852]** valued at Rs. 49. The defendants resisted the plaintiff's claim on the ground that there had been no valid marriage, but they did not take exception to the valuation of the suit. Two issues were raised in the Court of first instance,

(1) (1886) I. L. R. 13 Cal. 232, 234.
(2) (1891) I. L. R. 18 Cal. 378, 381.
(3) (1897) I. L. R. 24 Cal. 661.

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namely, first, whether defendant No. 1 was the lawfully married wife of the plaintiff, and secondly, whether the plaintiff was entitled to the enforcement of conjugal rights prayed for. The learned Munsif found that there was no valid marriage between the plaintiff and the first defendant and dismissed the suit. The plaintiff appealed to the Subordinate Judge, who held upon the evidence that the plaintiff did marry the first defendant in the *nika* form, and made a decree in favour of the plaintiff.

The defendants have appealed to this Court, and on their behalf, the decision of the Court below has been assailed on two grounds, namely, first, that the learned Subordinate Judge ought to have maintained the decree of dismissal made by the Court of first instance, inasmuch as the Munsif had no jurisdiction to try a suit for restitution of conjugal rights; secondly, that the judgment of the Subordinate Judge is defective, inasmuch as he has not found that the formal requirements of a Mahomedan marriage were complied with. We shall deal with each of these objections separately.

As to the first contention raised by the learned vakil for the appellant, he concedes that it was not taken in the Court of first instance; nor was it taken in the grounds of appeal to the Subordinate Judge, and, so far as we can gather from the judgment, the only question which appears to have been discussed before him, was whether there had been a valid marriage between the parties; the defendants, however, assert that, although not taken in the memorandum of appeal, the ground was urged before the Subordinate Judge that the Munsif had no jurisdiction to try the suit, and they produce affidavits in support of their allegation; the plaintiff, on the other hand, denies that any such point was argued before the lower Appellate Court. We have, however, allowed the point to be argued, as it is one of general importance and does not require the investigation of any facts for its decision. As pointed out by their Lordships of the Judicial Committee in *Ledgard* v. *Bull* (1), " when a Judge has no inherent jurisdiction [853] over the subject matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process." In a later case *Meenakshi Naidoo* v. *Subramaniya Sastri* (2), their Lordships pointed out that, where an appeal had been heard without objection, though no appeal was allowed by law, the judgment must be reversed, "no amount of consent could confer jurisdiction, where no jurisdiction exists." In a still later case, *Raja Har Narain Singh* v. *Chaudhurain Bhagwant Kuar* (3), their Lordships pointed out that though an objection relating to jurisdiction might not have been taken in any of the Subordinate Courts, it might be successfully taken even before the ultimate Court of Appeal, for " the Statute is there, and the Judges were bound to take judicial notice of it." We shall now proceed to examine whether the objection to the jurisdiction of the Munsif is well founded.

Under section 18 of Act XII of 1887, "save as otherwise provided by any enactment for the time being in force, the jurisdiction of a District Judge or Subordinate Judge extends, subject to the provisions of section 15 of the Code of Civil Procedure, to all original suits for the time being cognisable by Civil Courts." The first clause of section 19

(1) (1886) I. L. R. 9 All. 191; L. R. 13 I. A. 134, 145.
(2) (1887) I. L. R. 11 Mad. 26; L. R. 14 I. A. 160, 167.
(3) (1891) I. L. R. 13 All. 300; L. R. 18 I. A. 55, 58.

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of Act XII of 1887 then provides that, "save as aforesaid, and subject to the provisions of sub-section (2), the jurisdiction of a Munsif extends to all like suits, of which the value does not exceed one thousand rupees." The effect of these provisions is to confer on a District Judge or a Subordinate Judge jurisdiction to try all original civil suits, and to confer on a Munsif co-ordinate jurisdiction to try all like suits of which the value does not exceed one thousand rupees; and it is only by reason of section 15 of the Civil Procedure Code, which provides that every suit shall be instituted in the Court of the lowest grade competent to try it, that suits of which the value does not exceed one thousand rupees, which would otherwise be triable by a District Judge, a Subordinate Judge or a Munsif must be instituted before a Munsif: see *Matra Mondal* v. *Hari Mohan Mullick* (1). The present suit for restitution of conjugal rights **[854]** is therefore triable by a Subordinate Judge, unless it can be shown that its value does not exceed one thousand rupees. The learned vakil for the plaintiff-respondent contends that his claim was valued without any objection at Rs. 49, and this valuation must determine the forum, in which the suit is triable. In answer the learned vakil for the appellant argues that a suit for the restitution of conjugal rights is incapable of being valued, and that consequently the arbitrary valuation placed by the plaintiff in his plaint ought not to be a determining factor in fixing the forum. We are of opinion that this contention is well founded, and is supported by the decisions of this Court in the cases of *Golam Rahman* v. *Fatima Bibi* (2) and *Mowla Newaz* v. *Sajidunissa Bibi* (3). In the first of these cases an appeal had been preferred to this Court against a decision of the Recorder of Rangoon in a suit for restitution of conjugal rights, which had been valued by the plaintiff at Rs. 5,000, so as to bring his case within section 49 of the Burma Courts Act, which gave a a right of appeal to the High Court in suits of which the value exceeded Rs. 3,000 and was less than Rs. 10,000. This Court held that a suit for restitution of conjugal rights was not capable of money valuation, and that consequently, the appeal did not lie, inasmuch as it was a condition precedent that the appeal should be capable of a money-valuation and that money-valuation should fall within certain limits. In the second of the two cases referred to, an application for leave to appeal to Her Majesty in Council was made against a decree of this Court in a suit for restitution of conjugal rights, of which the value had been estimated by the plaintiff at Rs. 25,000, and such valuation had been acquiesced in by the defendant. The application was refused on the ground that a suit for restitution of conjugal rights and possession of a wife was not one to which a special money-value could be attached for the purposes of jurisdiction, and that the action of the parties, that is of the plaintiff, in putting an arbitrary valuation on the plaint, and that of the defendant, in acquiescing in such valuation and preferring an appeal to this Court on that footing, could not in any manner affect the question of jurisdiction. **[855]** We entirely agree with the view of the law taken in these cases, which appears to be in accordance with the decision of their Lordships of the Judicial Committee in the case of *Shire* v. *Shire* (4). We are of opinion therefore that section 19, sub-section 1, of Act XII of 1887 applies only to suits the value of which is capable of being estimated in money, and the money valuation does not exceed a certain limit, and

(1) (1889) I. L. R. 17 Cal. 155.
(2) (1886) I. L. R. 13 Cal. 232.
(3) (1891) I. L. R. 18 Cal. 378.
(4) (1845) 5 Moo. P. C. 81.

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that a suit for restitution of conjugal rights is not one of which it can be predicated that its value does not exceed one thousand rupees. We hold accordingly that a suit for restitution of conjugal rights is not triable by a Munsif under section 19, sub-section 1, of Act XII of 1887, but is triable by a District Judge or a Subordinate Judge under section 18 of that Act. The learned vakil for the respondents has invited our attention to the provisions of section 21 of Act XII of 1887, and has suggested that the necessary corollary to this conclusion would be that an appeal against a decree of a Subordinate Judge in such a suit must always lie to this Court; we are unable to see that this should in any way affect our decision. We may add that under section 9 of the Suits Valuation Act (VII of 1887) it appears to be open to the High Court in a case of this description to direct, with the previous sanction of the Local Government, that the subject-matter is to be valued in a specified manner.

As we have held that the Munsif had no jurisdiction to try the suit, the question arises what the effect of this decision ought to be. The learned vakil for the respondent has contended that we ought not to dismiss the suit at this stage by giving effect to this objection even though it be well founded, and in support of his argument he has relied upon section 11 of the Suits Valuation Act, which provides—we quote only so much of the section as is necessary for the present purpose—that, "notwithstanding anything in section 578 of the Code of Civil Procedure, an objection that by reason of the over-valuation or under-valuation of a suit, a Court of first instance, which had not jurisdiction with respect to the suit, exercised jurisdiction with respect thereto, shall not be entertained by an Appellate Court, unless the objection was taken in the Court of first instance at or before **[856]** the hearing at which issues were first framed and recorded." The learned vakil for the appellant contends that this section has no application to the facts of the present case, inasmuch as here the Court of first instance exercised a jurisdiction it did not possess, not by reason of over-valuation or under-valuation, but by an act of valuation, where no valuation was possible. We are of opinion that the argument advanced by the learned vakil for the respondent is well founded and must prevail. It seems to us to be clear that by the phrase "over-valuation or under-valuation" the Legislature intended to include all cases of erroneous valuation, and that the language of section 11 is comprehensive enough to cover a case like the present, in which a Court has exercised jurisdiction by reason of an arbitrary valuation, when no valuation ought to have been made, because the suit was incapable of valuation. Besides, it appears that though the plaintiff paid the fixed fee prescribed by schedule II, clause 15 of Act VII of 1870 on his plaint, he valued the suit at Rs. 49, in order that the Munsif might have jurisdiction over the suit. It may accordingly be fairly contended that the Munsif exercised jurisdiction by reason of an erroneous valuation of the suit. We hold accordingly that, although the Munsif had no jurisdiction to try the suit, it ought not to be now dismissed on that ground, as the objection to jurisdiction was not taken in the manner provided in section 11 of the Suits Valuation Act.

The second contention advanced on behalf of the appellant relates to the merits of the case, and we are of opinion that the appellant is entitled to succeed on this ground. The learned Subordinate Judge has found that the plaintiffs did marry the defendant No. 1 in the *nika*

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form, but he has not found whether the formal requirements of a Mahomedan marriage have been complied with; as pointed out in Wilson's Digest of Anglo-Mahomedan Law, 2nd edition, page 133, although neither writing nor any religious ceremony is necessary to the validity of a marriage contract, "Words of proposal and acceptance must be uttered by the contracting parties or their agents in each other's presence and hearing and in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Moslems, [857] and the whole transaction must be completed at one meeting;" see also Amir Ali's Mahomedan Law, Vol. II, page 283; *Badal Aurat* v. *Queen-Empress* (1). As the learned Munsif points out, the evidence upon these points is extremely conflicting, and before it can be declared that the first defendant is the lawfully married wife of the plaintiff, we think it necessary that it should be determined upon the evidence, whether all the requirements of a valid marriage as required by Mahomedan Law have been complied with.

The result therefore is that this appeal must be allowed, the decree of the Subordinate Judge reversed and the case remitted to him, so that he may determine upon the evidence, whether all the requirements of a valid Mohamedan marriage have been established. The costs of this appeal will abide the result.

Appeal allowed; Case remanded.

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31 C. 858 (=1 Cr. L. J. 852.)

[858] CRIMINAL REVISION.

Before Mr. Justice Pratt and Mr. Justice Handley.

DWARKA NATH RAI CHOWDHRY v. EMPEROR.*

[11th April and 17th May, 1904.]

Criminal proceedings—Stay of—Pending civil suit.

Upon an application in revision to stay criminal proceedings pending in a Magistrate's Court until the disposal of a civil suit in regard to the same subject-matter.

Held that the High Court ought not to interfere except on good cause shown.

That as this was not a private prosecution but one directed by the District Judge, in what he believed to be the interests of justice, and as the witnesses were related to the accused, it was desirable that the evidence should be recorded without delay and that the Magistrate should proceed forthwith to make the preliminary inquiry prior to commitment.

[**Ref.** 7 Bur. L. T. 73=15 Cr. L. J. 488=24 I. C. 576.]

RULE granted to the petitioners, Dwarka Nath Rai Chowdhry and others.

This was a Rule calling upon the District Magistrate of Faridpore to show cause why the case pending against the petitioners by an order of the District Judge, dated the 22nd March 1904, should not be stayed pending the disposal of the appeal in the probate case, which is now pending in the High Court.

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* Criminal Miscellaneous No. 63 of 1904 made against the order passed by L Palit, Sessions Judge of Faridpore, dated the 22nd of March 1904.

(1) (1891) I. L. R. 19 Cal. 79, 81.