Before Mr. Justice Macpherson.

P. *v.* P.

1872
June 6 & 17.

Attorney – Application by Attorney for Withdrawal or Dismissal of suit for Judicial Separation and for payment of his taxed Costs by Respondent.

On the 8th of January 1872 the petitioner A. L. P. instituted a suit for judicial separation against her husband, on the ground of his cruelty and desertion.

The respondent in his written statement denied the allegations of cruelty and desertion. He stated that the petitioner had left his house of her own accord, and that he had refused afterwards to take her back on finding that she was leading an immoral life. He further stated that, before his alleged marriage with the petitioner, she had represented herself to be a widow, but that he had subsequently discovered that her former husband M. M. was still alive.

On the 29th January an order for alimony *pendente lite*, and for deposit of the petitioner's costs of suit was made against the respondent; and on the 11th March he applied to be allowed to give security for the due payment of the costs, instead of depositing their amount in Court: this application was dismissed. On the 15th March, the respondent having failed to deposit the petitioner's costs in Court, a rule was obtained calling upon him to show cause why an attachment should not issue against him; and on the same day the respondent obtained leave to file a further written statement, and it was ordered that a commission should issue to examine M. M., upon the respondent's paying into Court the petitioner's costs of the said commission and of the application therefor, and, pending the return of the commission, the respondent was ordered to give security for the costs which, on the 29th January, he had been ordered to deposit in Court. The respondent's attorneys took no further proceedings on this order: and on the 28th March Mr. H. R. Fink, the attorney on the record for the petitioner, learned that she had returned to, and was living with, the respondent, and that the suit had been amicably settled.

Mr. *Bonnerjee*, on behalf of Mr. Fink, now moved upon notice to the petitioner, the respondent, and the respondent's attorneys, for an order that the suit be dismissed or withdrawn; that the petitioner's costs as between attorney and client be taxed; and that the respondent do pay such taxed costs to Mr. Fink as the attorney on record for the petitioner. The motion was based upon the pleadings, and the several orders made in the suit, and upon an affidavit of Mr. Fink in which, after stating that he had been retained by the petitioner, and had instituted the suit on her behalf and under her instructions, and after setting out the proceedings and orders made thereupon, and further stating that the parties had returned to cohabitation, and that the suit had been amicably

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settled, he alleged that, on the 10th of April, the petitioner called on him, and instructed him to withdraw the suit, saying that her husband would pay all her costs, and that he had accordingly prepared a petition in terms of these instructions, and sent it to the respondent's attorneys, but that they had returned it to him on 24th April, with a statement that they could not sign it. He then alleged that no final order in the suit having been made, he was unable to tax his costs; and that to the best of his information and belief, the petitioner had no separate property of her own.

Mr. *Bonnerjee*, stating that he moved on behalf of the petitioner, contended that, although the Divorce Act contains no provision as to costs, by s. 45, the Civil Procedure Code is embodied with the Act, the Court therefore, has power to deal with the question of costs. The attorney has such an interest in the suit as will entitle him to the order; for till the suit is dismissed or withdrawn, his costs cannot be taxed. The application is correct in form—*Cheale* v. *Cheale* (1). [MACPHERSON, J.—Neither the respondent nor the petitionor apply to have the suit dismissed. I could understand your moving on behalf of the attorney, but you said that you moved on the petitioner's behalf, and you call upon her to show cause]. The petitioner has not withdrawn her instructions, but, in point of fact, the motion is on behalf of her attorney. The Court has power to make this order—*Cooper* v. *Cooper* (2). The element which was wanting in that case is not wanting here, for we had an order that the respondent should furnish security.

Mr. *Macrae* for the respondent.—An attorney can come in and ask that his costs may be taxed, but he cannot ask that the suit shall be withdrawn or dismissed. Limiting myself, therefore, to that portion of the motion which asks for an order that the respondent do pay his wife's costs, I submit that, on the pleadings before the Court, there is sufficient to show there were circumstances of grave suspicion in the case which ought to have put the attorney on enquiry. See the judgment of Knight Bruce, L. J., in *Baylis* v. *Watkins* (3). [MACPHERSON, J.—You can only say that the petitioner made certain charges which she has now condoned; nothing more appears]. It is said that in England the wife was considered entitled to her costs in any event. but this is not so—*Jones* v. *Jones* (4) and *Lewis* v. *Lewis* (5). There are, indeed, cases in which a wife who has seperate property has been made to pay her husband's costs. It is true that in the Divorce Court the wife does generally obtain her costs, whether successful or not, but this is an anomaly which this Court will discountenance, unless it is bound by precedent, and the cases cited show, that it is not so bound. To saddle the husband with the costs of a suit which the

(1) 1 Hagg. Ecc., 374.
(2) 3 Sw. & Tr., 392.
(3) 2 DeG., J. & S., 91.
(4) L. R., 2 P. & D., 333,
(5) 29 L. J., P. & M., 123.

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wife has brought under the advice of a speculative attorney, for acts which she has condoned, would be a hardship and imposition.

Mr. *Bonnerjee* in reply

MACPHERSON, J.—Supposing the application to be regularly made (*i. e.*, by the petitioner moving to withdraw the suit, and that the respondent do pay her costs), I should act as the Judge Ordinary did in *Cooper* v. *Cooper* (1). That case is very similar in many respects to the present ; and I see no reason to doubt that the petitioner's costs might, as the case proceedeb, have been taxed *de die in diem* if the petitioner had so applied.

It is said that the facts appearing on the pleadings and affidavits which have been filed are such as show great negligence, amounting to want of ordinary care, if not to something more, on the part of the petitioner's attorney. And it is argued that the case is groundless, and that, under the circumstances, the respondent ought in no circumstances to be made to pay the petitioner's costs ; but without going into evidence,—the same evidence almost as would be necessary if the case went on to a regular hearing,—I cannot adjudicate upon the question of the truth or falsehood of the varions allegations of the parties. It is true that the respondent ssys that the petitioner has committed bigamy, and that he seems to have substantial grounds for so saying. But it is not proved that she has done so ; and the respondent does not profess to intend to proceed to prove it. The petitioner in her petition, which is verified, states that she was legally married to the respondent, and there is no doubt that she did go through the marriage ceremony with him. That being so, and in the absence of any indication that the petitioner's attorney had any knowledge of her being already the wife of another man, or that there was any reason why he should suspect her of having committed bigamy, I cannot say that I think Mr. Fink was guilty of negligence, so far as the question of bigamy is concerned, in making no special inquiries on that point before he filed the petition. There being no suggestion to the contrary, I do not wonder that he rested satisfied with her statement, true in fact, that she had been married recently to the respondent.

There is no doubt that the petitioner comes before the Court under exceptionally discreditable circumstances as regards her antecedents, taking her story as she herself tells it in her written statement; and it is possible, not to say probable, that, if the matter had gone on to a hearing, the respondent would not have been ordered to pay her costs. But the parties have chosen to return to cohabitation, and so prevent the further progress of the suit. That being so, and looking at all the circumstances, I think that the attorney is entitled to an order that his costs when taxed be paid by the respondent.

But the respondent will not have to pay the costs of this application, which in form is entirely irregular and wrong. Mr. Fink in his affidavit states that, on

(1) 3 Sw. & Tr., 392.

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the 15th of March, the petitioner obtained a rule against the respondent to show cause why an attachment should not issue for non-compliance with an order which had been made, that he should deposit in Court Rs. 1,500 to meet the petitioner's costs; that immediately thereafter the Court ordered the issue of a commission to England to take evidence as to the bigamy, and that, pending the return of the commission, the respondent should give security for the probable amount of the petitioner's costs, with liberty to the petitioner to apply for the deposit of those costs on the return of the commission from England; that no further proceedings were taken; and that on the 28th March he (Mr. Fink) was informed that the petitionar had gone back to live with the respondent, and that the suit was amicably settled. Mr. Fink then states that on the 10th of April the petitioner called on him and instructed him to withdraw the suit, saying that the respondent would pay all her costs; that he accordingly prepared a petition in terms of these instructions, and sent it to the respondent's attorneys for their consent, but they returned the same on the 24th April, and refused to consent.

On this state of facts, Mr. Fink, on the 29th May, of issued a notice to his own client the petitioner in the suit, to the respondent and to the respondent's attorneys, to the effect that he will apply in chambers for an order that the suit be dismissed or withdrawn, and that the respondent do pay him, as the attorney on the record for the petitioner, the amount of her costs when taxed. Mr. Fink was quite wrong in coming to the Court in this manner, asking for an order as against his own client. He ought either to have made an application to the Court in the terms of the instructions received from the petitioner on April 10th or, if for any reason he thought he could no longer act on those instructions, he should have again communicated with his client and have ascertained expressly her intentions and wishes. After having ascertained her wishes, he might then have made such application to the Court as was necessary. Coming in, however, as he does on his own account, and adversely to both parties, no order for the withdrawal or other final disposal of the suit can be made, and the parties will have to come again before the Court, and be put to further expense before the suit can be finally disposed of; whereas, if the matter had been moved in proper form, the suit might have been finally concluded now.

Therefore, although I shall order the petitioner's costs to be taxed and to be paid by the respondent to her attorney (he being substantially entitled to such an order), her attorney must personally bear his own costs of this application.

The petitioner's costs will be taxed on scale No. 2.

Before Mr. Justice Macpherson.

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June 27 & 28.

IN THE MATTER OF A PLAINT, No. 32 OF 1872, FILED IN THE COURT OF THE SUBORDINATE JUDGE OF ZILLA TIPPERAH AT COMILLAH, WHEREIN EUGENE JOSEPH COURJON IS PLAINTIFF AND ALFRED COURJON IS DEFENDANT.

10 B.L.R.67 *Removal of Suit from Mofussil Court—Letters Patent*, 1865, *c.* 13—*Practice—Using Affidavit on oMtion.*

MOTION to remove a suit pending in the Court of the Judge of Zilla Tipperah to the High Court.

The motion was supported by an affidavit of Mr. J. B. Knowles, a member of the firm of Messrs, Chauntrell, Knowles and Roberts, the plaintiff's attorneys. Mr. Knowles therein stated amongst other things that the suit was to set aside a patni and dar-patni lease executed by the plaintiff, on the 3rd of December 1866, in favor of the defendant, of the plaintiff's share in various estates and landed property situate principally in Zilla Tipperah, to recover mesne profits, for an account, and for the appointment of a receiver; that the plaintiff also sought to set aside an izara, or lease, dated the 22nd of April 1863 of the same properties, and for possession thereof; that the money value of the plaintiff's claim was laid at Rs. 11,81,226-4-6; that the ground of the plaintiff's case was fraud, undue influence, ignorance and concealment of value of the plaintiff's interest; that the defendant had applied to the Judge of the District of Tipperah to transfer the case to his own Court on the ground (*inter alia*) that the suit involved questions of French and English law of considerable difficulty; and that the suit had been so transferred. Mr. Knowles further stated that he was informed and believed that the plaintiff and defendant were both sons of one Farge Courjon, who in his will described himself as a French subject by birth; that the defendant resided at Chandernagore, a French settlement, not subject to the jurisdiction of the British Government or of the Civil Courts in British India; that the plaintiff was in Paris when the patni sought to be set aside was executed; that the defendant had been there recently; and that questions as to the *status* and domicile of the parties, and as to the applicability of French law, might arise in the suit; that the patni sought to be set aside was prepared, revised, and executed at Calcutta, and that it would probably be necessary to take the evidence of the solicitors and agents there of the parties, who prepared, revised, and executed such patni; that the defendant and his chief witness possessed very large estates, and commanded great influence in and around the District of Tipperah, and that he, Mr. Knowles, was informed and believed that the plaintiff's case might be prejudiced in consequence of such influence; that he was informed and believed that the defendant had engaged all the pleaders practising in the District and Subordinate Courts of Tipperah, with the exception of one, who had refused to accept his retainer. The affidavit further alleged as reasons, for

the removal of the case, the length, difficulty, and danger of the journey to Tipperah; the difficulty, if not impossibilty of obtaining evidence there on the questions of French law, suggested by the defendant as likely to arise in the case; the novelty of such questions, and of other intricate questions of law likely to arise in the case, to a Judge of any other Court than the High Court; the absence of experienced Counsel; and the fact that, owing to the procedure in Mofussil Courts, translations in Bengali of the plaint, and other documents in the case had to be filed.

The defendant, in an affidavit filed in answer to the affidavit of Mr. Knowles, admitted that he and the plaintiff were both sons of Farge Courjon, but stated that his father, instead of describing himself in his will as a French subject by birth, had said that, although a French subject by birth, he had lost his quality of Frenchman under the French Civil Code, by having, without authority from the French Government, held public office under the British Government in India, and by reason of having settled in British India without any intention of returning to France, or to any French dependencies. He further admitted that the patni which the plaintiff sought to set aside had been prepared, revised and executed in Calcutta. The defendant denied the allegations in Mr. Knowles' affidavit as to his having large estates in and around the District of Tipperah, as to his having engaged all the pleaders practising in the Tipperah Courts, and as to the difficulty and danger of the journey to Tipperah; and he stated that the only question really at issue between the plaintiff and himself was whether he had obtained the izara and patni leases of certain zemindaries by fraud.

Mr. *Kennedy* and Mr. *Reily* for the plaintiff.

Mr. *Woodroffe* and Mr. *Fergusson* for the defendant.

Mr. *Kennedy*, after referring to the facts of the case as stated in the plaint and reading the affidavit of Mr. Knowles, requested the Court's permission to read an affidavit of the plaintiff himself, filed after the day mentioned in the notice to the defendant and his attorneys as that upon which the motion would be made; and pending an adjournment which had been granted for Mr. Kennedy's convenience; he also proposed to use and rely on a certain appeal and proceedings in regular appeal wherein the defendant had been appellant, and which were not mentioned as grounds of motion in the original notice.

Mr. *Woodroffe* objected.

MACPHERSON, J., refused to allow the plaintiff's affidavit or the appeal proceedings to be read without the consent of the other side.

Mr. *Kennedy* then contended that the affidavit of Mr. Knowles disclosed sufficient grounds for the removal of the case. If questions of French law were to

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arise, as the defendant says they are likely to do, it will be less difficult to obtain the evidence of experts in Calcutta than at Tipperah, we do not suggest that such questions can arise, there will, therefore, be a dispute as to the applicability of French law. Then there is the question of domicile which cannot be tried according to the principles laid down in the Succession Act, since that Act was enacted long after the death of Farge Courjon under whose will the plaintiff obtained the property, the subject of the leases. Those leases were executed in Calcutta, and it was there that the fraud and concealment complained of took place. Having regard to the relationship of the plaintiff and defendant, a point may arise as to the legal position of a lately emancipated minor with respect to his guardian. The grounds for removing this case are far stronger than they were in the case of *Doucett* v. *Wise* (1), which was removed for trial in the High Court by Morgan, J. In the only reported case I can find in which an order of removal was refused, namely *Raja Ojooderam Khan* v. *S. M. Nabinmoney Dossee* (6), Markby, J., held that the mere fact that it would be less expensive to try the case in the High Court, is not sufficient of itself to justify a transfer, but it is doubtful whether the rule there laid down does not reduce the power of this Court within too narrow limits, and it is submitted that, when it is clearly proved that the expense would be less, and the convenience to witnesses greater in case of a trial here, that would be a sufficient ground of removal. If the case is tried a Tipperah, and appealed to the High Court there is the possibility—by no means remote—of the loss of documents during transit. The influence of the defendant at Tipperah, the importance and difficulty of the Legal questions involved, the absense of a trained Judge, of an experienced Bar, and of an extensive law library, all point to an unsatisfactory trial at Tipperah, and are cogent reasons for the removal of the case.

Mr. Woodroffe, contra.—No points of French or English law are involved. The leases are sought to be set aside on the ground of the defendant's fraud; the charge amounts to one of misrepresentation of the value of the property and evidence as to that value is best available on the spot. In *Doucett* v *Wise* (3), the Court in remanding the case said :—"This case appears to be one in which an application to this Court may fitly be made under the 13th section of the Charter," but no reason is assigned for that recommendation. Norman, J., refused to remove the case of *Borradaile* v. *Gregory* (4).

Mr. *Kennedy* in reply.

MACPHERSON, J.—It appears to me that there is no reason to suppose that any very specially difficult questions of law will arise in this case. As to the

(1) 1 Ind. Jur., 94.
(2) *Ib.*, 396.
(3) 2 Ind. Jur., 280.
(4) Bourke, Ex. J. 3.

other matters complained of, they are little more than ordinary incidents of all hotly contested Mofussil cases, I therefore refuse the application to transfer the case to this Court. As to costs, the reason why I refuse them to the defendant is, that it was he who in the first instance started the idea of there being intricate questions of English and French law which would have to be decided in the suit. I may add that many reckless statements have been made on both sides without much regard to truth.

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Before Mr. Justice E. Jackson and Mr. Justice Mitter.

1870 *Aug.* 18.

MAHARAJA DHIRAJ MAHATAB CHAND BAHADUR (PLAINTIFF) v. MA KUND BALLABH BOSE AND OTHERS (DEFENDANT).*

Suit for Rent of Land with Buildings—Jurisdiction of Revenue Court.

The Revenue Courts have no jurisdiction to entertain a suit for rent of land with buildings upon it, when the rent includes the rent of the buildings, as well as of the land.

Baboo *Chandra Madhad Ghose* for the appellant.

Baboo *Mahendra Lal Seal* for the respondents.

THE judgment of the Court was delivered by

JACKSON, J.—This was a suit for arrears of rent. The question before both the lower Courts seems to have been whether the jurisdiction to try the suit was in the Civil Court, or was in the Revenue Court. Both the lower Courts have come to the conclusion that the jurisdiction was with the Revenue Court, and have dismissed the suit of the plaintiff from hearing in the Civil Court. On special appeal to us, it is argued that this decision is wrong, and that the jurisdiction at the time this plaint was preferred was in the Civil Court.

It would not have been necessary to try this point now, as, whether the jurisdiction was in the one Court or the other, the jurisdiction is now in the Civil Court: but as the question has been pressed upon us in connexion with the matter of costs, it becomes necessary to decide whether, at the time this plaint was put in, it was entertainable in the Civil Court or not.

The mehals leased appear to consist of two large bazars in the town of Burdwan. One of them is the Chandee bazar, close to the Maharajah's palace. The kabuliat is put in. From this kabuliat, it is quite clear that not only is the land leased, but also the buildings in the bazar are leased

* Special Appeal, No. 151 of 1870, from a decree of the Judge of East Burdwan, dated the 18th May 1869, affirming a decree of the Subordinate Judge of that district, dated the 11th December 1868.