1874

ASGAR ALI CHOWDHRY v. MAHABHAT ALI.

of the plaintiff, he will then assess the damages to which the plaintiff is entitled on the evidence already given. Upon the issue of fraud the parties will be at liberty to give fresh evidence. If the issue of fraud is found against the plaintiff, the suit must be dismissed, as in that case there is in our opinion no proof of any damage for which a suit would lie.

MITTER, J.—I entirely concur in this order of remand. It is clear from the judgment of the Courts below that none of the items of losses proved in this case are damages flowing from the breach of the contract of marriage. The plaintiff is not therefore entitled to recover them simply upon the ground that there has been a breach of contract on the part of the defendant. But these losses are of such a nature as may be shown to have been the probable result of a fraudulent misrepresentation by the defendant of his daughter's age, which induced the plaintiff to enter into negociations for marriage. This charge of fraud is distinctly made in the plaint, but no issue seems to have been raised upon it in the Courts below.

Under the circumstances of this case, the plaintiff is entitled to have that issue tried, and if it be found in his favor, he is entitled to be reimbursed the reasonable expenses which he incurred for making presents to the bride's family, according to the social custom of the community to which both parties belong. How much of these expenses is reasonable, and how far they are the probable result of the defendant's fraudulent representation, are questions of fact which will have to be determined by the Court below upon the evidence in the case.

Before Mr. Justice Phear and Mr. Justice Morris.

FATTEH SINGH (ONE OF THE DEFENDANTS) *v.* LACHMI KOOER, *alias* BHAGABATTI KOOER, WIFE OF PUSA SINGH (PLAINTIFF).*

1873 *Dec.* 12.

Act VIII of 1859, *s.* 2.—*Dismissal of suit—Multifariousness.*

The dismissal of a suit for multifariousness is not a hearing and determination of the suit within the meaning of s. 2, Act VIII of 1859.

Mr. *Manamohan Ghose* (Baboos *Doorga Mohun Doss* and *Budh Sen Singh* with him) for the appellant.

Baboos *Chunder Madhub Ghose* and *Taraknath Sen* for the respondent.

THE facts are sufficiently stated in the judgment of the Court, which was delivered by

PHEAR, J.—In this case some little difficulty occurred during the argument of the appeal in ascertaining what was the true nature of the plaintiff's suit;

* Special Appeal, No. 226 of 1873, against a decree of the Officiating Judge of Zilla Patna, dated the 13th September 1872, affirming a decree of the Sudder Munsif of that district, dated the 24th January 1872.

1873

FATTEH SINGH v. LACHMI KOOER.

and we have since had the plaint translated in full. The translation is in these words :—" Suit for obtaining a decree for realization of decretal money, principal with interest and costs, covered by a decree, dated the 30th of December 1869, passed on a bond dated the 30th July 1869, by an auction-sale of 3 cowries out of 5 cowries of Mauza Makawan, Pergunna Enayetpore, held by defendant No. 1, pledged in the bond, by setting aside a nominal and fraudulent *kabala* dated the 2nd July 1869, set up by defendant No. 2 on the part of defendant No 1, who, having come to Patna, caused it to be executed to defraud your petitioner and other creditors ; and also for setting aside a miscellaneous proceeding dated the 26th March 1870, allowing the objections of the defendant No. 2 in execution case, laid at Rs. 831-5-9½, being the decretal money as per account given below. The cause of action arose from the date of the miscellaneous proceeding, allowing the objections of the defendant No. 2. Before this a suit was brought for the reversal of the *kabala*, sought to be reversed in the present suit, as well as a *kabala* set up by Kali Sing, another purchaser. That suit was dismissed, as if it was struck off, on the 16th August 1870, without trial. The present suit is for the reversal of one *kabala* only. It is prayed that a decree may be passed. As your petitioner is an uneducated lady, and her husband, &c."

It seems to us that the suit on the face of this plaint is simply a suit to have it declared that the property which the plaintiff sought to take in execution, for the purpose of getting satisfaction of a decree which he had obtained against the first defendant Debi Singh, was at the time of his application for execution the property of Debi Singh, and liable to be taken in execution to satisfy his judgment-debts.

It was argued on the part of the defendant that the suit was something more than this ; that it was a suit upon the bond itself for the purpose of obtaining the benefit of the mortgage which was the object of that bond. But this could not be so for several reasons : in the first place, in this suit the plaintiff seeks to recover a sum of money which had been already decreed to him against Debi Singh. If this had been a suit for the purpose of realizing the benefits of the bond, then one of the principal questions in this suit would have been, what was the amount of money secured by this bond, and what amount remained due thereon to the plaintiff at the time when the suit was brought ? That question could not possibly have been determined by the previous decree for two substantial reasons : the first is that the previous decree was a decree against one of the present defendants only, namely, Debi Singh ; and the second reason is that that decree was merely a money decree passed under the special provisions of the Registration Act upon the footing of the specially registered bond. There could not therefore be any decree against the property itself. It amounted at the most to a decree for a certain specified sum of money against Debi Singh alone.

But taking this plaint to be of the character which has already been described, it was first objected by the special appellant that it is barred by

the effect of s. 2 of the Civil Procedure Code. On the face of the plaint itself it appears that a previous suit was brought against Fatteh Singh for substantially the same purpose as the present suit is brought, namely, to set aside the claim which the second defendant, Fatteh Singh, made to this property as against Debi Singh upon the foundation of a deed of conveyance to him from Debi Singh ; and that this suit was dismissed on the 16th August 1870. The plaint goes on to state that it was dismissed without trial ; and we find from the decree itself, which is in evidence, that it was dismissed for misjoinder : it must rather have been for misjoinder, not of parties, but of distinct causes of action which is in other words multifariousness. There is no doubt, we understand, that this was the result of that suit ; and the question now is whether, in the event of a suit being dismissed in that way and for that cause, the cause of action upon which the suit was founded has been heard and determined within the meaning of s. 2 of the Civil Procedure Code.

It does not appear that there is any authority directly upon this point to be found in the decisions of our Courts. But we think on referring to English authorities that the dismissal of a suit for and on the cause of misjoinder or multifariousness is a disposing of the suit before hearing, and that the suit cannot under those circumstances be said to have been heard and determined. In the case of *Powell* v. *Cockerell* (1), the suit had come on to be heard, and it was pleaded that it was multifarious. The Vice-Chancellor says, p. 562 :— "But when the party does not demur for multifariousness, it is not an objection which he can, as of right, insist upon at the hearing. At the hearing of the cause, it very generally happens that one of the mischiefs of multifariousness has been incurred, and, if there is no future evil to be incurred by it, there is no reason why the Court should not exercise a discretion in making or refusing to make a decree."

And the Vice-Chancellor previously in the case of *Benson* v. *Hadfiled* (2) had come to the like conclusion. He there said (p. 40) :—"If the defendant does not take the objection *in limine*, the Court, considering the mischief as already incurred, does not, except in a special case, allow it to prevail at the hearing."

It seems to be clear then that the objection to a suit on the ground of multifariousness or misjoinder of causes of action, is an objection to the hearing of the suit, and if it prevails at whatever time, it has the effect of preventing a determination of the suit as after hearing. Now, under the Procedure Act of 1859, the Court would have done better instead of dismissing the suit, to have simply rejected it. But the fact that the Court has in form passed a decree dismissing the suit does not alter the character of the determination. It seems to us that the suit has not been, within the meaning of s. 2 of the Civil Procedure Code, heard and determined. Accordingly, we think that this objection must fail, and that the present suit taken in the shape which has

(1) 4 Hare, 557. (2) 4 Hare, 32.

1873

FATTEH SINGH v. LACHMI KOOER.

been already mentioned, ought to have been fairly heard and determined by the Courts below.

. . . . . .

On the whole, then, we think it best to reverse the decision of the lower Appellate Court, and remand the case to that Court for retrial upon the issue which was first mentioned.

Costs will abide the event.

Before Mr. Justice Kemp and Mr. Justice Birch.

IN THE MATTER OF THE PETITION OF SARDHARI LAL.*

1874
April 28.

Criminal Procedure Code (Act X of 1872). ss. 435 & 436—Registration Act (Act VIII of 1871), s. 82—Evidence Act (1 of 1872), s. 3—Sub-Registrar—Offence committed during a Judicial Proceeding—Meaning of Word "Court"—Indian Penal Code, s. 228.

A was charged before an Assistant Magistrate by a Sub-Registrar with having committed an offence under s. 228 of the Penal Code and fined. *Held*, that the Sub-Registrar should have tried the matter himself under ss. 435 and 436 of the Criminal Procedure Code, and as the Magistrate acted without jurisdiction, the order must be quashed.

By s. 82 of the Registration Act a Sub-Registrar is a public officer, and proceedings before him are judicial proceedings within the meaning of s. 228 of the Penal Code, and as he is legally authorized to take evidence, he is a "Court" as defined by the Evidence Act, s 3.

SARDHARI LAL, a pleader of the Bhaugulpore Court, was charged by the Sub-Registrar of that district with having committed an offence under s. 228 of the Indian Penal Code. The charge was laid before the Assistant Magistrate, who fined the accused Rs. 10. The Magistrate in his judgment stated that the accused had in words admitted the offence; that he had reasoned unbecomingly with a public officer in the course of a proceeding which the law says shall be held to be a judicial proceeding, and had threatened to publish his conduct in the newspaper—a speech most unbecoming to make in his presence. The Magistrate expressed his regret that he should have to punish a man in the position of the accused, and thought that the nominal fine of Rs. 10 would be sufficient to meet the case. Sardhari Lal now appealed.

Mr. *Sandel* and Baboo *Doorga Mohun Doss* for the appellant.

No one appeared to support the Magistrate's decision.

* Criminal Appeal against an order of the Assistant Magistrate of Bhaugulpore, dated the 31st December 1873.

1874

IN THE MATTER OF THE PETITION OF SARDHARI LAL.

The arguments urged on behalf of the appellant sufficiently appear from the judgment of the Court, which was delivered by

KEMP, J.—This is a very petty case, but several points of law have been raised in the course of the argument, which must be decided. (The learned Judge proceeded to state the facts as stated above and continued) :—It is now contended in this Court that the conviction is illegal, inasmuch as if the Sub-Rigistrar be considered to be a public officer, and if his proceedings be considered to be judicial proceedings, and if he is to be considered to be a Court then the Assistant Magistrate had no jurisdiction, inasmuch as the said Sub-Rigistar did not proceed under ss. 435 and 436 of the Criminal Procedure Code; and there is also an objection that the Magistrate has not examined the witnesses of the accused, or given him an opportunity of adducing any evidence on his behalf. We think that there can be no doubt that the Sub-Registrar is a public officer; that point is clear under the Registration Act. We also think that the proceedings of a Sub-Registrar are judicial proceedings within the meaning of s. 228 of the Penal Code. That also is set at rest by the Registration Act, s. 82. Then, on turning to the Criminal Procedure Code we find that offences under s. 228 are triable by "the Court," using the word "Court" generally, in which the offence was committed, subject to the provisions contained in Ch. xxxii, that is to say, the Court in which the offence is committed is to try the offence, but that the procedure is to be restricted by the provisions of Ch. xxxii. Now in the new Evidence Act as "Court" is described thus.—"A Court includes all Judges and Magistrates and all persons, except arbitrators, legally authorized to take evidence." There is no doubt that the Sub-Registrar under the Registration Act is legally authorized to take evidence, and therefore his Court is a Court under the interpretation put upon that word by the evidence Act; and Sch. 4 to the Code of Criminal Procedure, col. 7, says that an offence under s. 228 is triable by the Court in which the offence is committed under Ch. xxxii, s. 435. Now s. 435 refers to offences under several sections, and amongst other offences to offences under this very Section 228, of the Indian Penal Code, and enacts that the Court may take cognizance of such offences "and adjudge the offender to punishment by fine not exceeding Rs. 200, and in default of payment by imprisonment in the civil jail for a period not exceeding one month, unless such fine be sooner paid," and that "in every such case the Court shall record the facts constituting the offence, with any statement the offender may make, as well as the finding and sentence." Then s. 436 goes on to say that, "if the Court in any case considers that the person accused of any such offence should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding Rs. 200 should be imposed upon him, such Court, after recording the facts constituting the offence and the statement of the accused person as before provided, shall forward the case to a Magistrate." Now in this case, the Sub-Registrar has proceeded neither under s. 435 nor under s. 436. We think therefore that the Assistant Magistrate had no jurisdiction in the case. We quash his order and direct the fine to be refunded.