Before Mr Justice Markby.

HOSSAINI BIBI *v.* PERI KHANUM.

1868
February 26

Withdrawal from Suit—Costs—Act VIII. of 1859, *ss.* 97, 114.

Where the plaintiff applied under section 97, Act VIII. of 1859, to be allowed to withdraw from the suit, with liberty to bring a fresh suit for the same matter, the Court refused the application. Another application for leave simply to withdraw from the suit was granted, the Court dismissing the suit with costs.

Brass v. *Tiruvengada Pillai*, (1) dissented from.

THIS suit was brought for a declaration of the plaintiff's title as sole heiress and next-of-kin, according to Mahomedan law, of one Ladly Khanum, deceased.

Mr. *Eglinton* and Mr. *Cowell* for the plaintiff.

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

The plaintiff, in her plaint, alleged that she was the only daughter of a Mahomedan lady named Velati Khanum, deceased, who, she alleged, was the sister of Ladly Khanum; that Ladly Khanum died intestate, and without issue; and that she (the plaintiff) was, therefore, sole heiress and next-of-kin of Ladly Khanum, and that the defendant was the daughter of a Jew, from whom she had been bought years ago by Ladly.

Letters of administration to the estate of Ladly Khanum had been granted by the High Court to the defendant, shortly after Ladly's death, but had been re-called on the application of the plaintiff.

The defendant, in her written statement, denied that Velati Khanum and Ladly Khanum were sisters, and stated that she was the daughter and only lawful child of Ladly, who had (it was true) bought a child from a Jew to be her servant, but she had been afterwards married and had died some years ago.

(1) Madras High Court Reports, 247.

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The defendant further denied that the plaintiff was the daughter of Velati, but alleged that she was the daughter of Velati's female-servant.

From the evidence of the plaintiff, it appeared that she was the illegitimate child of Velati, and though she called Velati and Ladly sisters, she acknowledged that they had different fathers.

Under these circumstances, Mr. Eglinton applied under section 97 of Act VIII. of 1859, that the plaintiff might be allowed to withdraw from the suit, with liberty to bring a fresh suit for the same matter.

MARKBY, J.—I think I ought to refuse this application. I cannot grant it, without leaving the plaintiff at liberty to bring again this identical suit, raising the same issues, which ought not to be done. On the other hand, I consider on the best construction I can put on the section, that that is all from which the plaintiff will be shut out from doing by my refusal to grant this application.

Mr. *Eglinton* then applied simply for leave to withdraw from the suit. [MARKBY, J.—If you withdraw, I must dismiss the suit with costs.]

In *Brass* v. *Tiruvengada Pillai* (1), it was held, that the Court has not power to award costs, under such circumstances, no judgment having been given.

MARKBY, J.—I do not feel bound by the decision in that case. I think I have power to pass judgment against the plaintiff by default, under section 114. The suit must be dismissed with costs.

Attorney for the plaintiff: *Mr. Fenn.*

Attorneys for the defendants: *Messrs. Beeby* and *Rutter.*

(1) 1 Madras High Court Reports, 247.