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tween these parties, we agree that the preponderance of evidence is in favor of the plaintiff, but he who seeks a declaration of matters not necessary to the immediate relief sought must sustain the burden of making out the abstract proposition which he has volunteered to support, and it will even then be a matter for the discretion of the Court, not to be lightly exercised, whether it will undertake the solution of the problem. It seems to us that we shall do all, which can be discreetly done, by declaring that we confirm the decree so far as it declares defendant a trespasser upon the particular hill. We see no reason to doubt that he is so, and we must not be considered as either affirming or disaffirming the plaintiff's claim to the others. We merely decide that it is a question upon which, in this case, we ought not to enter. The defendant will pay the costs of this appeal.

Appeal dismissed with cost.

Judgment of Lower Court modified.

Appellate Jurisdiction.(a)

Appeal No. 2 *of* 1875.

M. VYTHELINGA MUDELLY..... { *Appellant.* *(Defendant,)*

M. CUNDASAWMY MUDELLY..... { *Respondent,* *(Plaintiff.)*

Leave to institute a suit relating to property out of the jurisdiction as well as to property within such jurisdiction was refused by one Judge on the 30th June 1874. The same application, in the same suit, between the same parties, relating to the same property, and founded on the same cause of action was made before another Judge on the 15th December 1874, and the leave prayed for was granted.

Held, that the order should not have been made, and that it should be discharged.

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THIS was an Appeal against the order of Mr. Justice Kernan, dated the 15th December 1874, admitting the plaint in Original Suit No. 12 of 1875.

On the 30th June 1874 the plaintiff (respondent herein) through his then attorney Mr. Clarke, applied for leave to file a certain plaint then presented against appellant, for an

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account of family property, and in respect of property out of the jurisdiction of the High Court as well as in respect of property within such jurisdiction.

The said application was made before Mr. Justice Kindersley, and it was at the time of such application stated by Mr. Clarke that the suit was for a very large amount; property to the extent of Rupees 40,000 or thereabouts being out of the jurisdiction and the remainder within the jurisdiction of the High Court.

After perusing the plaint, Mr. Justice Kindersley refused to grant leave for the suit to be filed.

On the 12th August 1874 the plaintiff, (respondent) filed a suit against defendant (appellant) for an account of family property within the jurisdiction of the High Court, being Original Suit No. 645 of 1874; in such suit the family property within the jurisdiction of the High Court was represented to be worth Rupees 83,886, Rupees 21,500 of which was represented by landed property, and the remainder, namely, Rupees 62,386 jewels and furniture.

On the application of Mr. Clarke on the 5th November 1874, the said Original Suit No. 645 of 1874 was withdrawn by the plaintiff (respondent herein) before service of any summons thereunder upon defendant (appellant) and without notice.

On the 15th December 1874, the plaintiff (respondent herein) by his then vakil Parthasarathy Iyengar applied for leave to file a suit against defendant (appellant) for an account of family property and in respect of property outside the jurisdiction of the High Court, but no mention was made at the time of the previous application to Mr. Justice Kindersley and his refusal to grant the same, and no plaint was presented at the time of such application.

The said application was made before Mr. Justice Kernan, and an order was made thereon permitting the said plaint to be filed.

On the 22nd December 1874, the said Parthasarathy Iyengar, at the request of Messieurs Prichard and Barclay defendant's (appellant's) solicitors, appeared before Mr.

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Justice Kernan and mentioned the fact of the previous application and refusal by Mr. Justice Kindersley, of which fact he Parthasarathy Iyengar, had not been informed by his client, the plaintiff, (respondent).

Upon enquiry before Mr. Justice Kernan, Parthasarathy Iyengar admitted that the plaint then sought to be filed, was between the same parties as the former one which Mr. Justice Kindersley had refused to admit, was in reference to the same property, and that the cause of action was also the same.

Messieurs Prichard and Barclay appeared on the said motion, objected to the reception of the plaint, and submitted that the plaintiff, (respondent), if dissatisfied with the order of Mr. Justice Kindersley, should be referred, in the usual course, to an appeal therefrom, that as the application had been refused by one Judge, it was not competent for another Judge, to set that order aside upon the same statement of facts, and that a final order having been passed in the matter, and no appeal having been presented therefrom, the plaintiff was precluded from taking further action in the matter.

Mr. Justice Kernan, however, refused to alter the order, and directed the plaint to be received.

The defendant (appellant) appealed against the order of Mr. Justice Kernan made herein dated the 15th December 1874, on the following grounds :—

1. That the learned Judge had no jurisdiction to make the order in question, the same application in the same suit between the same parties in reference to the same property and with the same cause of action having already been made and refused by Mr. Justice Kindersley on the 30th June 1874, and if plaintiff was dissatisfied with the said order he should have appealed against the same.

2. That as the plaint was not presented or filed until the 11th January 1875, the reception of the same is irregular as it should have been presented at the time of the application.

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Mr. Miller, for the appellant, contended that the Court could not take action on a plaint which was not before it. The Charter of 1865 (24 and 25 Vict. c. 104) s. 12 requires the leave of the Court to be first obtained before such a suit as this can be filed. Leave was asked and refused. Then the application was made to another Judge, and nothing was said by the Vakil about the previous application, and refusal. The plaintiff might have appealed against Mr. Justice Kindersley's order, *DeSouza* v. *Coles*, (1) but did not.

[CHIEF JUSTICE :—Mr. O'Sullivan, we should like to hear you on the preliminary question of the competency of the Court to issue the order passed by Mr. Justice Kernan.]

Mr. O'Sullivan for the respondent. First, this suit was not the same as that originally sought to be filed.

[CHIEF JUSTICE :—Was it not substantially the same ?] Yes, but I submit that Mr. Justice Kindersley's order did not render the matter *res judicata* so as to prevent the plaintiff's present suit being brought. It was open no doubt to the plaintiff to appeal, but that was not the only course open to him.

SIR W. MORGAN, C. J., thought the application raised a question in itself of importance, and, adverting to what had just been stated regarding the present practice on the Original Side of this Court, one which required to be set at rest.

That practitioners, after getting the decision of a Judge in Chambers, should procure its reversal (not by an application to the Court for that was a very different question) but by resorting to another Judge in Chambers on precisely the same grounds of application, seemed to him an irregular proceeding and one not to be sanctioned. He did not say that in this case there was absolutely no jurisdiction to make the order appealed against, but on the same principle which obtained in Westminster Hall, respecting renewed applications, whether in Court or in Chambers, he said that the second application ought not to have been made or granted.

(1) 3 Madras H. C. Rep., p. 384.

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If the making of this order were a mere question of discretion, an Appellate Court would, ordinarily, not interfere; but the ground on which he put his decision was that this was a renewed application on the same grounds as those laid before Mr. Justice Kindersley which he had considered and decided upon.

HOLLOWAY, J., was of the same opinion. When in the Appellate Court one Judge doubted the power of that Court to review a discretionary order, and one Judge thought that there was the power, but that it should be most sparingly exercised, it seemed *à fortiori* that one Judge cannot review the order of another. It seemed clear that these people, in bringing the same application on two occasions before two different Judges, were abusing the process of the Court.

Following the Chief Justice in refusing to say that there was an utter absence of jurisdiction to make the order appealed against, he certainly thought the order should not have been made, and that it should be discharged.

Appeal allowed and order discharged.

Attorneys for the appellant: *Messrs. Prichard* and *Barclay.*

Attorney for respondent: *Mr. Smith.*

Appellate Jurisdiction.(a)

Regular Appeal No. 77 *of* 1875.

KRISTNAPPA CHETTY.....*Appellant* (*Plaintiff.*)

RAMASAWMY IYER and 4 others...*Respondents* (*Defendants.*)

Evidence of some separation in residence, separate transaction of affairs in certain instances, and acquisition of the property in dispute by plaintiff, all occurring in recent years, are not sufficient to prove division.

Where the joint Hindu family derived considerable property from an ancestor after whose death these members of the family lived long together, the purchases of the property in dispute by the plaintiff, could not be treated as his separate acquisitions made from the money which had come to him with his wife, and by means of funds arising from that money.

(a) Present:—Sir W. Morgan, C. J., and Kindersley, J.