APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

1891 *April* 13.

MOWLA NEWAZ (PLAINTIFF), PETITIONER, *v.* SAJIDUNNISSA BIBI (ONE OF THE DEFENDANTS), OPPOSITE PARTY.*

Appeal to Privy Council—Appealable value—Suit for restitution of conjugal rights—Valuation of suit—Suit conducted up to appeal as if properly valued—Jurisdiction—Consent of parties.

A suit for restitution of conjugal rights is not one to which any special money value can be attached for the purposes of jurisdiction—*Golam Rahman* v. *Fatima Bibi* (1) followed.

Held, therefore, that no appeal lay as of right to Her Majesty in Council in such a suit, although the suit had been valued at Rs. 25,000, and that valuation had been relied on by the defendant, who had appealed to the High Court from the decision of the first Court which had gone against him.

THIS was an application for leave to appeal to the Privy Council from a decision of the High Court, dated 16th September 1890.

The suit was brought by Syed Mowla Newaz against Sajidunnissa Bibi and others, defendants, and the plaint stated that the plaintiff was married to Sajidunnissa in Pous 1283 (January 1877), and that she lived with him until Bysack 1292 (April 1885), when in his absence she was persuaded by the other defendants to leave his house, and that those defendants had since put obstructions in the way of his getting his wife back again. The relief prayed for was a declaration of the plaintiff's conjugal rights, and a decree against her for the restitution of his conjugal rights, and an injunction against the other defendants restraining them from interfering with his enjoyment of such rights, and for such further or other relief as the plaintiff might be entitled to.

* Privy Council Application No. 18 of 1891, from a judgment of Messrs. Prinsep and Banerjee, JJ., dated the 16th of September 1890, in appeal from Original Decree No. 45 of 1889.

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The suit was brought in the Court of the Subordinate Judge of Burdwan, and was valued at Rs. 25,000. In that Court the suit was decreed in favour of the plaintiff, and the defendant preferred an appeal from that decision to the High Court, which appeal she valued at Rs. 25,000.

In answer to the suit the defendant set up the plea of dissolution of her marriage by reason of an alleged breach of a condition in an agreement set up by her as having been entered into between the plaintiff and his wife's mother, Habibunnissa, under the terms of which the plaintiff was not to take his wife to his own house or to any other places against her will and consent, and that a breach of this condition (and such breach it was alleged had been committed by the plaintiff) had the effect of annulling the marriage, as if there had been a divorce.

The Subordinate Judge found that the alleged condition had not been broken, and that there was no dissolution of the marriage, and the decree of that Court was that the suit be decreed with costs, the costs, among others the pleader's fee, being calculated on the estimated value of the suit, viz. Rs. 25,000. On appeal the High Court held that there had been a violation of the condition, and that the marriage had been thereby dissolved, and they therefore allowed the appeal, and dismissed the suit. From that decision the plaintiff was now desirous of appealing to the Privy Council.

The grounds of appeal were that the judgment was erroneous in finding that there had been any breach of the condition by the plaintiff; that the said agreement was illegal and not binding on him, nor capable of affecting the rights and obligations arising from the marriage which had been contracted; that Sajidunnissa not being a party to the agreement could not avail herself of its provisions; and that no dissolution of the marriage was proved.

The only question now material was as to the proper valuation of a suit for restitution of conjugal rights.

Mr. *J. G. Apcar* and Baboo *Nilmadhub Bose* for the petitioner.

Mr. *Woodroffe*, Baboo *Upendra Chunder Bose*, Moulvie *Serajul Islam*, Baboo *Rajendra Nath Bose*, and Baboo *Mohan Chand Mitter* for the opposite party.

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Mr. *Apcar* for the petitioner contended that the suit being for an amount above Rs. 10,000, there was a right of appeal to the Privy Council, under section 596 of the Civil Procedure Code. The suit was properly valued, and had been tried up to the decision of the appeal in the High Court on the terms of the plaintiff's original valuation and without any objection on the part of the defendants. The costs also had been allowed on that valuation. The defendant had in fact, when appealing to the High Court from the decision of the Subordinate Judge, valued her appeal at the same amount, and had thereby waived any objection, and acquiesced in the valuation of the suit. The jurisdiction of the first Court depended on the valuation of the suit, and in this case the defendant had relied upon the valuation and had obtained an advantage by reason of the jurisdiction given thereby. The suit, moreover, was not one only for restitution of conjugal rights, but practically one for damages. The plaintiff was therefore now entitled to say that the suit was above the appealable value, and to claim a right of appeal.

Mr. *Woodroffe contra* contended that the suit was really one for restitution of conjugal rights, and was a suit which could not be estimated at a money valuation. In *Golam Rahman* v. *Fatima Bibi* (1) it was held that a money value could not be put on a suit for restitution of conjugal rights for the purpose of giving an appeal under the Burma Courts Act (XVII of 1875), section 49. This decision should govern the present case. Consent of parties does not confer jurisdiction on a Court.

Mr. *Apcar* in reply:—Since the case of *Golam Rahman* v. *Fatima Bibi* was decided, the Legislature have passed an Act (VII of 1887) to prescribe the mode of valuing certain suits for the purpose of determining the jurisdiction of the Courts; and section 9 of that Act gives power to the High Court, where it is of opinion that a suit does not admit of being satisfactorily valued, to make directions with regard to the valuation of such suits. No such directions have been given with respect to suits of this nature, and it is submitted the Court must fall back on the valuation made by the parties themselves, *i.e.*, made by one party and acquiesced in by the other.

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The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows:—

This is an application for leave to appeal to Her Majesty in Council.

It is first claimed that the petitioner has a right of appeal, inasmuch as the subject-matter of the suit was of a value exceeding Rs. 10,000. In support of this we have been referred to the amount of the suit as stated in the plaint, and also in the appeal to this Court made by the defendant. We have also been reminded that it was only on a consideration of such value that the suit was tried in the Court of the Subordinate Judge and by this Court in first appeal.

On these grounds, and especially because the defendant in a way consented to the value stated by the plaintiff by adopting it in her petition of appeal, we have been asked to hold that the subject-matter of the suit is above Rs. 10,000, and therefore appealable as a matter of right to Her Majesty in Council. We think that the action of the parties in this case cannot affect the question of jurisdiction. In respect of the trial by this Court of the case on first appeal, we would observe that the point was never raised, and was never considered at the trial. On the other hand, we find that this point has been directly decided by a Division Bench of this Court in a case of *Golam Rahman* v. *Fatima Bibi* (1), with which decision we entirely agree. It was there laid down that a suit of this description for restitution of conjugal rights and possession of a wife was not one to which any special money value can be attached for the purposes of jurisdiction.

We observe that this was a matter which it was apparently contemplated by the Legislature should be dealt with under Act VII of 1887, but no specific rules being passed on the subject, the matter has remained as it was when the judgment to which a reference has been made was passed. Under such circumstances we are unable to hold that, by reason of the value of the subject-matter of the suit, an appeal necessarily lies to Her Majesty in Council.

We have next been asked to certify that this is a fit case for appeal to Her Majesty in Council within the terms of section 595

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(*c*) of the Code. We have had some difficulty in deciding this point, but having regard to the facts found in the judgment of this Court read with the allegations made in the affidavit put in by the opposite party, the defendant in the suit, and which statements have not been contradicted on behalf of plaintiff, we are unable to certify that in our opinion this case is a fit one for appeal, and we therefore leave it to the petitioner, if so advised, to make an application to the Judicial Committee.

The application is refused with costs.

Application refused.

J. V. W.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

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April 7.

KAZEM ALI (PETITIONER) *v.* AZIM ALI KHAN (OBJECTOR).*

Appeal—Act XX of 1863, *s.* 18—*Order refusing leave to sue—Decree—Civil Procedure Code,* 1882, *s.* 2.

An order refusing leave to institute a suit under section 18 of Act XX of 1863 is not a "decree" within the meaning of section 2 of the Civil Procedure Code, and is not appealable.

AN application was made to the Judge of Moorshedabad by the petitioner as one of the members of the Committee of Management of a Mahomedan endowment for leave to institute a suit under Act XX of 1863, section 18, the object of the suit being to get rid of the objector as President of the Committee of Management of the endowment, and to have another trustee appointed in the place of one who had died. The Judge gave on the 8th February 1890 the following judgment on the application:—

"This is an application under Act XX of 1863, section 18, for leave to the petitioner to institute a suit against the objector. The latter having received notice to show cause why leave should not be granted appears by pleader. The petition has been read and the pleaders have been heard. The application does not appear to me to be a *bonâ fide* one. The charges brought against the

*Appeal from Original Decree No. 82 of 1890, against the decree of R. H. Anderson, Esq., Judge of Moorshedabad, dated the 8th of February 1890.