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RUN BAHADOOR SINGH v. LUCHO KOOER.

by both Courts, was held to have the effect of *res judicata* upon the second suit heard primarily by the District Judge, which went up to the High Court on regular appeal, and thence to the Privy Council.

We think that the rule of *res judicata* ought to be held to apply to judgments in rent-suits, at least until interventions in such suits are authoritatively prohibited; otherwise all the inconvenience and hardships which the rule is intended to obviate must continue to exist.

Upon the whole, therefore, though with regret, we feel we are bound to hold that the judgment in the rent-suit on the substantial issue of separation must be regarded as *res judicata* governing the present suit, and we must, therefore, affirm the decision of the Court below; though we differ from its judgment both on the merits and on the question of estoppel, but as the plea of *res judicata* was not raised until after all the evidence had been taken and great expense incurred, we think each party should bear his and her own costs both in this Court and in the Court below, and we direct accordingly. We dismiss the appeal of the plaintiff, and allow the cross-appeal of the defendant.

Appeal dismissed and cross-appeal allowed.

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

1880
Sept. 1.

FRECK *v.* HARLEY.

Costs—Abatement or Dismissal of Suit for want of Jurisdiction—Presidency Small Cause Courts Act (IX of 1850), *ss.* 42, 52.

Where a plea to the jurisdiction of the Small Cause Courts established under Act IX of 1850 is successful, the judgment ought to be one dismissing the suit. But whatever the form, it should be stated that the suit abates or is dismissed "for want of jurisdiction." In such a case the Court has power to award costs to the defendant.

THIS was a case referred from the Calcutta Court of Small Causes. The reference stated as follows:—

"This suit was instituted on the 2nd April 1880, and heard by

* Case stated for the opinion of the High Court under the provisions of Act IX of 1850, by H. Millett, Esq., and K. L. Banerjee, Esq., Judges of the Calcutta Court of Small Causes.

the First Judge in the first instance on the 24th May. The First Judge was then of opinion, that the suit ought to be dismissed on a point of law and also on a question of jurisdiction; and he accordingly dismissed the suit, and certified it as a fit case for counsel and attorney, awarding to counsel two gold mohurs and to attorney one gold mohur.

"Against this decision an application for a new trial was made on the following grounds:—(i) that the Court, having no jurisdiction in the case, was wrong in making an order for costs; (ii) that the Court should have merely noted the abatement of the suit on the record, and had no jurisdiction to dismiss the suit.

"This application was allowed on the 26th June 1880. The only question now raised before us is, whether the original order as to costs was good or not, plaintiff's pleader admitting that the Court has no jurisdiction.

"It is necessary to state that, up to the present time, in questions connected with jurisdiction, this Court has always followed the decision in *Lawford* v. *Partridge* (1). The Court of Exchequer in that case laid down the rule, that where a County Court has no jurisdiction to hear a case, it has no power to award costs; and that the proper order should be that the suit should abate. It based its decision on ss. 79 and 88 of 9 and 10 Vict., c. 95 (the County Courts' Act), which are identical with ss. 42 and 52 of Act IX of 1850, the Act which governs this Court. The former of these sections gives power to the Court to award costs to the defendant when he shall not admit the demand; and the latter gives the Court power to apportion the costs of any action or proceeding before it, not therein otherwise provided for, in such manner as it shall think fit. The same conclusion as in *Lawford* v. *Partridge* (1) was arrived at in *Peacock* v. *The Queen* (2). The question again occurring in *Diss Urban Sanitary Authority* v. *Aldrich* (3), the contrary opinion was arrived at, although *Peacock* v. *The Queen* (2) was cited as an authority. The Court in the last instance seems to have followed *McIntosh* v. *The Lord Advocate* (4).

(1) 1 H. & N., 621.
(2) 4 C. B., N. S., 264, at p. 268.
(3) L. R., 2 Q. B. D., 285, note.
(4) L. R., 2 App. Cas, 41, at p. 78.

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"It was again raised in *The Great Northern Committee* v. *Inett* (1), in which previous cases, except *Lawford* v. *Partridge* (2), were referred to; and Cockburn, C. J., gives his opinion thus: 'The respondent is entitled to avail himself of the objection, and he is obliged to come here and inform us of the absence of jurisdiction, for if he did not, the objection would not appear and judgment would be given against him. As he is obliged to come here by the act of the appellant, he is entitled to his costs. It is clear that, to some extent, there is jurisdiction over the subject, for the Court has jurisdiction to hear and determine whether the appeal lie or not. I am of opinion that, under these circumstances, there is jurisdiction to give costs.' Such reasoning as has been very ably put by Mr. Allen, the defendant's counsel, commends itself to the intelligence."

The following decisions, under the general power to award costs given by s. 187 of Act VIII of 1859, were also referred to as bearing on the question:—*Gopal Chunder Bose* v. *Dhurun Dhur Roy* (3), *Maharajah Jugesshur Bunwaree Gobind* v. *Seet Chunder Sircar* (4), *Punchanun Ghose* v. *Brojendro Narain Deb* (5), in all of which it was held that, where a suit or an appeal is dismissed for want of jurisdiction, the Court has power to award costs to the successful party.

The learned Judges were of opinion that the weight of the authorities was in favor of the Court having power to award costs, whether it has jurisdiction to hear the matter or not, and therefore gave judgment that the suit should abate, and that the plaintiff should pay costs to the defendant, contingent on the opinion of the High Court on the following questions:—

(i) Whether the judgment, where the Court has no jurisdiction, should be, that the suit abates or that it be dismissed?

(ii) Whether, where this Court has no jurisdiction, it has power to award costs to the defendant?

The opinion of the High Court was as follows:—

GARTH, C. J.— It appears to us that the real answer to this suit was rather a matter of law than of jurisdiction, but we

(1) L. R., 2 Q. B. D., 284.
(2) 1 H. & N., 621.
(3) Marsh. Rep., 311.
(4) *Id.*, 375.
(5) 1 Ind. Jur. (N. S.), 38.

think that the questions referred should be answered as follows:

(i) A plea to the jurisdiction is a plea in bar; and, therefore, the proper judgment would be, that the suit be dismissed; but whatever may be the form used, it should be stated that the suit abates or is dismissed "for want of jurisdiction," otherwise the plaintiff might be prejudiced when he brings his suit in another Court.

(ii) We think that the Court has power in such a case to award costs to the defendant. The question of jurisdiction is one which the Court is bound to try, and as the plaintiff invites the trial by bringing his suit, it is only right that he should pay costs if he turns out to be wrong. It appears to us that the cases of *Lawford* v. *Partridge* (1) and *Peacock* v. *The Queen* (2) have been virtually overruled by the case of *McIntosh* v. *The Lord Advocate* (3).

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

SHOSHI SHIKHURESSUR ROY, A WARD OF COURT, BY HIS MOTHER (DEFENDANT) *v.* TAROKESSUR ROY (PLAINTIFF).*

1880 *Sept.* 9.

Hindu Law—Will—Construction of Will—Restriction of Gift to Male Descendants void—How such a Gift should be construed..

A gift by will upon condition that the subject-matter should descend to heirs male only, is void by Hindu law.

By his will a Hindu testator made a gift of certain immoveable property to his nephews and their descendants in the male line with a condition that, "if any of them die childless, then his share shall devolve on the survivors of my nephews and their male descendants, and not on their other heirs."

Held, that the gift was bad in so far as it restricted the subject-matter of the gift to male descendants, but that the language used relating to the gift over to the testator's surviving nephew or nephews, was not inconsistent with the intention of the testator that the whole augmented share should pass to the plaintiff, the sole surviving nephew; but that, having regard to the doctrine frequently acted upon by the Courts of India, he was only entitled to a life-estate therein.

* Appeal from Original Decree, No. 205 of 1878, against the decree of Baboo Jodu Nath Mullick, First Subordinate Judge of Rajshahye, dated the 2nd May 1878.

(1) 1 H. & N., 621. (2) 4 C. B., N. S., 264, at p. 268.

(3) L. R., 2 App. Cas., 41, at p. 78.