

Abdul Kadar Ibrahim Vs. Dulanbibl

Abdul Kadar Ibrahim Vs. Dulanbibl

SooperKanoon Citation : sooperkanoon.com/331887

Court : Mumbai

Decided On : Apr-11-1913

Reported in : (1913)15BOMLR672; 20Ind.Cas.530

Judge : Basil Scott, Kt., C.J. and ;Shah, J.

Appeal No. : Second Appeal No. 288 of 1913

Appellant : Abdul Kadar Ibrahim

Respondent : Dulanbibl

Judgement :

Basil Scott, Kt., C.J.

1. The plaintiff filed this suit in the Court of the Subordinate Judge of Bhiwandi for restitution of conjugal rights against the defendant and for an injunction restraining her from marrying any other person pending the disposal of the suit. He was met with the plea that the questions at issue in the suit were rest judicata by reason of a decree passed by Mr. Justice Davar in High Court Suit No. 399 of 1908 and that therefore under Section 11 of the Code of Civil Procedure the Bhiwandi suit could not be tried. The High Court suit of 1908 was for a declaration that the defendant was the duly married wife of the plaintiff and for an injunction restraining a marriage alleged to be contemplated between her and one Abdul Gafur a defendant in the High Court suit. Three of the issues in that suit were as follows :-
(a) Whether the Court has jurisdiction to try the suit as against the first defendant?

(b) Whether the first defendant did not become a member of the Hanaf section or about April 1907 1 (c) Whether the plaintiff has been validly married to the first defendant

2. At the first hearing it was discovered that although it was stated in the plaint that only a part of the cause of action had arisen in Bombay and that the Court would have jurisdiction to try the suit after leave under class. 12 of the Letters Patent had been granted, no leave had in fact been obtained and upon that ground the first of the issues above set out was raised. The learned Judge, however, proceeded with the trial of the case upon the merits, and decided the issues as to the conversion of the first defendant and as to the question of her marriage with the plaintiff in the first defendant's favour.

3. He then proceeded to discuss the issue relating to jurisdiction and held that the Court had no jurisdiction in consequence of leave not having been obtained and that the suit on that ground must fail. The decree which was drawn up only records the dismissal of the suit on the ground that the alleged marriage of the plaintiff with the first defendant was not valid and binding upon her, but a reference to the judgment shows that the Court held that there was no jurisdiction.

4. The learned Judge of the Bhiwandi Court was of opinion that the plea of *res judicata* was satisfactorily met by showing that the judgment in which the issues pleaded were decided, was delivered by a Court not competent to deliver it. If the Court was so incompetent this would be a complete answer under Section 44 of the Evidence Act.

5. The learned Joint Judge, however, came to a different conclusion being of opinion that the absence of leave did not go to the root of the jurisdiction of the Court and that therefore the judgment of the Court was the judgment of a Court having jurisdiction. He based his decision on the judgment of the Calcutta High Court in *Gurdeo Singh v. Chandrikah Singh* I.L.R.(1907) Cal. 193.

6. In this appeal it is contended that the jurisdiction of the R High Court to try a suit in which part only of the cause of action arose within the jurisdiction and in which the defendants neither reside nor carry on business within the jurisdiction depends

entirely upon the question whether or not leave has been first obtained under clause 12 of the Letters Patent; and reliance was placed upon the decision of Sir Richard Couch in *Hadjee Ismail v. Hadjee Mahomed* (1874) 13 Bom. L.R. 91, where he said that an order under Clause 12 was not a mere formal order or an order merely regulating the procedure in the suit, but one that has the effect of giving a jurisdiction to the Court which it otherwise would not have; and the judgment of Mr. Justice Telang in *Rampurtab Samruthroy v. Premsukh Chandamal* I.L.R (1890) Bom. 93 was also referred to in which it was said that such leave (under cl. 12) affords the very foundation of the jurisdiction. Those cases were met by reference to the case of *King v. Secretary of State for India* I.L.R (1908) Cal. 394 in which Mr. Justice Fletcher, following *Moore v. Gamgee* (1890) 25 Q.B.D. 244, held that the objection that leave under Clause 12 had not been properly obtained might be waived by the defendant.

7. In the present case there is no question of waiver, for the objection to the suit on the ground that leave had not been obtained was taken at the first moment when the fact came to the knowledge of the defendant's advisers; and it is clear that under such circumstances the judgment of the Court was on issues (b) and (c) one which it was not competent to deliver: see *Khimji v. Forbes* (1871) 8 Bom. H.C. 102.

8. That this conclusion is in no way at variance with the decision of English Courts in such cases is apparent from *In re Brown v. London & North Western Railway Company* (1863) 4 B. & S. 326. The plaintiff was against the defendants as common carriers for negligently carrying a harp, delivered to them by the plaintiff, to be carried from Chester to London, whereby it was damaged. The plaintiff was filed and the suit was tried in the County Court at Chester and at the trial it was objected on the part of the defendants that the Court had no jurisdiction, on the ground that they did not dwell or carry on their business within the District as required by Stat. 9 & 10 Vict. c. 95, s. 60, and had not obtained leave either from the Court under that section or from its Registrar under Stat. 19 & 20 Vict. c. 108, Section 15, to issue the summons elsewhere. The Judge said that without expressing any absolute opinion on this point, it would be better to leave the case to the Jury, whereupon the defendants went into their case and called witnesses. The Jury found for the

plaintiff, and judgment was entered up accordingly but the Judge refused to allow execution to be issued on it. The plaintiff then obtained a rule calling on the Judge of the County Court and the defendants to show cause why the Registrar of that Court should not issue a writ of execution to the High Bailiff, empowering him to levy upon the goods of the defendants the amount of the judgment obtained in that Court by the plaintiff.

9. The discussion turned chiefly on the question whether it could be said that the defendants carried on business amongst other places at Chester. That question having been decided in the negative Mr. Justice Wightman said: ' This case is therefore not within the jurisdiction of the County Court of Chester and it is admitted that the plaintiff did not obtain the leave of that Court as the Court in which the cause of action arose to issue his summons there.' Consequently the rule for the issue of a writ in execution was discharged.

10. We hold that the judgment relied upon by the defendant was delivered by a Court not competent to deliver it within the meaning of Section 44 of the Indian Evidence Act and therefore the plea of *res judicata* cannot prevail.

11. We set aside the decree of the lower appellate Court and restore the order of the Subordinate Court, costs throughout being costs in the cause.