APPELLATE CIVIL.

(50)

1879
April 2.

Before Sir M. R. Westropp, Kt., Chief Justice.

APAYA (PLAINTIFF), APPLICANT, *v.* RAMA (DEFENDANT), OPPONENT.*

Practice—Framing of issues—Duty of the Judge—Title—Act XIX of 1844.

Plaintiff sued to recover certain fees from defendant, alleging that he had a right to officiate at marriages among the defendant's caste-people, and that, according to this right, he (plaintiff) had officiated at the marriage of the defendant's son at his request. The lower Court raised the issue, whether the plaintiff was entitled to the right alleged by him, and the issue was accepted by the parties without any objection. The Court held that, albeit plaintiff was head or senior of the caste, he could not have any right in that character to any fees at weddings, and accordingly dismissed the suit. In appeal the District Judge found that, if any such right had ever existed in the plaintiff, it had been taken away by Act XIX of 1844; he was also of opinion that the plaintiff had not been invited to assist, and did not assist at the marriage ceremony in question, and he affirmed the decree of the Court below.

Held by the High Court, in reversal of the decrees of the lower Courts, that Act XIX of 1844 did not apply to the case; and that the District Judge was bound to decide the question really involved in the issue, viz., whether, invited or uninvited, plaintiff was entitled by custom to the fees claimed by him.

The duty of a Judge in clearly ascertaining the reals points in dispute, and framing issues accordingly, pointed out.

THIS case was referred for the opinion of the chief Justice by West and Pinhey, JJ., under section 575 of Act X of 1877.

The facts of the case fully appear from the judgments of the High Court. Both the lower Courts dismissed the suit. Plaintiff then applied to the High Court under their extraordinary jurisdiction, as the claim was less than Rs. 500. The application was heard in the first instance by West and Pinhey, JJ.

March 27.—*Gokaldas* appeared for the applicant (plaintiff).

Shamrav Vithal appeared for the opponent (defendant).

WEST, J.—The plaint set forth the claim of the plaintiff as resting on his *hak* or right as head of the caste only incidentally. He said that in accordance with this right he had been invited to officiate and had officiated at the wedding of the defendant's son. But the Subordinate Judge raised as the first issue the question, "What are the plaintiff's rights on the occasion of

*Extraordinary Jurisdiction, No. 145 of 1878.

of a marriage?" This brought out explicity what was only set forth by implication in the plaint; but it was competent to the Subordinate Judge and proper on his part to raise the issue, if he thought it necessary, for determining the matter really in controversy between the parties(1).

The issue having thus been raised, and having also been accepted without objection, formed thenceforward an essential element of the cause.

The Subordinate Judge, in dealing with it, ruled that, albeit the plaintiff was heard or senior of the caste, he could not have any right in that character to any fees at weddings. This was a mere begging of the question. He ought to have determined it by reference either to some recognized law or to some customary law established by evidence, or to the non-existence of a customary law.

The District Judge found that the right to any such fees as the plaintiff claimed had been extinguished by Act XIX of 1844. It was hardly been seriously argued before us that this Act had any bearing on the case. The plaintiff's right stands quite independent of taxes on professions and town dues, and unaffected by the abolition of those imposts.

The finding of the District Judge, that the plaintiff was not invited by the defendant to perform any services, may be accepted as conclusive; but the other question of whether the plaintiff, invited or uninvited to officiate, is entitled by a customary law of the fees he claims, or any part thereof, still requires adjudication. The suit had been disposed of on an insufficient investigation of its essential elements, and the decrees must be set asides that the inquiry may be completed and a decision given in accordance with its results.

As this view of the law governing the case is not concurred by Mr. Justice Pinhey, the application is referred to the Chief Justice.

PINHEY, J.—I would discharge the rule. The plaint set forth the plaintiff, being entitled to take some part in the marriage

(1) Act VIII of 1859, secs. 139-141.

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in the caste of the parties, was called in to assist at a marriage in the house of defendant, and having so assisted and performed his proper work, was entitled to recover from defendant certain fees as reward for the work so done.

The District Court has found that the plaintiff was not called it to do any work at the marriage, that he did not work, and, therefore, that he is entitled to no fees.

This finding sufficiently, as it seems to me, dispose of the claim set up in the plaint; and as the law has not given any appeal from the District Court's decision, I see no ground for interfering by the exercise of our extraordinary jurisdiction.

It is true that the District Court seems to incline to unsound views on the point whether the plaintiff might have recovered, as being entitled to officiate whether called in by the defendant to officiate or not; but as this part of the District Court's judgment does not touch the merits of the claim which the plaintiff put forward for adjudication in his plaint, I do not think we ought to exercise our extraordinary jurisdiction in order to correct the District Judge's view in this case. Nor do I consider that the exercise of our extraordinary jurisdiction is rendered necessary by the Subordinate Judge's having raised an issue (which, in my opinion, he ought not to have raised in this case) as to whether plaintiff was entitled to officiate at marriages or not.

As my brother West thinks otherwise, the case will be referred, under the proviso to section 575 of the Code of the Civil Procedure, to the Chief Justice.

The reference was subsequently argued before Westropp, C.J.

April 2.—*Shámrav Vithal* for the defendant.—The plaintiff's suit was only for recovery of damages based on defendant's breach of promise. It was not a suit for a declaration of his title. Inquiry into plaintiff's title arose only incidentally as it arises in all such cases. If it had been an action for a declaration of title, then title would have been the basis of the plaintiff's claim.

[WESTROPP, C.J.—You admit that it was competent to the Courts below to raise and determine the question of plaintiff's

title.] Yes, they were competent to do so. But the suit has been treated as a Small Cause Court suit. If it were not so treated, plaintiff would have been right of a second appeal.

Gopaldas, for the plaintiff, was not called upon.

WESTROPP, C. J.—It appears to me (and it is, in fact, not denied here in argument) that the Subordinate Judge was entitled to raise the issue which he did as his first issue. That issue substantially is—Whether the plaintiff is entitled to a *hak* in respect of marriages amount members of the caste to whch the defendant belonged. Neither party appears to have objected to that issue. The District Judge found that, if such a *hak* ever existed in Apáyá, it had been abolished by Act XIX of 1844; which manifestly, as admitted here on both sides in argument, has not any bearing whatever on such a *hak* as is claimed by the plaintiff. It is found by the District Judge that the plaintiff was not invited to perform or assist at the ceremony; but that still leaves undecided the question really involved in the first issue, viz.: Whether, invited or uninvited, the plaintiff is entitled by custom to a fee in respect of marriages which occur amongst persons belonging to the caste of which the defendant is a member. That ques tion he was entitled to have decided by the District Judge. A case in this country often assumes a more pointed and different shape when the issues are framed, and one different from that which it presents *primâ facie* on the plaint and written statement; and it is indeed, a part of the duty of the Judge, who settles the issues, to ascertain as clearly as he can, on inquiry of the parties or their pleaders, the real points in dispute between them, those points being often missed or obscured by the infelicitous mode of drawing pleadings, which occasionally prevails in rural districts. This duty the Subordinate Judge performed when he laid down his first issue. For these reasons I concur with Mr. Justice West in thinking that an order should go hence, under our extraordinary and superintending jurisdiction, setting aside the decree of the District Judge and directing him to re-try the regular appeal from the Subordinate Judge upon the first issue laid down by that Judge, as explained above; and should he find that issue for the plaintiff, then the further questson as to the amount of fee recoverable.

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Costs of this application must be costs in the Regular Appeal, and, together with the other costs of that appeal, should be disposed of on the re-trial by the District Judge in such manner as may be just.

Order accordingly.

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Before Mr. Justice West and Mr. Justice Pinhey.

April 3. CHINTO JOSHI, APPLICANT, *v.* KRISHNAJI NARAYAN, OPPONENT.*

Civil Procedure Codes, Act VIII of 1859 *and Act X of* 1877—*Execution of a Decree—Appeal.*

Proceedings to execute a decree commenced when the former Code if Civil Procedure (Act VIII of 1859) was in force; but property belonging to the judgment-debtor was sold in pursuance of those proceedings on the 14th of November 1877 after the new Code (Act X of 1877) came into operation. Subsequently, at the instance of the applicant, the Court made an order, setting aside the sale on the ground of irregularity.

Held that this order was governed by the former Code, and was, consequently, not subject to appeal.

THIS was an application for the exercise of the High Court's extraordinary civil jurisdiction.

The material facts of the case are as follows:—

One Phadke obtained a decree against the applicant Chinto, and execution thereof caused certain property belonging to the latter to be sold on the 14th November 1877. By a petition, dated 11th December following, Chinto moved the Court of the Subordinate Judge, (first class,) at Ratnágiri to set aside the sale on the ground of its having been conducted in a manner calculated to cause him substantial injury, inasmuch as no due publicity had been given of the intented day of sale. The Subordinate Judge found this allegation proved, and made an order cancelling the sale. The Judge, on appeal, arrived at a different conclusion on the vidence, and reversed that order.

Shamrav Vithal for the applicant.—The order of the Judge is *ultra vires*, as no appeal lies, under Act VIII of 1859, against an order setting aside a sale. There is no doubt that proceedings for the execution of the decree began while that Code was in force, and the

*Extraordinary Application, No. 89 of 1879.