

DELMEGE *et al.* v. DELMEGE.

D. C., Colombo, C 4,988.

Civil Procedure Code, s. 781—Application for certificate as to fulfilment of requirements of s. 42 of the Courts Ordinance—Plaint for injunction and damages—Value of subject-matter in issue.

Where, in an action raised to restrain the defendant from trading under a certain name and to recover Rs. 9,000 as damages consequent upon the use of such name, no value was assigned in the plaint to the use of such name, and no issue relating to damages was framed, nor any attempt made to prove damage at the trial, and the dismissal of plaintiffs' case was affirmed by the Supreme Court—

Held that, under section 42 of the Courts Ordinance, the value of the subject-matter of the suit was to be determined by the statement in the plaint, whether proved or not, and that a party desiring to appeal to Her Majesty in Her Privy Council was entitled to the certificate referred to in section 781 of the Civil Procedure Code.

1896.

*Dec. 13 and
14, and Jan.
3, 1896.*

THIS action was raised to restrain the defendant from trading under the name and style of Delmege, Reid & Co., and to recover Rs. 9,000 as damages. No value was placed on the right to use the name. The District Judge refused the injunction and dismissed the plaintiffs' case, as no damages were proved.

1895.
*Dec. 13 and
 14, and Jan.
 3, 1896.*
 BONSER, C.J.

On appeal, this judgment was affirmed by the Supreme Court, and now the plaintiffs, preparatory to an appeal to the Privy Council, applied to the Supreme Court for a certificate under section 781 of the Civil Procedure Code, that as regards amount, value, and nature the case fulfilled the requirements of section 42 of the Courts Ordinance.

Layard, A.-G. (with him *Dornhorst* and *Loos*), appeared in support of the motion, and cited D. C. Colombo, 2,298 (*Hadjar v. Pitchey*), in which the Privy Council gave leave to appeal, on the footing that the value of the subject-matter of the suit was to be determined by the statement in the plaint.

Dumbleton (with him *Van Langenberg* and *De Saram*), for defendants. *Cur. adv. vult.*

3rd January, 1896. BONSER, C.J.—

This is an application for a certificate under section 781 of the Civil Procedure Code by plaintiffs, whose action has been dismissed by the District Court and by this Court, and who wish to have the case heard in review by the Full Court. My brother Lawrie, to whom the application was first made, having some doubt as to the propriety of granting the certificate, has referred it to this Court. The certificate which is asked for is one "either that as regards amount, value, and nature, the case fulfils the requirements of section 42 of the Courts Ordinance, 1889, or that it is otherwise a fit one for appeal to Her Majesty in Council." The petitioner does not attempt to make out that the case comes within the second alternative, but alleges that it satisfies the requirements of section 42 of the Courts Ordinance. These are, that the judgment appealed from "shall be given or pronounced for or in respect of a sum or matter at issue above the amount or value of Rs. 5,000, or shall involve directly or indirectly the title to property or to some civil right exceeding the value of Rs. 5,000." The plaintiffs and defendant were formerly carrying on business together in partnership, under partnership articles, which partnership determined by effluxion of time. The defendant thereupon commenced business on his own account under the old partnership name. The plaintiffs allege in their plaint that this was a wrongful act on his part, and that they have suffered damage thereby to the amount of Rs. 9,000, and they claim (1) an injunction to restrain the defendant from the use of the old name, and (2) Rs. 9,000 as damages. No value was placed upon the right to use the name as required by section 40 of the Civil Procedure Code, so that the only question for us to decide is whether or not the judgment was given or pronounced for or in respect of a sum at issue above the amount of Rs. 5,000.

The history of the case is shortly this. The plaintiffs applied for and obtained an *interim* injunction till the trial. On appeal to this Court, the injunction was dissolved. The case then came on for trial in the District Court. At the trial no evidence was adduced. The plaintiffs' counsel merely stated that his grounds were the same as those argued before the District Court and the Supreme Court on the question of the *interim* injunction, and that "the Court can decide on our claim."

1896.

January 3.

BONSER, C.J.

The Court did not, as it ought to have done, under our procedure, frame any issues (see section 146 of the Civil Procedure Code). But I think it may be taken that the issue which the plaintiffs submitted to the Court was whether or not the plaintiff disclosed a cause of action, and I think that this was the only issue which, speaking strictly, was before the Court at the trial. The question of damages was not raised at the trial, nor was any evidence adduced in respect of it. Judgment was given dismissing the action on the ground that the plaintiff disclosed no cause of action, and this judgment was affirmed by this Court in appeal. It is that judgment of this Court that the petitioners seek to bring under review. Although, strictly speaking, the question of damage was never at issue, for no issue respecting it was framed and recorded, yet I think that the judgment was one "given in respect "of the claim for damages," for plaintiffs are by that judgment altogether shut out from recovering any sum by way of damages, and that the question of damages was substantially at issue between the parties. The only doubt which I felt was whether we were justified in certifying that the amount at issue was above Rs. 5,000, there being no evidence whatever before us as to the amount of damages, or indeed that any damages at all have been sustained by the plaintiff. We have been referred, however, to a recent case of *Hadjiar v. Pitchey*, where the Privy Council gave leave to appeal, as of right it would seem, and not of grace, although this Court had refused such leave. In that case, the action was to recover land stated in the claim to be worth Rs. 4,050, and mesne profits at a rate which would make up the claim to over Rs. 5,000. I have referred to the record, and find that there was no evidence before this Court as to the value of the land, or of the mesne profits, and, therefore so far as this Court had any judicial knowledge, their value might have been nil. This Court refused leave to appeal on the ground that, as regards value, they had only the speculative estimate of the plaintiff in his plaint. The Privy Council gave leave to appeal without assigning any reason, but I gather that their Lordships acceded to the argument of the appellant's counsel that, for the purpose of giving leave to appeal,

1896. the value of the subject-matter of the suit is to be determined by
January 3. the statement in the plaint without more. This seems decisive
LAWRIE, J. of the present application, which accordingly is granted.

LAWRIE, J.—

On the authority of the allowance by the Privy Council of the appeal in D. C., Colombo, 2,298, I am of opinion that the certificate may be granted.

