

FULL BENCH.

*Before Jenkins C.J., Woodroffe, Mookerjee, Holmwood and
D. Chatterjee JJ.*

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RUP KISHORE LAL

April 12.

v.

NEMAN BIBI.*

*Transfer—Transfer by District Judge of particular case to Additional Judge
—Civil Courts Act (XII of 1887), ss 8 sub-s. (2), 22, sub-s. (2)—
Probate and Administration Act (V of 1881), ss. 3, 51, 53.*

It is competent to a District Judge to transfer a particular case to an Additional Judge under the provisions of sub-s. (2) of s. 8 of the Civil Courts Act of 1887.

REFERENCE to FULL BENCH by Mookerjee and Beacheroff JJ.

Appeal by Rup Kishore Lal, the objector.

This appeal was filed against the decree of Moulvi Ali Ahmed, Additional District Judge, Shahabad, dated the 9th March, 1914, made in a proceeding for grant of Letters of Administration with a copy of the will annexed to the estate of one Musammam Mohun Koer, deceased. The facts appear fully from the following Order of Reference :

“This appeal is directed against the grant of Letters of Administration, with a copy of the will annexed, to the estate of one Musammam Mohun Koer. The application was presented to the District Judge on the 16th July and registered in his Court on the 1st August, 1913. After various interlocutory orders to which reference is not necessary for our present purpose, the case was transferred to the Additional Judge for disposal on the 13th December, 1913. The record does not show that any objection was taken to the order of transfer or to the trial of the case by the Additional Judge, but it has been stated before us that an objection was taken verbally and was

* Reference to Full Bench in Appeal from Original Decree, No. 107 of 1914.

overruled. It is immaterial, however, whether such objection was taken or not, because the question is one of jurisdiction, and if the order of transfer was made without jurisdiction and if the Additional Judge was incompetent to try the case, it is open to the appellant to challenge the legality of his order on that ground.

On behalf of the appellant it has been contended that, under s. 51 of the Probate and Administration Act, the District Judge alone has jurisdiction in granting Letters of Administration in all cases within his district. The expression "District Judge" is defined in s. 3 of the Probate and Administration Act to mean the Judge of a principal Civil Court of original jurisdiction. An Additional Judge is *prima facie* a Judge of this description. Our attention is invited, however, to s. 8, sub-section (2) of the Bengal Civil Courts Act, 1887, which provides that an Additional Judge appointed under sub-section (1) shall discharge any of the functions of a District Judge which the District Judge may assign to him, and in the discharge of those functions, he shall exercise the same powers as the District Judge. The appellant argues that as the District Judge transferred only this particular case for trial to the Additional Judge, and did not assign to him his functions as a District Judge in respect of any specified class of cases, the Additional Judge was not competent to hear the case. In support of this contention, reliance has been placed upon the decision in *Mahomed Musa v. Abul Nassan Khan* (1), which apparently supports the argument of the appellant. The view taken in this case, however, is opposed to that adopted in the case of *Rakal Chandra Tewari v. The Secretary of State for India in Council* (2). In that case it was contended on behalf of the appellant that, under s. 8 of the Bengal Civil Courts Act, the District Judge had power only to assign certain functions to the Additional District Judge, that is to say, that he could assign to him particular classes of cases, but could not transfer to him any particular case for decision. Rampini J., in answer to this contention stated that he was unable to accede to this view of the matter, and Woodroffe, J., expressed his concurrence with Rampini J. But it has been suggested that the case of *Rakal Chandra Tewari v. The Secretary of State for India in Council* (2), is distinguishable, inasmuch as there the question arose in relation to the transfer of an appeal, as to which provision is made in sub-section (2) of s. 22 of the Bengal Civil Courts Act. The distinction, however, is really not material, because under sub-section (2) of s. 22 a District Judge is competent to transfer an appeal to a Court under his administrative control competent to dispose of it, and whether the Additional Judge is or is not competent to dispose of an appeal transferred to him by the District Judge must depend upon the interpretation to be placed upon

(1) (1914) I. L. R. 41: Calcutta: 866; (2) (1906) 8 C. L. J. 34;

18 C. W. N. 612.

10 C. W. N. 841.

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sub-section (2) of s. 8. Consequently, there is a clear conflict of judicial opinion as to the true scope and effect of sub-section (2) of s. 8.

We may add that we feel no doubt that the view taken in the case of *Rakhal Chandra Tewary v. The Secretary of State for India in Council* (1) gives effect to the true intention of the Legislature. It appears to us to be fairly clear that, if it is competent to a District Judge, under sub-section (2) of s. 8, to assign his functions to an Additional Judge in respect of a class of cases, there is no intelligible reason why he should not do so in respect of a particular case comprised within that class. We may further observe that the case of *Rakhal Chandra Tewari v. The Secretary of State for India in Council* (1) was not brought to the notice of the Divisional Bench which decided the case of *Mahomed Musa v. Abul Hassan Khan* (2).

In these circumstances, we are constrained, under paragraph 1 of Chapter V of the Rules of the High Court, to refer this case for decision by a Full Bench. As the question arises in an appeal from Original Decree, under Rule 3, the question of law alone is referred. The question is whether, in view of the provisions of sub-section (2) of s. 8 of the Bengal Civil Courts Act (XII of 1887), it is competent to a District Judge to transfer a particular case to an Additional Judge.

Babu Kulwant Sahay, for the appellant. Under section 51 of the Probate and Administration Act the District Judge alone has jurisdiction in granting Letters of Administration in all cases within his district, and "District Judge" is defined in section 3 of that Act to mean the Judge of a principal Civil Court of original jurisdiction. In non-contentious cases applications can be received by District Delegates. Further section 53 makes the Code of Civil Procedure applicable, and a District Judge can transfer such proceedings under section 24 of the Code. Sub-section (4) of section 2 of the Code defines "District Court," and sub-section (8) thereof defines "Judge" to mean the presiding officer of a Civil Court.

[HOLMWOOD J. Is the Additional Judge subordinate to the District Judge?]

Yes.

(1) (1906) 8 C. L. J. 34; (2) (1914) I. L. R. 41 Calc. 866;

10 C. W. N. 841.

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Sub-section (3) of section 24 of the Code of Civil Procedure makes the Court of the Additional Judge subordinate to the District Court.

[JENKINS C. J. It was a transfer to the Court of the Additional Judge, and before he can try the case he must be competent to try it.]

Section 3 of the Bengal Civil Courts Act provides for four distinct Courts, the Additional Judge's Court being one. Section 8 deals with the appointment of Additional Judges, and in sub-section (2) of section 8 the law contemplates the delegation of the District Judge's functions, and only thereafter can the *particular* case be transferred to the Additional Judge.

[D. CHATTERJEE J. Must the District Judge completely assign those functions?]

There can be a partial assignment after the vesting of jurisdiction.

[MOOKERJEE J. Do you say that there should first be an order by the District Judge transferring his functions, and then another transferring the particular case?]

The District Judge has Sessions functions also. Here he is to delegate to the Additional Judge his function to hear Probate and Administration cases.

[*Babu Umakali Mookerjee* (for the respondent). I rely on section 8 of the Bengal Civil Courts Act; in the alternative I say the transfer was under section 24 of the Code, or under the District Judges' administrative powers, as under section 9 of the Bengal Civil Courts Act, the Court of the District Judge has administrative control of the Court of the Additional Judge.]

Sub-section (2) of section 8 deals only with *class* of cases or functions.

[MOOKERJEE J. Suppose the District Judge assigns one case to the Additional Judge.]

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That is not functions. The question is whether the transfer of one case alone means transferring functions or jurisdiction. The provisions in the Madras and Bombay Civil Courts Acts are quite different, as the Legislature has conferred jurisdiction on them.

He can take up cases by way of transfer from the Additional District Judge. Under section 11 the District Judge may transfer an individual case.

[HOLMWOOD J. He thus distributes cases among his subordinate Courts.]

Yes. Similarly under section 22 the function of hearing an appeal, but not of receiving an appeal can be transferred. In *Mahomed Musa's Case* (1), Stephen J. took that view regarding section 92 of the Code that the assignment must be general for a *class* of cases.

[JENKINS C. J. What do you mean by "class of cases?" Suppose the general list is very heavy, can't the District Judge transfer some of those cases?]

Yes. If he has first assigned his functions and thus given jurisdiction.

Power is jurisdiction, while function is duty. Mere conferring of powers does not give functions. In *Bidya Moyee Debya Cho vdhurani v. Surja Kanta Acharji* (2) the same view has been taken by Ghose and Holmwood JJ. at p. 880 regarding appeals.

[MOOKERJEE J. That case has been often criticised.]

Yes. In *Abdul Karim v. Abdus Sobhan* (3), and also by Rampini J. in *Rakhal Chandra Tewary's Case* (4).

[HOLMWOOD J. Those remarks in *Bidya Moyee Debya* (2) are *obiter*, and I cannot associate myself with the general remarks in that judgment.]

(1) (1914) I. L. R. 41 Calc. 866; (3) (1911) I. L. R. 39 Calc. 146.

18 C. W. N. 612.

(4) (1906) 10 C. W. N. 841.

(2) (1905) I. L. R. 32 Cal. 875.

8 C. L. J. 34.

[JENKINS C.J. What are the sections under which a District Judge can transfer a case?]

Section 24 of the Code, or under his administrative powers under section 11 of the Bengal Civil Courts Act and also under section 92 of the Code as laid down in *Abdul Karim v. Abdus Sobhan* (1). The provisions of section 51 of the Probate and Administration Act are the same as section 92 of the Code.

[D. CHATTERJEE J. If functions mean official duties, are those to be transferred also?]

That is what these cases decide. After this jurisdiction has been conferred by the District Judge there will be two Courts.

The principle is the same that one case cannot be transferred to another Court unless it has jurisdiction to try all such cases.

“Functions” means jurisdiction. The only case against me is that of *Rakhal Chandra Tewari* (2) where Rampini J. said it would mean the transfer of functions in *one* case also. In the case of the inferior Courts a Judge can't be held to have jurisdiction unless it is expressly given, while in the case of the superior Courts jurisdiction is presumed unless explicitly removed.

Babu Umakali Mookerjee, Babu Raghunath Singh and Babu Sudhansu Shekhar Mookerjee, for the respondent, were not called upon to reply.

The judgment of the Court (JENKINS C. J., WOODROFFE, MOOKERJEE, HOLMWOOD AND D. CHATTERJEE JJ.) was delivered by

JENKINS C.J. The question proposed for our determination is, whether, in view of the provisions of sub-section (2) of section 8 of the Bengal Civil Courts Act (XII of 1887), it is competent to a District Judge to

(1) (1911) I. L. R. 39 Calc. 146.

(2) (1906) 8 C. L. J. 34 ;
10 C. W. N. 841.

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transfer a particular case to an Additional Judge. We answer the reference in the affirmative. The reasons which induce us to adopt that conclusion are sufficiently set forth in the Order of Reference, and we need not repeat them.

The case will go back to the Divisional Bench for final disposal. The Divisional Bench will deal with the costs of this reference.

G. S.