

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

VELAYUDAM (DEFENDANT No. 25), APPELLANT,

1889.

December 20.

v.

ARUNACHALA (PLAINTIFF), RESPONDENT.*

Jurisdiction—Objection as to, first taken in second appeal—Waiver of objection to jurisdiction—When objection cannot be waived.

A suit of which the subject matter was less than Rs. 2,500 was instituted in a Subordinate Court. The Subordinate Judge tried the suit and passed a decree, and an appeal against this decree was entertained and determined by the District Judge without objection taken that the Subordinate Court had no jurisdiction to hear and determine the suit. On second appeal objection was taken as above:

Held, that the objection must prevail and the plaint be returned for presentation in the proper Court.

SECOND APPEAL against the decree of H. T. Ross, Acting District Judge of Madura, in appeal suit No. 515 of 1887, affirming the decree of S. Gopalachariar, Subordinate Judge of Madura (East), in original suit No. 10 of 1887.

Suit to recover possession of land with mesne profits. To the plaint was affixed the following note:—

“The value of the property for purpose of jurisdiction is given at Rs. 4,500, and the value of plaintiff’s claim inclusive of mesne profits at Rs. 2,160. The suit has been instituted in this Court in pursuance to the ruling of the High Court in *Vydimatha v. Subramanya*(1).”

The plaintiff obtained a decree, which was affirmed on appeal.

Defendant No. 25 preferred this second appeal.

Mr. *Parthasaradhi Ayyangar* for appellant.

Mr. *Johnstone* for respondent.

The facts of the case appear sufficiently for the purposes of this report from the following judgment.

JUDGMENT.—The first objection taken in second appeal is that the Court of First Instance had no jurisdiction to hear and decide the suit, the value of the claim being below Rs. 2,500. This point was not raised in either of the Courts below, but we

* Second Appeal No. 240 of 1889.

(1) I.L.R., & Mad., 235.

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are of opinion that an objection to the jurisdiction of the Court of First Instance may be taken for the first time in second appeal, inasmuch as an act done without jurisdiction is of no legal effect and must be set aside when the illegality is made apparent. But it is argued that, inasmuch as the appellant did not demur to the jurisdiction of the Lower Appellate Court, he must be held to have waived the right to raise the question of jurisdiction. Admittedly the Subordinate Judge had no jurisdiction to try the suit which should have been filed in the Court of the District Munsif; but it is contended that the Judge was competent to hear and decide the appeal, and reference is made to the Privy Council case of *Ledgard v. Bull*(1). In that case it was distinctly held by the Privy Council that even an order transferring a case from one Court to another could not be validly made unless the suit was instituted in a Court of competent jurisdiction. An appeal could not be heard on the merits, unless the decree from which the appeal was preferred was passed by a Judge having jurisdiction over the matter in dispute. No doubt the District Judge was the appellate authority, whether the suit was heard and determined either by the Subordinate Judge or District Munsif, but it must be remembered that the Appellate Court is only a Court of error and the trial by the Appellate Court cannot be accepted in place of a trial by the Court of First Instance. In the case of *Ledgard v. Bull*(1) the Court to which by an irregular process the suit was transferred was competent to try the suit, and we cannot say that it is on all fours with the present, nor are we prepared to hold that this is a case to which the principle laid down by the Privy Council in that case can be extended. We must, therefore, set aside the decrees of both the lower Courts, dismiss the suit, and direct that the plaint be returned to be presented in the proper Court.

As the second appeal was necessary, the respondent must pay the appellant's costs in this Court, but we direct that each party bear his own costs in the Courts below.

(1) I.L.R., 9 All., 191.