SARAVANAI PERUMAL PILLAI *v.* POOVAYI.

JUDGMENT.—The suit was for restitution of conjugal rights. The District Judge has found that the plaintiff's claim was barred under article 35 of the Limitation Act. We agree with the decision of the Full Bench in *Dhanjibhoy Bomanji* v. *Hirabai*(1), that article 35 of the Limitation Act is applicable, and, with great deference, are unable to agree with the decision of the Allahabad Court in *Binda* v. *Kaunsilia*(2).

The suit was therefore rightly dismissed.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

1905. February 13. March 9.

THE MANAGER OF THE COURT OF WARDS, KALAHASTI ESTATE (PLAINTIFF), APPELLANT,

v.

RAMASAMI REDDI (DEFENDANT), RESPONDENT.*

Civil Procedure Code, Act XIV of 1882, s. 564—Whether consent of parties can validate an illegal remand under section 564 of the Civil Procedure Code—Waiver, effect of—Effect of illegal remand by lower Appellate Court on points properly decided.

Where the Court of First Instance had framed all the necessary issues and decided all those issues, and the lower Appellate Court, reversing the decision of the Court of First Instance on one of the issues, remanded the case for retrial under section 564 of the Code of Civil Procedure, held, on second appeal:—

Per SUBRAHMANIA AYYAR, J.—An order of remand, contrary to the provisions of section 564, is not merely irregular but illegal; but it is not on that account absolutely void so as to render any consent of the parties of no avail. It can be objected to by a party if he has not given his consent to such a course, and even a party who has not consented may be equitably estopped by subsequent conduct from treating such an order as null and void. Such an order of remand does not necessarily vitiate the decision of the lower Appellate Court on questions properly decided by it, which can be attacked only on grounds legally open to the parties on second appeal. It cannot be treated as void for want of jurisdiction so as to be incapable of being validated by consent or waiver.

(1) I.L.R., 25 Bom., 644 at p. 646. (2) I.L.R., 13 All., 126.

* Civil Miscellaneous Appeal No. 9 of 1904, presented against the order of D. Broadfoot, Esq., District Judge of Chinglepnt, in Appeal Suit No. 145 of 1903, presented against the decision of M.R.Ry. P. Sivarama Ayyar, Deputy Collector of Trivellore, in Summer Suit No. 12 of 1903.

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Mohesh Chandra Dass v. *Jamiruddin Mollah*, (I.L.R., 28 Calc., 324), referred to.
Mallikarjuna v. *Pathaneni*, (I.L.R., 19 Mad., 479), referred to.
Subrahmania Ayyar v. *King-Emperor*, (I.L.R., 25 Mad., 61 at p. 97), followed.
Per MOORE, J.—The order of remand was illegal and no consent of parties could make it valid.

THE suits, out of which these appeals* arose, were brought by the manager of the Court of Wards of the Kalahasti estate, to enforce acceptance by the defendants, the tenants, of waram puttahs for fasli 1312. The substantial contention of the defendants was, that from fasli 1304 it was agreed that the waram rate should be converted into a money rent, and the plaintiff had no right to enforce waram puttahs. The Deputy Collector framed six issues, of which the second related to the existence of the alleged contract. He decided all the issues in favour of the plaintiff and passed a decree directing the defendants to accept the puttahs tendered.

On appeal, the District Judge reversed the finding on the second issue, and being of opinion that the evidence on record was not sufficient to enable him to draw up the correct puttahs, remanded the case with directions that additional evidence should be taken, and that correct puttahs should be drawn up.

Against the order of remand the plaintiff preferred this appeal.

Mr. *Joseph Satya Nadar* and *V. Krishnaswami Ayyar* for appellant.

The Hon. Mr. *P. S. Sivaswami Ayyar* and *V. Krishnaswami Ayyangar* for respondent.

JUDGMENTS—SUBRAHMANIA AYYAR, J.—The suits, out of which these civil miscellaneous appeals arise, were instituted before the Deputy Collector of Trivellore by the Regulation Collector in charge of the Kalahasti estate for compelling the acceptance by the respective defendants of puttahs for fasli 1312. The main contest before the Deputy Collector was whether with reference to the lands constituting the holdings, rent was payable in kind as contended on behalf of the plaintiff, or, as contended for the defendants in money, under express contracts alleged to have been entered into in fasli 1305. This and certain minor questions were tried by the Deputy Collector who held that the contracts alleged were not made out, and he directed that waram puttahs should be accepted. The defendants appealed and the District

Judge on appeal disagreed with the Deputy Collector on the main question, and after discussing the evidence on the point, found that the contracts set up were proved. This conclusion rendered a revision of practically all the other terms of the puttahs necessary; and the District Judge reversed the decision of the Deputy Collector and remanded the suits for disposal on the basis that rent was payable in money in accordance with the contracts found. Against the orders of such remand, these appeals have been preferred.

Mr. *Krishnaswami Ayyar*, on behalf of the plaintiff, argued the cases on the merits, stating that the plaintiff was desirous of obtaining the decision of this Court on the question as to whether the finding of the District Judge that the contracts alleged by the defendants were established, was correct, and that if the decision should be against him, it was not intended to object to the order of remand. At the conclusion of the argument I expressed my opinion that the District Judge was right in his finding on the question of the contract and that we ought to dismiss the appeals. But my learned colleague, if I am not mistaken, was inclined to hold that the orders of remand having been passed contrary to section 564 of the Civil Procedure Code, the proper course was to set aside the whole proceedings of the District Judge, inclusive of his decision on the question of the contracts, and to direct him to restore the appeals to his file, rehear the case, and pass decrees settling the terms of the puttahs, taking fresh evidence or calling for findings as he may deem fit. Thereupon the vakils for the defendants, one of whom had appeared before the District Judge when the cases were disposed of by him, urged that the remand of the suits was, at the express request of both the parties made to the District Judge; that subsequent to the remand the matter had been tried by the Deputy Collector and fresh decrees given, and that consequently the plaintiff was precluded from taking exception to the order of remand; and that at all events the decision of the District Judge as to the contracts being true and valid could not be set aside in the absence of any reason warranting such a course on second appeal. Judgment was reserved for further consideration of the contentions thus raised on behalf of the defendants.

Now as to the first of these contentions there can be no doubt that when a suit is remanded contrary to the provisions of section

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564, proceedings taken in pursuance of such remand cannot be said to be absolutely null and void so as to render any consent given by the parties of no avail whatever. Nor, on the other hand, is such remand a mere *irregularity*, which in spite of objection duly taken by a party might, in the discretion of the Court, be treated as not necessarily affecting the validity of the proceeding. The true view is that a remand in contravention of section 564 is a violation of a mandatory provision of the law which makes the order of remand illegal, and one that ought to be set aside at the instance of a party entitled to object to such a procedure, but which nevertheless is of such a character that the defect can be cured by consent. That no question of want of jurisdiction in any real sense of the term is involved in the case of a remand such as that under consideration is to my mind obvious, inasmuch as the lower Court to which the proceeding is so erroneously remanded, could not only properly try the matter if instead of such remand issues had been referred in connection therewith, but could also have dealt with it in the first instance save for the error set right in the Appellate Court. And *Mohesh Chandra Dass* v. *Jamiruddin Mollah*(1) clearly and directly supports this view. No doubt that case as well as *Mallikarjuna* v. *Pathaneni*(2), speaks of an improper remand as an 'irregularity,' but such a description of the deviation in procedure in question is inconsistent with the subsequent ruling of the Judicial Committee in *Subrahmania Ayyar* v. *King-Emperor*(3), where it is observed that their Lordships are unable "to regard the disobedience to an express provision as to a mode of trial as a mere irregularity." Such disobedience must therefore, I think, be held to be null and void as against the party entitled to object thereto, provided, he has not waived his right so to object. *Perumbra Nayar* v. *Subrahmanian Pattar*(4) is not in conflict with what I have just stated, for, the remand there was one which, while being outside the scope of section 564, was warranted by an earlier provision of the Code in the manner explained by Strachey, C.J., in *Habib Bakhsh* v. *Baldeo Prasad*(5). The doctrine that consent does not give jurisdiction of course applies where the Court has "no inherent jurisdiction over the subject

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(1) I.L.R., 28 Calc., 324.
(2) I.L.R., 19 Mad., 479.
(3) I.L.R., 25 Mad., 61 at p. 97.
(4) I.L.R., 23 Mad., 445.
(5) I.L.R., 23 All., 167.

matter" (*Ledgard* v. *Bull*(1)). It would not, however, apply to violations of rules of procedure though they are more than irregularities. For the doctrine of waiver has been applied even where there have been what may be correctly described as jurisdictional defects in a general sense. *Moore* v. *Gamgee*(2) may be referred to as an instance in point. There, Cave, C.J., in accordance with a previous similar decision of Erle, J., in *In re Jones* v. *James*(3) held, notwithstanding that leave of the Court had not been obtained for the institution of the suit as it should have been, the objection to the jurisdiction of the Court had been waived by the defendant appearing and contesting the action. Another instance in point is *Revell* v. *Blake*(4) followed in *Gomatham Alamelu* v. *Komandur Krishnamacharlu*(5) and in *Sardarmal* v. *Aranvayal Sabhapathy*(6). In that case it was held by the Court of Common Pleas that when a tribunal, competent to adjudicate a person a bankrupt if he resided within its territorial limits, had proceeded to make the adjudication when that was not the case, but without objection having been made to its so acting, the adjudication was held to be not void. On substantially the same ground Kay, L.J., in *Warwick and Birmingham Canal Navigation Company* v. *Burman*(7) held the objection to the jurisdiction of a Court to proceed by way of injunction supposing the only remedy was by way of *mandamus* was waived by the conduct of the defendant in the course of the litigation. These are instances of waiver where the jurisdiction was, in the language of Erle, J., in *In re Jones* v. *James*(3). *Kandoth Mammi* v. *Neelancherayil Abdu Kalandan*(8), *Nallatambi Mudaliar* v. *Ponnusami Pillai*(9), and *Fazal Shau Khan* v. *Gafer Khan*(10) are authorities where, though the jurisdiction was not *contingent*, yet parties voluntarily submitting to it and taking the chance of a decision in their favour, were held to be equitably estopped from falling back on the objection of want of jurisdiction. Further it seems to me that the reason which I conceive underlies the prohibition against remand contained in section 564, favours the application of the doctrine of waiver here. That reason I take to be that once a lower Court has decided a

(1) L.R., 13 I.A., 134 at p. 145.
(2) L.R., 25 Q.B.D., 244.
(3) 19 L.J. (Q.B)., 257.
(4) L.R., 8 C.P., 533.
(5) I.L.R., 27 Mad., 118.
(6) I.L.R., 21 Bom., 205.
(7) 63 L.T. (N.S)., 670.
(8) 8 M.H.C.R., 14.
(9) I.L.R., 2 Mad., 400.
(10) I.L.R., 15 Mad., 82.

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case on the merits and the cause is removed on appeal to a higher Court, the latter should dispose of the cause finally, adopting whatever intermediate steps that may be necessary, and not by a remand of the whole cause to the lower Court, drive the party affected to incur the delay, trouble, and expense of a fresh appeal to the same tribunal in respect of the eventual decision of the case. If this is right, the provision is one introduced for the benefit of litigants who may consequently waive it if they find that the more advantageous course to make.

Passing to the other contention on behalf of the defendants referred to above, it is to be observed that, in the circumstances of the cases, the question whether the express contracts set up are true and valid was the crucial question between the parties, and it was essential that the Judge should come to a decision on it before any further order could be passed or step taken by him in the litigation, be that further step, the sending down of issues to the lower Court on the trial thereof by himself. Consequently the finding of the Judge in the matter was an adjudication rightly made at the stage in which it was made, and binding on the Court unless duly set aside on appeal or otherwise. The fact that an illegal remand followed, cannot of course affect what had already been properly done. It is clear, therefore, that if the finding is to be interfered with by us that must be only for reasons warranting such interference on second appeal. But no such reasons having been shown and the decision of the Judge being in accordance with the effect of the undisputed documents with reference to which it was sought to be impeached, it seems to me that the same must be upheld.

I should also add, supposing the order of remand was illegal, and that could possibly have affected the validity of the District Judge's decision as to the contracts relied on by the defendants, or that there was no consent in the lower Appellate Court for the remand, nevertheless having regard to the course adopted on behalf of the plaintiff in the conduct of the case before us as already stated, we must, on the principle of equitable estoppel laid down in the cases cited above, hold that the plaintiff can no longer rely on the impropriety of the remand and its supposed effect on the finding under consideration, and that we should proceed to determine the question on the merits, deliberately submitted for our decision, and dispose of the cases with reference to the

determination so arrived at (compare *Ex parte Butters, In re Harrison*(1)).

I would therefore dismiss the appeals with costs in Civil Miscellaneous Appeal No. 9 of 1904, and without costs in the other cases.

MOORE, J.—In Appeal Against Order No. 9 of 1904. The order of remand by the District Judge is, in my opinion, clearly illegal. The Deputy Collector had not disposed of the suit on a preliminary point. On the contrary he had framed six issues and had decided them all. It is alleged that the order was passed by consent. There is nothing on the record to show that such is the case, and even if it were proved that both the appellants and respondents consented to the suit being remanded, that would be immaterial. The order of remand being illegal (*vide* section 564, Civil Procedure Code) consent of parties would not make it legal. This appeal should, in my opinion, be allowed, the order of remand should be set aside, and the District Judge directed to retake the appeal on his file and dispose of it according to law. I, of course, at the present stage, give no opinion as to the matters treated of by the District Judge in his judgment.

The costs of this appeal against order should be provided for in the District Judge's final appellate decree. The other cases would follow.

Under the provisions of section 575, Civil Procedure Code, it is directed that these appeals be dismissed with costs in Civil Miscellaneous Appeal No. 9 of 1904, and without costs in the other cases.

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(1) L.R., 14 Ch. D., 265.