VENCATARAJU v. RAMANAMMA.

BENSON AND SUNDARA AYYAR, JJ.

of the two is logically prior to the other. This is in our opinion an entirely unsound view. See *Krishna Behari Roy* v. *Brojeswari Chowdranee*(1), *Venkayya* v. *Narasamma*(2) and *Bayyan Naidu* v. *Suryanarayana*(3), *per* SUNDARA AYYAR, J. We may also observe that it would often be impossible to apply the rule of logical priority. We do not consider it necessary to refer to certain decisions of the other High Courts which are contended to be in the respondent's favour. We reverse the Lower Appellate Court's order and remand the appeal for fresh disposal. The Subordinate Judge may, if he thinks fit, call for fresh findings on any of the other questions in the case or direct any evidence to be admitted which was wrongly rejected by the District Munsif. The costs of this appeal should be provided for in the revised decree.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

1912. February 13.

SRI RAJAH PRAKASARAYANIM GARU AND TWO OTHERS (LEGAL REPRESENTATIVES OF THE PLAINTIFF), APPELLANTS,

v.

Y. P. VENKATA RAO (SECOND DEFENDANT), RESPONDENT.*

Evidence—Evidence taken by a Court without jurisdiction—Effect of consent to treat it as evidence, if relevant.

Consent or want of objection to the reception of evidence which is irrelevant cannot make the evidence relevant, but consent or want of objection to the wrong manner in which relevant evidence should be brought on record of the suit disentitles parties from objecting to such evidence in a court of appeal.

Miller v. *Madho Das* (1897) I.L.R., 19 All., 76 at p. 92 (P.C.), followed.

The fact that it was evidence taken previously by a Court which was held to have had no jurisdiction to try the case and take the evidence and that it was consented to be treated as evidence does not affect the validity of the consent.

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(1) (1875) 2 I.A., 283. (2) (1888) I.L.R., 11 Mad., 204.

(3) (1912) 23 M.L.J., 543 at p. 564.

* Appeal Against Order No. 158 of 1912.

Quaere.—Whether in a case falling under section 33 of the Evidence Act, evidence recorded by a Court can be regarded as not given in a judicial proceeding on the mere ground that the decree of the Court was subsequently set aside for defect of jurisdiction?

APPEAL against the order of Diwan Bahadur M. O. PARTHASARATHI AYYANGAR, the District Judge of Godavari at Rajahmundry, in Appeal No. 162 of 1909 preferred against the decree of V. SUBRAHMANYAM PANTULU, the Subordinate Judge of Cocanada, in Original Suit No. 50 of 1907.

The facts of the case are fully given in the judgment.

P. Narayanamurti and *P. Somasundaram* for the appellants.

V. Ramesam for the respondent.

The judgment of the Court was delivered by

BENSON AND SUNDARA AYYAR, JJ.

SUNDARA AYYAR, J.—This is an appeal against the order of the District Court of Rajahmundry reversing a decree of the Subordinate Judge of Cocanada and remanding the suit for fresh trial. The Subordinate Judge had disposed of the suit on the merits but solely on evidence recorded by the District Munsif's Court of Peddapur. The suit was first instituted and tried in the latter Court, but its decree was reversed on appeal on the ground that the pecuniary value of the suit was beyond the jurisdiction of a Munsif's Court and the plaint was returned for presentation to the proper Court. The plaint was subsequently represented in the Subordinate Court. The parties presented a statement at the trial of the suit consenting to the evidence recorded at the former trial by the Peddapur Munsif's Court being treated as evidence in the suit and dispensing with any further evidence. The District Judge held that notwithstanding the consent of the parties the Subordinate Court's procedure in acting on the evidence recorded in the Peddapur Court was illegal. He was of opinion that, as all the evidence in the case was illegally admitted, the suit had virtually not been tried on the merits and must therefore be remanded for fresh trial. The contention of the appellants in this appeal is that the evidence in question was not illegally admitted by the Subordinate Judge, and that the order of remand cannot therefore be upheld. It is argued that as there was no objection raised on the admission of the evidence on the ground of irrelevancy [as to which see *Miller* v. *Madho Das*(1)], and as the objection raised in the

(1) (1897) I.L.R., 19 All., 76 at p. 92 (P.C.).

SRI RAJAH PRAKASARAYANIM GARU v. VENKATA RAO.

BENSON AND SUNDARA AYYAR, JJ.

Court of Appeal related purely to the manner in which relevant evidence should be brought on the record of the suit, the consent of both parties disentitled the respondent to any objection to it in the Appellate Court. The District Judge while apparently of opinion that irregularities in the mode of taking evidence might be cured by the consent of parties, considered that this principle should not apply to the present case, as the Munsif of Peddapur, who recorded the evidence, had no jurisdiction to try the suit, and the proceedings before him were pronounced to be *coram non judice*. On appeal we are of opinion that the distinction drawn by him is not well-founded. In *Maharajah Jagutendur Banwaree* v. *Din Dyal Chatterjee*(1), and *Lakshman* v. *Amrit*(2), statements made by witnesses in a former suit were held to be admissible with the consent of parties. In *Syed Mahomed* v. *Romdah Khanum*(3), deposition not taken before the Judge who completed the trial were admitted though there was then no legislative provision allowing this to be done—see also *Naranbhai Vrijbhukandas* v. *Naroshankar Chandroshankar*(4), and *Jadu Rai* v. *Kanizak Husain*(5). In *Sreenath Roy* v. *Goluck Chunder Sein*(6), evidence given in a suit to which the person consenting was not a party and had then no opportunity to test by cross-examination, was held to be rightly admitted. In *Ramaya* v. *Devappa*(7), it was held that consent made evidence, which might be recorded illegally or without jurisdiction by the trying Judge at the disputed locality, admissible. The *ratio decidendi* in all these cases was this. The facts admitted in evidence being themselves relevant, provisions of law intended to test the credibility of witnesses or to enable the trying Judge to make the test himself are not of such an important character that parties cannot waive the benefit of those provisions. They are not rules of public policy which the parties cannot waive—see 13 American Cyclopædia of Law and Procedure, page 1014. An Appellate Court is called upon to decide facts on evidence not taken before itself. The legislature has recognized several exceptions to the rule requiring the oral evidence in a case to be taken before the trying Judge. This

(1) (1864) 1 W.R. (C.R.), 309 at p. 310.
(2) (1900) I.L.R., 24 Bom., 591.
(3) (1870) 13 W.R., 184.
(4) (1867) 4. B.H.C.R., 98.
(5) (1886) I.L.R., 8 All., 576 (F.B.).
(6) (1871) 15 W.R., 348.
(7) (1906) I.L.R., 30 Bom., 109.

requisite is dispensed with, in cases where a suit is transferred from one Court to another and where there is a change of Judge in the trying Court owing to death, transfer or other cause : see order 18, rule 4, Civil Procedure Code. We do not think that the circumstance that the Appellate Court in the previous suit held that the Munsif who recorded the evidence had no jurisdiction to try the suit is material. That does not affect the validity of the consent of the parties which is the reason for the admission of evidence not recorded in the suit. It is unnecessary to express an opinion on the question whether in cases falling under section 33 of the Evidence Act, evidence recorded by a Court can be regarded as not given in a judicial proceeding on the mere ground that the decree of the Court was subsequently set aside for defect of jurisdiction, over the causes although *In the matter of Rami Reddi*(1), is an authority against the admission of such evidence in subsequent proceedings between the parties. We hold that the Subordinate Judge was justified in acting on the evidence recorded in the previous suit, set aside the order of the District Judge, and remand the appeal for fresh disposal according to law. The costs of this appeal will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.

ATCHAPARAJU (DEFENDANT), APPELLANT IN BOTH CASES,

1913. February 13.

v.

RAJAH VELUGOTI GOVINDA KRISHNAYACHENDRULAVARU, RESPONDENT.*

Madras Estates Land Act (I of 1908), ss. 3 (7), 153 and 157—Proviso to section 153, effect of—'Old waste', tenant of—Ejectment from, grounds of.

The combined effect of section 153 of the Madras Estates Land Act (I of 1908) even as amended by section 8 of Madras Act IV of 1909, and of section 157

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(1) (1881) I.L.R., 3 Mad., 48.

* Second Appeals Nos. 158 and 174 of 1912.