

## APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nándhái Havildás.

1884.  
December 8.

BA'BA'JI (ORIGINAL PLAINTIFF), APPELLANT, v. LAKSHMIBAI AND TWO OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

*Jurisdiction—Consent to jurisdiction—Waiver—Practice—Plaint, return of, on second appeal.*

The plaintiff sued three defendants on a bond alleged to have been executed by them to the plaintiff. Two of the defendants did not appear, or make any defence to the suit. The second defendant only appeared, and objected to the jurisdiction of the Court; but his objection was overruled, and a decree was made against all three defendants. On appeal the lower Appellate Court reversed the decree, holding that the Court of first instance had no jurisdiction. The plaintiff preferred a second appeal, and contended that the first and third defendants had consented to the jurisdiction of the Court, and that the decree was binding as against them.

*Held*, affirming the decision of the lower Appellate Court on the question of jurisdiction, that the conduct of the defendants, even if it could be held to have amounted to consent or acquiescence, did not give the lower Court any jurisdiction. Consent or acquiescence does not give jurisdiction to a Court of limited jurisdiction, though the waiver may be sufficient in a Court of superior jurisdiction. The consent which waives an irregularity, or allows the Court to exercise a power not vested in it, cannot, by itself, give the authority itself as an attribute of the Court, which must directly or indirectly emanate from the sovereign.

On finding that the Court of first instance had no jurisdiction, the lower Appellate Court ought to have ordered the plaint to be returned. It not having done so, the High Court on second appeal ordered the plaint to be returned, in order that it might be presented to the proper Court.

THIS was a second appeal from the decision of C. F. H. Shaw, District Judge of Belgaum.

Suit on a bond. The plaintiff sued the defendants in the Subordinate Judge's Court at Belgaum to recover the sum of Rs. 659 due on a bond alleged to have been executed at Belgaum by the defendants to the plaintiff. The first and third defendants did not put in their appearance at the hearing, or file written statements. The third defendant, however, when called *as witness* admitted the execution of the bond at Belgaum. The second defendant alleged that he was not a party to the bond, and had not signed it. He alleged that he resided at Hosur, outside the jurisdiction of the Subordinate Judge's Court at Bel-

\*Second Appeal, No. 233 of 1883.

gaum, and he contended that the suit would not lie in the latter Court in so far as the bond appeared to have been executed at Hosur. From the evidence adduced at the hearing the Subordinate Judge held the bond to have been executed at Belgaum, and that the second defendant was an executing party. He decreed, therefore, in favour of the plaintiff, directing the defendants to pay to the plaintiff Rs. 659 and costs.

The second defendant appealed from the decree of the Court of first instance, and the District Judge, having found that the bond was really executed at Hosur, held that the Subordinate Judge at Belgaum had no jurisdiction to entertain the suit. He, accordingly, reversed the decree of the lower Court.

The plaintiff appealed to the High Court.

*Vasudev Gopál Bhandárkar* for the appellant.—Two of the defendants have not raised any objection to the jurisdiction of the lower Courts, and it is binding on the third—*Venkata Virarágavayyangár v. Krishnasami*<sup>(1)</sup>; *Kandoth Munni v. Neelancherayil*<sup>(2)</sup>; *Bálkrishna Sakhdárám v. Aba*<sup>(3)</sup>; *Kalaya v. Kalaya*<sup>(4)</sup>. The District Judge could not, on the ground of want of jurisdiction, reverse the decree as against the defendants, who had raised no objection to the jurisdiction. If the Court now holds that the Court of first instance had no jurisdiction, we ask for the return of the plaint, that it may be presented to the proper Court. The Court has power to return the plaint at any time. A plaint can be returned even on second appeal—*Mussamut Edoo v. Shaikh Hefazul*<sup>(5)</sup>; *Prábhákarbhut v. Vishwambhar Pandit*<sup>(6)</sup>.

*Dáji Abáji Khare* for the respondents.—The provisions of section 57 of the Civil Procedure Code (Act XIV of 1882) give the cases in which a plaint can be returned. The application for a return of the plaint should always be made at the earliest opportunity. Objection to the jurisdiction was raised in the Court of first instance. The proceedings have advanced too far to allow

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(1) I. L. R., 6 Mad., 344.

(4) Printed Judgments for 1877, p. 187.

(2) 8 Mad. H. C. Rep., 14.

(5) 13 Calc. W. R. 358, Civ. Rul.

(3) Printed Judgments for 1876, p. 189. (6) I. L. R., 8 Bom., 313.

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of such an application. On second appeal the plaint cannot be returned—*In re Bái Amrit*<sup>(1)</sup>.

WEST, J.—As to the argument that the consent or acquiescence of two of the defendants gave the Subordinate Judge's Court jurisdiction over the case as against them, we observe that consent or appearance does not give jurisdiction to a Court of limited jurisdiction, though the waiver may be sufficient in a Court of superior jurisdiction. This is shown by the judgment of Brett, J., in *Oulton v. Radcliffe*<sup>(2)</sup>. There is a *dictum* of Bowen, L. J., in the recent case of *Ex parte Pratt*<sup>(3)</sup> which may seem somewhat at variance with what has just been said, but that was a case in which the Court had the requisite jurisdiction; the error consisted in its having been invoked in the wrong way. Such a case is plainly quite different from one in which the authority does not at all subsist. The consent which waives an irregularity or allows the Court to exercise a power vested in it on a wrong reason instead of the right one on which it might have rested, cannot give the authority itself as an attribute of the Court which must directly or indirectly emanate from the sovereign. Hence the objection taken on this ground cannot, we think, be allowed.

But it appears that the Court of the Subordinate Judge had not jurisdiction. The plaint ought then to have been retained in that Court; and as the Subordinate Judge did not find the facts which ousted his jurisdiction, the District Judge, who did, ought to have ordered the plaint to be returned. As he did not give this direction, we, on the authority quoted by Mr. Bhandárkar (*Mussamut Edoo v. Shaikh Hefuzat Husein*<sup>(4)</sup>), now order that the plaint be returned for presentation in the proper Court.

The District Court's decision on the question of jurisdiction is affirmed, and the appellant is to bear the costs throughout.

(1) I. L. R., 8 Bom., 380.

(3) L. R., 12 Q. B. D., at p. 341.

(2) L. R., 9 C. ., at p. 191.

(4) 13 Calc. W. R., 358.