APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

RAMAYA BIN SUBAYA AND ANOTHER (ORIGINAL DEFENDANTS 4 AND 5), APPELLANTS, *v.* DEVAPPA GANPAYA (ORIGINAL PLAINTIFF), RESPONDENT.*

1905. *July* 27.

Evidence taken in a particular way—Consent of parties—Jurisdiction of the Court.

In a suit to recover damages for wrongful diversion by the defendants of the course of a brook, the Subordinate Judge, at the desire of both the parties, proceeded to the spot of the diversion, made inspection and examined witnesses on the spot. The depositions of the witnesses were taken down in vernacular by a clerk of the Court. On going through the evidence the Subordinate Judge dismissed the suit, holding that the defendants had not diverted the course of the brook and the plaintiff had not suffered any damage. The plaintiff appealed and raised a preliminary objection to the procedure of the Subordinate Judge. The Judge in appeal held that the Subordinate Judge's procedure vitiated the decision and reversed the decree and remanded the suit for trial on the merits.

On second appeal by the defendants against the order of remand,

Held, reversing the decree of the Judge and restoring the appeal to the file, that the parties, if so minded, may ordinarily agree that evidence shall be taken in a particular way and it is a common experience that parties do agree that evidence in one suit shall be treated as evidence in another. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which apart from their consent cannot be so used.

APPEAL from an order of remand passed by C. C. Boyd, District Judge of Kanara, reversing the decree of G. N. Kelkar, Subordinate Judge of Sirsi, and remanding the suit for trial on the merits.

The plaintiff sued to recover Rs. 3,500 as damages for wrongful diversion by the defendants of the course of a brook which ran through the lands of the parties. The defendants denied that they had diverted the course of the brook and contended that the plaintiff had not suffered any damage. The Subordinate Judge, at the desire of both the parties, proceeded to the village where the lands were situate, made inspection and examined a number of witnesses whose depositions were taken

* Appeal from Order No. 6 of 1905.

1905.

RAMAYA v. DEVAPPA.

down in vernacular by his kárkún. With the said materials added to the proceedings in the Court the Subordinate Judge held that the defendants had not diverted the course of the brook and that the plaintiff had not suffered any damage. He, therefore, dismissed the suit.

The plaintiff appealed and at the hearing of the appeal urged a preliminary objection that the greater part of the evidence was not taken by the Subordinate Judge in his Court and so his decision based as it was on such illegally admitted evidence should be set aside. As to the procedure adopted by the Subordinate Judge the plaintiff raised three objections, namely that :—

(1) The Subordinate Judge omitted to draw up a memorandum of the results of his inspection, *Joy Coomar* v. *Bundhoo Lall*.[1]

(2) He omitted to write an English memorandum of the substance of the depositions of the witnesses examined at the village, section 184 of the Civil Procedure Code (Act XIV of 1882) and High Court Circular Orders, page 14, section 32.

(3) He was not empowered to record depositions of witnesses at the village as that amounted to a trial of the case which could only be held at his Court, section 23 of the Civil Courts' Act (XIV of 1869).

The Judge found that the Subordinate Judge's procedure vitiated the decision. He, therefore, reversed the decree and remanded the suit for trial on the merits for the following reasons :—

The first objection would not hold good in view of the remarks of the learned Judge who tried the case cited. From these remarks it appears that a memorandum of inspection ought to be drawn up, but that, if it is not, that omission alone would not justify an Appellate Court in ignoring the account of the inspection given in the lower Court's judgment.

With regard to objection (2), I think the irregularity might be cured by section 578, Civil Procedure Code (*vide* 9 W. R. 69, Cr.).

Objection (3) must, I think, prevail. Practically this suit was heard at the village. Witnesses were summoned to appear there. Parties and pleaders were present. Witnesses were examined and cross-examined. Their examination, though not amounting to a complete trial of the suit, was a substantial part of

(1) (1882) 9 Cal. 363.

it. It is argued that the Code contemplates that part of a trial may be in a place other than the Court-house, *e. g.*, with regard to the examination of witnesses by a Commissioner. Let that be granted. But, unless otherwise specially provided by the Code, a suit must be tried in the Court-house. And there is no provision in the Code authorizing a Judge to record evidence anywhere else. It follows that it is illegal for him to do so. Under section 392 he may make a local inspection, and he should reduce to writing the results of that; but he is nowhere authorized to record evidence of witnesses anywhere except in the place or places specified by the Government.

Were it otherwise, there would be nothing to prevent a Judge from touring about as a Magistrate does, and holding Court in any remote place in his jurisdiction. And this is not the intention of Government. It is obvious that the consent or otherwise of the parties makes no difference; they cannot give him more or less power than the Crown has given.

It is argued for respondent that a Judge can authorize a Commissioner (section 393) to record evidence at places all over his jurisdiction and that he cannot have less power in him than the power which he can give to the Commissioner. It is true that the depositions so recorded by the Commissioner may, *ceteris paribus*, be admitted in evidence. But the fallacy in this argument is that a Commissioner may be afterwards called and examined and cross-examined as a witness, whereas a Judge cannot. Hence in this case the Sub-Judge exercised a greater power than that which he could have given to a Commissioner.

Against the order of remand defendants 4 and 5 appealed.

G. S. Mulgamkar appeared for the appellants (defendants 4 and 5):—The Judge was wrong in holding that the evidence taken by the Subordinate Judge at the spot was illegally admitted and that it vitiated the whole proceeding. We contend that section 23 of the Civil Courts' Act does not prevent a Judge from holding inquiry on the spot when such inquiry becomes necessary owing to the peculiar circumstances of a case. Even the Civil Procedure Code contemplates such inquiry, see section 392. The presiding Judge can proceed to the spot for local investigation, *Dwarka Nath Sardar* v. *Prosunno Kumar Hajra*(1). Besides in the present case both the parties had applied to the Court not only for local investigation by the Subordinate Judge in person but had also summoned witnesses at the spot. The parties had thus consented to the procedure adopted by the Subordinate Judge, and the plaintiff, moreover, did not object to the procedure even in his memorandum of appeal before the Judge.

(1) (1897) 1 Cal. W. N. 682.

1905.

RAMAYA v. DEVAPPA.

S. V. Palekar appeared for the respondent (plaintiff):—Section 23 of the Civil Courts' Act should be construed strictly, that is, the Judge cannot hold his court outside the Court-house. An illegality cannot be remedied by consent.

The order of remand was proper, because the Subordinate Judge decided the case on materials totally insufficient for the decision of the case on the merits.

JENKINS, C. J.—We are of opinion that the District Judge has erred, for it cannot be said that what has been done affects the jurisdiction of the Court. Parties, if so minded, may ordinarily agree that evidence shall be taken in a particular way, and it is a common experience that parties do agree that evidence in one suit shall be treated as evidence in another. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which apart from their consent cannot be so used.

Therefore we are of opinion that the order of the District Court must be reversed.

It has been suggested before us that the materials are so defective that when the Court comes to deal with the case on the merits, it will be found necessary to send the case back. As to that we say nothing, and the order which we now pass will not interfere with any order of that kind which the Judge may find it necessary to make, should the circumstances demand it.

The appeal, therefore, will be restored to the file of the District Court, and that Court will proceed with the further hearing.

Appellants must get their costs.

Order reversed.

G. B. R.