APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Shah.

ABDUL KADIR VALAD IBRAHIM CHIVANE, (ORIGINAL PLAINTIFF), APPELLANT, *v.* DOOLANBIBI, WIFE OF ABDUL KADIR CHIVANE (ORIGINAL DEFENDANT), RESPONDENT.* 1913. *April* 11.

Civil Procedure Code (Act V of 1908), section 11—Letters Patent, clause 12—Evidence Act (I of 1872), section 44—Suit for restitution of conjugal rights—Previous suit for similar relief—Competency of the Court to try the previous suit—Dismissal of the suit for want of jurisdiction after raising and deciding issues on the merits—No bar of res judicata.

The plaintiff filed a suit for restitution of conjugal rights against the defendant and for an injunction restraining her from marrying any other person pending the disposal of the suit. The defendant raised the plea of *res judicata* urging that the plaintiff had filed a previous suit against her in the High Court for similar relief and had failed in it. The previous suit was filed without obtaining the leave of the Court under clause 12 of the Letters Patent, the residence of the parties being outside the jurisdiction of the Court. The Court, therefore, dismissed the suit for want of jurisdiction though issues on the merits were raised and decided.

The first Court disallowed the plea of *res judicata* on the ground that the judgment in the previous suit was delivered by the Court not competent to do so in consequence of the absence of leave.

On appeal by the defendant the Judge dismissed the suit holding that the absence of leave did not go to the root of the jurisdiction of the Court and therefore the judgment of the Court was the judgment of a Court having jurisdiction.

Held, on second appeal by the plaintiff, that the judgment in the previous suit was delivered by a Court not competent to deliver it within the meaning of section 44 of the Evidence Act (I of 1872) and therefore the plea of *res judicata* could not prevail.

SECOND appeal against the decision of A. W. Varley, Joint District Judge of Thana, reversing the order passed by R. Baindur, Subordinate Judge of Bhivandi.

The facts were as follows :—

The plaintiff filed a suit, No. 399 of 1908, in the High Court at Bombay in its original civil jurisdiction against

* Second Appeal No. 288 of 1912.

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the defendant and two others for a declaration and injunction on the ground that defendant 1 was his legally wedded wife and that she at the instigation of her father, who was defendant 2 in the said suit, was intending to marry defendant 3 in the said suit and prayed that defendant 1 be declared to have been legally married to the plaintiff and that an injunction be issued to all the defendants preventing them from bringing about the alleged intended second marriage. The plaintiff's allegation in the said suit was that the marriage between him and defendant 1 took place in Bombay within the local limits of the original side of the High Court; but the defendant was not admittedly a resident within the said limits and the cause of action for plaintiff's prayer for injunction, which was consequential relief sought for in the suit, did not arise within the said local limits. The defendant relied on the latter fact and contended that as the plaintiff did not obtain leave of the Court under clause 12 of the Letters Patent, the suit was not maintainable in the High Court. She also denied that she was the legally wedded wife of the plaintiff. Notwithstanding the defendant's objection to the maintenance of the suit, the High Court decided the suit on the merits and found that the defendant was not the legally wedded wife of the plaintiff. The suit was, however, dismissed for want of leave and jurisdiction under section 12 of the Letters Patent.

After the dismissal of the suit by the High Court, the plaintiff brought the present suit in the Court of the Subordinate Judge of Bhivandi to have his conjugal rights restituted against the defendant and for an injunction restraining her from marrying any other person pending the disposal of the suit. He alleged that the defendant was legally married to him on the 22nd August 1909 in the City of Bombay, but she refused to live with him even after notice to do so was issued to

her on the 7th June 1911 and that the plaintiff was informed that the defendant intended marrying some other person.

The defendant contended *inter alia* that the question raised by the plaintiff, namely, that the defendant was the lawfully wedded wife of the plaintiff had already been decided against him by a competent Court in Suit No. 399 of 1908 on the file of the original side of the High Court of Bombay which decision was binding on the parties, that the Court was, therefore, precluded from entering into the said question by the principle of *res judicata* and that on the face of the said decision the plaintiff could not claim restitution of conjugal rights.

The Subordinate Judge found that the decision of the High Court in Suit No. 399 of 1908 on the issues relating to the merits was a nullity as that Court had no jurisdiction to decide the suit. Therefore, that decision was not binding on the parties and could not operate either on the principle of *res judicata* or of estoppel so as to prevent the parties in the present suit from litigating on the same question or questions as arose on the merits in the former suit. Having arrived at the said conclusion, the Subordinate Judge appointed a day for the examination of parties as regards the other allegations made in the pleadings.

Against the said finding of the Subordinate Judge the defendant appealed to the District Court and the Joint Judge found that the matter sought to be litigated in the present suit was *res judicata* by reason of the decree in Suit No. 399 of 1908 of the High Court of Bombay. The Joint Judge was further of opinion that "where there is jurisdiction over the subject-matter but non-compliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived. * * * Where jurisdiction over the subject-matter exists requiring only to be invoked in the right

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way, the party who has invited or allowed the Court to exercise it in a wrong way, cannot afterwards turn round and challenge the legality of the proceedings due to this own invitation or negligence." He, therefore, allowed the appeal and dismissed the suit.

The plaintiff preferred a second appeal.

Inverarity and *Narma* with *D. A. Khare* and *P. D. Bhide*, for the appellant (plaintiff):—The High Court having held that it had no jurisdiction to entertain the previous suit, its decision on the merits was a mere *obiter dictum* and it could not operate as *res judicata*. The point of jurisdiction was specially raised before the Court and the judgment was pronounced on the point. The case does not fall under the doctrine of *res judicata* as provided by section 11 of the Civil Procedure Code. The High Court was not competent to try the suit as only a part of the cause of action had arisen in Bombay, and to invest it with jurisdiction it was necessary to obtain leave under clause 12 of the Letters Patent. But such leave was not obtained.

[SCOTT, C. J.:—It was not such a strong case as when the Court has no jurisdiction at all.]

We further contend that as this is a suit for restitution of conjugal rights and as both parties reside outside Bombay, there was an entire absence of jurisdiction. The granting of the leave under clause 12 of the Letters Patent is not a mere matter of form. It is not that whenever a part of the cause of action arises in Bombay and the leave is applied for that the leave is or must be granted. The granting of the leave is the foundation of the jurisdiction: *Rampurtab Samruthroy* v. *Premsukh Chandamal*[1], *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub*[2].

(1) (1890) 15 Bom. 93 at p. 98. (2) (1874) 13 Beng. L. R. 91.

We contend that there can be no *res judicata* unless a case is finally decided and a case cannot be held to be finally decided if the Court had no jurisdiction to decide it.

Captain with *M. M. Karbhari*, for the respondent (defendant) :—A part of the cause of action having accrued in Bombay, the High Court had jurisdiction to entertain the suit. It was no doubt, necessary to obtain the leave of the Court under clause 12 of the Letters Patent to proceed with the suit but the failure to obtain the leave cannot go to the root of the jurisdiction. The jurisdiction was in existence and the leave under clause 12 would have made it ripe. There is a distinction between cases where the Court has no jurisdiction at all, and where the Court has jurisdiction but it cannot exercise it unless invoked to exercise it in a certain manner, namely, by applying for leave under clause 12 of the Letters Patent. The point of jurisdiction dependent upon the leave of the Court being obtained to proceed with the suit could be waived: *Pisani* v. *Attorney-General for Gibraltar*[1]. A part of the cause of action having arisen in Bombay, the decree passed by the High Court cannot be nullity on the ground that the leave was not obtained. There was the jurisdiction in the High Court but it exercised it in an irregular manner. As the case was decided by the High Court on the merits, the irregularity must be taken to have been waived: *Moore* v. *Gamgee*[2], *King* v. *Secretary of State for India*[3]. Where there is existing jurisdiction which the Court is required to exercise in a particular way, the party who invites such jurisdiction cannot afterwards turn round and challenge the legality of the proceedings: *Vishnu Sakharam Nagarkar* v. *Krishnarao Malhar*[4].

(1) (1874) L. R. 5 P. C. 516.
(2) (1890) 25 Q. B. D. 244.
(3) (1908) 35 Cal. 394.
(4) (1886) 11 Bom. 153.

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Inverarity in reply :—The ruling in *King* v. *Secretary of State for India*[1] is contrary to the *dicta* of Telang J. in *Rampurtab Samruthroy* v. *Premsukh Chandamal*[2]. In any case there was no waiver in the case as the then defendant strenuously contended that the Bombay High Court had no jurisdiction to try the suit. The true test is whether the Bombay High Court was competent to deliver judgment within the meaning of section 44 of the Evidence Act. See Halsbury's Laws of England, Vol. 13, p. 353.

SCOTT, C. J. :—The plaintiff filed this suit in the Court of the Subordinate Judge of Bhivandi for restitution of conjugal rights against the defendant and for an injunction restraining her from marrying any other person pending the disposal of the suit. He was met with the plea that the questions at issue in the suit were *res judicata* by reason of a decree passed by Mr. Justice Davar in High Court Suit No. 399 of 1908 and that therefore under section 11 of the Code of Civil Procedure the Bhivandi suit could not be tried. The High Court Suit of 1908 was for a declaration that the defendant was the duly married wife of the plaintiff and for an injunction restraining a marriage alleged to be contemplated between her and one Abdul Gafur, a defendant in the High Court suit. Three of the issues in that suit were as follows :—(*a*) Whether the Court has jurisdiction to try the suit as against the first defendant? (*b*) whether the first defendant did not become a member of the Hanafi sect on or about April 1907? (*c*) whether the plaintiff has been validly married to the first defendant?

At the first hearing it was discovered that although it was stated in the plaint that only a part of the cause of action had arisen in Bombay and that the Court

(1) (1908) 35 Cal. 394. (2) (1890) 15 Bom. 93 at p. 98.

would have jurisdiction to try the suit after leave under clause 12 of the Letters Patent had been granted, no leave had in fact been obtained and upon that ground the first of the issues above set out was raised. The learned Judge, however, proceeded with the trial of the case upon the merits, and decided the issues as to the conversion of the first defendant and as to the question of her marriage with the plaintiff in the first defendant's favour.

He then proceeded to discuss the issue relating to jurisdiction and held that the Court had no jurisdiction in consequence of leave not having been obtained and that the suit on that ground must fail. The decree which was drawn up only records the dismissal of the suit on the ground that the alleged marriage of the plaintiff with the first defendant was not valid and binding upon her, but a reference to the judgment shows that the Court held that there was no jurisdiction.

The learned Judge of the Bhivandi Court was of opinion that the plea of *res judicata* was satisfactorily met by showing that the judgment, in which the issues pleaded were decided, was delivered by a Court not competent to deliver it. If the Court was so incompetent this would be a complete answer under section 44 of the Evidence Act.

The learned Joint Judge, however, came to a different conclusion being of opinion that the absence of leave did not go to the root of the jurisdiction of the Court and that therefore the judgment of the Court was the judgment of a Court having jurisdiction. He based his decision on the judgment of the Calcutta High Court in *Gurdeo Singh* v. *Chandrikha Singh*[1].

In this appeal it is contended that the jurisdiction of the High Court to try a suit in which part only of the

[1] (1907) 36 Cal. 193.

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cause of action arose within the jurisdiction and in which the defendants neither reside nor carry on business within the jurisdiction depends entirely upon the question whether or not leave has been first obtained under clause 12 of the Letters Patent; and reliance was placed upon the decision of Sir Richard Couch in *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub*[1], where he said that an order under clause 12 was not a mere formal order or an order merely regulating the procedure in the suit, but one that has the effect of giving a jurisdiction to the Court which it otherwise would not have; and the judgment of Mr. Justice Telang in *Rampurlab Samruthroy* v. *Premsukh Chandamal*[2] was also referred to in which it was said that such leave (under clause 12) affords the very foundation of the jurisdiction. Those cases were met by reference to the case of *King* v. *Secretary of State for India*[3] in which Mr. Justice Fletcher, following *Moore* v. *Gamgee*[4], held that the objection that leave under clause 12 had not been properly obtained might be waived by the defendant.

In the present case there is no question of waiver, for the objection to the suit on the ground that leave had not been obtained was taken at the first moment when the fact came to the knowledge of the defendant's advisers; and it is clear that under such circumstances the judgment of the Court on issues (*b*) and (*c*) was one which it was not competent to deliver: see *Khimji Chaturbhuj* v. *Sir Charles Forbes*[5].

That this conclusion is in no way at variance with the decisions of English Courts in such cases is apparent from *In re Brown* v. *London and North Western Railway Company*[6]. The plaint was against the defendants

(1) (1874) 13 Beng. L. R. 91.
(2) (1890) 15 Bom. 93.
(3) (1908) 35 Cal. 394.
(4) (1890) 25 Q. B. D. 244.
(5) (1871) 8 Bom. H. C. R. 102 (O. C. J.).
(6) (1863) 4 B. & S. 326.

as common carriers for negligently carrying a harp, delivered to them by the plaintiff, to be carried from Chester to London, whereby it was damaged. The plaint was filed and the suit was tried in the County Court at Chester and at the trial it was objected on the part of the defendants that the Court had no jurisdiction, on the ground that they did not dwell or carry on their business within the district as required by Stat. 9 and 10 Vict., c. 95, s. 60, and had not obtained leave either from the Court under that section or from its Registrar under Stat. 19 and 20 Vict., c. 108, s. 15, to issue the summons elsewhere. The Judge said that without expressing any absolute opinion on this point, it would be better to leave the case to the jury, whereupon the defendants went into their case and called witnesses. The jury found for the plaintiff, and judgment was entered up accordingly but the Judge refused to allow execution to be issued on it. The plaintiff then obtained a rule calling on the Judge of the County Court and the defendants to show cause why the Registrar of that Court should not issue a writ of execution to the High Bailiff, empowering him to levy upon the goods of the defendants the amount of the judgment obtained in that Court by the plaintiff.

The discussion turned chiefly on the question whether it could be said that the defendants carried on business amongst other places at Chester. That question having been decided in the negative Mr. Justice Wightman said: "The case is therefore not within the jurisdiction of the County Court of Chester; and it is admitted that the plaintiff did not obtain the leave of that Court, as the Court in which the cause of action arose, to issue his summons there." Consequently the rule for the issue of a writ in execution was discharged.

We hold that the judgment relied upon by the defendant was delivered by a Court not competent to deliver

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it within the meaning of section 44 of the Indian Evidence Act and therefore the plea of *res judicata* cannot prevail.

We set aside the decree of the lower appellate Court and restore the order of the Subordinate Court, costs throughout being costs in the cause.

Decree reversed.

G. B. R.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Chandavarkar.

1912.
September 26.

NAWAB BEHRAM JUNG, APPELLANT AND PLAINTIFF, *v.* HAJI SULTAN ALI SHUSTRY, RESPONDENT AND DEFENDANT.*

Civil Procedure Code (Act V of 1908), Order XLI, Rule 10, and section 129—Bombay High Court Rules, Rule 725—Deposit of security by appellant residing outside British India in an appeal from the original civil jurisdiction of the Bombay High Court, rules governing.

The Bombay High Court in its original civil jurisdiction is not bound to demand security from an appellant residing outside British India for the costs of the appeal or of the original suit or of both as provided in Order XLI, Rule 10 of the Civil Procedure Code. The provisions contained in Rule 725 of the Bombay High Court Rules deal with the deposit of security in all appeals from the original jurisdiction of the High Court, and are inconsistent with the provisions of Order XLI, Rule 10 of the Civil Procedure Code and accordingly by virtue of section 129 of the Civil Procedure Code, Order XLI, Rule 10 does not apply.

Semble : it is not clear whether it is imperative on the Bombay High Court, in cases where Order XLI, Rule 10, does apply, to demand security from an appellant residing outside British India for the costs of both the appeal and the original suit.

THE respondent in this appeal called on the appellant to deposit further security, above that already deposited

* Appeal No. 33 of 1912. Suit No. 681 of 1909.