

APPELLATE CIVIL.

Before Mr. Justice Wassooder.

1938
December 7

AJAM IBRAM MODAN (ORIGINAL PLAINTIFF), APPLICANT *v.* BAI HAVA BIBI, DAUGHTER OF IBRAHIM AJAM MODAN AND WIFE OF HASAM ISAP MALAN AND OTHERS (ORIGINAL DEFENDANTS NOS. 1, 2 AND 3), OPPONENTS.*

Practice—Procedure—Suit for administration and accounts—Suit filed in the Court of the First Class Subordinate Judge—Suit transferred by the Court to the Joint First Class Subordinate Judge—The Judge proceeded with hearing—Suit withdrawn and transferred to the Court of the Extra Joint Second Class Subordinate Judge—Particled evidence before the Court—Decree by the Court—Waiver of jurisdiction—Circumstances under which principle of waiver of jurisdiction can be invoked considered.

The plaintiff filed a suit in the Court of the First Class Subordinate Judge of Surat for administration and accounts. The suit upon its registration was on February 3, 1930, transferred to the Joint First Class Subordinate Judge attached to that Court. The Judge framed issues on August 11, 1932 and on March 9, 1933, ordered a commission to issue for the examination of certain witnesses. At that stage the First Class Subordinate Judge withdrew the suit and transferred it to the Court of the Extra Joint Second Class Subordinate Judge, who decided it on July 8, 1933. On appeal, the District Judge held that the order made by the First Class Subordinate Judge was without jurisdiction and quashed it, and set aside the decree passed by the Extra Joint Second Class Subordinate Judge as a nullity and ordered a retrial by the Joint First Class Subordinate Judge from the stage at which it was sent to the Second Class Subordinate Judge's Court. On an appeal from this order, which was treated as a Civil Revision Application to the High Court,

Held, setting aside the order of the District Judge, that in the circumstances of the case the principle of waiver of objection to jurisdiction could be invoked, as both the parties led evidence concurring in the Court's assumption of jurisdiction under a wrong order of transfer by the First Class Subordinate Judge who was competent to entertain and try the suit, as also the Extra Joint Second Class Subordinate Judge had necessary jurisdiction over the subject matter of the suit.

Ledgard v. Bull,⁽¹⁾ relied on.

Shankarji Samalji v. Vrajlal Bapalal,⁽²⁾ distinguished.

Meenakshi Naidoo v. Subramaniya Sastri,⁽³⁾ *Gurdeo Singh v. Chandrikah Singh*,⁽⁴⁾ *Ex parte Prati*,⁽⁵⁾; *Ex parte May*⁽⁶⁾, and *Kishen Lal v. Jai Lal*,⁽⁷⁾ referred to.

APPLICATION praying that the order passed by N. J. Shaikh, District Judge at Surat, may be set aside.

*Civil Revision Application No. 471 of 1937.

⁽¹⁾ (1886) L. R. 13 I. A. 134, s. c. 9 All. 191. ⁽⁴⁾ (1907) 36 Cal. 193.

⁽²⁾ (1934) 59 Bom. 466. ⁽⁵⁾ (1884) 12 Q. B. D. 334.

⁽³⁾ (1887) L. R. 14 I. A. 160, s. c. 11 Mad. 26. ⁽⁶⁾ (1884) 12 Q. B. D. 497.

⁽⁷⁾ (1919) 1 Lab. 158.

Suit for administration and accounts.

The facts material for the purposes of this report are sufficiently stated in the judgment of Wassoodew J.

M. R. Vidyarthi, for the applicant.

I. I. Chundrigar, for opponents Nos. 1 and 2.

WASSOODREW J. This is an appeal from the order of the District Judge of Surat reversing the preliminary decree passed by the Extra Joint Second Class Subordinate Judge of Surat in a suit for administration and accounts on the ground that the decree was passed without jurisdiction. The appellant is the plaintiff in whose favour the decree was passed in the trial Court. The suit was originally instituted in the Court of the First Class Subordinate Judge of Surat. There was a Joint First Class Subordinate Judge attached to that Court, and the suit upon its registration was transferred to his Court on February 3, 1930. The Joint First Class Subordinate Judge framed issues on August 11, 1932, and ordered a commission to issue for the examination of certain witnesses on March 9, 1933. At that stage the First Class Subordinate Judge withdrew the suit and transferred it to the Court of the Extra Joint Second Class Subordinate Judge who ultimately decided it three years thereafter on July 8, 1933, after considering the voluminous evidence recorded in the case. In first appeal from that decision the learned District Judge relying upon *Shankerji Samalji v. Vrajlal Bapalal*,⁽¹⁾ thought that the order of transfer made by the First Class Subordinate Judge was without jurisdiction as the Court from which the suit was withdrawn had already taken cognizance of the case. Accordingly he held that the decree passed by the Extra Joint Second Class Subordinate Judge was a nullity, and quashed it and ordered a retrial by the Joint First Class Subordinate Judge from the stage at which it was sent to the Second Class Subordinate Judge's Court. The plaintiff

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filed a second appeal against that order and under instructions of the Office that appeal was described as an Appeal from Order. As an extra precaution the plaintiff also filed a Civil Revisional Application which is No. 471 of 1937. Therefore the question as to the form, which the application to set aside the order of the District Judge should take, becomes academic, although in my opinion in view of the decision in *Motibhai Jesingbhai v. Ranchodbhai Shambhubhai*,⁽¹⁾ the more appropriate remedy will be by a Civil Revisional Application. I have therefore treated the appeal as a Civil Revisional Application.

The transfer of the suit was made apparently in accordance with the practice prevailing in the mofussil in the matter of allocating business to particular Judges attached to the Subordinate Judge's Courts. That practice which has been referred to in *Shankerji Samalji v. Vrajlal Bapalal*⁽²⁾ seems still to continue. It is presumably based upon the provisions of s. 23 of the Bombay Civil Courts Act of 1869. Clause (5) of that section provides that "a Subordinate Judge appointed or deputed to assist in the Court of another Subordinate Judge shall dispose of such civil business within the limits of his pecuniary jurisdiction as may, subject to the control of the District Judge, be referred to him by the Judge of such Court". Undoubtedly the Judge of the Court in question was a First Class Subordinate Judge and the jurisdiction was clearly assumed under the supposed powers of transfer conferred on him by cl. (5) of s. 23. If, as has been held in *Shankerji's* case,⁽²⁾ those powers are controlled by the provisions of s. 24 of the Civil Procedure Code and are necessarily limited to administrative orders allocating business, then, undoubtedly the order of transfer purporting to have been made under cl. (5) of s. 23 of the Bombay Civil Courts Act, after another Subordinate Judge had taken cognizance of the suit, was incompetent. On the other hand, if the phrase "shall dispose of such civil business as

⁽¹⁾ (1934) 59 Bom. 430.⁽²⁾ (1934) 59 Bom. 466.

may be referred to him " confers a wider jurisdiction, then the District Judge's order under appeal is clearly wrong. I shall, however, assume that *Shankerji's* case⁽¹⁾ is correctly decided. The question, then, is whether in the circumstances of this case the principle of waiver of objection to jurisdiction can be invoked.

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Fundamentally speaking, a judgment of a Court without jurisdiction would be a nullity. Halsbury (see Halsbury's Laws of England, Second Edition, Volume 8, pp. 531-532, paragraphs 1176 and 1178) explains what jurisdiction of Courts means and states the general rule that consent cannot give jurisdiction and that the plea of want of jurisdiction cannot usually be waived. He says, "By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision." In *Shankerji's* case⁽¹⁾ the suit which was wrongly transferred had not been decided finally and the question as to waiver of objection did not arise and was not considered. But Courts have drawn a distinction between want of jurisdiction as described by Halsbury and irregularity in the assumption and exercise of jurisdiction. The case of *Ledgard v. Bull*,⁽²⁾ decided by the Privy Council, is a leading case on the subject. That was a suit for damages and injunction for infringement of a patent. Under the Indian Patent's and Designs' Act such a suit could only be brought in a District Court, but it was brought in the Court of a Subordinate Judge who had no jurisdiction to entertain it. The suit was eventually transferred from the Subordinate Judge's Court to the District Judge's Court and there heard and decided. It was contended on behalf of the defendant that an order for transfer of a suit from one Court to another under s. 24 of the Civil Procedure Code could not be made unless the suit had been brought in a Court having jurisdiction. Their Lordships observed that, although

⁽¹⁾ (1934) 59 Bom. 466.

⁽²⁾ (1886) L. R. 13 I. A. 134, s. c. 9 All. 191.

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jurisdiction cannot be conferred by consent where there is an entire absence of jurisdiction, in a case where the Court is competent to entertain the suit, if it were competently brought, the defendant may be barred by his own conduct from objecting to the irregularities in the institution of the suit, unless the Judge has no inherent jurisdiction over the subject matter of the suit. This is what they say (p 145) :—

“ . . . there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit.”

Ultimately on the question as to whether a proper inference of waiver could be drawn they held that the defendant had not waived the objection and that therefore the decree of the District Judge could not stand. That principle was affirmed in *Meenakshi Naidoo v. Subramaniya Sastri*.⁽¹⁾

Mr. Justice Mookerjee in *Gardeo Singh v. Chandrikah Singh*,⁽²⁾ drew a distinction between total incompetency and mere irregularity in the exercise and assumption of jurisdiction. There are other cases such as *Ex parte Pratt*,⁽³⁾ and *Ex parte May*⁽⁴⁾ which reiterate the same principle that where jurisdiction over the subject matter exists requiring only to be invoked in the right way, the party, who has invoked or allowed the Court to exercise it in a wrong way, cannot afterwards turn round and challenge the legality of the proceedings. Those cases are cases where the parties had themselves invoked the jurisdiction in an improper way. But it seems to me that the principle would be common to cases where in the preliminary stage in invoking jurisdiction the Court itself has proceeded in a wrong way without the invitation of the parties and where the latter have neglected to question the irregularity ; or, in other words the defect in jurisdiction arises merely by reason of the irregularity in

⁽¹⁾ (1887) L. R. 14 I. A. 160, s. c. 11 Mad. 26.

⁽²⁾ (1907) 36 Cal. 193.

⁽³⁾ (1884) 12 Q. B. D. 334.

⁽⁴⁾ (1884) 12 Q. B. D. 497.

the commencement of the proceedings before the transferee Court [see *Kishen Lal v. Jai Lal*⁽¹⁾].

Here it cannot be doubted that the First Class Subordinate Judge, in whose Court this suit was originally instituted, was perfectly competent to entertain and try the suit. It cannot also be denied that the Extra Joint Second Class Subordinate Judge had the necessary jurisdiction over the subject matter of the suit. Consequently the principle recognised by the Privy Council in *Ledgard v. Bull*⁽²⁾ would apply if a proper inference of waiver can be drawn from the circumstances. It seems to me clear upon the facts of this case that both the parties led evidence concurring in the Court's assumption of jurisdiction under a wrong order of transfer. A large body of evidence was led, as I have said, directly before the Court and considerable expense has been incurred in examining witnesses on commission. The fruit of that effort and expense would be completely lost if the concurrence, which amounts to consent, is not given its legitimate effect in mitigating the consequences of the erroneous order. It seems to me that the conduct of the respondents is tantamount to a waiver of objection of jurisdiction and that *Shankarji's case*⁽³⁾ which was relied upon for setting aside the decree by the District Judge is clearly distinguishable. Accordingly I set aside the order of the District Judge and remand this case to his Court for disposal according to law on the evidence recorded in the suit before the Extra Joint Second Class Subordinate Judge.

Consequently I make the Rule absolute with costs in the Civil Revisional Application and the Appeal from Order which shall be treated as part of the former application.

Rule absolute.

J. G. R.

⁽¹⁾ (1919) 1 Lah. 158.

⁽²⁾ (1886) L. R. 13 I. A. 134, s. c. 9 All. 191.

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