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Kania J.

of one party. In my opinion it includes only two classes of agreements: those which are unlawful and those which on their face are void and therefore not capable of being enforced. Under the circumstances the opposition fails. If the plaintiffs have any grievance in respect of the agreement their remedy is to file a suit to set aside the agreement and the decree. They are not prevented from doing so by this judgment.

The agreement which is contained in the letters of March 10 and 12, 1939, which are put in and marked No. 1 is recorded, and a decree is passed in accordance therewith. Plaintiffs to pay the costs of this motion and decree.

Attorneys for plaintiffs: Messrs. *Crawford, Bayley & Co.*

Attorneys for defendant No. 1: Messrs. *Bhaishankar, Kanga & Girdharlal.*

Order accordingly.

N. K. A.

APPELLATE CIVIL.

Before the Hon'ble Mr. R. S. Broomfield, Acting Chief Justice, and Mr. Justice Sen.

UMABAI BHRATAR SHANKAR HARI BORGAONKAR (ORIGINAL PLAINTIFF), APPELLANT *v.* SHANKAR HARI BORGAONKAR (ORIGINAL DEFENDANT), RESPONDENT.*

1939 *July* 26

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 15—Application to sue in forma pauperis*—Application rejected—Applicant ordered to pay costs of opponent—Plaintiff instituting a suit in ordinary manner without paying defendant's costs in pauper application—Defendant not mentioning bar of Rule 15—Suit decreed—Appeal by defendant—By a subsequent application defendant raising a point of jurisdiction—Whether plea of waiver permissible—Failure to comply with prior payment of costs an irregularity.*

A failure to comply with the condition in O. XXXIII, r. 15 of the Civil Procedure Code, 1908, as to prior payment of costs is an irregularity in the initial procedure

* Second Appeal No 511 of 1936.

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which does not affect the inherent jurisdiction and competence of the Court to entertain the suit and therefore on the authority of *Ledgard* v. *Bull*,[1] it may be waived.

The plaintiff made an application to the Court to sue *in forma pauperis* claiming separate maintenance and residence from her husband. The application was opposed on the ground that the plaintiff was not a pauper and it was rejected, and the plaintiff was ordered to pay the costs of the opponent. Without having paid the costs in the pauper application, the plaintiff instituted an ordinary suit on the same cause of action. The defendant put in a written statement contesting the claim on the merits but saying nothing about O. XXXIII, r. 15. The claim was decreed. The defendant appealed on the merits, again not mentioning the bar of r. 15. By a subsequent application, however, he raised the point that the Court had no jurisdiction to entertain the suit and the District Judge allowed the demurrer and dismissed the plaintiff's claim for separate maintenance and residence. The plaintiff appealed to the High Court.

Held, allowing the appeal, that there was a waiver of the condition as to prior payment of costs by reason of the defendant submitting himself to the jurisdiction throughout in the proceedings in the trial Court.

Ledgard v. *Bull*,[1] relied on.

Ramabai v. *Shripad Balvant*,[2] discussed and distinguished.

Chandulal v. *Awad* bin *Umar Sultan*,[3] *King* v. *Secretary of State for India*,[4] *Jose Antonio Baretto* v. *Francisco Antonio Rodrigues*,[5] *Girwar Narayan Mahton* v. *Kamla Prasad*[6] and *Shiam Sundar Lal* v. *Savitri Kunwar*,[7] referred to.

SECOND APPEAL against the decision of G. H. Guggali, District Judge at Sholapur reversing the decree passed by M. H. Kazi, additional joint Subordinate Judge at Sholapur.

Suit for maintenance.

The facts material for the purposes of this report are stated in the judgment of Broomfield Ag. C. J.

M. G. Chitale, for the appellant.

A. G. Kotwal, for *D. A. Tulzapurkar*, for the respondent.

BROOMFIELD Ag. C. J. This appeal raises a question of the construction of O. XXXIII, r. 15. The question arises in this way. The plaintiff-appellant is the wife of defendant-respondent. She made an application to sue

(1) (1886) 9 All. 191, s. c. L. R. 13 I. A. 134, P. C.
(2) (1935) 59 Bom. 733.
(3) (1896) 21 Bom. 351.
(4) (1908) 35 Cal. 394.
(5) (1910) 35 Bom. 24.
(6) (1932) 12 Pat. 117.
(7) (1935) 58 All. 191, F. B.

in forma pauperis claiming separate maintenance and residence. The application was opposed by the husband on the ground that she was not a pauper and it was rejected and the plaintiff was ordered to pay the costs of the opponent. Notice had been sent to the Government Pleader, but he did not appear, and therefore no costs were incurred on behalf of Government.

Order XXXIII, r. 15, is in these terms :—

"An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue ; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Provincial Government and by the opposite party in opposing his application for leave to sue as a pauper."

Without having paid defendant's costs in the pauper application the plaintiff instituted an ordinary suit on the same cause of action but claiming an additional relief in respect of her *stridhan* ornaments. The defendant put in a written statement contesting the claim on the merits but saying nothing about O. XXXIII, r. 15. The claim was decreed. The defendant appealed on the merits, again not mentioning the bar of r. 15. By a subsequent application, however, he raised the point that the Court had no jurisdiction to entertain the suit and the District Judge allowed the demurrer and dismissed the plaintiff's claim for separate maintenance and residence. He thought he was bound to do so on the authority of *Ramabai* v. *Shripad Balwant*.[1] The decree in respect of the ornaments was confirmed with a modification. Plaintiff has appealed against the dismissal of the claim for residence and maintenance.

Before discussing *Ramabai* v. *Shripad Balwant*[1] there are some other authorities which require to be considered. There is first of all *Ledgard* v. *Bull*.[2] In that case a suit for infringement of a patent, which the law required to be instituted in the District Court, was instituted in the Court

[1] (1935) 59 Bom. 733, F. B.

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

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of a Subordinate Judge, and was then transferred to the District Court. Therefore, it was not properly instituted, but the District Court would have had jurisdiction if the suit had been properly instituted. It was held that the defect was one which might have been waived, although on the facts it was found that no waiver had been established. The Court drew a distinction between inherent want of jurisdiction or the competence of the Court and irregularities in the initial procedure, and certain general propositions were laid down of which the ones material for our purposes were these. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process. But when, in a cause which the Judge is competent to try, the parties without objection join issues 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. Referring to the particular case their Lordships said (page 203):—

"The District Judge was perfectly competent to entertain and try the suit if it were competently brought, and their Lordships do not doubt that, in such a case, the defendant may be barred, by his own conduct, from objecting to irregularities in the institution of the suit."

Ledgard v. *Bull*[a] is a leading case, the authority of which cannot be questioned. It has been argued for the appellant, with great force we think, that the ruling covers this case and cannot be distinguished. It cannot be gainsaid that the Subordinate Judge here was competent to entertain and try the plaintiff's suit for maintenance, provided it was competently instituted, which it would have been if the costs of the defendant had been first paid. Therefore, it would seem on the principle laid down in *Ledgard* v. *Bull*[a] it was not a case of inherent want of jurisdiction in the

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

Court, but an irregularity in the initial procedure capable of being waived.

The next case to be considered is *Chandulal* v. *Awad* bin *Umar Sultan*.[1] That was a case under s. 433 of the old Procedure Code corresponding to the present s. 86. That section provides that Ruling Princes and Chiefs may, with the consent of the Governor General in Council, certified in a particular manner, but not without such consent, be sued in any competent Court. There was a suit against a Ruling Chief which was instituted without consent. A consent that the action should be proceeded with was obtained afterwards, but this was held to be insufficient. Mr. Justice Strachey who tried the case held that the defect arising from the want of a proper consent was waived, the defendant having put in a written statement contesting the claim on the merits and having taken part in various other proceedings in the suit. The learned Judge applied *Ledgard* v. *Bull*[2] and treated the omission to obtain the consent of the Governor General as an initial irregularity which could be waived. He also relied on an English case *Moore* v. *Gamgee*[3] in which a distinction was drawn between cases where there is a total want of jurisdiction, i.e., where under no circumstances can the Court entertain the particular kind of action, and cases where there is no want of jurisdiction over the subject-matter of the action but jurisdiction in the particular case is contingent, for instance on leave to sue being obtained. It was held that in the latter class of cases the objection of want of jurisdiction may be waived.

An additional reason relied on by Mr. Justice Strachey in *Chandulal* v. *Awad* bin *Umar Sultan*[1] was that s. 433 created a personal privilege for sovereign Princes and Ruling Chiefs, which privilege is capable of being waived, presumably

[1] (1896) 21 Bom. 351. [2] (1886) 9 All. 191, s. c. L. R. 13 I. A. 134.
[3] (1890) 25 Q. B. D. 244.

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on the principle *quilibet potest renunciare juri pro se introducto*. Mr. Kotwal who appears for the respondent has sought to distinguish the case on this ground. But this was only a part of the *ratio decidenti*, and moreover the condition that the costs of the other party already incurred are to be paid before a suit can be brought may be described not unreasonably as a condition imposed for the benefit of that party.

In *King* v. *Secretary of State for India*[1] it was held that where leave under s. 12 of the Letters Patent was required before the Court could entertain a suit, and the leave had not been obtained, the defect was one that could be waived and had been waived by the defendant filing a written statement and applying for a commission to examine witnesses. In that case *Moore* v. *Gamgee*[2] was followed.

Reference may also be made to *Jose Antonio Baretto* v. *Francisco Antonio Rodrigues*[3] and *Girwar Narayan Mahton* v. *Kamla Prasad*[4] where a distinction has been drawn between inherent want of jurisdiction and want of jurisdiction on grounds which have to be determined by the Court itself, if there is a dispute as to the facts on which jurisdiction depends.

In *Ramabai* v. *Shripad Balwant*[5] the facts were these. The plaintiff was the widowed sister-in-law of the defendant. In 1919 she applied for permission to sue *in forma pauperis*. The application was rejected in March 1920, and by the terms of the order she was bound to pay the costs of the opponent. In 1927 she filed a suit on payment of the ordinary Court-fees to recover maintenance from the defendant. The costs payable to the defendant in respect of the pauper petition were not paid by the plaintiff before the institution of the suit. But some time after the hearing of the suit had begun the defect was noticed by the Court

[1] (1908) 35 Cal. 394.
[2] (1890) 25 Q. B. D. 244.
[3] (1910) 35 Bom. 24.
[4] (1932) 12 Pat. 117.
[5] (1935) 59 Bom. 733.

and the plaintiff thereupon paid the amount of the costs into Court. The trial Judge dismissed the suit and that order of dismissal was confirmed by the District Court on appeal and by Mr. Justice Divatia in second appeal.

The grounds of Mr. Justice Divatia's decision are that the words in the rule "provided that he first pays the costs" must mean that it is only when the costs are paid before the institution of the suit that the Court can proceed with it, that the rule is imperative and that therefore if the costs are not paid the Court has no alternative but to dismiss the suit. Very few authorities were referred to. *Ranchod Morar* v. *Bezanji Edulji*[1] was mentioned. That was a case under the first part of the rule, that is to say, an application for leave to sue as a pauper had been rejected with costs and a subsequent application was made to sue as a pauper on the same cause of action. The costs of the first application had not been paid, but that it would seem could make no material difference. It is the rejection of the first application and not the non-payment of the costs which operates as a bar to the second application. It was held in that case that, although the fact that a previous application had been rejected was brought to the notice of the Court at a very late stage, it was bound to take notice of it and to dismiss the second application. But in view of the difference in the language of the two parts of the rule ("shall be a bar to any subsequent application" in contrast to "shall be at liberty to institute a suit provided that he first pays the costs") this case is not an authority on the point now before us. Nor does it appear that Mr Justice Divatia relied upon it. The only case he mentions as an authority is *Rai Mahadeo Sahai* v. *Secretary of State for India*.[2] But that is of little assistance as the judgment merely contains an incidental reference to O. XXXIII, r. 15 which is described as an "imperative" provision.

[1] (1894) 20 Bom. 86.

[2] (1931) 54 All. 300.

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It is not clear from the report of *Ramabai* v. *Shripad Balwant*[1] that the facts would have justified a plea that the bar of the rule had been waived. In any case no such plea appears to have been taken and there was no discussion of the question of waiver. Nor has Mr. Justice Divatia said in so many words that there was anything in the nature of an inherent defect of jurisdiction. He simply agreed with the Courts below that the suit was "not validly instituted" and therefore had to be dismissed. *Ramabai* v. *Shripad Balwant*[1] has been approved by a bench of this Court in an unreported case, *Ganeshram Ramlal* v. *Shrikishan Rupchand.*[2] But there again the point of waiver did not arise. The appellant had made an unsuccessful application to be allowed to appeal as a pauper and had not paid the costs before appealing in the ordinary way. A preliminary objection was taken that the appeal was not competent. The objection was allowed and the appeal was dismissed.

Mr. Kotwal for the respondent has argued that as there is no right to sue unless the costs are first paid, therefore, the Court has no jurisdiction to entertain the suit and a defect of jurisdiction cannot be waived. He relies on a recent full bench decision of the Allahabad High Court, *Shiam Sundar Lal* v. *Savitri Kunwar*,[3] which no doubt lends support to his argument, though not on the question of waiver for no such question appears to have arisen on the facts of that case. It was held that the payment of costs of an unsuccessful pauper application is a condition precedent to the entertainment of an ordinary suit on the same cause of action and if they are not so paid, the Court is bound to dismiss the suit.

This decision was based partly on the language of the rule but mainly, it would appear, on a ruling of the Privy

[1] (1935) 59 Bom. 733.
[2] (1937) F. A. No. 236 of 1930, decided by Barlee and Tyabji JJ., on January 15 and February 2, 1937 (Unrep.).
[3] (1935) 58 All. 191, F. B.

Council in *Ohene Moore* v. *Akesseh Tayee*.[1] That was an appeal from West Africa and the question was whether the Provincial Commissioner had jurisdiction to entertain an appeal from a native tribunal. The statutory rules regulating such appeals provided that a party desiring to appeal from a Paramount Chief's tribunal should first obtain the leave of such tribunal to do so and that leave to appeal should not be granted unless and until the appellant should either have paid the costs in such tribunal or should have deposited therein or in the Court to which the appeal was being taken a sum of money sufficient to satisfy such costs. A native tribunal had granted leave to appeal on conditions, but in those conditions no provision was made for the costs in the first Court. Therefore the statutory condition on which alone leave to appeal could be given was not fulfilled. When the appeal came before the Provincial Commissioner this point was taken (so that here also there was no question of a waiver), but he overruled the objection and allowed the appeal. The Judicial Committee held that he had no jurisdiction to make any order at all because no appeal was properly before him. Their Lordships said: "It is to be remembered that all appeals in this country and elsewhere exist merely by statute and unless the statutory conditions are fulfilled no jurisdiction is given to any Court of Justice to entertain them."

This Privy Council case is no doubt conclusive on the point that if a statutory condition limiting the right to appeal is not fulfilled, and objection is taken on that ground at the proper time, the appeal must be dismissed, and the same will apply to suits. We have no hesitation in agreeing with *Ramabai* v. *Shripad Balwant*[2] and *Shiam Sundar Lal* v. *Savitri Kunwar*[3] so far that O. XXXIII, r. 15, is mandatory, and when failure to comply with the rule is brought to the notice of the Court the suit must be

[1] [1935] All. L. J. 44, P. C. [2] (1935) 59 Bom. 733.
[3] (1931) 54 All. 390.

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dismissed, *if the objection has not been waived.* But some defects which are in a sense defects of jurisdiction may be waived, as we have seen. The Privy Council case just cited is no authority on the question of waiver, nor, as we understand it, does it afford any guidance as to the application of the rule in *Ledgard* v. *Bull*[1] to the provisions of O. XXXIII, r. 15. In that respect as far as we are aware this is a case of first impression.

We take the view that the failure to comply with the condition in O. XXXIII, r. 15 as to prior payment of costs is an irregularity in the initial procedure which does not affect the inherent jurisdiction and competence of the Court to entertain the suit and that therefore on the authority of *Ledgard* v. *Bull*[1] it may be waived. It is clear on the authorities and is not disputed that if the plea of waiver is permissible there has been a waiver in this case by reason of the defendant submitting himself to the jurisdiction throughout the proceedings in the trial Court. The trial Court's decree was, therefore, wrongly set aside.

We allow the appeal. There will be a decree for maintenance and residence in the terms of the trial Court's decree and a decree for the ornaments in the terms of the first appellate Court's decree and respondent will pay the costs throughout.

SEN J. I agree.

The principle enunciated by the Privy Council in *Ohene Moore* v. *Akesseh Tayee*[2] is that an appeal is a creature of the statute and unless the statutory conditions as to the filing of appeals are fulfilled no jurisdiction is given to any Court of justice to entertain it. The statute which their Lordships were concerned with appears to have provided that an appeal would lie only by leave granted by the trial Court and that the said leave was not to be

[1] (1886) 9 All. 191, s. c. L. R. 13 I. A. 134. [2] [1935] All. L. J. 44, P. C.

granted unless the costs in the trial Court had been paid in such Court or deposited therein or in the Court to which the appeal was being taken. The words "an appeal would lie only by leave" obviously have reference to the question of the Court's jurisdiction. It was thus the express intention of the statute in question that unless the conditions named had been fulfilled, the appellate Court would not have jurisdiction. It appears unquestionable that where a statute lays down the conditions under which alone an appeal would lie, the Court cannot get jurisdiction unless and until such conditions are satisfied. There are, however, statutory provisions, for instance those in the rule we are concerned with, O. XXXIII, r. 15, which do not appear primarily to be concerned with a question of jurisdiction but which enable or allow a party "to institute a suit in the ordinary manner" provided a particular condition is first satisfied. Is it possible to say that the two cases stand on the same footing? It seems to me that a differentiation is not only possible, but justifiable.

The first part of O. XXXIII, r. 15 no doubt deals directly with the question of jurisdiction. The rule does not then proceed to provide that the non-payment by the applicant of the costs of the opposite party in opposing his application for leave to sue as a pauper shall be a bar to the institution by him of a suit in the ordinary manner with respect to the same right. What the second part of O. XXXIII, r. 15 says is, in my opinion, something different. Instead of creating a bar to the Court's jurisdiction it confers on the applicant the right to sue provided he fulfills a certain condition. The distinction, though somewhat fine, is in my opinion a real distinction and is the kind of distinction which forms the basis of the passage in *Ledgard* v. *Bull*[1] which is quoted at pages 367-368 in *Chandulal* v. *Awad* bin *Umar Sultan*.[2] There their Lordships speak of the

[1] (1886) 9 All. 191, s. c. L. R. 13 I. A. 134. [2] (1896) 21 Bom. 351.

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Court's "inherent jurisdiction over the subject matter of the suit" and disputes as to jurisdiction based on "irregularities in the initial procedure which if objected to at the time would have led to the dismissal of the suit". The word "irregularities" appears to have been used in view of the fact that they are essentially concerned with the procedure laid down: their Lordships, however, were undoubtedly thinking of provisions as to procedure which are imperative and not merely directory [to quote the words used in *Shiam Sundar Lal* v. *Savitri Kunwars*.[1]] They held that in the latter kind of cases, if the objection that the said provision had not been complied with was not raised at the initial stage of the trial, the defendant could not subsequently dispute the Court's jurisdiction; that means that such objections could be waived. In *Chandulal* v. *Awad* bin *Umar Sultan*[2] it was held that objections as to the condition in s. 433 of the Civil Procedure Code, which corresponds to the present s. 86 of the Code, could be waived. This decision was based also on the ground that the section created a personal privilege for Sovereign Princes and Ruling Chiefs, their Ambassadors and Envoys, a privilege which could be waived. The language of s. 86 of the Civil Procedure Code appears to correspond largely to the language used in O. XXXIII, r. 15. In that section no bar to jurisdiction is primarily created, but it confers a right to sue and lays down a condition which has to be satisfied before a suit can be filed. The question of waiver derives its importance in the present case from the fact that it was open to the defendant to forego the costs incurred by him in opposing the plaintiff's application for leave to sue as a pauper. No costs appear in this case to have been incurred by Government in this behalf. If it be possible for the defendant to forego the recovery of such costs, as it certainly is, the condition as to the payment of costs, at least so far as he is concerned, can hardly be

[1] (1935) 58 All. 191 at p. 194, F. B.

[2] (1896) 21 Bom. 351.

regarded as a condition the satisfaction of which is a necessary preliminary to the Court's obtaining jurisdiction. In any case, it seems to me that the second part of O. XXXIII, r. 15, is not primarily concerned with the question of jurisdiction and that the proviso thereto must be regarded as laying down a procedure, the objection as to the non-observance of which can be waived and that in this case the fact that no such objection was raised at the trial must be held to mean that such objection was waived.

Decree reversed.

J. G. R.

APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Sen.

R. K. NAIK, PETITIONER (ORIGINAL ACCUSED) *v.* EMPEROR.*

1939
August 4.

Indian Penal Code (Act XLV of 1860), s. 420—Bombay Local Boards Act (Bom. Act VI of 1923), s. 136—Government of India Act, 1935 (26 Geo. V. Ch. 2), s. 270—Accused, an administrative officer of District Local Board—Travelling allowance—False bill made by accused in claiming travelling allowance—Whether accused acting or purporting to act in pursuance of the Act—Accused not entitled to claim advantage of protection clause.

Where an accused, who was an administrative officer of a District Local Board, was charged under s. 420 of the Indian Penal Code, 1860, for having, by a false representation and with dishonest intention, claimed and drawn travelling allowance in respect of touring done by him at a higher rate than that to which he was entitled under the Bombay Civil Service Regulations, he would not be entitled to the protection afforded by s. 136 of the Bombay Local Boards Act, 1923, or by s. 270 of the Government of India Act, 1935, as the accused in delivering the false bill was not acting or purporting to act in pursuance of either of these Acts.

Ranchhoddas Morarji v. *The Municipal Commissioner for the City of Bombay*,[1] referred to.

Hori Ram Singh v. *Emperor*,[2] distinguished.

*Criminal Revision Application No. 190 of 1939.

[1] (1901) 25 Bom. 387.

[2] [1939] A. I. R. F. C. 43.