

Ram Chandra and anr. Vs. the State of Uttar Pradesh and anr.

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Court : Allahabad

Decided On : Oct-26-1964

Reported in : AIR1965All446; 1965CriLJ342

Judge : Satish Chandra, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 146, 146(1) and 439;
;[Code of Civil Procedure \(CPC\) , 1908](#) - Sections 4(1), 24 and 141

Appeal No. : Criminal Revn. No. 808 of 1963

Appellant : Ram Chandra and anr.

Respondent : The State of Uttar Pradesh and anr.

Advocate for Def. : S.T. Rathore, Adv.

Advocate for Pet/Ap. : Kunwar Bahadur Verma, ;K.B. Mathur, Sirish Pd. and ;J.N. Chaturvedi, Advs.

Disposition : Revision dismissed

Judgement :

ORDER

Satish Chandra, J.

1. This revision arises out of proceedings under Section 145, Criminal P. C.

2. The facts are that on 15-6-1958 the Station Officer, Kotwali, made a report on which the magistrate, on 27-9-1958 drew up a preliminary order under S, 145, Criminal P. C. There being an immediate apprehension of breach of peace the property in dispute was attached and the parties were called to file their written statements and adduce evidence. The parties did so. The learned magistrate felt unable to decide as to which party was in possession. He made a reference under Section 146 (1) Criminal P. C. to the court of the City Munsif, Azamgarh. An application under Section 24, Civil P. C. was made to the District Judge, Azamgarh, for the transfer of these proceedings to some other competent court. This application was after notice and a hearing, allowed and the proceedings were transferred to the court of the Munsif, Mohammadabad, Azamgarh, The learned Munsif, Mohammadabad, heard the parties and on. 26-7-1961 recorded a finding that the first party was and the second and the third parties were not, in possession of the involved property, on the date of the preliminary order.

3. The matter came back before the referring magistrate who, in conformity with the adjudication of the civil court, released the property in favour of the first party and restrained the second and the-third parties from interfering with the possession of. the first party. Aggrieved, the second and the third parties went up in revision.

4. In revision for the first time the competence of the court of the Munsif, Mohammadabad, Azamgarh to hear and decide the reference was raised. It was urged that Section 24, Civil P. C. was inapplicable and the District Judge had no jurisdiction to transfer the case. This contention was repelled on the ground that the point was not raised before the magistrate or in the memorandum of revision and that no prejudice appears to have occasioned to the applicants. The other points raised also failed. The revision was in the result, dismissed. The second and third parties have come to this court in revision. They urge that the civil court deciding a reference made by a magistrate under Section 146 (1), Criminal P. C. does not act as regular civil court, and that the provisions of the Civil Procedure Code or Section 24 thereof are not applicable to it; as .such the finding of the transferee Munsif was incompetent and the magistrate could not decide the case in conformity with it.

5. The learned counsel for the opposite party has reiterated that the objection as to competence not having been taken before the court of the Munsif, Mohammadabad, when it proceeded to adjudicate the reference, or before the magistrate it cannot be raised in revision. The existence of jurisdiction is very different from the exercise of it. The question whether there is jurisdiction over the person and the subject-matter relates to the existence of jurisdiction; the decision of all other questions in the cause or matter pertains to the exercise of jurisdiction, *Govindprasad v. Pawankuniar*, AIR 1952 Nag 278. The requirements of the law for the assumption of jurisdiction if not complied with make the entire adjudication null and void. There is ample authority for the proposition that when there is lack of competence to entertain a cause or proceeding the consent of the parties or the omission to raise an objection at the threshold will not convert it into a proper judicial process. Where jurisdiction does not exist, no amount of consent, acquiescence or waiver can create it or confer it, *Kiran Singh v. Chaman Paswan*, : [1955]1SCR117 ; *United Commercial Bank Ltd. v. Their Workmen*, : (1951)ILLJ621SC and *Ledgard v. Bull*, ILR 9 All 191 (203) (PC).

6. This is all the more so in respect of inferior courts as distinguished from the superior courts of Record In Halsbury's Laws of England, 3rd Edition, Vol 9 p 349, it is stated.

'Prima facie no matter is deemed to be beyond the jurisdiction of Superior Court unless it is expressly shown to be so, while nothing is within the jurisdiction of an Inferior Court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognizance of the particular Court'.

The Civil Court while deciding the Reference is not a Superior Court of Record. There being no presumption as to the existence of jurisdiction such a defect can be pointed out by any party at any stage.

7. Learned counsel for the opposite party has relied upon the Supreme Court decision in the case of *Tikaram & Sons Ltd. v. Its workmen*, : (1960)ILLJ514SC . This was an appeal by special leave under Art. 136 of the Constitution, arising out of an Industrial Dispute. Their Lordships ruled that they will not allow the question of jurisdiction to be raised for the first time in that appeal. Under Art. 136 of the

Constitution the powers of the Supreme Court are unfettered and completely discretionary. If in their discretion the Supreme Court refused to entertain any question about the competence of the Industrial Tribunal, it cannot, as a matter of law be taken to be a declaration of law governing other jurisdictions. This is a three Judge Bench decision. It does not refer to or consider the seven judge bench decision in : (1951)ILLJ621SC referred to above.

8. Reliance has also been placed on the case of Manak Lal v. Dr. Prem Chand, : [1957]1SCR575 . That was a case of an infirmity having arisen in the constitution of the tribunal because one of the members was held to be biased. Their Lordships ruled that if the objection was not raised at the proper time, in spite of the knowledge of the infirmity, the objection will be deemed to have been waived, and hence the question of the defect in the constitution of the tribunal could not be raised before the High Court for the first time. There is nothing to indicate that the present applicants were aware of the infirmity. The preliminary objection does not impress me.

9. On the merits the Question is if Section 24, C. P. C. applies. That depends on the applicability of Section 141, Civil P. C which states that:

'The procedure provided in this Code in regard to suit shall be followed, as far as it can be made applicable in all proceedings in any court of civil jurisdiction.'

If a 'proceeding' is pending in a 'Court of civil jurisdiction' the prescribed procedure is available. But it is contended that the 'proceeding' within meaning of Section 141 has to be an original and ' a civil proceeding and should be one pending in a civil Court properly so-called and not before a Persona Designata; and that the proceedings on a reference under Section 146, Criminal P. C. do not satisfy any of these tests. Thus three aspects require consideration, namely :

(1) Does Section 141, Civil P. C. apply to original matters alone ?

(2) Is it confined to civil proceedings ?

(3) Is the reference under Section 146, Criminal P. C. to a Court or to a persona designata

10. On a plain reading the 'proceeding' contemplated by Section 141 is qualified by only one factor; that it be in a Court of civil jurisdiction. The word proceeding is of a general nature and of wide import.

11. On the first point a Single Judge decision in Sheonath Prasad v. City Magistrate, Varanasi : AIR1959 All467 is material. In this case Hon'ble Jagdish Sahai, J. held that Section 141, Civil P. C. applies to original matters in the nature of suits namely matters which originate in themselves and not those which spring up from a suit or from some other proceeding or arise in connection therewith. His Lordship has relied on the Privy Council decision in Thakur Prasad v. Fakirullah, 22 Ind App 44 (PC) and on Sarat Krishna Bose v. Bisweswar Mitra, : AIR1927 Cal534 . In view of the Full Bench of our Court in Maharam v. Harbans, : AIR1941 All101 , I am unable to subscribe to the view taken by Hon'ble Jagdish Sahai, J. as to the interpretation of the Privy Council decision in Thakur Prasad's case, 22 Ind App 44 (PC). The Full Bench held that the Privy Council did not lay down that Section 141, Civil P. C. applied only to original proceedings; that that decision did not exclude the applicability of Section 141, Civil P. C. to matters which were not original in nature; and that it applied to references made to the Civil Court under Section 271 of the Agra Tenancy Act, 1926. It appears that the attention of Hon'ble Jagdish Sahai, J. was not drawn to this Full Bench decision of our Court. The decision of the Calcutta High Court referred to by him, with great respect, finds in a dictum of their Lordships of the Judicial Committee a good deal more than was intended by the authors.

12. On facts also the Full Bench decision is applicable. Section 271 of the Agra Tenancy Act, 1926, envisages a situation identical to the one dealt with by Section 146, Criminal P. C. It runs thus :

'271 (1) If such question of proprietaryright has not been already determined by a Court of competent jurisdiction, the revenue Court shall frame an issue on the question of proprietary right and submit the record to the competent civil Court for the decision of that issue only

(2) The civil Court shall decide that issueonly and return the record together with its finding on that issue to the revenue Court, which submitted it.' Under

Section 146, Criminal P. C. the magistrate forwards the record to a civil Court of competent jurisdiction for deciding the question of possession. The civil Court gives a finding on that question only and returns the record to the, Magistrate concerned. Both the Revenue Court and the Magistrate have to decide the case in conformity with the finding of the civil Court. The revenue Court, mentioned in this section, it may be remembered, is for purposes of the Civil Procedure Code, not a species of civil Court. Section 5(2), Civil P. C. says that a 'revenue Court' does not include a civil Court. Therefore, it cannot be urged that S, 271, Agra Tenancy Act provides for a reference from one civil Court to another. The reference is from one Court to another of a different jurisdiction just as a reference under Section 146, Criminal P. C. is from a criminal Court to a civil Court. After an elaborate discussion the Full Bench held that the provisions of Section 141, Civil P. C. will apply to the proceeding before the civil Court on a reference by the revenue Court. In the Full Bench case the learned Munsif, to whom the matter had been referred by the revenue Court, in its turn, referred the dispute to arbitration in exercise of the powers conferred by the 2nd Schedule of the Civil Procedure Code. It was held that by virtue of Section 141 the 2nd Schedule applied to this proceeding and the matter was validly referred to arbitration.

13. In *Sada Sheo v. Mt. Ram Pearey*, : AIR1931 All29 this Court held that the proceedings on a reference under Section 271, Agra Tenancy Act can be transferred under Section 24, Civil P. C. The same principle should apply to a reference under Section 146, Criminal P. C.

14. On the second point, learned counsel has relied upon the following passage from the decision of Hon'ble Jagdish Sahai J. in the aforesaid case of *Sheo Nath Prasad*, : AIR1959 All467 :

'The result of a study of the provisions of Section 146 is that proceeding even on reference made to the civil Court retains its old moorings and does not change its character from criminal proceeding to civil proceeding.'

Section 141, Civil P. C. speaks only of a proceeding. It does not restrict itself to a civil proceeding. If a proceeding is pending in a civil Court this section will apply--no matter what the theoretical character of the proceedings be. In *Kochadai v.*

Nagayasami : AIR1961 Mad247 , it has been held that the reference under Section 148, Criminal P. C. to the civil Court is a proceeding which can be transferred under Section 24, Civil P. C.

15. It is urged that Section 141 should be confined to civil proceedings alone and not to references under Section 146, Criminal P. C. as otherwise a conflict is likely to arise. Section 146, Criminal P. C. curtails the powers of the civil court in several matters. Sub-section 1-D directs the Civil Court to conclude the enquiry and transmit its finding normally in three months. Sub-section 1-D excludes any appeal, revision or review of the civil Court's finding. The argument is misconceived. Civil Procedure Code in its Section 4 (1) provides a saving clause. It says that nothing in the Code shall limit or otherwise affect any special or local law or any special jurisdiction or power conferred or any special form of procedure prescribed by any other law for the time being in force. The position is that the provisions of the special law shall prevail so far as they go; but in matters on which they are silent the provisions of the Civil Procedure Code will apply : See *Goswami v. Shyam*, 1957 All W R (H C) 157; *Bhaidas v. Bai Gulab*, ILR 45 Bom 718: (AIR 1921 PC 6), *Ram Sarup v. Mt. Kaniz Ummehani*, : AIR1937 All165 .

16. Section 141, Civil P. C, is intrinsically flexible. The section itself uses the phrase 'as far as it can be made applicable'. The specific provisions of Section 146, Criminal P. C. will have overriding effect. Sub-section 1-D excludes appeal review or revision of the finding. Thus the provisions of the Code of Civil Procedure directly or indirectly providing therefor will not apply. The decision of a Division Bench of our Court in *Raja Ram Pal v. Sardar Jaswant Singh*, 1964 All LJ 635 : (AIR 1965 All S68) is understandable. There it was held that the bar against review impliedly includes restoration of an ex parte proceeding and as such Order 9, Civil P. C. will not apply to reference proceedings under Section 146, Criminal P. C. The Bench did not decide the wider question that Section 141 does not apply.

17. It is next contended that the Civil Court, to which reference is made, does not act as a Court of law, but as a persona designate. In England the doctrine of persona designata is peculiar to the law of wills. It means where a person is

indicated not by name, but either by an official designation or as one of a class, the question arises whether he ceases to be the person indicated on losing his official designation or character as one of the class or whether the intention is to single him out as a *persona designata* as an individual, the designation being merely a further description of him. In some of the Statutes in this country powers have been delegated to officers of a Court referred to by their official designation like the District Judge, the Judges of the Small Cause Court, etc. The question has arisen whether the person so designated has been invested with the powers as a Court. If not it is a mere *persona designata* and is not subject to the various incidents of the Courts. Such a person has been held to be not subordinate to the High Court under Section 115, Civil P. C. According to the Supreme Court (*Ebrahim Aboobaker v. Tekchand*, : [1953]4SCR691 , Section 141, Civil P. C. does not apply to a Tribunal like the Custodian of Evacuee Property as it is not a Court though the proceedings held by him are of a quasi judicial nature. Section 24 Civil P. C. also in its terms applies to a Court subordinate.

18. What is a Court? The definition given in the Indian Evidence Act is that Court 'includes all Judges and Magistrates and all persons except arbitrators legally authorized to take evidence.' This definition has been framed only for the purposes of the Evidence Act and is not exhaustive: See AIR 1956 S C 68 (69).

19. There is in this country a difference of opinion as to the connotation in law of a Court.

20. One set of authorities (*Hasan v. Mohammad Shamsuddin*, : (1951)11LLJ6Pat ; *Mt. Dirji v, Smt. Goalin*, AIR 1941 Pat 85 (FB); *Works Manager Carriage and Wagon Shops, Mahalpura v. K. G. Hashmat*, AIR 1948 Lah 316 (FB)) hold that in order to be a Court a person or authority ought to have three salient attributes :

(a) It must be entrusted with judicial functions; that is the function of deciding litigated questions not, arbitrarily but on evidence and according to rules of procedure which ensure acting with impartiality and fairness.

(b) It must have judicial powers to receive evidence, enforce attendance of witnesses and power to pronounce judgment and carry it into effect between the

parties thereto.

(c) It must exercise jurisdiction by sanction of law and not by voluntary submission.

21. It has also been held in these cases that a *persona designata*, if it has these characteristics will be a court; but if he conducts a ministerial enquiry he is not a Court: *Dargah Committee, Ajmer v. State of Rajasthan*, : [1962]2SCR265 . The court to which, reference is made under Section 146, Criminal P. C. satisfies all these tests. According to a catena of decisions *H. C. D. Mathur v. E. I. Rly.* : AIR1950 All80 , *Bishambhar Nath v. Achal Singh*, : AIR1932 All651 ; *Sultan Ali v. Nur Hussain*, AIR 1949 Lah 131 (161) (FB) and *Gaya Prasad v. Kalap Nath*, AIR 1929 Oudh 389 (FB) of other High Courts (including our own) these features alone are not sufficient. The person or authority must in addition have the 'status' of a Court.

22. To the same effect is the view of the Privy Council. Sankey L. J. in *Shell Co. o Australia v. Federal Commissioner of Taxation*, 1931 A. C. 275, observed that:

'a Tribunal is not necessarily a Court in the strict sense because it gives a final decision (2) nor because it hears witnesses on oath (3) nor because two or more contending parties appear before it between whom it has to decide (4) nor because it gives decisions which affect the rights of subjects (5) nor because there is an appeal to a Court (6) nor because it is a body to which a matter is referred by another body.'

23. The same Judge but as Sankey J. in 1918-2 K B 405, *Co-Partnership Farms v. Harvey Smith*, laid down that a vital indicia of a court is its constitution. This means that it has to be seen whether the person or authority has been in existence as a Court and the statute has added a new matter to its jurisdiction. In other words, Desai J. (as he then was) (*Phul Kumari v. State*, : AIR1957 All495 observed :

'The question rather is whether the new powers are made to be exercised in the course of -the existing jurisdiction of the Court or as a new Court.... a *persona designata* can be a Court, the real question is whether he is a Civil Court or a different Kind of Court.'

24. The same view has been taken in *Kedarnath v. S. N. Misra*, : AIR1957 All484 and *Chatur Mohan v. R.B. Dixit*, : AIR1964 All562 (per Desai C. J. at p. 26 L (of All L J) : (at p. 566 of AIR).

25. Section 10 of the Bengal and Madras Native Religious Endowments Act conferred power on 'the Civil Court' to decide certain disputes that may be referred to it The Privy Council (*Balakrishna Udayar v. Vasudeva Ayyar*, AIR 1917 P C 71) held that the Court acted as a Civil Court and not as a *persona designata*. The intention of the Legislature was to let the power be exercised by the existing civil court in the course of its ordinary jurisdiction.

26. Even this strict view is satisfied in the instant lease.

27. Section 146, Criminal P. C. provides for a reference to a 'Civil Court of competent jurisdiction.' The Criminal Procedure Code does not create any such authority or Court. Section G, Criminal P. C. only constitutes 'Criminal Courts.' Section 3 of the Bengal Assam and Agra Civil Courts Act which occurs in Chap. II headed as 'Constitution of Civil Courts' reads as follows :

'There shall be the following classes of Civil Courts under the Act, namely :

- (1) The Court of District Judge,
- (2) The Court of the Additional Judge,
- (3) The Court of the Civil Judge,
- (4) The Court of the Munsif.'

28. The Magistrate has to choose from amongst these courts. His powers to refer is limited to the Civil Court of competent jurisdiction. The competency has been held to be territorial) : AIR1959 All467 and *Bodh Narain v. Deo Narain*, AIR 1958 All 308).

29. So the reference is to an already existing and duly functioning Civil Court of law. As held in *K. Parthasarathi v. C. Koteswara Rao*, AIR 1924 Mad 561 (FB), when by statute a matter is referred for determination to a court of law, the

necessary implication is that the court will determine it as a court and the incidents of its jurisdiction will equally attach to the determination. Normally the parties approach a Court: direct. Here the reference by a magistrate is no doubt a condition precedent but once that condition is satisfied its existence can have no effect on the nature, capacity or character of the referred court. The reference is an enlargement of the existing jurisdiction of the civil Court.

30. In my opinion Section 141, Civil P. C, is applicable to a reference under Section 146, Criminal P. C. It is a proceeding in a Court subordinate within the meaning of Section 24, Civil P. C. and can be transferred. The finding recorded by the transferee Court viz. the Court of the Munsif, Mohammadabad, was valid.

31. In the result, the revision fails and is dismissed.

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