

Hridyanath Roy and ors. Vs. Ram Chandra Barua Sarma and ors.

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Court : Kolkata

Decided On : May-20-1920

Reported in : 58Ind.Cas.806

Judge : Asutosh Mookerjee, C.J., ;Ernest Fletcher, ; N.R. Chatterjea, ;Teunon and ;Asutosh Chaudhuri, JJ.

Appellant : Hridyanath Roy and ors.

Respondent : Ram Chandra Barua Sarma and ors.

Judgement :

Asutosh Mookerjee, C.J.

1. The suit which has culminated in this reference was instituted by the appellants for recovery of possession of land upon declaration of title. The Court of first instance found in favour of the plaintiffs upon the questions, of title and possession and decreed the suit. Upon appeal, the Subordinate Judge affirmed the findings of the trial Court as to title and possession, but dismissed the suit on the ground that a previous suit, instituted in respect of the same subject matter, had been improperly withdrawn under Order XXIII, Rule 1(2). In support of this view, the Subordinate Judge relied upon the decision in Kali Prasanna Sil v. Panchanan Nandi Chowdhury 33 Ind. Cas. 670 : 23 C.L.J. 489 : 20 C.W.N. 1000 : 44 C. 367 which is an authority for the proposition that where the Appellate Court allows a plaintiff to withdraw from a suit on the ground that he had not been able to adduce

all the evidence which should have been adduced, the order is without jurisdiction and a fresh suit brought in pursuance of that order is barred by res judicata. In the previous litigation, it appears, the plaintiffs succeeded in the Primary Court. Upon appeal by the defendants, the following order was recorded by the Subordinate Judge on the 18th September 1913:

'Heard both parties and appellant' objection. The plaintiff respondent applies to withdraw from suit with liberty to bring fresh suit. There appears reason. The plaintiff filed a Chitta dated 1246 B.S. his case is that the disputed land is covered by that Chitta as belonging to him. That Chitta was not compared or re-laid in the locality and the identity was not established, the oral evidence is not sufficient. I, therefore, allow the suit to be withdrawn and permit the plaintiff to bring fresh suit, if not otherwise barred, on condition of his paying appellants' costs in both the Courts before institution of fresh suit. Appeal thus disposed of.

2. The present suit was, thereafter, instituted on the 2nd April 1914, and was, as already stated, decreed by the trial Court where no objection was taken by the defendants that it was barred by reason of the alleged incompetence of the order in the previous suit. The objection was taken in the lower Appellate Court for the first time, as the decision in *Kali Prasanna Sil v. Panchanan Nandi Chowdhury* 33 Ind. Cas. 670 : 23 C.L.J. 489 : 20 C.W.N. 1000 : 44 C. 367 had been meanwhile pronounced and published. The Subordinate Judge entertained and gave effect to the objection, which he described as a technical ground not taken in the lower Court. On second appeal to this Court, the Division Bench has dissented from the view taken in *Kali Prasanna Sil v. Panchanan Nandi Chowdhury* 33 Ind. Cas. 670 : 23 C.L.J. 489 : 20 C.W.N. 1000 : 44 C. 367 and has referred the following questions for decision by a Full Bench:

(1) If an order for withdrawal of a suit with leave to institute a fresh suit be made under Order XXIII, Rule 1, Civil Procedure Code (or Section 373 of Act X, 1877) but on a ground not of the same nature as 'formal defeat' mentioned in Clause (a), can it be treated as an order made without jurisdiction and, therefore, null and void?

(2) Is a fresh suit instituted upon such leave incompetent?

(3) Is the Court trying the subsequent suit competent to enter into the question whether the Court, which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit, had jurisdiction to make such an order?

(4) Is such an order open to revision under Section 115, Civil Procedure Code?

3. Order XXIII, Rule 1, mentioned in the first of these questions, is in the following terms:

(1). At any time after the institution of a suit, the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied

(a) that a suit must fail by reason of some formal defeat or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in Sub-rule (2) he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such Subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to withdraw without the consent of the others.

4. The case has been argued before us on the assumption that the order for withdrawal in the previous litigation was improperly made. The contention of the appellants is that, even on the assumption that the order was improperly made, it is conclusive between the parties, because, however erroneous it might be deemed to have been, it cannot rightly be regarded as made without jurisdiction. The contention of the respondents, on the other hand, is that as the Sub ordinate Judge in the previous litigation, invoked the aid of Order XXIII, Rule 1(2) under

circumstances not contemplated thereby, the order, in so far as it reserved liberty to the plaintiffs to institute a fresh suit, must be deemed to have been made without jurisdiction and consequently null and void, with the inevitable result that under Sub-rule (3) the plaintiffs are precluded from instituting the present suit. The question thus emerges for consideration whether an order for withdrawal of a suit, with liberty reserved to the plaintiffs to institute a fresh suit in respect of the same subject-matter, is an order made without jurisdiction, if it is passed under circumstances not contemplated by Order XXIII, Rule 1(2). The answer to this question depends upon an analysis of the notion of jurisdiction of a Court.

5. In the Order of Reference to a Full Bench in the case of Sukh Lal v. Tara Chand 33 C. 68 : C.W.N. 1046 : 2 C.L.J. 241 : 2 Cr. L.J. 618 it was stated that jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it; in other words, 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. An examination of the cases in the books discloses numerous attempts to define the term 'jurisdiction,' which has been stated to be 'the power to hear and determine issues of law and fact,' 'the authority by which judicial officers take cognizance of and decide causes,' 'the authority to hear and decide a legal controversy'; 'the power to hear and determine the subject-matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over them;' 'the power to hear, determine and pronounce judgment on the issues before the Court, ' "the power or authority which is conferred upon a Court by the Legislature to hear and determine causes between parties and to carry the judgments into effect', 'the power to enquire into the facts, to apply the law, to pronounce the judgment and to carry it into execution', Reference may in this connection be made to the discussion of the nature of jurisdiction in the judgments of this Court in Ashutosh Sikdar v. Behari Lal 11 C.W.N. 1011 : 6 C.L.J. 320 : 35 C. 61 (F.B.) and Gurdeo Singh v. Chandrika Singh 1 Ind. Cas. 913 : 36 C. 193 : 5 C.L.J. 611. This jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus, the jurisdiction may have to be considered with reference to place, value, and nature of the subject matter. The power of a tribunal may be exercised within defined territorial-limits. Its cognizance may be restricted to

subject-matters of prescribed value. It may be competent to deal with controversies of a specified character, for instance, testamentary or matrimonial causes, acquisition of lands for public purposes, Record of Rights as between landlords and tenants. This classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject-matter is obviously of a fundamental character. Given such jurisdiction, we must be careful to distinguish exercise of jurisdiction from existence of jurisdiction, for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction. The authority to decide a cause at all, and not the decision rendered therein, is what makes up jurisdiction, and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction. The extent to which the conditions essential for creating and raising the jurisdiction of a Court or the restraints attaching, to the mode of exercise of that jurisdiction should be included in the conception of jurisdiction itself is sometimes a question of great nicety, as is illustrated by the decisions reviewed in the order of reference in *Sukh Lal v. Tara Chand* 33 C. 68 : C.W.N. 1046 : 2 C.L.J. 241 : 2 Cr. L.J. 618 and *Khosh Mahomed Sircar v. Nazir Mahomed* 9 C.W.N.1065 : 33 C. 352 : 2 C.L.J. 259 : 2 Cr. L.J. 637. See also the observation of Lord Farker in *Raghunath Das v. Sundar Das* 24 Ind. Cas. 304 : 43 C. 72 at p. 83 : 18 C.W.N. 1058 : 1 L.W. 567 : 27 M.L.J. 150 : 16 M.L.T. 353 : (1914) M.W.N. 747 : 16 Bom. L.R. 814 : 20 C.L.J. 555 : 13 A.L.J. 154 : 41 I.A. 251 (P.C.); But the distinction between existence of jurisdiction and exercise of jurisdiction has not always been borne in mind and this has sometimes led to confusion. See *Mabulla Sardar v. Hemangini Debi* 6 Ind. Cas. 629 : 11 C.L.J. 512; *Moser v. Marsden* 37 Ind. Cas. 414 : 40 M.259 : 21 M.L.T. 82 : (1917) M.W.N. 217 and 246 : 5 L.W. 558 : 32 M.L.J. 477 where the term jurisdiction is used to denote the authority of the Court to make an order of a particular description]. We must not thus overlook the cardinal position that, in order that jurisdiction may be exercised, there must be a case legally before the Court and a hearing; as well as a determination. A judgment pronounced by a Court without jurisdiction is void, subject to the well-known reservation that when the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction, though the result of the enquiry may be that it has no jurisdiction to

deal with the matter brought before if *Rashmoni Dasi v. Ganada Suniari Dasi* 26 Ind. Cas. 275 : 20 C.L.J. 213 : 19 C.W.N. 34.

6. Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly. As an authority for this proposition reference may be made to the celebrated dictum of Lord Hobhouse in *Malkarjun v. Nathan* 25 B. 337 at p. 347 : 5 C.W.N. 10 : 2 Bom. L.R. 927 : 27 I.A. 216 : 10 M.L.J. 368 : 7 Sar. P.C.J. 739 a Court has jurisdiction to decide wrong as well as right; if it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed'. Lord Hobhouse then added that, though it was true that the Court made a sad mistake in following the procedure adopted, still in so doing the Court was exercising its jurisdiction and to treat such an error as destroying the jurisdiction of the Court was calculated to introduce great confusion into the administration of the law. The view that jurisdiction is entirely independent of the manner of its exercise and involves the power to decide either way upon the facts presented to the Court, is manifestly well founded on principle, and has been recognized and applied elsewhere. *Watkins, Ex parte* (1883) 7 Peter U.S. 568 : 8 Law. Ed. 786 *Herron v. Dater* (1886) 120 U.S. 464 : 80 Law. Ed. 748, There is a clear distinction between the jurisdiction of the Court to try and determine a matter, and the erroneous, action of such Court in the exercise of that jurisdiction. The former involves the power to act at all while the latter involves the authority to act in the particular way in which the Court does act. The boundary between an error of judgment and the usurpation of power is this: the former is reversible by an Appellate Court within 'a certain fixed time and is, therefore, only voidable, the latter is an absolute nullity. When parties are before the Court and present to it a controversy which the Court has authority to decide, a decision not necessarily correct but appropriate to that question is an exercise of judicial power or jurisdiction'. So far as the jurisdiction itself is concerned, it is wholly immaterial whether the decision upon the particular question be correct or incorrect. Were it held that a Court had jurisdiction to render only correct decisions, then each time it made an erroneous ruling or decision, the Court would be without jurisdiction and

the ruling itself void. Such is not the law, and it matters not what may be the particular question presented for adjudication whether it relates to jurisdiction of the Court itself or affects substantive rights of the parties litigating, it cannot be held that the ruling or decision itself is without jurisdiction or is beyond the jurisdiction of the Court. The decision may be erroneous, but it cannot be held to be void for want of jurisdiction. A Court may have the right and power to determine the status of a thing, and yet may exercise its authority erroneously, after jurisdiction attaches in any case, all that follows in exercise of jurisdiction, and continuance of jurisdiction is not dependent upon the correctness of the determination.

7. It follows from these principles that when a Court of competent jurisdiction has made an order under Order XXIII, Rule 1(2), in circumstances not contemplated by the rule, the order cannot be deemed to have been made without jurisdiction. The Court has jurisdiction to try the suit, and, in the exercise of that jurisdiction, is competent to make an order for withdrawal with liberty reserved to the plaintiff to institute a fresh suit in respect of the same subject-matter, if it is satisfied that circumstances exist which justify such an order. The Court is so satisfied rightly or wrongly as the Subordinate Judge in the previous suit put it quaintly, 'there appears reason'. The Court accordingly makes the order. It is plain that, however erroneous the order may be, it is not an order made by a Court without jurisdiction, it is, on the other hand, an order made by a Court of competent jurisdiction acting with material irregularity in the exercise of its jurisdiction. The order cannot, consequently, be deemed null and void. The party aggrieved may directly impugn the order, and may, in an appropriate proceeding, invoke the aid of a superior tribunal to set aside the order, as appears to have been done in the cases brought to our notice, except the case of *Kali Prasanna Sil v. Panchanan Nandi Chowdhury* 33 Ind. Cas. 670 : 23 C.L.J. 489 : 20 C.W.N. 1000 : 44 C. 367; but, till it has been so vacated, it is operative between the parties and cannot be ignored or challenged collaterally in a different proceeding. There is thus to escape from the position that the decision in *Kali Prasanna Sil v. Panchanan Nandi Chowdhury* 33 Ind. Cas. 670 : 23 C.L.J. 489 : 20 C.W.N. 1000 : 44 C. 367 cannot be defended on principle. That decision, indeed, has been doubted on more than one occasion, as pointed out in the Order of Reference, Besides the cases mentioned therein,

reference may particularly be made to the judgment of Srinivasa Aiyangir, J., in *Tuljaram Bow v. Gopala Aiyar* 40 Ind. Cas. 611 : 32 M.L.J. 434 : (1917) M.W.N. 234 : 21 M.L.T. 229 where the true rule was stated to be that, if a Court has jurisdiction to try a suit and has authority to pass orders of a particular kind, the fact that it has passed an order which it should not have made in the circumstances of that litigation, does not indicate total want or loss of jurisdiction so as to render the order a nullity.

8. The first three questions referred to the Full Bench must, consequently, be answered in the negative; the fourth question does not arise and has not been argued before us. The result is the following series of propositions:

(1) An order for withdrawal of a suit with leave to institute a fresh suit, made under Order XXIII, Rule 1, but in circumstances not within the scope of the rule, cannot be treated as an order made without jurisdiction, such order is consequently not null and void.

(2) A fresh suit instituted upon leave so granted is not incompetent.

(3) The Court trying the subsequent suit is not competent to enter into the question, whether the Court which granted the plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had properly made such order.

9. These propositions leave no room for doubt that the decision of the Subordinate Judge in this case must be set aside and the decree of the Court of first instance restored with costs in all the Courts including the costs of the hearing before the Full Bench and the Division Bench.

Fletcher, J.

10. I agree.

Chatterjea, J.

11. I agree.

Teunon, J.

12. I agree.

Chaudhuri, J.

13. I agree.

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