

(1920) 11 MAD CK 0014
In the Madras High Court

Govindaswami Kadavaran

APPELLANT

Vs

Kaliaperumal Munayathiriyar and Others

RESPONDENT

Date of Decision : 18-11-1920

Acts Referred:

Citation : AIR 1921 Mad 696 : 66 Ind. Cas. 837 : (1922) 16 LW 155

Hon'ble Judges : Sadasiva Aiyar, J; Coutts Trotter, J

Bench : Division Bench

Judgement

Sadasiva Aiyar J.

1. Second Appeal No. 502 of 1920 and the connected Civil Revision Petition No. 308 of 1920 have arisen out of a suit instituted by three trustees of a temple against their so trustee in a Munsif's Court.

2. The suit, as I understand the plaint, is one for directing the defendant to submit his accounts and to pay up whatever may be found as the balance in his hands on the scrutiny of the accounts. The Court-fee paid on the valuation of the reliefs sought for were paid on two sums as follows:---"(a) amount which plaintiffs estimate as likely to be due from defendant on account of receipts and expenditure in respect of the temple.... Rs. 950.0 0," "(b) for rendering accounts Rs. 50-0 0." Order VII, Rule 2, of the Civil Procedure Code, states that where the plaintiff seeks for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaintiff shall state approximately the amount sued for and I take it that Rs. 950 is mentioned accordingly in the plaint as such approximate amount.

3. As I said, this suit was brought in the Munsif's Court. Section 92 of the Civil Procedure Code, corresponding to old Section 539, contains a new clause, (Clause 2) which is as follows:---"Save as provided by the Religions Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-Section (1) shall be instituted in respect of any sub-trust as is therein referred to" (i.e., a public charitable or religious trust) "except in conformity with the provisions of that sub

Section" (i.e., expert in a District Court: or in specially empowered Court after obtaining the sanction of the Advocate-General). Paragraph 7 of the plaint, no doubt, recites that the defendant received certain moneys (1,300 and odd rupees) and certain quantities of paddies (195 and odd kalams) belonging to the temple. But that recital was clearly inserted in order to show that the defendant is liable to submit bin accounts in respect of those amounts and paddies and the other moneys and paddies which must have been received by him (see 9th and 10th paragraphs of the plaint mentioning approximate annual incomes of the temple) and to have the accounts duly scrutinized and to pay the balance after deducting authorized and valid expenses proved and established by such scrutiny. In paragraph 19 (b) of the plaint, the plaintiffs also seek for recovery of damages from the defendants for acts of malfeasance and malfeasance (the Munsif has, in the beginning of his judgment, set out the nature of the suit correctly), and I am, therefore, clear that the recitals in paragraph 7 of the plaint as regards certain sums and paddies cannot be treated as capable of converting the suit into, or permitting us to construe the suit as, a simple money suit for the recovery of those particular sums and of the value of those particular paddies mentioned in paragraph 7 alone. The decree passed was also not a money and a paddy decree for the amounts and quantities mentioned in paragraph 7 but for - what was agreed upon as due on the scrutiny and settlement of accounts.

4. Now sub Clause 1 of Section 92, CPC has added to the Sub-clauses of the old Section 539 a new Clause (d) whose words are "directing accounts and inquiries." The present suit is a suit praying for a direction to the defendant to render accounts and for inquiries into the amount, due by him as such an accountable person and, therefore, clearly falls under Clause (1). Hence, it follows that as under Clause (2) of Section 92, a suit claiming any of the reliefs specified in Sub-section (1) cannot be instituted except in conformity with the provisions of Sub-section (1) i.e., except in the District Court or in a Subordinate Judge's Court, (all Subordinate Judges having been empowered by the Local Government in the Madras Presidency to entertain such suits), this suit brought in the District Munsif's Court was brought in a Court which had no jurisdiction to entertain it. The decision in *Nellaiyappa Pillai v. Thangama Nachiyar* 7 Ind, Dec, 644 was pronounced when the old Code was in force and when no provision corresponding to the provision of Section 92, Clause (2) of the present CPC was in existence. Having regard to the history of the legislation on this matter, I think the reasonable conclusion is that the Legislature wanted to put an end to the conflict of decisions between the Bombay High Court and the Madras High Court on the question whether a suit may or may not be entertained for any or all of the reliefs mentioned in Section 539 (old Code) without conforming with the requirements of that section (present Section 92, Clause 1), if the plaintiffs were persons who had by the common law of the land or otherwise a certain peculiar and special interest in the trust (such as that of a trustee thereof) over and above that of the ordinary public "having an interest in the trust." That conflict was intended by the Legislature to be ended by enacting

Clause 4 Sar. P. C. J. 741. so as to favour the Bombay view.

5. Now, taking it then that the Munsif had no jurisdiction to entertain the suit, the defendant?, not taking an objection, in the first instance, cannot confer on the District Munsif jurisdiction to deal with any question arising in the suit except of course the question of jurisdiction. See *Ledgard v. Bull* 4 Sar. P. C. J. 741 . Order II, Rule 2, no doubt, enables a plaintiff to relinquish any portion of his claim in order to bring a suit within the jurisdiction of a particular Court. That, of course, means that in bringing the suit, he can in his plaint relinquish any portion of his claim based upon the same cause of action in order to bring it within the jurisdiction of a particular Court. But if a suit has been filed in a Court having no jurisdiction to grant the reliefs prayed for, I think the provision in Order VII, Rule 10, of the Code at once becomes applicable. That provision corresponds to old Section 57, In the old Section, it was enacted "the plaint shall be returned to be presented to the proper Court in the following cases," and then follows the enumeration of cases where the Court had no jurisdiction to entertain the suit. Order VII, Rule 10 enacts the same provisions more tersely thus: "The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted." Of course, it follows that all proceedings which took place in the suit before such return are of no effect.

6. Now, as I said, this suit should have been instituted in the proper District Court or Subordinate Judge's Court and should not have been instituted in the Munsif's Court. Hence the only course open to the Munsif was to have returned the plaint to be presented to the proper Court. I think whether a second appeal lies or not, whether the civil revision petition is entertainable on the grounds set forth in it or not, the question of jurisdiction having been brought to the notice of this Court, the proper course is to do what the District Munsif ought to have done, namely, to order the return of the plaint to be presented to the proper Court,

7. On the question what is a consent decree within the meaning of Clause 25 Ind. Cas. 56. of Section 96 of the new Civil Procedure Code (that clause containing a provision not found in the old Code), *Tyabji, J.*, and myself expressed a certain opinion in *Ayyagiri Veerasalingam v. Kovvuri Basivireddi* 25 Ind. Cas. 56 . which was approved in *Thenal Ammal v. Sokkammal* 41 Ind. Cas. 429., Our opinion was that a consent decree was a decree to the passing of which both sides consented in a communication or communications made by both sides to the Court, and that a decree passed in accordance with the terms to which the parties might have consented outside the Court but to the passing of which decree, one side withheld and would not give its consent was not a consent decree. The soundness of that opinion was hotly (sic) criticised at the Bar and my learned brother expressed strong dissent therefrom at the arguments. There seems to be much to be said in favour of that view. Having, however, regard to the fact that in Order XLIII, Rule 1 (corresponding to old Section 538) a new provision has been inserted under Clause (m), allowing an appeal from an

order under Rule 3 of Order XXIII, recording or refusing to record an agreement of compromise, I admit that there is great force in the contention that Order XII, Rule 3, Order XLIII, Rule 1, Clause (m) and Section 96, Clause 25 Ind. Cas. 56 . should be read together, and that, so reading them together, the only appeal intended by the legislature was an appeal against the recording or refusing to record" the agreement alleged to have been made between the parties about the passing of a particular decree, and that a decree passed on. the finding arrived at in favour of such agreement is also intended in the expression, decree passed with the consent of the parties" in Section 96, Clause 25 Ind. Cas. 56. Though, in practice, there has been a distinction usually made between what is called a decree based on a compromise agreement and a decree passed with consent, I am (on further consideration) not very much inclined to stand by the opinion Tyabji, J, and myself expressed in Ayyagari Veerasalingam v. Kovvuri Basivireddi 25 Ind. Cas. 56 . as I am as much (if I may say so with respect) for curtailing unnecessary and repeated appeals as my learned brother. It is, however, not essential to express a final opinion on that question for deciding this case.

8. In the view I have above taken of the proper course to be followed by this Court where a lower Court has no jurisdiction to entertain a suit, all the proceedings passed by the lower Court during the course of the suit ought to be set aside and the only order which ought to have been passed by that Court, viz., in return of the plaint to be presented to the proper Court ought to be passed now. I would accordingly pass orders to that effect. As my learned brother takes a different view, the second appeal and Civil revision petition will be dismissed, the former with costs in plaintiff's favour.

Coutts Trotter, J.

9. I regret that I cannot agree on all the points on which my learned brother has given judgment, though I do agree on some of them.

10. First with regard to the appeal. I am of opinion that no appeal lies under the Code and of course in that opinion I am in complete with the two cases referred to. The matter is of some importance, and my view is that Courts ought not to encourage multiplicity of appeals where the Code has indicated that they should come to a stop. What happened in this case was that the defendant in this suit was alleged to have given full authority to his Vakils to arrange the settlement of the claim against him by the payment of a lump sum of money in lieu of the moneys and paddy claimed. The Vakils met and agreed on a figure which was endorsed on the pleadings and knowing the kind of person he had to deal with, the defendant's Vakils got the defendant to sign the paper himself. When it came to the passing of a decree, the defendant began to renege from the compromise he had entered into and made all sorts of allegations which have been entirely disbelieved by both the Courts below. An enquiry was held by the District Munsif as to whether or no it was a fact that the defendant had consented to judgment being entered up against him, and as a result of that enquiry, he found that he had consented. Now, ordinarily that would have been

done by the machinery of Order XXIII, Rule 3. An application would have been made to record the compromise and the Court would have made an order recording the compromise and would have gone on to pass a decree in accordance with that and from that order there is an appeal given by Order XLIII, Rule 1 (m). So that whatever the result of the suit,---I will come to that presently---from the order according the compromise there would have been an appeal, and if the Appellate Court came to the conclusion that the compromise ought not to have been recorded, it would, I suppose, have ordered the District Munsif to retry the suit.

11. But with regard to the suit itself, in my opinion, it is regulated by Section 98 of M. L. T. 125. which says that no appeal shall lie from a decree passed by the Court with the consent of the parties." I want to follow the reason of the thing and I do not agree with the two decisions that have been cited that a decree passed with consent means and only means a decree passed with the consent of the parties expressed at the moment the decree is passed. It seems to me that the reason of the thing is this: there are only two ways in which a decree can come into being and there is no third way; one is by allowing the dispute to be determined by the Court and the other is--- you may call it a compromise or consent or what you will---not by the determination of the Court but by reason of an agreement between the parties. That seems to me to be the essence of a consent decree and I cannot conceive of anything that is neither a decree by the determination of the Court nor by consent of parties. It seems to me that every decree must be one or other of those things and it seems to me that the policy of the Code is that all consent decrees when they have been once established to be by consent should be unappealable. The consideration for consent or compromise decrees is that both sides give up the right of appeal for ever and the Code, I think, includes cases of this sort when it says that these consent decrees should not be appealable. The answer to this, as I have pointed out already by implication, is the answer pointed out in *Thenal Ammal v. Sakkammal* (4), namely, that from the question of consent being proper or not there ought to be an appeal, that is, although you cannot appeal from the decree as a decree when it is a consent decree, you can appeal against the determination that it is a consent decree. Therefore, with regard to the appeal, my opinion is that no appeal lies and I do not think it lay to the lower Appellate Court either.

12. Then I come to the civil revision petition and that I think is more difficult matter. The defendant is invoking the aid of this Court in revision to say that there was no jurisdiction in the District Munsif's Court to try the suit. The suit is by three trustees of a temple against a co trustee asking for a variety of reliefs, and I think it may be said that the frame of the suit was very much in suggest that it was such a suit as would ordinarily be brought u/s 92, Civil Procedure Code. Accounts were asked for and there was in the plaint a prayer for payment of a certain lump sum of money and a certain defined quantity of paddy. Now, what the defendant says is that the suit being of the kind contemplated by Section 92, Civil Procedure Code, and the sanction of the Advocate General not

having been obtained, it was incompetent for the plaintiffs to bring the suit without the sanction, and moreover, in a District Munsif's Court. I agree that the language of Section 92 must not necessarily be held to enact the old law as laid down in *Nellaiyappa Pillai v. Thangama Nachiyar* (1) and other cases; and that the preliminaries required by Section 92 of the Code must be complied with. There are two answers put forward; one is a very curious one and it is this. The civil revision petition is against an order, not against a decree, but it is to revise an order whereby the District Munsif refused to set aside the decree on the ground that it had not been obtained by a genuine consent, the defendant having been deceived by his own Vakil. At any rate, the petitioner asks that his signature should be cancelled. What Mr. Krishnaswamy Aiyangar says is this: this has nothing to do with jurisdiction at all, simply to ask the Munsif to cancel the signature. I, at one time, was rather inclined to think that if there was no jurisdiction to try the case, there was no jurisdiction to try a point which can only be regarded as auxiliary to the case, it seemed to me that if he had no jurisdiction to try the suit, he had also no jurisdiction with regard to the petition. But I think there is another answer and it is one which I am prepared to adopt: in the plaint, as I have said, there are two pleas and there is a distinct claim for moneys and paddy; and with regard to that, the action was settled by the defendant agreeing to pay no much money and the decree is for that and for none of the other reliefs. When the plaintiff consents to a decree in which one of the reliefs asked for is granted, it seems to me the only possible inference is that the rest of the reliefs he abandons.

13. That brings us to the question on which unfortunately I have to differ from my learned brother, as to whether it is open to the plaintiffs to clothe the Court with jurisdiction by abandoning all claims except a claim for a specified sum of money and paddy which would be a cause of action which the Munsif was clearly competent to try. The question is whether Order II, Rule 2 permits that course to be taken. I cannot see what there is in Order II, Rule 2 which should hinder any person in abandoning any portion of his claim. It [says "the plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court." It seems to me that when the plaintiff abandons all his claims except his claim for money and paddy and states the compromise as to the to be recorded and consents to judgment, he may be taken to have abandoned all parts of his claim which were obnoxious to the provisions of Section 92 of the Code. I am therefore, prepared to hold that by that abandonment which I hold to have taken place, the District Munsif was invested with jurisdiction and, therefore, there is nothing we can touch in revision. I may add that in the last resort I would be prepared to say that this is not a case in which even if there was a lack of jurisdiction I should exercise the powers of this Court which are purely discretionary in this matter. It seems to me that this is a fraudulent and vexatious defence and that the defendant ought not to be allowed to pursue his dishonest attitude any longer.