

**(2001) 02 BOM CK 0113**

**In the Bombay High Court**

**Case No :** Civil Revision Application No. 1405 of 2000

Smt. Manharbala Jeram Damodar and Another

APPELLANT

Vs

Prabhudas Damodar Kotecha and Others

RESPONDENT

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**Date of Decision :** 01-02-2001

**Acts Referred:**

Bombay Civil Courts Act, 1869 — Section 16, 23, 37  
Civil Procedure Code, 1908 (CPC) — Section 2(4), 24  
Constitution of India, 1950 — Article 233, 234, 235, 236  
Presidency Small Cause Courts Act, 1882 — Section 10, 7

**Citation :** (2001) 3 ALLMR 230 : (2001) 3 BomCR 76 : (2001) 2 BOMLR 533 :  
(2001) 2 MhLj 477

**Hon'ble Judges :** F.I. Rebello, J

**Bench :** Single Bench

**Advocate :** Mr. A.M. Sakharkande and Mrs. S.S. Wagh, for the Appellant; Mr. A.Y. Sakhare, Mr. Jayadeo Thakkar and Mr. Jawahar Thakkar, for the Respondent

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## **Judgement**

P.I. Rebello, J.—Admit. By consent of the parties heard forthwith.

2. The petitioners herein have approached this Court to impugn the decision of the Principal Judge of the Small Causes Court. Bombay, dated 24th November, 2000 whereby on a notice taken out by the respondents, the suit was transferred from Court Room No. 4 to Court Room No. 2 on the ground of partiality of one of the Judges constituting the Appellate Bench of that Court. The notice was taken out on behalf of the respondents pleading bias on the part of one of the Judges constituting the Bench. In fact it seems earlier another notice had been taken out for transferring the Appeal from Court Room No. 3 to any other Court for the same reason, as the very Judge against whom allegations of bias are raised was also a part of the Bench presiding over Court Room No. 3. On behalf of the petitioners learned Counsel states that another Revision Application has been preferred against the said order which is pending. Be that as it may, that issue will not stand in the way of deciding the matter. The question involved in the present Revision Application is "Whether the Principal Judge of the Small Causes

Court has powers to transfer a matter allotted to another Judge of the same Court on an application by a party contending bias on the part of the Judge."

3. Considering these aspects in my opinion the facts need not be gone into as the issue which will arise is whether the Principal Judge has powers under the provisions of the Presidency Small Cause Courts Act, 1882 or whether such a power is conferred on the District Court and/or on the High Court u/s 24 of the Code of Civil Procedure.

4. On behalf of the petitioners it has been principally contended that the power conferred on the Principal Judge will be subject to the provisions of Section 24 of the Code of Civil Procedure. The power conferred on the Principal Judge is in the nature of administrative power which permits the Judge to allot or distribute work amongst the various Judges constituting the Small Causes Court. Section 10 of the Presidency Small Cause Courts Act, 1882 reads as under :-

"Subject to such rules, the Chief Judge may, from time to time, make such arrangements as he thinks fit for the distribution of the business of the Court among the various Judges thereof."

5. On behalf of the respondents it is however contended that Section 10 must encompass within itself all powers in the Principal Judge for better administrative work of the Small Causes Court. It is contended that it will include the power to transfer from one Court to another Court, even where there is a Judge available and is seized of the matter. My attention is invited to the provisions of Part VI Chapter VI of the Constitution of India and more specifically to Articles 233, 234, 235 and 236 of the Constitution. It is pointed out that under Article 236 expression District Judge includes a Chief Judge of a Small Causes Court, but does not include the other Judges of the Court. Article 236(A) at the outset it may be noted is an inclusive provision. The said inclusion is in the matter of the High Court exercising control over the subordinate Courts. The expression in Article 235 is District Courts and Courts subordinate thereto, whereas Article 234 includes the definition appointment of persons other than District Judge to the Judicial service of a State. What this means is Insofar as Chapter VI is concerned the appointment of persons other than District Judges would be covered by Article 234 of the Constitution, whereas appointment of District Judges would be covered by Article 233. Articles 234 and 236, therefore, would be irrelevant for the purpose of discussing the Issue in controversy before us. It may be pointed out that by referring to the provisions of the Constitution, it was sought to be pointed out that the Principal Judge would be a District Judge. The extended meaning, is insofar as the provisions of Part VI of Chapter VI for the purpose of administrative control by the High Court over subordinate Courts and District Courts. What Is in issue in the present Revision Application is the power of transfer of work amongst the Judges of the Small Causes Court. That chapter of the Constitution does not deal-with the exercise of power of allocation and transfer of work amongst the various Judges.

6. Section 24 of the CPC confers a power on the High Court or the District Court to transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try and/or dispose of the same. Similarly, Section 24(b) is to withdraw any suit, appeal or other proceeding pending in any Court subordinate to it. In other words Section 24 provides for exercise of jurisdiction by the High Court or District Courts over Courts subordinate to the High Court or the District Court. By an amendment to Section 24, sub-section (3) has been Introduced by Act 104 of 1976, which provides for the purpose of that Section, the Courts of Additional and Assistant Judges shall be deemed to be subordinate to District Courts. In other words by a deeming fiction all additional and Assistant District Judges are deemed to be subordinate to the District Court for the purpose of exercise of power u/s 24, which otherwise they were not. The District Court under sub-section 2(4) of the Code of Civil Procedure, is defined to mean "the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court." A reading of Section 2(4) of the C.P.C. indicates that the District Court is the Principal Civil Court of original jurisdiction and insofar as the High Court conferred with ordinary original civil jurisdiction the limits of the High Court exercising such ordinary original civil jurisdiction. We may also note some provisions of the Bombay Civil Courts Act, 1969. Section 16 reads as under :-

"Original Jurisdiction of Additional District Judge.- The District Judge may refer to any Additional District Judge subordinate to him any original suits and proceedings of a civil nature, applications or reference under special Acts and miscellaneous applications.

The Additional District Judge shall have jurisdiction to try such suits and to dispose of such applications or references.

Where the Additional District Judge's decrees and orders in such cases are appealable, the appeal shall lie to the District Judge or to the High Court according as the amount or value of the subject-matter does not exceed or exceeds two lakh rupees."

Section 23 reads as under :-

"Situation of Subordinate Courts.- The Civil Judges shall hold their Courts at such place or places as the State Government may from time to time appoint within the local limits of their respective jurisdictions :

Provided that, for special reasons it shall be lawful for the State Government to order that a Civil Judge shall hold his Court at a place outside the local limits of his jurisdiction.

Wherever more than one such place is appointed, the District Judge shall, subject to the control of the High Court, fix the days on which the Civil Judge shall hold his Court at each of such places, and the Civil Judge shall cause such

days to be duly notified throughout the local limits of his jurisdiction.

The same person may be the Judge or more than one subordinate Court and may dispose of the civil business of any one of his Courts at the headquarters of any other of his Courts; and in such-cases the District Judge shall, subject to the control of the High Court, prescribe rules for regulating the time during which the Civil Judge shall sit in each Court."

Section 37 reads as under :-

"In the event of the death, suspension or temporary absence of any Civil Judge, the District Judge may empower the Judge of any subordinate Court of the same district to perform the duties of the Judge of the vacated subordinate Court, either at the place of such Court or his own Court; but in every such case the registers and records of the two Courts shall be kept distinct."

7. For the purpose of resolving the controversy, we may now deal with the judgments cited at the Bar. It may at the outset be noted that on behalf of the Respondents their main argument is based on the analogy of the power of the Chief Justice of the High Court exercising power of distribution of work amongst Judges of the High Court.

8. In that context we may now examine the Judgments cited at the Bar in furtherance of the contentions.

In the case of *Dhobi Shankerji Samalji v. Patel Vrajlal Bapalal*,, a similar issue as before us was in issue before the then learned Chief Justice of this Court. In that case the First Class Subordinate Judge of Ahmedabad directed the transfer of a suit to the Court of the Second Joint Second Class Subordinate Judge from that of ".he Third Joint Second Class Subordinate Judge. It was contended that the said order was without jurisdiction being violative of Section 24 of the Code of Civil Procedure. The learned Chief Justice observed as under :-

"In my opinion there is a clear distinction between orders of transfer and administrative orders allocating business lo Courts of particular Judges. When once a Judge has taken cognizance of a suit, it seems to me that any order removing the suit from his file is an order of transfer. It may be that no serious inconvenience is occasioned by such an order if the Judge has not commenced to hear the evidence; but that is not the point. If the order is an order for transfer, it can only be made by the District Judge or the High Court, and in my opinion, once a Judge has taken cognizance of a suit, any order removing the suit from his file is an order of transfer, and cannot be regarded as a mere administrative redistribution of business."

In *Ajam Ibram Modan v. Bai Hava Bibi and Anr.*,, the First Class Subordinate Judge, Surat, withdrew a suit and transferred it to the Court of Extra Joint Second Class Subordinate Judge. The Joint First Class Subordinate Judge who had framed issues had ordered a commission before the matter was transferred. Judgment was thereafter pronounced. An appeal was preferred against the same.

The District Judge was of the opinion that the order of transfer was without jurisdiction as the Court from which the suit was withdrawn had already taken cognisance of the case. The Appellate Court held that the judgment was a nullity and quashed the said judgment and ordered retrial by the Joint First Class Subordinate Judge. A Second Appeal was preferred against that order as also by way of abundant caution a Civil Revision Application. The issue before the Court was whether the Appellate Court was right in holding that the judgment was a nullity. This is how this Court answered the issue as under :-

"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 clause (5) of Section 23. If, as has been held in 37 Bom. L. R. 255, those powers are controlled by the provisions of Section 24 of the P. C., and are necessarily limited to administrative orders allocating business, then, undoubtedly, the order of transfer purporting to have been made under cl. (5) of Section 23 of the Bombay Civil Courts Act, after another Subordinate Judge had taken cognizance of the suit, was incompetent."

On the facts of that case, the judgment was, however, reversed on the ground that there was waiver as the respondent before the Court had participated in the proceedings. We then have the judgment of a Division Bench of this Court in the case of L. S. Sherlekar u. D. L. Agarwal,. It may be noted that the Division Bench of this Court in the said judgment has noted that under the Bombay Civil Courts Act there is only one Court of the Civil Judge and all other Judges are attached to that Court to assist the Civil Judge's Court. The Division Bench then observed that no doubt once an order assigning a suit is made by the Civil Judge himself, the Civil Judge has no right to withdraw that suit from the file- The Division Bench however observed that the power conferred u/s 37 of the Civil Courts Act, on the District Court was distinct from the power conferred u/s 24 of the Code of Civil Procedure.

9. We may now look on the judgments relied upon on behalf of the respondents. In the case of Niranjana Singh v. State of Rajasthan and Ors.,. Centre of Indian Trade Unions U. P. State Committee, Kanpur v. The acting Chief Justice, High Court, Allahabad and Ors., Narasimhasetty and Ors. v. Padmasetty, and the judgment of the Apex Court in the case of State of Rajasthan v. Prakash Chand & Ors.,. All these judgments were considering the power of the Chief Justice under the Constitution of India allotting work to the other Judges of the Court in terms of the Rules framed. In that context the Apex Court in State of Rajasthan (supra) held that even if a matter was before one learned Single Judge in exercise of power of allocation of work conferred on the learned Chief Justice it was permissible for the learned Chief Justice to transfer a matter pending before a Bench presided over by a learned Judge to another Bench.

We are really not concerned with those cases as what is in issue before us is the exercise of power u/s 24 of the C.P.C. and the effect of Section 10 of the Presidency Small Cause Courts Act, 1882.

10. From a reading of the provisions of the Code of Civil Procedure, the I Presidency Small Cause Courts Act, and the Civil Courts Act it is clear that what Section 10 of the Small Causes Court Act contemplates is a power in the Chief Judge to allocate work amongst other Judges of the Court. That is purely an administrative power conferred on the Chief Judge. That will include the power to transfer the matter if a Judge is not available temporarily or on account of sickness and urgent orders are to be passed thereon. Such a power must necessarily be traced in the larger interest of justice. However, the other Judges of the Small Causes Court are not Judges subordinate to the Chief Judge. Section 7 of the Presidency Small Cause Courts Act contemplates that there shall be appointed from time to time a Chief Judge of the Small Cause Court and as many other Judges as the State Government thinks fit. The exercise of control, their posting, promotion would be covered by Chapter VI of Part VI of the Constitution of India and is conferred on the High Court. Therefore, a harmonious construction would have to be given both to the C.P.C. as also the provisions of the Presidency Small Cause Courts Act. 1882. If so read, the Small Causes Court is a Court subordinate to the District Court and (he High Court. The power to transfer, therefore, must be of the District Court and the High Court. If the other argument is accepted that it is the Chief Judge of the Small Causes Court who has power to transfer when the matter is allocated to a Judge, who is seized of the matter, it would render Section 24 otiose, insofar as the Court of Small Causes is concerned. It is a fundamental and/or cardinal principle of interpretation that Courts give intent to the intention of the legislation and not frustrate legislative provisions. In the instant case to my mind the Section is clear, that Section 10 would have to be read In consonance with the provisions of Section 24 of the C.P.C. as u/s 6 of the Small Causes Courts Ac.t the Small Causes Court is a Court subject to the superintendence of the High Court of Judicature.

Having said so, I am clearly of the opinion and bearing in mind the Judgments of this Court in the case of Dhobi Shankerji Samalji (supra) and Ajam Ibram Modan (supra) that Section 10 of the Presidency Small Cause Courts Act. 1882 does not confer a power on the Chief Judge to transfer matters allocated to another Judge of the same Court and who is seized of the matter, otherwise than as an administrative measure or when there is a vacancy in the Court to which the matter was assigned. The power u/s 10 is purely administrative, to allocate the work amongst various Judges, to assign work to another Judge in the case of temporary vacancy of the Judge to whom the work is assigned and/or on a request of a Judge of the same Court to the Principal Judge for some reason to transfer the work from his Court to another Judge and in such like matters. Such a power could never have been exercised when a party moves the Principal Judge, to contend that the matter must be transferred from a Judge seized with the matter on account of bias or impartiality or such like other matters. In such cases the power could only be exercised in terms of Section 24 of the C.P.C.

11. It Is true that the earlier order was not challenged when the second order

was passed. However, learned Counsel points out that even against the first order a Revision Application has been preferred. Be that as it may, the mere failure on the first occasion, not to challenge the order would not amount to waiver insofar as the present order is concerned. In the Instant case the party immediately after the order was passed has challenged the said order. In these circumstances I am of the considered opinion that the order of transfer being without Jurisdiction is liable to be quashed and set aside.

12. In the fight of that Civil Revision Application made absolute in terms of prayer clause (a). In the circumstances there shall be no order as to costs.