

REVISIONAL CIVIL

Before Eric Weston, C.J.

MURARI LAL,—Petitioner,

versus

MADAN LAL,—(Plaintiff) 2. FIRM DES RAJ-

SURINDER MOHAN,—Defendants-Respondents

Civil Revision No. 632 of 1950

1952

April 22nd

Code of Civil Procedure (V of 1908)—Sections 11, 21 and 115—Resjudicata—wrong decision on—Whether open to Revision—Effect of section 21 on Court's power under section 115, Civil Procedure Code—Discretion not to interfere in Revision when not to be exercised.

Held :—

- (i) That a wrong decision on question of *Resjudicata* is revisable under section 115 Civil Procedure Code.

Joy Chand-Lal Bahu v. Kamalaksha (1), followed.

- (ii) That the "Consequent failure of Justice" in section 21, Civil Procedure Code can be regarded only in the light of the conclusion of the suit. When a party objecting to jurisdiction has come at the earliest opportunity and before any decision on the merits of the suit has been made, such party, if he succeeds in showing want of jurisdiction, is entitled as of right that his objection be upheld ;
- (iii) That the procedure is the instrument and not the master of justice, nevertheless it is essential that procedure must be followed. The discretion under section 115, Civil Procedure Code must be exercised against a person who has neglected or refused to take his proper remedy. When he has allowed a decision to become final he cannot be heard to say that it should not be final.

(1) 76 I. A. 131 at page 142-A. I. R. 1949 P. C. 239.

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Petition under section 115, Civil Procedure Code for revision of the order of Shri Sewa Singh, Sub-Judge 1st Class, Fazilka, dated the 23rd October, 1950, holding that the plaintiff is not estopped from filing this suit in this Court and deciding the issue against the defendant.

ROOP CHAND, for Petitioner.

SHAMAIR CHAND, for Respondents.

JUDGMENT

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ERIC WESTON, C. J. The facts giving rise to this application are shortly these. On the 29th of March 1949 a suit was filed by one Madan Lal in the Court of the Subordinate Judge first class, Ferozepore against a firm Des Raj-Surinder Mohan of Abohar Mandi which is in the Fazilka Tehsil of the Ferozepore District. The suit was against this firm through two of its partners Des Raj and Gian Chand. There were other defendants shown, namely Murari Lal Surinder Mohan, Mulk Raj, all three of Abohar Mandi and partners of the firm Des Raj-Surinder Mohan, one Devi Dayal of Jait on Patiala, one Suraj Bhan of Hapur in Uttar Pradesh and lastly one Babu Ram of Bhiwani in the Hissar District. The suit was on forward contracts said to have been entered into by the plaintiff and his partners, who were defendants, Devi Dayal, Suraj Bhan and Babu Ram, at a time when plaintiff and his partners were resident in the Montgomery District prior to partition. Although on the face of the plaint the defendant firm and its partners as named were resident in the Ferozepore District the plaintiff for some reason or no reason claimed jurisdiction of the Ferozepore Courts under the Displaced Persons Ordinance No. XVIII of 1948 on the ground that the plaintiff was a displaced person and was resident in the Ferozepore District.

The contesting defendants, namely those other than the plaintiff's former partners, disputed the jurisdiction of the Ferozepore Courts on the ground that the plaintiff was not a resident in the Ferozepore District and this question of the plaintiff's residence

* was gone into and tried, and the Subordinate Judge came to the conclusion that the plaintiff was not a resident anywhere in the Ferozepore District. He therefore held that he had no jurisdiction and returned the plaint for presentation to the proper Court. The plaintiff did not file an appeal against this order as he was entitled to do under Order XLIII, rule 1 (a) of the Code of Civil Procedure. The order returning the plaint was made on the 10th of January 1950 and on the 12th of January the plaintiff presented the plaint in the Court of the Subordinate Judge first class, Fazilka. Notice was issued to the defendants and the contesting defendants took the objection that the question of jurisdiction of the Ferozepore Courts had been decided by the Subordinate Judge first class, Ferozepore, and was concluded. The Subordinate Judge, Fazilka, framed two issues—

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1. Has not this Court jurisdiction to try this suit ?
2. Is the plaintiff estopped by the judgment of Shri K. S. Ghambir, Sub-Judge, Ferozepore, dated the 10th January 1950 from filing this suit in this Court ?

He held in the affirmative on the first issue and in the negative on the second, considering that "jurisdiction cannot be taken away by the casual remarks of particular Court which were not necessary for the purpose". The present revision application against the dismissal of the objection as to jurisdiction has been filed by Murari Lal, one of the partners of the defendant firm.

The jurisdiction of Subordinate Judges is laid down in section 27 of the Punjab Courts Act which reads as follows :—

- " 27. (1) The local limits of the jurisdiction of a Subordinate Judge shall be such as the High Court may define.

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(2) When the High Court posts a Subordinate Judge to a district, the local limits of the district shall, in the absence of any direction to the contrary, be deemed to be the local limits of his jurisdiction."

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Learned Advocate for the plaintiff has been unable to show an order limiting the jurisdiction of the first class Subordinate Judge, Ferozepore, who passed the order of the 10th of January 1950 returning the plaint. It must be assumed therefore that the jurisdiction of this Judge extended to the whole of the Ferozepore District. His decision that he had not jurisdiction to entertain the suit was a decision that no Subordinate Judge in the Ferozepore District had such jurisdiction. His decision, whether right or wrong, and no doubt it was wrong, cannot be dismissed as "casual remarks". The plaintiff has his remedy by appeal, which appeal would have been to the High Court on the valuation as given of the suit. The plaintiff did not choose to take this remedy and the decision as to jurisdiction became *res judicata* just as much as any other decision would be. The plea of *res judicata* therefore was one which the Subordinate Judge, Fazilka, was bound to consider. It is urged, however, that his refusal to accept this plea, however wrong it may be, is not a matter which is open to revision of the High Court.

I do not think this can be accepted. Section 11 of the Code of Civil Procedure lays down that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties litigating under the same title. Even if on grounds that statutory prohibitions such as those of section 11 of the Code and section 3 of the Limitation Act do not amount to the deprivation of jurisdiction but are only prohibitions to the exercise of it, it seems to me that action by a Court directly contrary to the prohibitions of section 11 would be action revisable under clause (c) of section 115 of the Code. The matter, however, is concluded by the decision of the

* Privy Council in *Joy Chand Lal Babu v. Kamalaksha* (1) where at page 142 it was said—

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"There have been a very large number of decisions of Indian High Courts on section 115, to many of which their Lordships have been referred. Some of such decisions prompt the observation that High Courts have not always appreciated that although error in a decision of a subordinate court does not by itself involve that the subordinate court has acted illegally or with material irregularity so as to justify interference in revision under sub-section (c), nevertheless, if the erroneous decision results in the subordinate court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested a case for revision arises under sub-section (a) or sub-section (b), and sub-section (c) can be ignored. The cases of *Babu Ram v. Munna Lal* (2) and *Hari Bhikaji v. Naro Vishvanath* (3) may be mentioned as cases in which a subordinate court by its own erroneous decision (erroneous, that is, in the view of the High Court), in the one case on a point of limitation and in the other on a question of *res judicata*, invested itself with a jurisdiction which in law it did not possess, and the High Court held, wrongly their Lordships think, that it had no power to interfere in revision to prevent such a result."

It is urged on behalf of the plaintiff that in this matter section 11 has to be read with section 21 of the Code which provides that no objection as to the place of suing shall be allowed by any appellate or revisional Court unless there has been a consequent failure of justice. It seems to me that the consequent failure of

(1) 76 I. A. 131
(2) I.L.R. (1927) 49 All. 454
(3) I. L. R. (1885) 9 Bom. 432

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justice can be regarded only in the light of the conclusion of the suit. When a party objecting to jurisdiction has come at the earliest opportunity and before any decision on the merits of the suit has been made, such party, if he succeeds in showing want of jurisdiction, is entitled as of right that his objection be upheld.

Lastly, it is urged that the power of interference under section 115 of the Code is discretionary and should not be exercised to deprive a Court of jurisdiction which it obviously has. While procedure may be accepted to be the instrument rather than the master of justice, nevertheless it is essential that procedure should be followed. In matters of procedure also hard cases make bad law. It seems to me that this matter is not to be looked at from the point of view whether the decision of the Ferozepore Court was right. Once the plaintiff neglected to take the remedy provided for him against that decision, that decision became final just as much as any other unchallenged decision will become final, and it is impossible to accept that this decision can be ignored if on examination it is found not to have been justified. It seems to me that in cases such as this the discretion under section 115 must be exercised against a person who has neglected or refused to take his proper remedies. When he has allowed a decision to become final he cannot be heard to say that it should not be final. I think therefore that I must interfere in this case and hold that on the facts as they existed at the time the plaint was presented in the Fazilka Court, which facts admittedly were identical with those existing at the time the plaint was presented in the Ferozepore Court, the question that no Court in the Ferozepore District had jurisdiction is concluded by the decision of the Subordinate Judge first class, Ferozepore, and the Subordinate Judge, Fazilka, had no jurisdiction to entertain the plaint. I must therefore make the rule absolute in this matter. In the circumstances the parties will bear their own costs.