Syed Ashfaq Husain Sajjad Hussain Vs Sant Ram and Another

Court: Allahabad High Court (Lucknow Bench)

Date of Decision: May 4, 1964

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 115, 24, 96
Provincial Small Cause Courts Act, 1887 â€" Section 35

Citation: AIR 1964 All 420

Hon'ble Judges: G.D. Sahgal, J

Bench: Single Bench

Advocate: Kalbe Mustafa, for the Appellant; Mohd. Husain and M.A. Haider, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

G.D. Sahgal, J.
A suit was filed by the applicant in the Court of the Munsif. Rae Bareli, on the 30th of May, 1959 for recovery of Rs.

132-50 NP. against opposite party No. 1 and one Ram Chandra whose legal representatives are opposite parties Nos. 2/1 to 2/3 in this revision.

As the suit was a money suit and was valued at Rs. 132.50 nP. and the learned Munsif Shri M. P. Tripathi at that time was exercising Small .Cause

Court powers, it was registered before him as a Small Cause Court suit and would have been tried by him as such. Shri M P. Tripathi, however,

was transferred and he handed over charge of his office in the afternoon of 8th June, 1959 before the suit could be decided and the post remained

vacant for sometime.

It was only on 13th July, 1959 that Shri R. B. Srivastava (sic) did not exercise Small Cause Court powers. A number of Small Cause Court cases

however, were on the file of the Munsif, Rae Bareli when Shri R. :B. Srivastava took over charge. As appears from an order of the District Judge

dated 9th December, 1959, he found that thirteen cases out of them had even been decided by him by that date and a number of cases were still

pending. As Shri R. B. Srivastava had no Small Cause Court powers he was of opinion that in view of the Full Bench decision of this Court,

namely, Bhagwati Pande Vs. Badri Pande and Another , those cases should be tried by Shri R.B. Srivastava as regular suits and he ordered

accordingly. The case out of which the present application in revision arises its one of those cases.

2. Shri R. B. Srivastava tried that suit as a regular suit and granted a decree in favour of the applicant. Sant Ram and Ram Chandra, the defendants

to the suit, made an appeal against that decree and that appeal was heard by the Civil Judge, Rae Bareli on 13th December, 1960. The appeal

was allowed and the suit dismissed. It is against that decision that this application in revision has been filed.

3. There are only two grounds that have been taken in the application in revision, namely, that the law having given finality to the decrees or orders

passed in all Small Cause Court cases, there was no right of appeal to go to higher Court and the appeal was not entertainable and secondly, as

the appeal was not entertainable, the decree passed by the learned civil Judge was wholly without jurisdiction and unsustainable in law.

4. It appears from a report submitted in this case by the District Judge, Rae Bareli on an order of this Court, that though Shri M.P. Tripathi in

whose Court the suit was tiled had Jurisdiction to try Small Cause Court cases and Shri R. B. Srivastava who came in his place did not have that

jurisdiction, during the period these two Courts were working, there was a Civil Judge at Rae Bareli who was vested with the powers to try Small

Cause Court cases. That Civil Judge exercised these powers upto a valuation of Rs. 500.

5. Sub-section (1) of Section 35 of the Provincial Small Cause Courts Act provides as follows :

Where a Court of Small Causes, or a Court invested with the jurisdiction of a Court of Small Causes, has from any cause ceased to have

jurisdiction with respect to any case, any proceeding in relation to the case, whether before or after decree which, if the Court had not ceased to

have jurisdiction, might have been had therein, may be had in the Court which, if the suit out of which the proceeding has arisen were about to be

instituted, would have jurisdiction to try the suit.

On the transfer of Shri M. P. Tripathi on the 8th June, 1959 the Court of the Munsif at Rae Bareli ceased to have jurisdiction with respect to Small

Cause Court cases on that date. However, there was another Court at Rae Bareli exercising Small Cause Court powers, namely, the Court of the

Civil Judge, Rae Bareli. Under Sub-section (1) of Section 35 of the Provincial Small Cause Courts Act, therefore, it was the Civil Judge exercising

Small Cause Court powers who ought to have dealt with the case after the transfer of Shri M. P. Tripathi, but this was not done. Had there been

no other Small Cause Court Judge having jurisdiction to try the cases pending in the Court of Shri Tripathi then the suit would have been

cognizable by the Court of the Munsif and in view of Sub-section (1) of Section 35 of the Provincial Small Cause Courts Act, the learned Munsif

could take charge of the case and proceed to decide it as a regular suit.

6. The learned District Judge, on inspection found that the suits of Small Causes were being tried by the Munsif as such though he had no

jurisdiction to try them. He, accordingly, ordered that they would be tried by him as regular civil suits. Obviously, it was a wrong direction given by

the learned District Judge. He ought to have paid attention to the provisions of Sub-section (1) of Section 35 of the Act and in view of that

provision he ought to have directed that the cases would be tried by the Civil Judge exercising Small Cause Court powers.

7. A similar situation arose in the district of Basti also when a Munsif exercising Small Cause Court powers was succeeded by another Munsif who

did not, exercise those powers as Munsif in Basti in that district. There was at that time a subordinate Judge at Basti who was vested with Small

Cause Court powers upto the pecuniary jurisdiction of Rs. 500/- and this local jurisdiction extended over Basti also. The Additional District Judge

of Basti, however, passed an order to the effect that the Small Cause Court cases pending in the Court of Munsif, Basti would be tried by the new

incumbent of the office as regular suits as he did not have Small Cause Court powers and he drew attention of the Munsif to the provisions of

Section 35 of the Provincial Small Cause Courts Act in accordance with which he directed that the cases shall be dealt with by him. In pursuance

of that direction the new Munsif took cognizance of the cases and tried them as regular suits.

It was held by a Full Bench of this Court in Bhagwati Pande Vs. Badri Pande and Another in those circumstances, that the direction given by the

District Judge to the new Munsif was not an order of transfer within the meaning of Section 24 of the CPC and Clause (4) of that section had no

application to the case and as on the date of the transfer of the Munsif, there was a subordinate Judge exercising jurisdiction as a Small Cause

Court Judge, the suit should, u/s 35 of the Provincial Small Cause Courts Act have gone to the file of that subordinate Judge, and the trial of the

suit by the new Munsif was without jurisdiction and therefore an appeal would lie from such a decision to the District Judge. In view of this Full

Bench, decision there remains no manner of doubt that the trial of the suit by the learned Munsif, Rae Bareli also was without jurisdiction.

8. A similar situation arose in Gonda and the matter came up before the Oudh Judicial Commissioner''s Court in AIR 1925 101 (Oudh) It was

held that a Munsif without Small Cause Court powers who succeeded Munsif having Small Cause Court jurisdiction, had no jurisdiction to try a

small cause suit as a regular suit if it had been instituted in the Court of the previous Munsif as a Small Cause Court suit, when at the time of the

transfer of the previous Munsif there was at Gonda a subordinate Judge who exercised Small Cause Court powers.

9. The case out of which this application in revision arises was, obviously decided by the Munsif, Rae Bareli, as a regular suit without jurisdiction.

Learned counsel for the applicant points out that no order of the District Judge or of any officer was necessary for the suit being transferred to the

Court of the Civil Judge, Rae Bareli exercising Small Cause Court jurisdiction on the transfer of Shri Tripathi. u/s 35(1) of the Provincial Small

Cause Courts Act the suit should have automatically come before the Civil Judge exercising Small Cause Court powers and must be deemed to

have been pending in that Court from the date of the transfer of Shri M. P. Tripathi even though the record might not have been bodily transferred

to that Court.

So when the learned District Judge passed an order for the trial of the case by the Munsif, he must be deemed to have passed that order u/s 24 of

the CPC and under Sub-section (4) of Section 24 the suit continued to remain a Small Cause Court suit and was tried by the learned Munsif as

such. There was, in these circumstances, no appeal and the decision in appeal by the learned Civil Judge is without jurisdiction. It will, however, be

seen that the order passed by the learned District Judge was to the effect that the case could be tried by the learned Munsif as a regular suit. He

never passed any order that the case would stand transferred to that Court. The order purported to be passed in pursuance of the Full Bench

decision Bhagwati Pande Vs. Badri Pande and Another referred to above as understood by the learned District Judge. It cannot, therefore, be

held that it was an order u/s 24 of the Code of Civil Procedure. This argument, therefore, has no force and should be rejected.

10. The case was thus tried by the Munsif under the orders of the District Judge who was under the impression that u/s 35(i) of the Provincial

Small Cause Courts Act, it ought to have been tried by him as a regular suit. It has been held in the Bhagwati Pande Vs. Badri Pande and Another

referred to above that when a case had been tried by a Munsif without jurisdiction, in these circumstances, an appeal does He. In that case also an

appeal was filed from the decision of the Munsif to the District Judge who transferred it to the Court of the subordinate Judge at Basti. The

subordinate Judge, however, refused to entertain the appeal on the ground that no appeal lay. It was, in these circumstances held that an appeal

did lie and the sub-ordinate Judge ought to have entertained the appeal.

But the appeal was not sent back to the subordinate Judge for hearing. By the time the appeal came up before the High Court, the subordinate

Judge had ceased to exercise jurisdiction as a Judge of Small Cause within the Jurisdiction of Munsif, Basti. In these circumstances, the case was

sent back to the Additional District Judge, Basti, directing him to cause the suit to be transferred to the Munsif, Basti or such other Court as may

have jurisdiction over the subject-matter. If the Additional District Judge did not himself have jurisdiction u/s 24 of the CPC to transfer the case, he

was to take orders as regards its transfer from the District Judge, Gorakhpur.

11. As to the question what orders should be passed in this revision, it was urged on behalf of the opposite parties that the plea as to jurisdiction

was not taken by the applicant either in the Court of the Munsif or before the Civil Judge who heard the appeal and as he never took that plea in

those two Courts, he should not be allowed to take that plea in this application in revision before this Court and the decree should not be

disturbed. For this contention he has relied on a number of authorities both of this Court and of other Courts, for making out the case that no

interference is called for at this stage, specially when the applicant himself had not cared to take the plea as to jurisdiction in the lower Courts even

though the Court of the Munsif might not have had jurisdiction to try the suit. On the other hand, the contention on behalf of the applicant is that the

plea of jurisdiction goes to the root of the matter and the decree passed by a Court having no jurisdiction is wholly void and it must be set aside.

12. Let us now examine this aspect of the case in the light of the authorities cited before me.

13. The first case referred to is Ram Lal v. Kabul Singh ILR 25 All 135. In that case one Kabul Singh brought a suit against Ram Lal and Shib Lal.

The case was tried as a Small Cause Court suit and no objection as to its not being a suit of the nature cognizable by a Court of Small Causes was

raised at the hearing. The suit was decreed. The defendant applied to the District Judge asking that a reference be made to the High Court under

the provisions of Section 646B of the CPC then in force which would be equivalent to Order 46, Rule 7 of the CPC now in force. The High Court

refused to interfere. That case, however, is clearly distinguishable from the present case. Section 648B of the CPC provided as Sub-rule (1) of

Rule 7 of Order 46 now provides :--

Where it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of

Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the District

Court may, and if required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the

subordinate Court with respect to the nature of the suit to be erroneous.

Now in order to attract the application of this provision of law, it is necessary that the subordinate Court must have erroneously held a suit to be

cognizable by it or not so cognizable. As in that case no plea as to jurisdiction was raised, there was no occasion for the Small Cause Court for

holding that the suit was cognizable by it and as there was no holding, naturally, the District Judge had DO jurisdiction to refer the matter to the

High Court. This was the main ground on which the reference was rejected. No doubt, the Division Bench which heard the case held that it was

not in favour of assisting parties to set aside decrees upon points which they did not raise before the Court which tried the matters in issue, and of

which they gave no notice to the opposite party.

It was also remarked that if the plea of want of jurisdiction had been taken it could have been met by the facts showing that the want alleged did

not exist. Here again, the present case is distinguishable. Had a plea been taken in this case in any Court that the suit was not cognizable by the

Munsif, there was no defence to such a plea and it could not be shown that the Munsif did have jurisdiction. This ground also, therefore, did not

apply and this ruling does not help the respondent.

14. We now come to the case of Sukh Lal v. Nannoon Prasad AIR 1918 All 355 (2). There also it was held that it is not open to the parties to

waive a question of jurisdiction but the High Court has discretion to interfere or not to interfere in a case in which jurisdiction has been waived. On

fact, however, it was held that the suit was no better than a suit for money had and received and the suit was cognizable by a Court of Small

Causes. The suit having been filed in the Court of Small Causes and jurisdiction of that Court having been challenged in the application in revision,

the remarks of the learned Judge who heard that revision to the effect that the High Court had discretion to interfere or not to interfere in a case in

which jurisdiction had been waived were therefore, only obiter.

15. The next case that was cited was AIR 1925 17 (Nagpur) . There a suit cognizable by a Court of Small Causes was tried by a Munsif under his

ordinary jurisdiction without objection to his jurisdiction though he had none and a decree was passed for the plaintiff. The District Judge, in appeal

reversed the decree and an application was filed before the Judicial Commissioner u/s 115 of the Code of Civil Procedure. The Judicial

Commissioner held that as the parties had had a full trial before the Munsif and in appeal to the District Judge without objection on the point of his

jurisdiction, no interference was called for and in this view the learned Judge purported to act on the authorities of the Allahabad and the Calcutta

High Courts.

The authority of this Court on which he relied was one referred to above, namely ILR 25 All 135. I have already pointed out that that case does

not help the respondents, and cannot be said to go against the applicant in view of the facts particular to that case. The Calcutta High Court case

which had been referred to by the learned Judge is reported in Suresh Chunder Maitra v. Kristo Rangini Dasi ILR 21 Cal 249. It was a second

appeal and it was dismissed primarily on the ground that no second appeal lay, the suit being of the nature cognizable by a Court of Small Causes.

It was also held that in view of the point of jurisdiction being not raised in the lower Courts they had never held that they had or had no jurisdiction

and in view of the provisions of Section 646B of the CPC then in force there was no point for interfering.

That was a case which though cognizable by a Court of Small Causes was filed in the Court of the Munsif as a regular case and even an appeal

was heard by the learned Civil Judge and before none of the two Courts any plea as to jurisdiction was taken by any of the parties. As I have

already pointed out that the case came up in second appeal before the Calcutta High Court and not in its revisional jurisdiction and as the second

appeal did not lie and the Hon''ble Judge did not think it fit to interfere suo motu in view of the provisions of Section 646-B of the CPC the appeal

was dismissed. That case also is, therefore distinguishable.

16. Two cases of the Madras High Court were considered by the learned Judicial Commissioner in the Nagpur, namely) Ramasamy Chettiar v. R.

G. Orr, ILR 26 Mad 176 and Kollipara Seetapathy v. K. Subbayya ILR 33 Mad 323. In both the cases the suit was instituted in the Court of the

Munsif on the original side though it ought to have been instituted on the Small Cause Court side, and in both these cases an appeal was filed

before the District Judge and it was transferred to the Court of a subordinate Judge. In both these cases there was a revision application against the

order of the subordinate Judge passed in appeal. The earlier of these two cases was heard by a Single Judge who was of opinion that it was a case

where it appeared that the Court of the First Instance, or of appeal, had exercised a jurisdiction not vested in it by law and the High Court was

bound to interfere under its revisional powers.

The subsequent case was referred to a Full Bench on an appeal in Letters Patent against the decision of a Single Judge in revision, and the Bench

came to the conclusion that where a Small Cause suit is tried by a Munsif on the original side and his decision is reversed on appeal, the High

Court is bound to set aside the appellate decree as having been passed without jurisdiction. The decision in the earlier Single Judge case, namely

ILR 26 Mad 176 was approved. These two decisions of the Madras High Court were not followed in this Nagpur case in preference to what the

learned Judge thought were the decisions of the Allahabad and the Calcutta High Courts. I have already distinguished the cases of the Allahabad

and Calcutta High Courts and with respect I am of opinion that the learned Judicial Commissioner does not seem to have gone deeply into the

matter in considering the authorities. The Madras High Court cases clearly support the contention put forward on behalf of the opposite parties and

go against the applicant.

17. A Bombay High Court case reported in Shankarbhai v. Somabhai I L R 25 Bom 417 was also considered, but the facts of that case are

distinguishable. There the subordinate Judge who tried the case under his ordinary jurisdiction was also invested with Small Cause Court

jurisdiction. No interference was made by the High Court on the ground that the character of the suit was not altered by the mode in which the

subordinate Judge had exercised his jurisdiction meaning thereby, though not stated in so many words, that the suit must be deemed to have been

tried by him as a Small Cause Court suit.

18. I would not, in the circumstances, place reliance on this Nagpur case.

19. We now come to another Nagpur case reported in AIR 1934 121 (Nagpur) In this case the suit was cognizable by a Court of Small Causes,

but it was filed in the Court of the subordinate Judge of the IInd Class on the regular side and was tried as such. There was an appeal and in that

appeal a reference was made by the District Judge under Order XLVI, Rule 7 of the CPC to the Judicial Commissioner. The Judicial

Commissioner did not accept the reference on the authorities of AIR 1925 17 (Nagpur) an authority of this Court does not help the respondents,

as to the other authority, I have held with respect to the learned Judicial Commissioner that he did not go deep into the matter and if he had done

so he would, probably, have not arrived at the conclusion at which he arrived in the case.

20. Altogether, therefore, learned counsel for the respondents has relied on two authorities of this Court, two of Nagpur High Court and in

connection with the two authorities of the Nagpur High Court, two authorities of the Madras High Court, one authority of the Calcutta High Court

and one authority of the Bombay High Court have also been considered. A consideration of all these authorities would show that while none of the

authorities except the Nagpur authorities which I have already explained above can be said to support the contention put forward on behalf of the

respondents, the two authorities of the Madras High Court specifically go against the contention of the respondents.

21. Learned counsel then placed reliance on Mula and Another Vs. Babu Ram and Another, for the proposition that there should be no

interference in this application in revision on the ground that the plea of jurisdiction was not taken in the lower Courts. In this case the plea as to

jurisdiction was raised for the first time in second appeal and the learned Judge before whom the case came up for hearing was of opinion that it

had been raised with the object of causing delay in the final decision of the suit. In such circumstances it was held that the Court had inherent

power to refuse to entertain such a plea if the Court feels that the appellant has by his conduct disentitled himself to raise it. This Single Judge

decision was given in teeth of the case of Shri Kishan Lal and Others Vs. Bijai Singh and Others, decided by a Division Bench of this Court.

The case was tried to be distinguished and it was pointed out that when nearly seven years after the original decision the appellant sought

permission to challenge the jurisdiction of a Court which decided the suit for causing another long delay in the final decision of the suit, the Court

was not powerless in the matter and had inherent power to refuse "to entertain the plea relating to jurisdiction if it feels that the appellant has

disentitled himself by his conduct. It was pointed out in reply to the contention that the Appellant"s conduct will not convert lack of jurisdiction into

its opposite that in revisional proceedings the Court is not bound to interfere even on proof of total lack on jurisdiction if it is of the opinion that it

would not be in the interests of justice to interfere.

Attention also was drawn to cases coming up before the Court under Article 226 of the Constitution where the Court has even refused to interfere

in cases in which the petitioner proved that the tribunal concerned had no jurisdiction because it felt that the petitioner had disentitled himself by his

conduct to any relief. This view, however was specifically disapproved by a Division Bench in Ram Chandra Vs. Muneshwar and Others, though

the learned Judge again pointed out in Maharaj Singh and Others Vs. Hukum Singh, that the case was distinguishable from other cases inasmuch as

in those cases no argument was addressed to the Court regarding the conduct of the appellant where he took an objection of this sort for the first

time in second appeal.

Thus while the two Division Bench cases, namely Shri Kishan Lal and Others Vs. Bijai Singh and Others, and Ram Chandra Vs. Muneshwar and

Others, specifically lay down that a plea as to jurisdiction can be raised for the first time to second appeal even though it might not have been

raised earlier, the Single Judge decision Mula and Another Vs. Babu Ram and Another, makes an exception and lays down that when the plea had

been raised with the object of causing delay in the final decision of the suit, the Court had inherent power to refuse to entertain such a plea if the

Court feels that the appellant had by his conduct disentitled him to raise it. This view has been subsequently insisted upon by the same Single Judge

in spite of the Division Bench case Ram Chandra Vs. Muneshwar and Others, in Maharaj Singh and Others Vs. Hukum Singh, though with

respect, I am of opinion that it is difficult to take that view in view of the two Division Bench rulings referred to above.

22. Those cases, however, related to second appeals and the conflict of jurisdiction was between a Civil Court and a Revenue Court. In the

present case, however, the conflict of jurisdiction is not between the Civil Court and the Revenue Court, for it is the Civil Court that did have

jurisdiction to try the suit; the only controversy being as to whether it was triable by the Court of Munsif or was triable by the Judge of the Court of

Small Causes. It could be tried both by the Munsif and also by the Judge of the Court of Small Causes but in different circumstances. Therefore,

inherently both the Court had jurisdiction to try the suit though under certain conditions the suit was to be tried by the Judge of the Small Causes

while under conditions it was to be tried by the Munsif. The second distinction between those two cases and this case is that; it comes up for

hearing before this Court in revision u/s 115 of the CPC and the point to be decided is that even if the suit ought ""not to have been tried by the

Munsif whether any interference is called for at this stage in this application in revision.

23. u/s 115 of the Code of Civil Procedure, this Court can interfere only when the subordinate Court has exercised a jurisdiction not vested in it by

law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity. In view of

the Full Bench decision in Bhagwati Pande Vs. Badri Pande and Another the Court against the decree and judgment of which this application in

revision has been filed did have the jurisdiction to hear the appeal. It has not failed to exercise that jurisdiction nor has it exceeded its jurisdiction.

The question is whether it has acted to the exercise of its jurisdiction illegally or with material irregularity. It is contended on behalf of the applicant

that the learned Civil Judge acted in the exercise of his jurisdiction illegally by not setting aside the decision of the learned Munsif and ordering the

case to be tried by the Court of Small Causes.

The appeal was before him as against the decision of the Munsif, but the point as to jurisdiction was not raised before him at all. There was thus no

occasion for him to decide that point. Therefore, when he has not decided that point which was not raised before him, it cannot be said that he has

acted in the exercise of his jurisdiction illegally or with material irregularity. The contention on behalf of the applicant that the decree should be set

aside as the Munsif had no jurisdiction to try the case and the case should be ordered to be tried afresh by the Small Causes Court, therefore,

cannot be accepted. It has not been raised in the grounds of revision. On the other hand, the grounds that have been raised are that the decision of

the Munsif was final it being a case of Small Causes and that no appeal lay against the decision of the Munsif and the appellate decision of the

learned Civil Judge was without jurisdiction.

24. The application is directed against the decision of the Civil Judge in appeal. It is not directed against the decision of the Munsif for the decision

of the Munsif no longer stands as it has been set aside by a Court having jurisdiction to hear the appeal. There was no occasion, therefore, to

challenge the decision of the Munsif. The decision of the Civil Judge only has been challenged in these proceedings. That decision was given in an

appeal and in deciding the appeal the learned Civil Judge exercised jurisdiction illegally or with material irregularity. It was not necessary for him to

decide a point which was not raised before him at all and it cannot be said that by not deciding that the Munsif had no jurisdiction to try the suit, he

acted in the exercise of his jurisdiction illegally or with material irregularity.

In the case of Bhagwati Pande Vs. Badri Pande and Another this Court interfered in a revision case where the Civil Judge refused to entertain an

appeal which he had jurisdiction to entertain. In the present case the Civil Judge did entertain the appeal. He decided that appeal and he had

jurisdiction to hear the appeal, he does not appear to have acted illegally by not deciding a point which was not raised before him at all. This aspect

of the case does not appear to have been brought to the notice of the Hon''ble Judges in the two Madras cases referred to above. In the earlier of

the two cases, namely ILR 26 Mad 176 the learned Judge found the justice to be so much on the side of the respondents that he had to confess in

the end that he would be glad to find mode of escape, but he had no alternative but to set aside all the proceedings in the suit and directed that the

plaint be returned for presentation to-proper Court. Thus, probably, if this aspect had been brought to his notice, his decision too could have been

the contrary and the revision would have been dismissed. In the circumstances, this application is dismissed with costs.