1884

QUEEN EMPRESS v. THÁKU.

The Session Judge of Násik having reported that no inconvenience or failure of justice will be caused by the transfer of the case to Ahmednagar, the Court directs that the case be transferred for trial by the Sessions Court at Ahmednagar.

Order accordingly.

APPELLATE CIVIL.

FULL BENCH.

Before Sir Charles Sargent, Knight, Chief Justice, Mr. Justice Kemball, and Mr. Justice West.

PRABHA'KARBHAT, APPLICANT (ORIGINAL PLAINTIFF), *v.* VISHWA'MBHAR PANDIT, OPPONENT (ORIGINAL DEFENDANT.)*

January 28, 29; *February* 13, 26; *March* 6.

Practice—Procedure—Return of plaint for presentation to proper Court—Jurisdiction—Construction—Civil Procedure Code Act VIII of 1859, *Secs.* 30 *and* 32—*Civil Procedure Code Act XIV of* 1882, *Secs.* 53 *and* 57.

Where, after a trial has begun, or even after it has concluded, it appears that the Court has not jurisdiction to hear the case, the plaint should be returned in order that it may be presented to the proper Court, and no additional Court fees are payable.

The pre-existing state of the law as recognized by the tribunals is one of the chief means of interpreting laws of procedure.

Jagjivandás Jávherdás Seth v. *Magdum Ali*(1) overruled.

THIS was a reference to a Full Bench by a Division Bench on an application made by Prabhákarbhat for the return of his plaint in Appeal No. 114 of 1882. The following are the facts of the case :—

Prabhákar brought a suit against the Secretary of State for India and Vishwámbhar Pandit in the District Court of Belgaum, alleging that Bhaváníbái, mother of Vishwámbhar (defendant No. 2), on the 3rd April, 1878, executed to him a deed of gift in respect of certain lands; that Vishwámbhar gave his consent to the deed on the 27th April, 1879; that Bhaváníbái died on the 9th June following, leaving defendant No. 2 as her heir; that the deed was executed at Kolhápur, beyond British India, and

* Civil Application, No. 52 of 1884.

(1) I. L. R., 7 Bom., 487.

1884

PRABHÁKAR-BHAT v. VISHWÁM-BHAR PANDIT.

brought into British territories on the 18th August, 1881; that on the 13th December following the plaintiff sought to register it, but defendant No. 2 would not attend the Sub-Registrar's office; that the deed, therefore, could not be registered within the time allowed by law; that the Sub-Registrar refused to register it on the 12th September, 1881; that on the 14th November following, his order was upheld by the District Registrar, who referred the plaintiff to a civil suit. He, therefore, prayed that the deed might be ordered to be registered.

The defendant No. 2 *(inter alia)* answered that he did not give his consent to the deed, and that it was a forged document. Defendant No. 1 did not appear.

The District Judge (Mr. Shaw) after taking evidence ordered the deed to be registered (23rd September, 1882).

Vishwámbhar appealed to the High Court. The Secretary of State was not a party to the appeal.

The appeal first came before West and Nánábhái Haridás, JJ., who held that the Secretary of State was not a necessary party and that, therefore, the District Court of Belgaum had no jurisdiction to entertain the suit. They, accordingly, reversed the decision of the lower Court, and dismissed the suit on the 28th January, 1884.

On the 29th January, 1884, Prabhákar applied to the Court (West and Nánábhái Haridás, JJ.), praying that the plaint might be returned to him for its presentation in the proper Court. The Court referred the application to a Full Bench by the following order:—

"The Court thinks the recent order of this Court as to the non-return of a plaint by a Court not having jurisdiction, deserves reconsideration. It would seem that the proceedings in such a Court may not unreasonably be treated as if they had not taken place, and then the plaint would properly be returned. The Court refers the question to a Full Bench (13th February, 1884)."

The Full Bench heard the application on the 26th February, 1884.

Máneksháh Jehángirsháh for the applicant.—This reference has been made in consequence of the ruling in *Jagjivandás Jávherdás Seth* v. *Magdum Ali*[1], in which it was decided that the practice of returning plaints is wrong. The former practice is thus admitted. The cases in which plaints have been returned, after evidence is gone into and even in appeals and second appeals, are too numerous to be cited. The principal cases are *Khandu Moreshvar* v. *Shivji Gorkoji*[2]; *Bái Máhkor* v. *Bulákhi Chaku*[3]; *Sayáji bin Nembáji* v. *Rávji bin Lingápá*[4]; *Bái Motigowri* v. *Pránjivandás Bháidás*[5]. The practice in Bengal and the North-Western Provinces is the same: *Rám Gutty* v. *Goonomonee Dabia*[6]; *Musst. Edoo* v. *Shaikh Hefazut Hossein*[7]; *Prosád Doss Mullick* v. *Russick Lall Mullick*[8]; *Abdul Samad* v. *Rajindro Kishor Singh*[9]. I submit the practice of returning plaints, whenever the Court finds it has no jurisdiction, is correct. Section 57 of the Civil Procedure Code (XIV of 1882) directs that when, at the time of the presentation of a plaint, the Court finds it has no jurisdiction, it shall return the plaint. That section evidently contemplates a case of want of jurisdiction appearing on the face of a plaint. Neither that section nor anything else in the Code prohibits the Court from returning the plaint, when, after the institution of the suit, want of jurisdiction appears either from the evidence or otherwise. The analogy of section 57 still applies, there being nothing to prevent its application to a later stage of the suit. Amendment of a plaint stands on a somewhat similar footing to the return of it, and the Privy Council has, in appeal, allowed a plaint to be amended in order to prevent miscarriage of justice. See *Mohummud Zahoor Alikhán* v. *Musst. Thákooránee Rutta Koer*[10], and the High Court of Calcutta has followed that case under similar circumstances—*Joseph* v. *Solano*[11]. It is said that when once the stamps on a plaint are cancelled, it cannot be again presented to another Court with the cancelled stamps. But if the stamps are cancelled

(1) I. L. R., 7 Bom., 487.
(2) 5 Bom. H. C. Rep., 212, A. C. J.
(3) I. L. R, 1 Bom., 538.
(4) Printed Judgments for 1881, p. 13.
(5) Printed Judgments for 1883, p. 100.
(6) 11 Calc. W. R. Civ. Rul., 177.
(7) 13 Calc. W. R. Civ. Rul., 358.
(8) I. L. R, 7 Calc., 157.
(9) I. L. R., 2 All., 357.
(10) 11 I. M. A., at p. 486; S. C. 9 Calc. W. R. P. C., 9.
(11) 9 Beng. L. R., at p. 453.

1884

PRABHÁKAR-BHAT v. VISHWÁM-BHAR PANDIT.

by a Court which had no jurisdiction, they should be regarded as still uncancelled.

Ghanashám Nilkanth, contra.—The practice of returning plaints, after they have once been admitted, is wrong. Section 57 only authorizes the return of a plaint at the time of its presentation.

[SARGENT, C. J.—When want of jurisdiction appears at a later stage of the suit, is there anything in the Code to prevent the Court from doing what it might have done at the time of the presentation of a plaint under section 57 ?]

While the Code expressly provides in section 57 for the return of a plaint at its presentation for want of jurisdiction, it does not provide for its return after its admission. I admit that the practice of the High Courts of Bombay, Bengal and Allahabad is in favour of returning plaints after they are admitted. When a Court dismisses a suit as barred by limitation, it does not return the plaint. Why should it then return it, when it throws out the suit for want of jurisdiction ?

[WEST, J.—What is the use of returning it in the former case ? The Court has decided the suit, and the plaint cannot be presented in any other Court.]

The following is the judgment of the Full Court delivered by

WEST, J.—Section 57 of the Code of Civil Procedure provides that if, on the presentation of a plaint, it appears that the Court has not jurisdiction to try the cause, the plaint shall be returned to be presented in the proper Court. The question is, whether the same thing can be done after the plaint has been admitted and the trial begun or even concluded. The practice of this, as of the other High Courts, from the time of their institution has, it is admitted, been to return, or direct the return, of the plaint in ordinary cases when, in the course of the trial either of the original suit or of an appeal, it has come out that the suit had been entertained by a Court without jurisdiction ; but, by a recent judgment of a Division Court, this practice has been pronounced wrong. It might have been well had the Division Court referred such a matter to a Full Bench. The established practice of the Court in matters

of procedure is the law of the Court, unless it be inconsistent with some higher law or legal principle; and a series of precedents ought not, we think, to be overruled without deliberate consideration of the matter by a Bench more numerous or differently constituted from the one to which the objection has occurred. It is a general principle that a Court, on finding it has not jurisdiction, should decline to proceed further in a cause placed before it. An objection on this ground may be taken at any stage (1), and a judgment which is obtained in a Court without jurisdiction is a determination *coram non judice*. It would, therefore, be a futile proceeding for the Judge in such a case to go on with an investigation, his decision on which could have no jural effect. The obvious course would seem to be that the plaintiff, who had been suing in a wrong Court, should go to the right one, paying to the defendant the costs occasioned by his abortive suit. Apart from fiscal considerations, the Courts ought to aid, rather than obstruct, a plaintiff in thus placing his case before the proper tribunal, and the fiscal interests of the Government do not, in such cases, need guarding beyond the necessary sense of the laws made for that purpose. Where a Court fee on the institution of a suit has been paid in a Court which cannot possibly afford the relief sought, it does not seem consistent with sound principle that the plaintiff should be condemned to lose the fee thus paid, or that he should not be allowed to ask without paying a second fee for an adjudication from a Court which can really give one. Apart, therefore, from any special rules prescribed by the Legislature, the return of a plaint in the case supposed would be, at least, an allowable and unobjectionable course. Where the Court has had to act judicially on the plaint, whether in favour of the plaintiff or against him, the plaint must obviously be retained as part of the record of the jural relation established between the parties. Even if an investigation of the merits is prevented by the operation of some bar, as that of limitation, still the plaint, as part of the subject-matter judicially dealt with, should be retained. But when the decision is that the Court has no jurisdiction, that is a decision that the plaint ought not really to have been admitted. It ought to have been returned under section 57 of the Code of Civil Procedure,

(1) Com. Dig., Abatement; 1 T. R., 552.

1884

PRABHÁKAR-BHAT v. VISHWÁM-BHAR PANDIT.

and as the proceedings subsequent to its admission have been purely abortive, there seems to be no good reason why those proceedings should make any difference. A copy retained in returning the plaint would indicate what had been done.

The Code, however, makes no provision for the return of a plaint, except under section 57, at the time of its presentation. This, no doubt, affords a ground for the contention that the express provision in this one place for returning a plaint prevents it's being supposed elsewhere. The principle of *expressum facit cessare tacitum* is one of extensive operation; but that it is not universal and sufficient, may be seen from the examples cited in Maxwell on the Interpretation of Statutes, page 323. Where the whole of a particular subject must be supposed to have been before the mind of the Legislature at once, the provision of a rule for one set of circumstances may well exclude its operation in other different circumstances; but it is not, we think, a necessary consequence of the provision that a plaint may be returned at its first presentation that it may not be returned at any other time. The Chapter V, in which the provision occurs, deals only with the institution of suits. The Legislature in framing it probably had no other stage of the suit in view except so far as section 53 extends. In section 53 a provision for rejecting a plaint, or returning it for amendment, is expressly limited to the first hearing. Without now discussing the decision of this Court by which a certain expansion has been given to the terms of that section, we may observe that the provision as to the first hearing may indicate that it was thought by the Legislature that otherwise the plaint might be returned on the grounds stated at any time. It might also indicate that there could be no rejection or return of the plaint on the grounds stated, except at the moment of presentation. What for our present purpose is important is that the mere omission to do at the presentation of the plaint what might properly be done then, is recognized as not in itself a sufficient cause for omitting to do the same thing at a later stage when the necessity or propriety of it first becomes evident; much less does it make what would otherwise be a proper step at the later stage impossible. After the hearing has been entered on, a rejection of the plaint or a return of it for alteration would open a way to irregularities

and to chicane which the Legislature has thought it expedient, to close at the first hearing.

Act VIII of 1859 provided in the Chapter on the Institution of Suits (by section 30) that if there should appear to be a want of jurisdiction, the Court should return a plaint presented to it in order to its being presented in the proper Court. Section 32 in the same chapter provided for the rejection of the plaint, or the return of it for amendment, when the complaint disclosed an insufficient ground of action, or one barred by limitation. These are provisions which are now repeated in Chapter V of the amended Code, with such additions and modifications as the practice of twenty years suggested. Under the older, as under the newer, law there was no express provision for returning a plaint, or allowing it to be amended after presentation, though the Court (section 139) could examine the parties, frame the issues accordingly, and at any stage of the investigation amend the issues or frame new ones. The objection to allowing the return, or the amendment of a plaint after admission, would appear, therefore, to have been quite as strong under the Act of 1859 as under that of 1882. Yet in the case of *Mohummud Zahoor Alikhán* v. *Musst. Thákooránee Rutta Koer* (1) the Judicial Committee, even in the late stage of an appeal to Her Majesty in Council, thought they might "do what the Judge of the Court of first instance might, under the Code of Procedure, have done at an earlier stage of the cause, namely, allow the appellant to amend his plaint." In the old Code, as in the new one, there were provisions for allowing a plaintiff to withdraw from a suit with leave to bring a new one, but these were not thought to exclude an amendment at a late stage, any more than the rule allowing an amendment at the institution of the suit. The latter rule would appear to have been taken as merely the explicit application of a principle to a stage of litigation at which there might be a doubt whether it ought to be brought into operation so early, rather than as any restriction on the power to allow amendment at any later stage, which has now been limited to the time of the first hearing.

1) 11 M. I. A., at p. 486.

1884

PRABHÁKAR-BHAT v. VISHWÁM-BHAR PANDIT.

The case we have just considered was one in which the principle of section 32 of Act VIII of 1859 applicable, in terms, to the institution of a suit was held by the highest tribunal to extend to any later stage of the cause. In the case of *Mussamut Edoo* v. *Shaikh Hefazu Hossein* (1) it was similarly held that the provision in section 30 for the return of a plaint at the institution of a suit was not a restriction of this procedure to that particular stage of the litigation, but merely a specification of the earliest stage of a case as one at which a principle assumed as general might be applied in order to check fruitless contention. The property in suit was found in regular appeal to be of a value beyond the jurisdiction of the Munsif who had tried the case, and the proceedings were, consequently, se aside. In special appeal, this decision was upheld, but the High Court ordered that the plaint should be returned to the plaintiff in order that he might make up a deficiency of stamp duty, and present his plaint anew in the proper Court. The learned Judges held that, "if the lower Appellate Court has such a power, it is clear that this Court, which has all the powers of the Court below, has also that power",—a statement of the relative jurisdictions which is equally correct now as then. They refer to a case in 11 Calc. W. Rep., 541, in which a question arose under section 31 of Act VIII of 1859. The Judge, in appeal, found that the suit had been filed on an insufficient stamp, and rejected the claim without allowing the stamp duty to be supplemented. This the High Court held to be wrong: "it was the duty of the Judge to give to the plaintiff that opportunity" (of supplying the deficiency of stamp duty). Here, though the rule in section 31 of Act VIII of 1859 applied, in terms, only to the institution of a suit, the rule of *expressum facit cessare tacitum* was not thought of as preventing it from being applied at a later stage. Rather, it would seem, the learned Judges thought that the rule was the embodiment of a principle which ought to be applied wherever the occasion arose, and even so early as at the institution of the suit.

Without going further into the details of the cases that have been cited to us, we think that it is manifest that the admittedly uniform practice of this Court under Act VIII of 1859 in allowing

(1) 13 C. W. R. Civ. Rul., 358.

and directing the return of a plaint where it was found that the trying Court has not jurisdiction was supported by the practice elsewhere under the same Code. The doctrine of the Courts, including the Judicial Committee, must be taken to have been opposed to any application of the rules as to the institution of suits as affecting the power of the Courts at a later stage to return a plaint which ought not to have been received, and on which no judicial authority could be exercised in establishing a jural relation, or giving effect to it. In this state of circumstances the new Code of Civil Procedure was passed in 1877. It embodies many rulings of the Courts on the earlier Code. Some it distinctly rejects. Some it accepts with qualifications. It is evident that the mind of the Legislature had been carefully applied to the existing law as expounded by the chief tribunals with a view to rectify and complete it. In a case affecting the Central Criminal Court it was laid down that a Statute might be construed even against its literal sense when "read by the light of what was the established practice under commissions of Oyer and Terminer in general"(1). In other words, the pre-existing state of the law as recognized by the tribunals is one of the chief means of interpretation of laws of procedure as of other laws. It may be said, indeed, to be of special importance in this class of cases. This the Legislature must have known. It is to be presumed, therefore, that when it left a known existing practice untouched, it tacitly approved it, or was, at any rate, content to leave it to be applied by the Courts within the same limits and with the same discretion as before. Now, in section 588 of the new Code it is significant that while, in the long enumeration of the various orders in a suit against which an appeal may be made, the section under which the order may be made is in every other instance cited, section 57, providing for the return of a plaint, is not cited. This cannot have arisen from accident, and the omission appears to be due to an acceptance of the doctrine that a plaint may be returned at a later stage than the institution of a suit. Had section 57 been cited, it would have seemed to intimate that no return, save under that section, was contemplated; the omission to cite it seems to intimate the contrary.

(1) *Lawson* v. *The Queen*, *per* Cockburn, C. J., L. R., 4 Q. B., 406.

1884

PRABHÁKAR-BHAT v. VISHWÁM-BHAR PANDIT.

Between the passing of Act X of 1877 and Act XIV of 1882 the practice established under Act VIII of 1859 as to the return of plaints was continued by the High Courts. As an instance, reference may be made to the case of *Abdul Samad* v. *Rajendro Kishor Singh*[1]. There the learned Judges say of section 57(c): "It may be that the section contemplates a return of the plaint when it is first presented, but there is nothing in the wording of the section which forbids the return of the plaint at a later stage in the case, and it has been so held in former cases." Nothing could be plainer than this; and had the Legislature disapproved it, the opportunity arose for superseding it by another rule when the Code was recast in Act XIV of 1882. As this was not done, there can be no reasonable doubt, we think, that the intention was to leave it as it had been, and as it had been recognized before. The absence of provisions for the later stages of a case is due probably to the desire of the Legislature to leave the hands of the Courts unfettered in dealing with a class of cases in which the errors of plaintiffs may sometimes be ascribed to the most excusable ignorance, and in others to craft, or a purpose of manipulating the jurisdiction according to the plaintiffs' convenience. The Courts, under the existing law, can prevent any such abuse, and will do so; under a more rigid system they could not. Mr. Ghanashám referred to the case of limitation as one in which, when a suit was found barred, the plaint was not returned, but in such a case the Court having competence pronounces judicially on the question of limitation. Nor need it return a plaint which could not be presented in another Court. The rules provided for withdrawing from a suit have, in our view, no application. A Court allowing a plaintiff to withdraw from a suit and exercising a discretion to forbid or permit another suit, has, *ex hypothesi*, jurisdiction, and uses it, while in the case before us it has not jurisdiction.

For these reasons we are of opinion that the long-established practice of this Court as to the return of plaints was not opposed to the earlier law, and that it has, at least, indirectly been confirmed by the present law. The answer to the reference from the Division Court will be in accordance with this decision.

[1] I. L. R., 2 All., 357