

## APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice  
Chandavarkar.

HAJI UMAR ABDUL RAHIMAN (ORIGINAL PLAINTIFF), APPLICANT,  
v. GUSTADJI MUNCHERJI COOPER (ORIGINAL DEFENDANT),  
OPPONENT.\*

1910.

February 7.

*Civil Procedure Code (Act V of 1908), section 24—Bombay Civil Courts Act (XIV of 1869), Part V—Suit cognizable and heard by the First Class Subordinate Judge—Application to the Court of the District Judge for transfer—Transfer of the application to the Assistant Judge—Order of the Assistant Judge for transfer of the suit to the District Court—Jurisdiction.*

The plaintiff filed a suit in the Court of the First Class Subordinate Judge claiming Rs. 18,797. The suit was heard by that Judge for some days and then the defendant filed an application in the Court of the District Judge for transfer of the suit to another Court. The District Judge transferred the application to the Assistant Judge for disposal. The Assistant Judge heard the application and ordered that the suit be transferred to the District Court for trial.

The plaintiff having objected that the order of the Assistant Judge was without jurisdiction,

*Held*, setting aside the order, that under the provisions of the Bombay Civil Courts Act (XIV of 1869), Part V, the limit of the Assistant Judge's jurisdiction for the purpose of hearing suits is Rs. 10,000 and that in case of suits and applications when the value of the subject-matter does not exceed Rs. 5,000, an appeal in appealable cases lies to the District Judge. The Assistant Judge is, therefore, not a Judge of co-ordinate jurisdiction to the District Judge. He is, therefore, not a Judge of the District Court and the order complained of was not made by the District Court which alone had jurisdiction.

Section 24 of the Civil Procedure Code (Act V of 1908) empowers the District Court to withdraw any suit and try and dispose of it. The suit withdrawn being for a sum exceeding the jurisdiction of the Assistant Judge, he could not try and dispose of it. He was, therefore, not a Judge of the District Court as contemplated by the section which must be a Court of unlimited pecuniary jurisdiction.

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against an order

\* Application No. 187 of 1909 under extraordinary jurisdiction.

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passed by K. Barlee, Assistant Judge of Poona in the matter of an application for the transfer of a suit from the Court of the First Class Subordinate Judge.

The plaintiff sued the defendant in the Court of the First Class Subordinate Judge of Poona for the recovery of Rs. 18,797-13-0 due on a promissory note. The suit was filed on the 14th January 1909. It was heard by the Subordinate Judge on several days and was allowed to stand over till the 19th July 1909. The defendant, however, on the 17th July presented a miscellaneous application, No. 197 of 1909, to the District Judge of Poona for the transfer of the suit to another Court on the ground that the First Class Subordinate Judge was biased against the defendant and that he illegally granted plaintiff's application for the examination of two witnesses after the evidence for the defence was taken.

The District Judge transferred the said application to the Assistant Judge for disposal.

The Assistant Judge heard the application and found that the Subordinate Judge was absolutely free from any bias against the defendant. He, however, ordered the suit to be transferred to the District Judge of Poona on the following grounds:—(1) That the defendant had a genuine belief that he would not obtain justice from the First Class Subordinate Judge, and (2) that the order of the Subordinate Judge granting the plaintiff's application for the examination of two witnesses after evidence for the defence was taken, was illegal and if it were carried into effect it would prejudice the defendant.

Being dissatisfied with the said order, the plaintiff preferred an application under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) urging that the District Judge had no jurisdiction to transfer the miscellaneous application to the Assistant Judge, that the Assistant Judge had no jurisdiction to dispose of the said application and that there was no ground whatsoever to transfer the suit as ordered by the Assistant Judge. A *rule nisi* was issued requiring the defendant to show cause why the order of the Assistant Judge should not be set aside.

*Strangman* (Advocate-General) with *G. S. Rao* and *A. G. Sathaye* appeared for the applicant (plaintiff) in support of the rule:— The Assistant Judge found that the Subordinate Judge was not at all biased against the defendant. Therefore he should have dismissed the defendant's application for the transfer of the suit. No ground has been made out for the transfer. Even admitting that the order of the Subordinate Judge granting our application for examining witnesses after the defendant had commenced his case was illegal, still we submit the order would afford a ground for appeal and not for transfer. The application for transfer was in the nature of appeal.

Next we contend that the Assistant Judge had no jurisdiction to entertain the application. Under section 24, sub-section 3 of the Civil Procedure Code, only the High Court or the District Judge can exercise jurisdiction and not the Assistant Judge who is subordinate to the District Court. If the Assistant Judge had jurisdiction, he could have transferred the suit to his own file. But he could not do so because under the Bombay Civil Courts Act, section 16, the limit of his pecuniary jurisdiction is Rs. 10,000 while the claim in the present suit amounts to Rs. 18,797 and odd. The jurisdiction exercisable is a personal one, that is, peculiar to the High Court or the District Court. The section expressly differentiates the Assistant Judge from the District Judge.

*Raikes* with *M. B. Chaubal* (Government Pleader) and *J. R. Gharpure* appeared for the opponent (defendant) to show cause:— The Assistant Judge is an assistant of the District Judge in the District Court. Therefore he forms part of the District Court. Sub-section 3 of section 24 of the Civil Procedure Code recognizes the fact that the Assistant Judge is part of the District Court: see also Bengal Act XII of 1887, section 8 (2). Section 16 of the Bombay Civil Courts Act must be read in that light.

The present application is not in the nature of appeal. The prayer for transfer is not co-extensive with the right of appeal, as for example, Small Cause Suits are transferred to the High Court: *Abdul Karim v. The Municipal Officer, Aden*<sup>(1)</sup>.

(1) (1903) 27 Bom. 575.

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Under the Regulations and the Civil Procedure Code the Assistant Judge can transfer to the District Court only and not to his own file.

SCOTT, C. J. :—The applicant obtained this rule calling on the opponent to show cause why an order of the Assistant Judge of Poona should not be set aside as being without jurisdiction.

The material facts are that a suit filed by the applicant in the Court of the First Class Subordinate Judge of Poona against the opponent claiming Rs. 18,797-13-0 had been heard by that Judge for some days when the opponent filed an application in the Court of the District Judge for transfer of the suit to another Court.

The District Judge transferred the application to the Assistant Judge for disposal.

The Assistant Judge heard the application and ordered that the suit be transferred to the District Court, Poona, for trial.

It is objected that this order was without jurisdiction as the application was under section 24 of the Code (Act V of 1908) which gives power to the High Court or District Court (*b*) to withdraw any suit pending in any Court subordinate to it and (i) try or dispose of the same or (ii) transfer the same for trial or disposal to any Court Subordinate to it, whereas the Assistant Judge has ordered the withdrawal of the suit from a Subordinate Court and transferred it for trial to a Court *superior* to him. The answer of the opponent is that the order is legal as the Assistant Judge is one of the Judges of the District Court and his order is in effect the order of the District Court. In order to judge of the position of the Assistant Judge we must turn to the Bombay Civil Courts' Act XIV of 1869, Part V, which is concerned with the creation and functions of Assistant Judges. It is to be observed that the limit of the Assistant Judge's jurisdiction for the purpose of hearing suits is Rs. 10,000 and that in the case of suits and applications when the value of the subject-matter does not exceed Rs. 5,000 an appeal in appealable cases lies to the District Judge. The Assistant Judge is therefore not a Judge of co-ordinate jurisdiction with the District Judge. He is therefore not a Judge of the District Court and

the order complained of is not made by the District Court which alone had jurisdiction.

The same conclusion follows from a consideration of the words of section 24 of the Code. The District Court may withdraw any suit *and* try and dispose of it. Here the suit withdrawn was for a sum exceeding the jurisdiction of the Assistant Judge and he therefore could not try and dispose of it. He therefore is not a judge of a District Court as contemplated by the section, which must be a Court of unlimited pecuniary jurisdiction.

Again section 24 provides that for the purposes of the section the Courts of Assistant Judges shall be deemed to be subordinate to District Courts but the opponent's argument is based on the contention that for the purposes of the section the Court of the Assistant Judge is part of the District Court.

The rule must be made absolute setting aside the order with costs.

CHANDAVARKAR, J. :—I do not think that an Assistant Judge's Court can be held to be a District Court or even part and parcel of it for the purposes of *all* suits and miscellaneous applications. An Assistant Judge's decree passed in suits is generally appealable to the District Court; probate applications and cases arising under the Land Acquisition Act heard and determined by him have been held by this Court to be similarly appealable. Therefore, whether the Assistant Judge's Court is a District Court or not must depend upon the law under which that Court exercises jurisdiction in any given case. In the matter of the present application, the jurisdiction exercised was under section 24 of the Code of Civil Procedure. Now, it is true that in the present case under the Bombay Civil Courts' Act, section 19, the District Court "referred" the application for transfer made to it to the Assistant Judge's Court for disposal; but a power to decide a case referred to it by a higher Court does not necessarily make the Court, to which it is referred, the equal of the former, unless the provision of the law under which the case has to be decided confers jurisdiction on the lower Court. Section 19 of the Bombay Civil Courts' Act is a merely enabling section, giving power of reference to the District Court in respect of suits and

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miscellaneous applications, but section 24 prescribes the conditions of the jurisdiction of the District Court. These are restrictive conditions and those of them which apply here require that the Court exercising jurisdiction must be one which is competent, according to law, to try or dispose of the suit withdrawn from a lower Court. Here the Assistant Judge's Court, it is conceded, was not so competent.

The rule must be made absolute by setting aside the order of the Assistant Judge and directing the District Court to retake the application on its file and dispose of it according to law. Rule absolute with costs.

*Rule made absolute.*

G. B. R.

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## ORIGINAL CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

1909.

*March 4.*

HARGOVAN RAMJI, APPELLANT AND PLAINTIFF, v. MULJI  
HARJIVAN, RESPONDENT AND DEFENDANT.\*

*Res judicata—Capacity of parties—Matter substantially in issue—  
Civil Procedure Code (Act XIV of 1882), section 13.*

The plaintiff in conjunction with another had in 1902 filed a suit against the defendant for possession of certain property, basing his claim on the allegation that he was owner. He succeeded in the first Court, but the Court of Appeal held that the property had been dedicated to charity, and refused to uphold his claim as owner. The plaintiff declined to adopt the Court's suggestion to modify his claim and be content to ask for a decree for possession as manager, and his suit was therefore dismissed. Five years later he filed the present suit, claiming possession as manager.

*Held*, that his title as manager was one which might and ought to have been put forward in the previous suit, and that his present claim was therefore *res judicata*.

If a plaintiff is suing in a capacity in which he is a stranger to the capacity in which he sued in a former suit, his claim has no proper connection with that former suit, and the Civil Procedure Code (Act XIV of 1882) section 13 does not apply.

\* Original Suit No. 764 of 1907.

Appeal No. 5 of 1908.