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 AND
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One other point remains. In two of the cases the shroffs died during the pendency of the suit or appeal, and it is urged that the right to sue did not survive. This contention is based on the maxim "*actio personalis moritur cum persona*". This maxim does not apply where, as here, the plaintiff has sustained a pecuniary loss arising out of a breach of obligation or contractual duty, by the person sued. This seems to me to be clear from a study of the three English cases: *Phillips v. Homfray*⁽¹⁾ and *Batthyany v. Walford*⁽²⁾ and *United Collieries Ltd. v. Simpson*⁽³⁾. I would dismiss the appeals of the shroffs with costs throughout, and allow the appeals of the Secretary of State and award the claims with costs throughout as proposed by my learned colleague.

Decree accordingly.

R. R.

(1) (1883) 24 C. D. 439.

(2) (1887) 36 C. D. 269.

(3) (1909) A. C. 36 C. D. 333, 391.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

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 July 12.

JOSE ANTONIO BARETTO (ORIGINAL DEFENDANT), APPELLANT, v. FRANCISCO ANTONIO RODRIQUES AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Jurisdiction—Court—Consent of the parties as to jurisdiction—Suit of value beyond the jurisdiction of the Court—Trial of suit—Jurisdiction cannot be questioned in appeal—Evidence Act (I of 1872), section 58.

The plaintiffs filed a suit for partition in the Court of the Subordinate Judge, First Class, valuing their claim at an amount which made the suit triable by that Court alone. The Judge, however, made over the trial of the suit to the Joint Subordinate Judge. In the latter Court, neither party raised any objection on the ground of jurisdiction; nor was any issue raised relating to it. The trial proceeded on merits: and a decree was passed in favour of plaintiffs. The defendant appealed to the lower appellate Court, where, he for the first time raised the question of jurisdiction on the strength of the market value stated in the plaint. The objection was overruled. On appeal:—

*Appeal No. 573 of 1909.

Held, that the market value stated in the plaint *prima facie* determined the jurisdiction.

Held, further, that as neither party raised any question as to want of jurisdiction in the first Court, and as they by their conduct and silence treated the market value to be of the amount sufficient to give jurisdiction to the Court, they dispensed with proof on the question by their tacit admissions, and thus the principle of law laid down in section 58 of the Indian Evidence Act. came into operation and prevented the result of the statement of the market value in the plaint.

As a rule, parties cannot by consent give jurisdiction where none exists. This rule applies only where the law confers no jurisdiction. It does not prevent parties from waiving inquiry by the Court as to facts necessary for the determination of the question as to jurisdiction, where that question depends on facts to be ascertained.

SUIT for partition.

The plaintiffs filed a suit for partition of certain property, valuing their claim at Rs. 7,000. It was filed in the Court of the Subordinate Judge, First Class, Thana, who had jurisdiction to try suits of any amount. That Judge transferred the case for trial to the Court of the Joint Subordinate Judge at Thana, who was invested with jurisdiction to try suits involving claims valued at less than Rs. 5,000. When the latter Judge took up the case for trial neither party raised any objection on the score of jurisdiction. The suit was tried on its merits and decided in favour of plaintiffs.

The defendant appealed to the District Judge where he contended among other things that the Subordinate Judge had no jurisdiction to try the suit. The District Judge overruled the contention on the following grounds :—

In the first place, it was said that the moiety of the plaint property having been valued by the plaintiffs themselves at approximately Rs. 7,000, the Court of the Second Class Subordinate Judge had no jurisdiction to try the suit. Even assuming that this valuation is to be accepted, section 11 of the Suits Valuation Act, No. 7 of 1887, furnishes a bar to the objection on the score of jurisdiction being entertained at this stage; because, the objection was never taken at any stage in the Court of first instance. Besides a glance at the record shows that the undervaluation; if any, has not prejudicially affected the disposal of the suit on the merits. When such is the case the Court of appeal would not interfere with the decree passed by the lower Court merely on the ground of an undervaluation. In support of this view I rely upon the rulings in Indian

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Law Reports XXIV Calcutta, 661; XXXI, Calcutta, 334; XXIV Madras, 43, 427, XXV Allahabad, 174, and VIII Calcutta, Weekly Notes, 705.

The defendant appealed to the High Court.

Bhandarkar with *K. A. Pathke* and *G. K. Dandekar*, for the appellant :—

The market value of the plaintiff's share, as stated in the plaint, was Rs. 7,000. The only Court competent to try the suit was the Court of the Subordinate Judge, First Class. (See section 24 of the Bombay Civil Courts Act.) The fact, that the defendant did not object to the jurisdiction of the Court, does not improve the case for, even a party's consent cannot confer jurisdiction where none exists. See also *Ramayya v. Subbarayudu*⁽¹⁾.

P. B. Shingne, for the respondent, was not called upon.

CHANDAVARKAR, J. :—The respondents as plaintiffs filed Suit No. 48 of 1908 in the Court of the First Class Subordinate Judge, Thana, for a partition of the property in dispute. In their plaint the market value stated was such as to make the suit triable only by the First Class Subordinate Judge. That Judge made over the trial of the suit to the Joint Subordinate Judge at Thana. He had no jurisdiction to try it if the market value stated in the plaint was correct. Neither party raised any objection on the ground of jurisdiction; no issue was raised relating to it. So the trial proceeded on the merits, and the Joint Subordinate Judge, after taking evidence on the issues raised, passed a decree for partition in favour of the present respondents.

The appellants on appeal to the District Court raised for the first time the question of jurisdiction, on the strength of the market value stated in the plaint. That Court overruled the objection on the ground that section 11 of the Suits Valuation Act (7 of 1887) furnished a bar to it, and that the record showed that "the undervaluation, (?) if any, had not prejudicially affected the disposal of the suit on the merits".

In this second appeal the objection has been renewed, and, in support of it, *Ramayya v. Subbarayudu*⁽¹⁾ is cited. That decision

(1) (1889) 13 Mad. 25.

no doubt supports the contention. But the principle governing the question of jurisdiction in such cases is laid down by our Court in several cases, of which the leading authority is *Lakshman Bhatkar v. Babaji Bhatkar*⁽¹⁾. There it was said:—"What *prima facie* determines the jurisdiction is the claim, or subject-matter of the claim, as estimated by the plaintiff, and this determination having given the jurisdiction, the jurisdiction itself continues whatever the extent of the suit, unless a different principle comes into operation to prevent such a result or to make the proceedings from the first abortive."

In the present case, the market value stated in the plaint *prima facie* determined the jurisdiction. It was not conclusive and binding on the plaintiffs so as to estop them from disputing its correctness or seeking its amendment merely because they had stated it in the plaint. When the trial commenced before the Joint Subordinate Judge, it was open to the defendant to rely on the statement in the plaint and dispute the jurisdiction of the Court. Had that been done, the plaintiffs might have asked for amendment and perhaps satisfied the Court by evidence that the market value had been overestimated in the plaint. Neither party raised any question as to want of jurisdiction arising from the allegation in the plaint. And by their conduct and silence, they treated the market value to be of the amount sufficient to give jurisdiction to the Court. They dispensed with proof on the question by their tacit admissions, and thus the principle of law laid down in section 58 of the Indian Evidence Act came into operation and prevented the result of the statement of the market value in the plaint.

But it is urged that parties cannot by consent give jurisdiction where none exists. That is so where the law confers no jurisdiction. Here the consent is not given to jurisdiction where none exists. Here the consent related to the question of the market value. No doubt the question of jurisdiction depended on that question. But all that the law has said is that a suit relating to property, the market value of which is of, or exceeds a certain amount (Rs. 5,000), shall not be tried by a

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(1) (1883) 8 Bom. 31 at p. 33.

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Second Class Subordinate Judge. To bring that law into operation, the market value must be determined by evidence, where it is in issue. If it is not in issue and is taken to be Rs. 5,000 or more, there is no jurisdiction and parties by consent cannot give it. But where it is not in issue and parties agree, expressly or by conduct, to treat the suit as one for property of lesser value than Rs. 5,000, the maxim of law does not apply. The law does not prevent parties from waiving inquiry by the Court as to facts necessary for the determination of the question as to jurisdiction, where that question depends on facts to be ascertained. See *Birn Malata v. Shyama Churn Khawas*⁽¹⁾.

The only other point urged before us was on the question of mesne profits. It had not been raised in either of the Courts below and involves no question of law not dependent on evidence. We must, therefore, decline to entertain it in second appeal.

The decree is confirmed with costs.

HEATON, J.:—The defendant by his own conduct led the Judge in the trying Court to suppose that he had jurisdiction to try this suit, or at least by his conduct prevented the Judge from suspecting that there could be any doubt as to whether he had jurisdiction. The defendant's conduct also, I think, raises a presumption that for his part he did not accept the valuation of the property set out in the plaint, for, had he accepted that valuation, the question of jurisdiction should have been raised. After the defendant's own conduct had led to this presumption, finding that the case was decided against him, he wishes in appeal to raise the question of jurisdiction. That question can only be decided definitely by ascertaining on evidence what is the value of the property. Having regard to the defendant's conduct the question is certainly a matter of doubt. This is a second appeal, and I do not think we ought to allow the defendant to solve this difficulty by now remanding the case in order to enable him to adduce evidence on the point.

Decree confirmed.

R. R.

(1) (1895) 22 Cal. 483 at p. 486.