

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 48 of 1981

Between:

CHIMAN LAL
s/o Vallabh Dass

Appellant

and

PAN BAI
d/o Bhowan Kara

Respondent

K.C. Ramrakha & A.K. Singh for the Appellant
A. Ali for the Respondent

Date of Hearing: 25th November, 1981

Delivery of Judgment: 27 NOV 1981

JUDGMENT OF THE COURT

Gould V.P.,

This appeal is brought from a judgment of the Supreme Court dated the 19th August, 1981, sitting in appellate jurisdiction from the Magistrates Court at Labasa. In an earlier appeal to this Court (Civil Appeal No. 73/1978 - 29th March, 1979) it was held that such appeals lie only on questions of law.

The parties to the litigation were husband and wife when, in Suva Maintenance Case No. 142/60, an order for maintenance was made. The dates given throughout the records of proceedings are unreliable and conflicting, but the learned Chief Justice's

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judgment indicates that an increase in the amount of the order was made on the 26th August, 1970, under the same Suva No. 142/60. In the earlier judgment of this Court cited above, it was recorded that it was common ground that the magisterial order for maintenance survived the divorce of the parties on the 9th March, 1971.

The record shows that the respondent filed a complaint in the Labasa Magistrates Court, dated the 12th June, 1978, with supporting affidavit asking for an increase in the amount ordered.

On the 10th July, 1978, the Chief Magistrate sent the following memorandum to the Resident Magistrate at Labasa :

"

Chiman Lal v. Pan Bai
Maintenance Cause

I refer to your memorandum dated 20th March, 1978 to the Chief Registrar.

In exercise of the powers conferred on me by section 70 of the Criminal Procedure Code I order that the above named civil maintenance cause be transferred to Labasa Magistrate's Court. I understand that the case file is already in Labasa.

(Sgd.) T. Madhoji
Chief Magistrate "

We take the following narrative of subsequent events from the judgment of the learned Chief Justice :

" On 16th August 1979 Labasa Maintenance Case No. 38 of 1979 which is in fact the same case as Suva Maintenance Case No. 142/60 under a different label was called before Mr. S.N. Sadal, Resident Magistrate. Mr. Parmanandam appeared for the respondent and Mr. Ramrakha for the appellant. Two preliminary matters were raised and the case was adjourned for ruling to 31/8/79. Following the ruling which is not relevant to the present

appeal the case was adjourned twice more before the next significant hearing of the case on 19th November 1979 when Mr. Ramrakha raised for the first time the issue of jurisdiction of the Court. He said he had just seen the order of the Chief Magistrate purporting to transfer the maintenance case between the parties to Labasa. Mr. Ramrakha submitted that the powers of transfer given under section 70 of the Criminal Procedure Code did not apply to a maintenance case. However, the Court ruled against his submission on jurisdiction in these words :

'The order was made for the transfer. This case has come before the Court on numerous occasions. Now the learned counsel says this Court has no jurisdiction. This is only a delaying tactic. The case is for hearing today.

(Sgd.) S.N. Sadal
Magistrate' "

We pause at this stage to say that after this ruling was given Mr. Ramrakha said to the Court "I am not seeking adjournment", and the taking of evidence commenced. We continue to quote from the judgment -

" After this ruling was given the Court proceeded to hear evidence on the merits of the case from respondent and several other witnesses. The case was then adjourned twice more until 30/11/79 when the hearing dwelled mainly on the lack of effort and interest by the appellant to appear in the case. The next adjournment was to 11/12/79 when counsel for each side closed his case and made submissions to the Court. At this stage of the hearing the Court indicated that a social welfare report be obtained as to the means of the parties and for that purpose the case was adjourned to 31/12/79. On resumption of the hearing the Court was told that the social welfare report was not ready yet and more time was needed to prepare the report. It was then that counsel for appellant informed the Court that an appeal would be filed though there was no intimation given as to the basis of the appeal. The case was adjourned to 14/1/80 and on that day counsel for appellant informed the Court that an order for stay of proceedings had been made in the Supreme Court on 4/1/80. The Magistrate then indicated that he would wait for the outcome of this appeal."

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As the learned magistrate observed in that passage, there was no intimation as to the basis of the appeal. Under section 29 of the Maintenance and Affiliation Act (Cap.52 - Ed. 1978) an appeal lies from any order or the refusal of any order by a magistrate under the Act. The Petition of Appeal to the Supreme Court in fact refers to two orders - paragraph 1 thereof reads :

"1. That on the 11th day of December, 1979 in Action No.38 of 1979 the following orders were made :

- a) An order directing the Social Welfare Department to report on the means of the parties;
- b) An order directing the Central Monetary Authority to furnish full particulars of all the transactions of the Petitioner."

Paragraph 2 states the grounds upon which the Petitioner desired "to appeal against the Order". Which of the two orders mentioned is not plain and only one of the "grounds" which follow has reference to either of them - it claims that the magistrate had no power to ask for a Social Welfare Officer's report. The remaining grounds are plainly designed to raise the question of the magistrate's jurisdiction, which might have been appropriate had he arrived at the stage of making a final order, which he had not, or possibly in another form of proceeding.

We have no means of knowing what course the argument took before the learned Chief Justice, but he dealt only with what he called the main issue :

" The main issue raised in this appeal is that the transfer of the said maintenance case to Labasa Magistrate's Court by the Chief Magistrate under the provisions of section 70 of the Criminal Procedure Code was misconceived in that the Chief Magistrate had no powers to do so and consequently the proceedings for variation of maintenance order in Labasa

Maintenance Case No. 38/79 were null and void as the Labasa Magistrate's Court had no jurisdiction to hear the proceedings in question."

The only reference to the two orders which might be said to have been actually under appeal was a passage in which the learned Chief Justice said he did not consider the other grounds of appeal of sufficient merit to alter the outcome.

We will accordingly disregard for the moment the shortcomings of the Notice of Appeal to the Supreme Court and will examine the appeal on the basis of the approach of the learned Chief Justice. The grounds set out in the Notice of Appeal to this Court were two in number :

- "1. That while His Lordship correctly found that the order of transfer which was made by internal memorandum was invalid, he nevertheless erred in holding that the appellant by his conduct had voluntarily submitted to the jurisdiction of the Magistrate at Labasa inasmuch as two objections were made, and the Magistrate insisted in hearing the case despite the said objections.
2. The Order for transfer ex post facto was inconsistent with the dismissal of the appeal, and if the said order takes effect than the appeal ought to have been allowed."

The learned Chief Justice accepted, on the authority of the case of Sukhraj v. Kalika Prasad (1958-59) F.L.R. 50 that there was no power in section 70 of the Criminal Procedure Code (under which the Chief Magistrate made his transfer order) enabling the Chief Magistrate to make that transfer. This was because a maintenance case is a civil proceeding and section 70 applies only to criminal causes and inquiries. Sukhraj's case is not binding on this Court but it is not challenged and for the purposes of the argument we accept the law as being as stated by the learned Chief Justice.

The next question is what is the result of the events that happened. The learned magistrate in good faith accepted that he had jurisdiction to decide the proceedings. From a territorial point of view he did not, as section 8(1) of the Maintenance and Affiliation Act provides that orders for variation may be made by a magistrate having jurisdiction "in the place in which an order under the provisions of this Part has been made". In the present case that place was Suva. It is necessary to ascertain the consequences of an error in territorial jurisdiction in a civil case.

Mr. Ramrakha in argument relied upon such cases as Forsyth v. Forsyth [1947] 2 All E.R. 623. In his judgment in that case, at p.624 Tucker L.J. referred to the rule that English courts will enforce the judgments of foreign courts of competent jurisdiction where the defendant had (inter alia) by voluntarily appearing, submitted to the jurisdiction. He then said :

"Such cases have no application to courts of inferior jurisdiction in this country which derive their jurisdiction from statute. If such an inferior court lacks jurisdiction, parties cannot by agreement or otherwise confer jurisdiction on it."

He argued that the judgment of the learned Chief Justice in the present case offended against this principle, as the Magistrates Court also derived its jurisdiction from statute. With this principle we have no quarrel, but the statute must in each case be examined with care to ascertain what jurisdiction it confers and what provisions it makes with relation to that jurisdiction.

The position of a magistrate in Fiji is governed by the Magistrates' Courts Act (Cap.14 - Ed. 1978). Section 3 provides for three classes; we are concerned here with a resident magistrate, the senior

class. Section 4 provides that every Magistrates Court shall exercise jurisdiction within the limits of the Division in which it is situated; if there are more than one, the Chief Justice may direct the distribution of business between them.

Section 8 appears to emphasize the personal nature of the jurisdiction, as distinct from the territorial. It reads :

"....., every magistrate shall have jurisdiction throughout Fiji but may be assigned to any specified Division or Divisions and transferred from one Division to another. Notwithstanding any such assignment a magistrate so assigned may, without any special notification or appointment to that effect, exercise jurisdiction in any other Division or Divisions."

The civil jurisdiction of a resident magistrate is set out in detail in section 16, but, to cover the jurisdiction in maintenance cases it is necessary to have regard to early words in subsection (1), "..... in addition to any jurisdiction which he may have under any other Act for the time being in force.....". Here, of course, it is the Maintenance and Affiliation Act. Section 17 confers as criminal jurisdiction "all the powers and jurisdiction conferred on them by the Criminal Procedure Code, this Act or any other law for the time being in force".

Sections 31, 32 and 33 deal with transfer of proceedings. Section 31 is not relevant. Section 32 gives power to magistrates to report cases to the Supreme Court and gives the latter unlimited power to give directions. Though expressed to be subject to the provisions of the Criminal Procedure Code, it clearly embraces civil and criminal proceedings. Section 33 is limited to civil proceedings and confers unlimited general powers. Subsections (1) and (2) are as follows :

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"33(1)(a) The Supreme Court may at any time at any stage thereof before judgment -

(i) transfer to a magistrates' court any civil cause before the Supreme Court, being a civil cause which is not excluded from the jurisdiction of such magistrates' court;

(ii) transfer any civil cause or matter before a magistrates' court, to any other magistrates' court, being a civil cause which is not excluded from the jurisdiction of such other magistrates' court, or to the Supreme Court.

(b) Any civil cause may be transferred either entirely or in respect of any part thereof or procedure required to be taken therein.

(2) The power of transfer shall be exercised by means of an order under the hand of a judge and the seal of the court, and may apply either to any particular cause or causes, matter or matters in dependence either entirely or in respect of any part thereof or procedure required to be taken therein, or generally to all such causes and matters as may be described in such order, and in the latter case may extend to future causes or matters as well as to such as may at the time of making such order be in dependence."

We would add that in section 34(2) it is provided that any order given under section 31, 32 or 33 shall not be subject to appeal. The powers given by section 33 in particular are of the very widest and give virtually complete general control to the Supreme Court without the necessity of any application.

To take the matter one step further we now refer to Order XIII of the Magistrates' Courts Rules. Rule 1 of the Order provides that, subject to the law respecting transfer, the place for the trial and institution of any suit or matter shall be regulated (in the manner provided). Paragraph (c) is headed

"Suits commenced in the wrong Court" and reads :

"(c) Where any suit shall have been commenced in the wrong court, and whether or not the defendant shall plead specially in objection to the jurisdiction, the court may :

- (i) if the suit should have been commenced in some other court in the same Division in which it was commenced, transfer the suit to the court in which it ought to have been commenced; or
- (ii) order that the suit shall continue in the court in which it was commenced; or
- (iii) order the proceedings to be struck out; or
- (iv) report to the Supreme Court pursuant to section 32 of the Act the pendency of the action."

We do not read the reference to "the same Division" in subparagraph 1 of paragraph (c) as applying to the remaining subparagraphs; it follows that under subparagraph (ii) the Court (and this applies even if the defendant has objected to the jurisdiction) has power to order that the suit continue in the court in which it was commenced. In a civil case at least it would therefore appear that the legislation does not treat the territorial limitations on a magistrate's court as something depriving the court of all jurisdiction. Provided a suit is within the general jurisdiction of the magistrate the institution of the proceedings in the wrong court is seen as a defect which could be waived (this was the position described in Pringle v. Hales [1925] 1 K.B. 573 at 579) by lack of objection, or apparently, in Fiji, disregarded by the magistrate. The appellant's whole argument in the present case depends of course upon it being accepted that these are civil proceedings.

We return now to the Magistrates' Courts Act. Section 21 appears under the heading "Acts of magistrate not affected by errors as to venue". Subsection (1) reads -

"21(1) Subject to the provisions of the Criminal Procedure Code, no act done by or under the authority of a magistrate shall be void or impeachable by reason that such act was done, or that any act, offence or matter in respect of or in relation to which such act was done, occurred or was situated beyond the limits of the area of the jurisdiction of such court."

Despite the opening words we do not read that subsection as being limited to criminal proceedings. It points the distinction between general jurisdiction and "the area of jurisdiction" and protects acts done with relation to matters occurring beyond the latter. For example the act relied upon in this case as conferring jurisdiction (section 8 of the Maintenance and Affiliation Act) was the making of the maintenance order in Suva. Section 21(1) would relate to magisterial acts done in Labasa.

Subsection (2) gives a defendant in a civil case a special right of objection up to the time he is required to state his answer. It reads as follows :

"(2) If the defendant in any civil cause or matter wherein such objection might but for this enactment be of force, shall at or before, but not after, the time when he is required to state his answer in such cause or matter before the court, allege specially any such objection, the court shall consider the same, and if there is prima facie proof of the objection the magistrate shall report such cause or matter to a judge and the judge shall make an order directing where the cause or matter shall be heard and determined, and such order shall not be subject to appeal."

The record of proceedings discloses that on the 19th November, 1979, Mr. Ramrakha made a submission,

that the Court had no jurisdiction on the ground that he had just seen the Chief Magistrate's order for transfer, which was made on the 10th July, 1978. He added that "If the Court upholds this then this case has to go before the Supreme Court". The learned magistrate did not uphold the objection, being apparently of opinion that the transfer was valid, and the application was for the purpose of delay. As we have already observed Mr. Ramrakha then said that he was not seeking adjournment. He continued with the conduct of the case, during which he put in by consent a number of documents, and finally closed his case.

The learned Chief Justice in his judgment referred to this ruling and commented that the appellant did not see fit to give notice of appeal against the ruling of the Court on jurisdiction. He continued -

"By his continued participation in the maintenance proceedings at Labasa the appellant had allowed the case to be adjudicated on the merits and this as we have seen entailed the hearing of evidence of several witnesses including that of the respondent herself. An appeal in this matter was not presented until the 31/12/79 when the maintenance proceedings between the parties were almost completed. For the reasons I have given I hold that the appellant by his conduct in the case had voluntarily submitted to the jurisdiction of the Labasa Magistrate's Court and he could not now be heard in protest of the Court's jurisdiction. The appeal fails and must be dismissed with costs."

On examination of the legislation as a whole, particularly sections 8 and 21 of the Magistrates' Courts Act and Order 13 Rule 1(c) of the Rules we are of the opinion that the territorial aspect of the jurisdiction of the Magistrates Court in civil proceedings is not such that a breach inevitably results in the proceedings being null and void. Order 13 Rule 1 gives the court certain powers, whether special objection has been taken or not, which implies that an objection may be

waived, without depriving the court of its right to decide. The civil defendant is given specific right to object by section 21(2), which he loses if he does not make it by a certain stage. That presupposes that the exercise of the jurisdiction under challenge remains good if the objection is not taken.

In the present case the appellant made his objection within the time limited by section 21(2), in effect applying to have the matter sent before a judge. When the learned magistrate refused the application the appellant specifically said that he did not require an adjournment, which indicated that he did not require time to challenge the ruling by appeal or other form of proceeding. The learned magistrate then adopted the course of continuing the hearing, which was one of those authorised by Order 13 Rule 1(c). The absence of any challenge to this Order of the learned magistrate, combined with participation in the proceedings from then on, and even the very bringing of the appeal to the Supreme Court against two orders made relating to evidential matters relating to the magistrate's final decision, justify the finding of the court below that he had submitted to the magistrate's jurisdiction.

In taking the view that the appellant could waive his right of objection the learned Chief Justice in our opinion did not fall into error of law. No appeal lies on a question of fact, though, as we have indicated, we consider there is material to support the learned Chief Justice's decision.

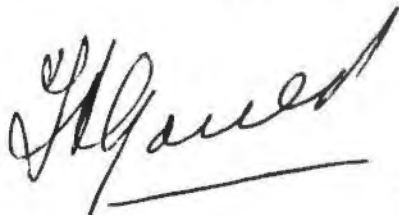
We add the comment that this jurisdictional question was never properly raised on the appeal; it was brought in apparently by a sidewind. Neither did the appeal seek to challenge the decision of the learned magistrate under section 21(2). From this, and from the fact that the only two matters actually made the

subject of the Petition of Appeal to the Supreme Court were never mentioned in argument before us, we agree with the courts below that delay has at least been one main objective of the appellant.

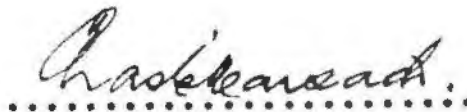
For these reasons we uphold the order of the learned Chief Justice dismissing the appeal with costs.

In case he was held to be in error the learned Chief Justice included in his judgment, in exercise of his powers under section 33 of the Magistrates' Courts Act, an order "ex post facto" for the transfer of Suva Maintenance Case No. 142/60 to Labasa. We have already pointed out that no appeal lies from an order under section 33, and we are not therefore concerned with this order.


The present appeal is dismissed with costs.



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Vice President



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Judge of Appeal



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Judge of Appeal

27 NOV 1981