

SETH HIRALAL PATNI

v.

SRI KALI NATH

(B. P. SINHA, C.J., K. SUBBA RAO,
RAGHUBAR DAYAL and
J. R. MUDHOLKAR, JJ.)

1961

May, 4.

Execution Proceeding—Objection to territorial jurisdiction of court granting decree—When to be raised—Reference to arbitration—Decree—Waiver—Estoppel—Letters Patent. cl. 12—Code of Civil Procedure 1908 (V of 1908). ss. 47, 51.

The respondent instituted a suit on the Original Side of the Bombay High Court against the appellant for the recovery of his commission in respect of certain share transactions at Agra. The plaint was filed after obtaining leave of the Bombay High Court under cl. 12 of the Letters Patent. One of the defences of the appellant, taken in his written statement, was that the suit filed was outside the territorial jurisdiction of the Bombay High Court Original Side, in as much as the entire cause of action, if any, had arisen at Agra. The suit was eventually referred to arbitration. The arbitrator gave his award in favour of the respondent which was upheld on appeal by the High Court.

The respondent took out execution proceedings wherein the appellant took objection *inter alia* that the Bombay High Court had no jurisdiction to entertain the suit and to make the award a decree of the court, as no part of the cause of action ever arose within the territorial jurisdiction of that court, and that therefore all the proceedings following thereupon were wholly without jurisdiction.

Held, that where a party to a suit had agreed to refer the matter to arbitration through court he would be deemed to have waived his objection to the territorial jurisdiction of the court raised by him in his written statement.

Held, further, that the question of the correctness of the procedure or the order granting leave under cl. 12 of the Letters Patent or the waiver of any objection must be raised in the proceedings before the High Court and could not be agitated in execution proceedings. The validity of the decree could be challenged in execution proceedings only on the ground that the court which had passed the decree was lacking in inherent jurisdiction in respect of the subject matter of the suit or over the parties to it.

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In the present case the appellant was estopped from challenging the jurisdiction of the Bombay High Court to entertain the suit and to make the reference to the arbitrator; and he was equally estopped from challenging the authority of the arbitrator to render the award.

Ledgard v. Bull (1886) L. R. 13 I. A. 134, not applicable.

CIVIL APPELLATE JURISDICTION : Civil Appeal No 237 of 1958.

Appeal from the judgment and decree dated January 27, 1955, of the Allahabad High Court in Execution First Appeal No. 137 of 1954.

A. V. Viswanatha Sastri, E. Udayarathnam and *S. S. Shukla*, for the appellant.

Vidya Sagar, for respondent.

1961. May 4. The Judgment of the Court was delivered by

Sinha C. J.

SINHA C. J.—This appeal, on a certificate by the High Court of judicature at Allahabad, arises in execution proceedings, taken by the decree holder-respondent in the following circumstances. The appellant wished to acquire shares in certain mills, popularly known as 'John Mills', at Agra. He engaged the services of the respondent to negotiate the deal on certain terms. The bargain was concluded, and the appellant, together with another person, purchased the entire interest of one Major A. U. John by an indenture of sale dated July 10, 1946. The respondent instituted a suit, being suit No. 3718 of 1947, on the original side of the High Court of judicature at Bombay for recovery of his commission, amounting to one lakh of rupees, in respect of the transaction aforesaid.

The suit was eventually referred to the arbitration of one Mr. W. E. Pereira, administrator of the estate of the aforesaid Major A. U. John, deceased. One of the defences taken by the appellant, as

defendant in the action, was that the suit filed in the Bombay High Court, as aforesaid, after obtaining leave of that Court, under cl. 12 of the Letters Patent was outside the territorial jurisdiction of the Bombay High Court on the original side, in as much as the entire cause of action, if any, had arisen at Agra. The arbitrator gave an award in favour of the respondent to the extent of decreeing his claim for only seventy five thousand rupees as commission, with interest at 6% per annum *pendente lite*. Proceedings were taken in the High Court of Bombay for setting aside the award on certain grounds, not necessary to be stated here. The Bombay High Court found that there was no defect in the award and that there was no legal misconduct on the part of the arbitrator. The High Court further held that the petition was frivolous, and dismissed it with costs. The appellant preferred an appeal which was dismissed by a Division Bench of the High Court of Bombay on January 21, 1952. The award was, thus, incorporated in a decree of the High Court. That decree was transferred to the court of the District Judge Agra, for execution. On February 5, 1952 the execution proceedings were instituted by the decree holder in the Court of the Civil Judge, Agra, to realise the sum of one *lakh* ten thousand rupees, approximately, on the basis of the decree passed as aforesaid by the Bombay High Court.

The appellant, as judgment-debtor, put in an objection under ss. 47 and 151 of the Code of Civil Procedure, objecting to the execution of the decree on a number of grounds, of which it is only necessary to notice the one challenging the jurisdiction of the High Court to entertain the suit and to make the award a decree of court. It was contended the Bombay High Court had no jurisdiction to entertain the suit as no part of the cause of action ever arose within the territorial jurisdiction of that Court, and that therefore, all the proceedings

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following thereupon were wholly without jurisdiction. The learned Execution Judge, by his judgment and order dated April 3, 1954 dismissed the objection petition with costs. The appellant then preferred an appeal to the High Court of judicature at Allahabad against the aforesaid judgment and order of the Executing Court. The appeal, being Execution First Appeal No. 137 of 1954, was ultimately dismissed by a Division Bench of the Allahabad High Court, by its judgment dated January 27, 1955. The judgment debtor-appellant moved the High Court and obtained the necessary certificate that the case was a fit one for appeal to this Court; and that is how the matter is before us.

The only ground on which the decision of the High Court is challenged is that the suit instituted on the original side of the Bombay High Court was wholly incompetent for want of territorial jurisdiction and that, therefore, the award that followed on the reference between the parties and the decree of Court, under execution, were all null and void. Strong reliance was placed upon the decision of the Privy Council in the case of *Ledgard v. Bull* (1). In our opinion, there is no substance in this contention. There was no inherent lack of jurisdiction in the Bombay High Court where the suit was instituted by the plaintiff-decree holder. The plaint had been filed after obtaining the necessary leave of the High Court under cl. 12 of the Letters Patent. Whether the leave obtained had been rightly obtained or wrongly obtained is not a matter which can be agitated at the execution stage. The validity of a decree can be challenged in execution proceedings only on the ground that the Court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seizen of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have

(1) (1886) L.R. 13A. 134.

the effect of rendering the Court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it. But in the instant case there was no such inherent lack of jurisdiction. The decision of the Privy Council in the case of *Ledgard vs. Bull* ⁽¹⁾ is an authority for the proposition that consent or waiver can cure defect of jurisdiction but cannot cure inherent lack of jurisdiction. In that case, the suit had been instituted in the Court of the Subordinate Judge, who was incompetent to try it. By consent of the parties, the case was transferred to the Court of the district Judge for convenience of trial. It was laid down by the Privy Council that as the Court in which the suit had been originally instituted was entirely lacking in jurisdiction, in the sense that it was incompetent to try it, whatever happened subsequently was null and void because consent of parties could not operate to confer jurisdiction on a Court which was incompetent to try the suit. That decision has no relevance to a case like the present where there could be no question of inherent lack of jurisdiction in the sense that the Bombay High Court was incompetent to try a suit of that kind. The objection to its territorial jurisdiction is one which does not go to the competence of the Court and can, therefore, be waived. In the instant case, when the plaintiff obtained the leave of the Bombay High Court on the original side, under cl. 12 of the Letters Patent, the correctness of the procedure or of the order granting the leave could be questioned by the defendant or the objection could be waived by him. When he agreed to refer the matter to arbitration through Court, he would be deemed to have waived his objection to the territorial jurisdiction of the Court, raised by him in his written statement. It is well settled that the objection as to local jurisdiction of a Court does not stand on the same footing as an objection to the competence of a Court to try a case. Competence of a Court to try a case goes to the very

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root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a Court can be waived and this principle has been given a statutory recognition by enactments like s. 21 of the Code of Civil Procedure. Having consented to have the controversy between the parties resolved by reference to arbitration through Court, the defendant deprived himself of the right to question the authority of the Court to refer the matter to arbitration or of the arbitrator to render the award. It is clear, therefore, that the defendant is estopped from challenging the jurisdiction of the Bombay High Court to entertain the suit and to make the reference to the arbitrator. He is equally estopped from challenging the authority of the arbitrator to render the award. In our opinion this conclusion is sufficient to dispose of the appeal. It is not, therefore, necessary to determine the other points in controversy, including the question whether The Decrees and Orders Validating Act, 1936 (Act V of 1936) had the effect of validating what otherwise may have been invalid.

The appeal is accordingly dismissed with costs.

Appeal dismissed.
