Navaratnasingham v. Arumugam and Another

COURT OF APPEAL.
SOZA, J. AND ATUKORALE, J.
C. A. APPLICATION NO. 266/80—M. C. JAFFNA 20319.
AUGUST 15, 1980.

Supreme Court Rules, 1978, Rule 46—Revision application—Objection taken for non-compliance therewith—Meaning of the term "proceedings" in such Rule—Application rejected.

Jurisdiction—Objection to be taken at the earliest opportunity—Waiver—Judicature Act, No. 2 of 1978, section 39.

Administration of Justice Law, No. 44 of 1973, section 62—Requirement that breach of peace imminent—Has Magistrate jurisdiction to proceed in the absence of such material.

The petitioner filed this application to revise the orders dated 19th and 21st February, 1930, made in the Magistrate's Court of Jaffna in proceedings under section 62 of the Administration of Justice Law, No. 44 of 1973. In the Court of Appeal a preliminary objection was raised on behalf of the 1st respondent that the petitioner had not complied with Rule 46 of the Supreme Court Rules which required, *inter alia,* that "originals of documents material to the case or duly certified copies .. ..and also two sets of copies of *proceedings* in the Court of first instance" should be filed along with the petition and affidavit. It was also submitted on behalf of the petitioner that the learned Magistrate was not vested with jurisdiction to proceed with the matter as he had failed to satisfy himself that a breach of the peace was imminent before he issued process.

Held

(1) In relation to an application in revision the term "*proceedings*" as used in Rule 46 means so much of the record as would be necessary to understand the order sought to be revised and to place it in its proper context. The expression can and often will include pleadings, statements, evidence and judgment.

(2) As the petitioner in the instant case had come into Court only with a certified copy of the proceedings of 10th February, 1980, and the order delivered on 19th February, 1980, and the orders canvassed by him could not be reviewed in the absence of the earlier proceedings, the evidence and original complaint which were procured subsequently, the petition should have been rejected for non-compliance with Rule 46.

(3) Where a petitioner invokes the jurisdiction of the Appellate Court by way of revision as in the present case, the Court expects and insists on *uberrima fides* and where the petitioner's affidavits contradict the record of the trial judge the Court would be very slow to permit this.

(4) Although the learned Magistrate did not in the first instance have material before him on which he could have been satisfied that a breach of the peace was likely, there was evidence led thereafter which was sufficient not only to found the belief that the breach of the peace was likely on the date the application was made but also to rectify any defect in the earlier proceedings.

(5) In any event, an objection to jurisdiction such as that in the present case must by virtue of section 39 of the Judicature Act, No. 2 of 1978, be taken as early as possible, and the failure to take such objection when the matter was being inquired into must be treated as a waiver on the part of the petitioner. Where a matter is within the plenary jurisdiction of the Court, if no objection is taken, the Court will then have jurisdiction to proceed and make a valid order. In the present case, the objection to jurisdiction was raised for the first time when the matter was being argued in the Court of Appeal and the objection had not even been taken in the petition filed before that Court.

Cases referred to

(1) *Orathinahamy v. Romanis,* (1900) 1 Browne's Reports 188.
(2) *Gunawardene v. Kelaart,* (1947) 48 N.L.R. 522.
(3) *Bisram v. Kamta Pd.,* A.I.R. 1945 (32) Oudh 52.
(4) *Jose Antonie Baretto v. Francisco Antonio Rodrigues,* (1910) 35 Bombay 24.
(5) *Alagappa Chetty v. Arumugam Chetty,* (1920) 2 C.L. Rec. 202.
(6) *Gurdeo Singh v. Chandrikah Singh ; Chandrikah Singh v. Rashbehary Singh,* I.L.R., (1907) 36 Cal. 193.
(7) *Pisani v. Attorney-General for Gibraltar,* (1874) L.R. 5 P.C. 516 ; 30 L.T. 729.
(8) *Thevagnanasekeram v. Kuppammal,* (1934) 36 N.L.R. 337.

APPLICATION to revise orders of the Magistrate's Court, Jaffna.

C. Motilal Nehru, for the petitioner.
C. Ranganathan, Q.C., with *S. Mahenthiran,* for the respondent.

Cur. adv. vult.

September 10, 1980.

SOZA, J.

This is an application for revision of the orders of the 19th and 21st February, 1980, made by the Magistrate of Jaffna in M. C. Jaffna Case No. 20139. The orders complained of were made when the learned Magistrate dealt with an information filed in his court under section 62 of the Administration of Justice Law, No. 44 of 1973, by the 2nd respondent to the present petition who is the officer in charge of the Annaicoddai Police Station. The 2nd respondent had himself acted after inquiry into a complaint made to him by the present 1st respondent who was the 1st respondent in the Magistrate's Court proceedings also. The present petitioner was the 2nd respondent in the Magistrate's Court proceedings.

A preliminary objection was raised by learned counsel for the 1st respondent. He pointed out that according to Rule 46 of the Supreme Court Rules of 1978 (published in Gazette Extraordinary No. 9/10 of 8. 11. 1978) an application for revision should be made by way of petition and affidavit accompanied by originals of documents material to the case or duly certified copies thereof in the form of exhibits and also two sets of copies of proceedings in the Court of First Instance. The term "proceedings" has not been defined. Rule 46 appears in part 4 of the Supreme Court Rules of 1978. In part 2 of these rules we have Rule 43 which reads as follows :—

> "In this part 'record' means the aggregate of papers relating to an appeal (including the pleadings, proceedings, statements, evidence and judgment) necessary for the consideration of the appeal by the Supreme Court".

The reference to pleadings, proceedings, statements, evidence and judgment, as I see it, is there for the purpose of emphasis and completeness and to prevent argument on the meaning of the term "record". From this definition it cannot be argued that

the terms "pleadings", "proceedings", "statements", "evidence" and "judgment" are in watertight compartments and should be assigned separate meanings. Indeed the expression "proceedings" can include pleadings, statements, evidence and the judgment. In any event the term "proceedings" as it appears in part 4 has not been defined. The definition given in Rule 43 cannot be invoked to ascertain the exact meaning of the term "proceedings" as used in rule 46. The expression "proceedings" as used in legal phraseology can bear varying meanings depending on the particular statute or rule where it occurs—see *Stroud's Judicial Dictionary* (1974) 4th Ed. Vol 4 pages 2124 to 2128 where a wide range of definitions of the term is given. In relation to an application for revision the term "proceedings" as used in Rule 46 means so much of the record as would be necessary to understand the order sought to be revised and to place it in its proper context. The expression can, and often will, include the pleadings, statements, evidence and judgment. In the instant case the petitioner has come into this Court only with a certified copy of the proceedings of 10.2.1980 and the order delivered on 19.2.1980. The orders canvassed before us cannot be reviewed in the absence of the earlier proceedings, evidence and original complaint. These were procured only subsequently. This petition therefore should have been rejected for non-compliance with Rule 46 of the Supreme Court Rules of 1978.

I might further add that not only has the 2nd respondent-petitioner failed to supply the Court with the necessary documents, he has even made averments in his petition which do not accurately reflect the state of the true facts. The proceedings filed show that the order of Court of 19. 2. 1980 was delivered in open Court in the presence of the parties. Mr. Nagarajah had appeared for the 1st respondent. On that occasion the 2nd respondent-petitioner moved for one month's time to vacate the land without causing any damage to the buildings and to hand over possession. The 2nd respondent-petitioner has however stated in his petition that he was dragged into the Magistrate's Chambers and peremptorily asked to leave the land in one month. This Court would be very slow indeed to permit contradiction of the record of the trial Judge. On this question I like to remind myself of the words of Bonser, C.J. in *Orathinahamy v. Romanis* (1)

"With the appeal was filed an affidavit which I have not read........and I understand that the affidavit is to the effect that the record of the evidence taken by the Magistrate does not give a correct account of the statements of the witnesses, and it is sought to impeach the record, and to

prove that certain statements were made which do not appear on the record......... It seems to me to be contrary to all principle to admit such an affidavit, and I certainly will not be the first to establish such a novelty in appellate proceedings. The prospect is an appalling one, if on every appeal it is to be open to the appellant to contest the correctness of the record........ If such a procedure is to be introduced it must be introduced by some other Judge than myself ".

This dictum was cited with approval by Canekaratne, J. in the case of *Gunawardene v. Kelaart* (2). I am in respectful agreement with these views. I would like to emphasise that in applications of this type the Court expects and insists on *uberrima fides.*

What I have said in regard to the preliminary objection is sufficient to conclude this matter but as we heard considerable argument on the question of jurisdiction also I would refer to it.

On behalf of the petitioner it was submitted that the learned Magistrate had failed to satisfy himself that a breach of the peace was imminent before he issued process. As the Magistrate failed initially to satisfy himself of the likelihood of a breach of the peace he was not vested with jurisdiction to proceed in the matter. Reliance was had on the Indian case of *Bisram v. Kamta Pd* (3) where the Court in interpreting a provision of the Indian Criminal Procedure Code similar to our section 62 held that the Magistrate must make an order stating in writing the grounds of his being satisfied that a dispute likely to cause a breach of the peace exists. The Indian statutory provision however is not identical with ours. The local decisions on section 62 of the Administration of Justice Law, No. 44 of 1973, are agreed that all that is necessary is that the Magistrate himself must be satisfied on the material on record that there is a present fear that there will be a breach of the peace stemming from the dispute unless proceedings are taken under the section. On this point I might straight away say that it is true that in the first instance the learned Magistrate had no material on which he could have been satisfied that a breach of the peace was likely but thereafter evidence was led on the question and this evidence is sufficient not only to found the belief that the breach of the peace was likely on the date the application was made, but also to rectify any defect in the earlier proceedings.

It is significant that no objection to jurisdiction has been raised by the 2nd respondent-petitioner until the matter was argued before us. It is also significant that the objection to jurisdiction

has not been taken even in the petition that has been filed before us. It is necessary to remember that an objection to jurisdiction must be taken as early as possible. Section 39 of the Judicature Act, No. 2 of 1978 (and prior to that section 43 of the Administration of Justice Law, No. 44 of 1973) laid down that—

> "Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of First Instance neither party shall afterwards be entitled to object to the jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such action, proceeding or matter". (cf. also sections 30 and 71 of the old Courts Ordinance).

Further the failure to object to jurisdiction when the matter was being inquired into must be treated as a waiver on the part of the 2nd respondent-petitioner. It is true that jurisdiction cannot be conferred by consent. But where a matter is within the plenary jurisdiction of the Court if no objection is taken, the Court will then have jurisdiction to proceed on with the matter and make a valid order. This point has been well explained by Chandavarkar, J. in the case of *Jose Antonio Baretto v. Francisco Antonio Rodrigues* (4) :

> "But it is urged that the 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".

This was a case where the plaintiff had sued the defendant regarding a property the market value of which he fixed at an amount so as to bring it within the monetary jurisdiction of a second class subordinate judge. The defendant did not object to the value. The Court held that where parties expressly or by conduct agree to treat the suit as one for property of a value so as to bring the suit within the monetary jurisdiction of the Court, the parties must be treated as having waived inquiry by the court as to the facts necessary for the determination of the question as to jurisdiction based on monetary value where that question depends on facts to be ascertained.

In the case of *Alagappa Chetty v. Arumugam Chetty* (5), Bertram, C.J. on the same point cited with approval a dictum of Mookerjee, J. in the case of *Gurdeo Singh v. Chandrikah Singh* and *Chandrikah Singh v. Rashbehary Singh* (6) :

> "......where jurisdiction over the subject matter exists requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a

wrong way, cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation or negligence."

In the case of *Pisani v. Attorney-General for Gibraltar* (7), the Privy Council affirmed this same doctrine that unless there is an attempt to give the Court a jurisdiction which it does not possess, the Court can, in the absence of objection, hear a case where it has jurisdiction over the subject. These principles were followed also in the case of *Thevagnanasekeram v. Kuppammal* (8) where Macdonell, C.J. held that a party was not entitled to challenge the jurisdiction of the Court to give the decision invited by such party, so long as the Court had jurisdiction over the subject.

The distinction between elements which are essential for the foundation of jurisdiction and the mode in which such jurisdiction has to be assumed and exercised is of fundamental importance. Non-compliance with the prescribed mode in which a particular jurisdiction should be assumed and exercised can be waived, provided there is jurisdiction over the subject matter.

Therefore in the instant case as there was no objection to the jurisdiction of the Magistrate, he was entitled to proceed on with the matter as it was within his plenary jurisdiction.

For the reasons I have given I dismiss this application with costs.

ATUKORALE, J.—I agree.

Application dismissed.