1971 *Present :* Samerawickrame, J., and Pandita-Gunawardene, J.

W. ROBISON FERNANDO, Appellant, *and* S. HENRIETTA FERNANDO, Respondent

S. C. 248/68 (F), 96/68 Inty. and 260/68 (F) —D. C. Panadura, 9867/D

Jurisdiction—Difference in effect between patent and latent want of jurisdiction—Conciliation Boards Act No. 10 of 1958—Section 14 (1) (a)—Omission to comply with its requirements—Whether defendant can waive objection relating to it—Courts Ordinance, s. 62.

Objection relating to the want of jurisdiction in a Court to hear a case may be waived by the defendant, if the want of jurisdiction is not apparent on the face of the record but depends upon the proof of facts.

After the plaintiff's case was closed and after the defendant and two witnesses had given evidence the trial Judge allowed an application made by the defendant to amend the answer in order to raise the plea that the Court had no jurisdiction to try the case as the dispute had not been referred to the Conciliation Board and no certificate from the Chairman had been annexed to the plaint as required by section 14 (1) (*a*) of the Conciliation Boards Act.

Held, that, having regard in particular to the prejudice to the plaintiff and the late stage at which the amendment of the answer was sought to be made, the defendant was precluded by delay and acquiescence from raising the objection to jurisdiction and that she had in fact waived it.

APPEAL from a judgment of the District Court, Panadura.

H. W. Jayewardene, Q.C., with *M. S. M. Nazeem* and *P. Edussuriya*, for the plaintiff-appellant in S. C. 248/68 (F) and for the plaintiff-respondent in S. C. 96/68 (Inty.) and S. C. 260/68 (F).

C. Ranganathan, Q.C., with *S. Sharvananda* and *K. Kanagaratnam*, for the defendant-respondent in S. C. 248/68 (F) and for the defendant-appellant in S. C. 96/68 (Inty.) and S. C. 260/68 (F).

Cur. adv. vult.

January 30, 1971. SAMERAWICKRAME, J.—

The plaintiff-appellant filed this action against his wife the defendant-respondent seeking a divorce on the ground of malicious desertion. The defendant-respondent filed answer denying the allegations in the plaint and counter-suing for a decree for judicial separation. After the plaintiff's case was closed and after the defendant had given evidence, an application was made to amend the answer to raise the plea that the Court had no jurisdiction to try the case as the dispute had not been referred to the Conciliation Board and no certificate from the Chairman of the Panel of Conciliators had been annexed to the plaint as required by Section 14 (1) (*a*) of the Conciliation Boards Act No. 10 of 1958. Objection to the application was taken on behalf of the plaintiff on the ground that the defendant had waived such an objection to jurisdiction The learned District Judge made order allowing the application to amend the answer and thereafter upheld the plea to jurisdiction raised on

behalf of the defendant and dismissed plaintiff's action but ordered the defendant to pay costs to the plaintiff and to return to the plaintiff all alimony *pendente lite* she had obtained from him.

Learned counsel for the plaintiff-appellant submitted—

(*a*) that a divorce action is not based upon a cause of action and that accordingly there was no dispute which may be a cause of action within the meaning of s. 6 (*b*) of the Conciliation Boards Act ;

(*b*) that the defendant had waived objection to jurisdiction of the District Court.

It will be convenient to consider first whether the defendant-respondent was precluded by her conduct from raising an objection to jurisdiction.

Where the want of jurisdiction is patent, objection to jurisdiction may be taken at any time. In such a case it is in fact the duty of the Court itself *ex mero motu* to raise the point even if the parties fail to do so. In *Farquharson v. Morgan* [1] Halsbury L.C. said, "It has long since been held that where the objection to the jurisdiction of an inferior court appears upon the face of the record it is immaterial how the matter is brought before the Superior Court, for the Superior Court must interfere to protect the prerogative of the Crown by prohibiting the inferior court from exceeding its jurisdiction. That is to say, where the want of jurisdiction appears upon the libel, as in an ecclesiastical court, or upon the face of the record, and does not depend upon a mere matter of fact, and a cause is entertained by an inferior court which is clearly beyond its jurisdiction, no consent of parties will justify the Superior Court in refusing a prohibition."

In the same case, Lopes L.J. said, "The reason why, notwithstanding such acquiescence, a prohibition is granted where the want of jurisdiction is apparent on the face of the proceedings is explained by Lord Denman (6 N. & M. 176) to be for the sake of the public, because 'the case might be a precedent if allowed to stand without impeachment' and I would add for myself, because it is a want of jurisdiction which the court is informed by the proceedings before it, and which the judge should have observed, and a point which he should himself have taken.".

The position however appears to be different where the want of jurisdiction is not apparent on the face of the record but depends upon the proof of facts. In such a case, it is for a party who asserts that the Court has no jurisdiction to raise the matter and prove the necessary facts. A Court has to proceed upon the facts placed before it and its jurisdiction must therefore depend upon them and not upon the facts that may actually exist. It is appropriate in this connection to cite a dictum of Nagalingam, J. in the case of *Marjan v. Burah* [2] :— "As

[1] *70 Law Times 152 at 153.*

[2] *(1948) 51 N. L. R. 24 at 33.*

stated by Hukm Chand (1894 ed. page 240) jurisdiction " does not depend upon facts or the actual existence of matters or things but upon the allegations made concerning them". Hukm Chand quotes a passage from Van Fleet in support :—

> " If certain matters and things are alleged to be true and relief prayed which the tribunal has power to grant if true, that gives it jurisdiction over the proceedings. . . A great deal of trouble has arisen from the mistaken conception that jurisdiction depends upon facts or the actual existence of matters and things instead of upon allegations made concerning them ".

In the case of *National Coal Co. v. L. P. Dave* [1] Choudhary, J. said " .... where the want of jurisdiction is not apparent on the face of the proceedings but the absence of jurisdiction depends on a fact in the knowledge of a party, then if he does not bring that fact forward but allows the Court to proceed with the judgment he ought not to be permitted to impeach the jurisdiction in any collateral proceeding."

In *Kandy Omnibus Co., Ltd. v. T. W. Roberts* [2] Sansoni, J. drew a distinction between patent and latent want of jurisdiction and he said, " When a Court has jurisdiction in particular cases which depend on the existence of a certain state of facts a person who admits, or does not challenge, the existence of those facts can estop himself from denying their existence at a subsequent stage of the proceedings. "

There is no question in this case of any inherent want of jurisdiction. Section 62 of the Courts Ordinance confers jurisdiction on District Courts in all matrimonial matters. There was nothing on the face of the plaint or answer or of the proceedings until the application to amend the answer which could afford any reason to the Court to think it lacked jurisdiction. The objection to jurisdiction which the defendant sought to raise depended on the following facts which were set out in the amendment to the answer :—

(1) That the matrimonial house was at No. 12, Molpe Road, Moratuwa.

(2) That these premises were situate within the Moratuwa Urban Council area.

(3) That a Panel of Conciliators had been constituted for the Moratuwa Urban Council area as and from 2.6.65 and such Panel of Conciliators was in existence at the date of action.

(4) That the cause of action alleged in the plaint was that the defendant had left the matrimonial house and had refused to come back and had thereby maliciously deserted the plaintiff.

(5) That the defendant's position was that she was compelled to leave and that she did not maliciously desert.

(6) That the dispute was not referred to the Panel of Conciliators and a certificate from the Chairman has not been produced.

These matters, particularly those set out at 2 and 3 above were not before the Court prior to the application to amend the answer.

[1] *A. I. R. (1956) Patna 294 at 297.* [2] *(1954) 56 N. L. R. 293 at 303.*

The question for consideration therefore is whether at that time the defendant had precluded herself by waiver, delay or acquiescence from raising the objection to jurisdiction. The following matters are relevant :—

(i) By making a counter claim for a decree for judicial separation the defendant had invited the court to exercise jurisdiction in this action.

(ii) The defendant had applied for and obtained an order for monthly payment of alimony *pendente lite* and had received payments for a period of over two years.

(iii) A period of nearly three years had passed since the institution of the action.

(iv) The plaintiff had led all evidence and closed his case and the defendant had given evidence and called two other witnesses to give evidence.

(v) The plaintiff had been put to much expense as there were several dates of trial apart from other interlocutory proceedings.

Having regard to these matters and, in particular the prejudice to the plaintiff and the late stage at which the amendment was sought to be made, I am of the view that the defendant was precluded by delay and acquiescence from raising the objection to jurisdiction and that she had in fact waived it.

In view of the finding at which I have arrived it is not necessary to consider the submission of the learned counsel for the appellant that a divorce action is not based on a cause of action.

I set aside the order allowing the amendment and the order dismissing the action and send the case back for decision on the other issues. As the defendant may have closed her case in reliance on this point it will be in the discretion of the District Judge to permit her to lead further evidence if he thinks it fit to do so. The order directing the defendant to pay the costs and to re-pay the amount received as alimony *pendente lite* are set aside. The defendant will in any event not be entitled to costs incurred in relation to the amendment of the answer to raise the objection to jurisdiction and the proceedings had in connection with it or to costs relating to the raising of issue No. 7 and the leading of evidence thereon and the proceedings had in connection with them.

The plaintiff-appellant will be entitled to costs of appeal.

In view of the order I have made, appeals numbered S. C. 96/68 Inty. and S. C. 260/68F filed by the defendant have become unnecessary and they are formally dismissed without costs.

PANDITA-GUNAWARDENE, J.—I agree.

Case sent back for further proceedings.