1969 *Present:* Samerawickrame, J., and Weeramantry, J.

LILY FERNANDO, Appellant, *and* RONALD (*alias* R. A. Vanlangenberg) and another, Respondents

S. C. 208/67 (Inty.)—D. C. Panadura, 9135

Jurisdiction—Action filed in District Court—Objection to territorial jurisdiction of the Court not pleaded in defendant's answer—Subsequent denial of jurisdiction by amendment of answer—Not permissible—Courts Ordinance, s. 71—Civil Procedure Code, s. 93—Death resulting from collision—Action in delict—Forum.

Where, in an action instituted in a District Court, the defendant has not denied in his answer the territorial jurisdiction of the Court, section 71 of the Courts Ordinance precludes him from raising such objection subsequently by moving to amend the answer.

[1] *(1933) 34 N. L. R. 438.*

Obiter : Where a man dies in consequence of a collision with a motor vehicle, and the death occurs in an area different from that where the accident occurred, the jurisdiction of the Court in which the wife of the deceased may institute action for recovery of damages may be determined by the area where the accident occurred.

APPEAL from an order of the District Court, Panadura.

S. Sharvananda, with *T. Kanagasabei*, for the plaintiff-appellant.

Sam. P. C. Fernando, with *D. S. Wijewardene*, for the defendants-respondents.

Cur. adv. vult.

February 13, 1969. WEERAMANTRY, J.—

Arising out of an accident in which the plaintiff's husband was killed, the plaintiff instituted this action against the defendants, who are respectively the driver and the owner of the motor vehicle which came into collision with the deceased.

The accident occurred on February 4th 1962 and the plaintiff came into Court as late as 31st January 1964. The defendants entered no appearance initially and the case was heard ex parte and decree *nisi* entered. Thereafter objections were filed to the decree nisi and it was vacated of consent. Answer was accordingly filed on 28th January 1967.

Many months later, on 29th September 1967, the defendants moved to amend their answer. The amendment involved the withdrawal of a specific admission contained in the original answer, relating to the jurisdiction of the Court to hear and determine the action and a plea that the Court had no jurisdiction. No reasons are stated for the denial of jurisdiction, and the place at which the accident occurred would seem to be within the territorial jurisdiction of the Court in which the action was instituted. The reason for denial of jurisdiction would appear to be that the death of the plaintiff's husband occurred outside the jurisdiction of this Court. It is not necessary for the purpose of disposing of the present appeal to arrive at a determination on the validity of this ground of objection, suffice it to say that if the wrongful act complained of, namely the collision, occurred within the territorial limits of that Court's jurisdiction, it is difficult to see how the mere circumstance that death occurred in another area can deprive that Court of its jurisdiction.

Objection was taken to this amendment on the ground that section 71 of the Courts Ordinance precludes a defendant who has pleaded in any cause, suit or action in a District Court, without pleading to the jurisdiction of such District Court, from afterwards objecting to the jurisdiction of such Court. This matter was inquired into by the learned District Judge who made order allowing the proposed amendment. t is from this order that the plaintiff appeals.

The learned District Judge has, in permitting this amendment, proceeded on the basis that no prejudice would be caused to the plaintiff in consequence of the amendment being allowed. He draws a distinction between the present case, where, in consequence of the lateness of the plaint, the first answer would be filed after prescription has run, and a case where the first answer can be filed within the prescriptive period and the amended answer, taking exception to the jurisdiction, is filed after prescription has run. An amendment allowed in the latter circumstances, the learned Judge observes, would cause prejudice whereas in the present case there would be none.

Another ground on which the learned District Judge has permitted the amendment is that the attempt to object to the jurisdiction has been made, in the learned District Judge's language, " before pleadings are closed ". He observes that the trial as such has not yet commenced and that the bar imposed by section 71 would apply only after the trial as such has commenced or in appeal.

It would appear that both these grounds on which the learned District Judge has relied are untenable.

In regard to the first ground it seems clear upon an examination of section 71 that that express provision of statute law does not depend on the existence or absence of prejudice. All that it stipulates is that the defendant should have pleaded in the cause without pleading to the jurisdiction and if that requirement is satisfied, irrespective of questions of prejudice, the consequences set out in that section must follow. Questions of prejudice would indeed be appropriate had the matter for consideration before the learned District Judge been one falling purely within the purview of section 93 of the Civil Procedure Code. Here however the proposed amendment must be considered not merely in terms of section 93 of the Civil Procedure Code but also in terms of section 71 of the Courts Ordinance. Although the latter provision does not in so many words speak of amendments to pleadings, it covers this matter, for by the amendment it is sought to object to jurisdiction after pleadings have been filed without such objections having been raised. The objection visualised by section 71, though not necessarily one by way of pleading, may well be taken in many a case, as indeed in the present, through the filing of amended pleadings, and in such an event such amendments of pleadings would be shut out by the bar imposed by section 71.

In regard to the second ground which has weighed with the learned District Judge I need only observe that what the section requires is that the party should have pleaded. It does not state that the case should have reached the stage where the entirety of pleadings which he would file in the action has already been filed, for till the close of the trial it would not be possible to say whether a party may seek and be granted permission to file amended pleadings. There is no limitation in law on the number of amended pleadings that may be filed or on the time

within which they should be filed and there is nothing in section 71 to indicate that the entirety of pleadings should have been filed or that the stage of possible amended pleadings should have been passed before a defendant is precluded thereby from challenging the jurisdiction. Indeed if the construction placed by the learned District Judge on this section be correct it would be well nigh impossible to give effect to section 71 in the trial Court, for the possibility would always exist that amended pleadings would be filed even at a late stage of trial. If therefore objection were taken to the amended pleading in which it is sought to challenge jurisdiction, such an objection could be met by the plea that all the party's pleadings in the action had yet not been filed and that application would be made to Court for permission to file fresh pleadings taking objection to the jurisdiction. Such a conclusion is clearly one which cannot be sustained.

An examination of section 71 shows that two consequences follow from the fact that a party has pleaded in the first instance without pleading to the jurisdiction. The first is that he shall not afterwards be entitled to plead to the jurisdiction and the second is that the Court shall be taken and held to have jurisdiction over such proceedings. When therefore a defendant pleads without pleading to the jurisdiction it would appear that the section brings into operation the legal result that the Court is taken and held to have jurisdiction. That legal result when once it has come into effect cannot be negatived or taken away by any subsequent pleading.

In the present case it would appear that the defendants had more than one opportunity of registering their objection to the jurisdiction of the Court. They had that opportunity in the first place when they filed papers seeking to have the decree *nisi* vacated. They had their second opportunity when they filed their original plaint. On neither of these occasions was the opportunity availed of for objection to the jurisdiction. It may well be argued that these acts amount to a submission to the jurisdiction. Furthermore, in the special circumstances of this case it is necessary to note that the decree *nisi* was vacated of consent—a consent which may not have been forthcoming from the plaintiff had the plaintiff been aware that the defendants would take advantage of the vacation of the decree *nisi* to object to the jurisdiction.

It would thus be seen that it is not merely the provisions of section 71 but the conduct of the defendants as well which would stand in the way of the proposed amendment. It is also pertinent to observe that there was not in the original answer a mere general denial of averments including averments relating to jurisdiction, but a specific admission in so many words that the Court did have jurisdiction.

This is a type of action and a claim for relief which would undoubtedly fall within the jurisdiction of a District Court. It is only on the basis that the cause of action falls outside the territorial limits of its jurisdiction

that it is sought to be urged that this particular Court lacks jurisdiction to hear this particular suit. It will be seen then that such a case is completely different from cases of total and absolute want of jurisdiction in a particular Court or Tribunal, as where a matter exclusively within the purview of the District Court comes before the Court of Requests or a matter clearly outside the jurisdiction of a Tribunal is brought before it. In such cases, unlike in the present, no amount of submission to the jurisdiction can confer on the Court or Tribunal a jurisdiction it altogether lacks. The case before us is rather one where the Court is spared the trouble of satisfying itself of the facts on which its jurisdiction depends, for the party by his conduct is taken to have accepted those facts, thus dispensing with the need for an inquiry into their existence. This would appear to be the principle underlying the section. So also it would appear that in English law by virtue of a similar principle, a defendant is considered to waive an objection to the jurisdiction if, knowing the facts, he enters an unconditional appearance to the writ. [1]

As Sansoni, J. observed in *Kandy Omnibus Co. Ltd. v. Roberts* [2] there is a sharp distinction between cases of patent and latent want of jurisdiction. Where it appears on the face of the proceedings that the Court had no jurisdiction, the case is differently treated from cases where the difficulty is not apparent and depends upon some fact in the knowledge of the applicant which he might have put forward but has kept back. In the former case conduct does not preclude a party who took part in the proceedings from raising the question of jurisdiction whereas in the latter case the parties may, by appearing without protest or by taking any steps in the action, waive their right to object to the jurisdiction.[3] It is in cases where there is a total lack of jurisdiction not depending on the existence of any fact that questions of estoppel or consent do not arise.[4]

In conclusion, a contrast should be drawn between section 71 of the Courts Ordinance and section 21 of the Indian Code of Civil Procedure V of 1908. The latter section provides that objection to the territorial jurisdiction will not be allowed by an Appellate or Revisional Court unless taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice. It will be seen that section 71 of the Courts Ordinance is more absolute in its terms and that the notion that objection may be taken at any time before issues, which finds a place in the Indian section, finds no place in ours. Where the Statute is in the absolute terms in which section 71 is framed, there would thus be no room for giving to it the extended interpretation which the learned District Judge has sought to give, for which express statutory provision, totally absent in our law, was required in India.

[1] *Odgers on Pleadings, 19th ed. p. 125.*
[2] *(1954) 56 N. L. R. 301.*
[3] *Halsbury, Vol. 9 Part 824.*
[4] *See Spencer Bower's Estoppel by Representation, 1st. ed. pp. 188–9.*

In all the circumstances, therefore, it seems that the learned District Judge's order conflicts with the provisions of section 71 of the Courts Ordinance and cannot be upheld. Consequently the application for amendment by a denial of jurisdiction is refused with costs both here and in the Court below.

SAMERAWICKRAME, J.—I agree.

Appeal allowed.