

SOMARU DASS

v.

MOAPE NAIDUKI

[HIGH COURT, 1989 (Palmer J) 22 February]

Appellate Jurisdiction

Courts- setting aside Judgment- powers of registrar- want of jurisdiction- whether remediable by the parties- High Court Rules 1988 Order 13 r 10.

An acting Chief Registrar purported to set aside a final Judgment entered by his predecessor. On appeal the High Court HELD: (i) that only a Judge may set aside the Order of a Registrar entering Judgment in default of defence and (ii) that the parties could not confer jurisdiction on the Registrar by consent.

Cases cited:

Pasmore v. Oswaldtwistle Urban Council (1898) AC 394

Rothmans of Pall Mall (Overseas) Ltd & Ors v. Saudi Arabian Airlines Corp. [1980] 3 All ER 359

Wilkinson v. Barking Corp [1948] 1 All ER 564; [1948] 1 KB 721

H.M. Patel for the Appellant

B. Bali for the Respondent

Palmer J:

This appeal arises from a curious circumstance, namely the action of a Chief Registrar in purporting to set aside an order made by another Chief Registrar.

It is necessary to say something about the history of the action which has dragged on at a snail's pace for 3½ years before reaching its present unsatisfactory state.

On the 29.11.82 (!) the Plaintiff was injured in a collision between his motorcycle and one driven by the first and owned by the second Defendant - according to a writ and statement of claim filed by the Plaintiff on 4.7.85 and seeking damages.

The Writ was served on the 1st Defendant on 15.8.85 and on the 2nd Defendant on 14.1.86. No appearance was entered by either and judgment in default thereof for damages to be assessed was entered against the 1st Defendant on 20.1.86 and against the 2nd Defendant on 19.3.86. Summons for Assessment of Damages was served on both Defendants in April 1986.

The assessment was heard by the then Chief Registrar, Mr. F. Jitoko on 5.6.86, evidence being given by the Plaintiff and a Doctor. It was heard *ex parte*. The Chief Registrar delivered his judgment on 9.3.87 ordering the Defendant to pay the Plaintiff \$3638 and costs. The order was sealed on 22.4.87. On 27.11.87 the

A Defendants filed a summons asking that the judgment be set aside. That application came before Mr. A. Seru who at that time was Acting Chief Registrar. It was not explained how that learned judicial officer assumed jurisdiction in the light of the statutory provisions to which I will refer shortly, nor why both parties submitted to it without demur. The application was heard on 22.1.88, both parties being represented by counsel. Mr. Seru's decision is dated 26.1.88, but was not handed down until 17.10.88. By it he purported to set aside the final judgment entered by his predecessor on 9.3.87 and gave liberty to defend and gave the Defendants B 14 days to file a Defence. The Order was sealed on 19.10.88 and on 21.10.88 the Plaintiff filed the present Appeal. By this he asks that Mr. Seru's Order be set aside and the original judgment be restored.

The jurisdiction of Registrars of the Court, while quite extensive is strictly circumscribed by the High Court Rules:-

C Order 1 Rule 2 states that:

D 'the Court' means the High Court or any Judge thereof, whether sitting in Court or in chambers, and, where appropriate, the Registrar: provided that this definition shall not be taken to affect any provision of these Rules and, in particular, the provisions of Order 32 rule 9, by virtue of which the authority and jurisdiction of the Registrar are defined and regulated."

Order 32 Rule 9 provides that:-

E "The Registrar shall, subject to the directions of the Chief Justice given generally or in respect of any particular case, have the powers, authority and jurisdiction of a judge in Chambers with respect to the following matters " and those matters are thereunder set out. They do not include setting aside a judgment or order.

Order 36 provides for inquiries by the Registrar;

F Order 37 provides for the assessment of damages by the Registrar;

Order 58 provides that appeals from Registrars lie to a Judge.

G The entering of judgment in default is regulated by Order 13 Rule 10 whereof provides that the Court may set such a judgment aside. It is clear, having regard to the provisions referred to above, that "the Court" in Order 13 rule 10 does not include a Registrar. One must go to a Judge.

It would indeed be very surprising if a Registrar did have power to set aside a Registrar's order, made at the same judicial level, especially as he might be in the position in such a case of virtually hearing an appeal against himself. It is quite fortuitous that in the present case the incumbent of the office changed between one step and another.

However, seeing that the parties obviously consented to Mr. Seru hearing the application I need to consider the effect if any, of such consent.

In Pasmore v Oswaldtwistle Urban Council, [1898] AC 394 the House of Lords, per Earl of Halsbury said:-

“The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law.”

In Rothmans of Pall Mall (Overseas) Ltd and others v. Saudi Arabian Airlines Corp. [1980] 3 All ER 359, at 364 Mustill J. cited what Asquith, L.J. had said in Wilkinson v Banking Corp., [1948] 1 All ER 564 at 567; [1948], 1KB 721 at 724:

“It is undoubtedly good law that, where a statute creates a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to this remedy or this tribunal and not to others.”

Mustill J. (who was upheld on appeal) went on to say:-

“Where the statute is of this kind, it is immaterial whether the parties wish the Court to try the action. It must disclaim jurisdiction, since to continue with the action would be contrary to law.”

In the Wilkinson case (ibid) the Court also said (at p 567 E):

“A party cannot submit to, so as to make effective, a jurisdiction which does not exist.”

In the present case there was not just a mere irregularity such as can be cured by consent. There was a question of jurisdiction and as is abundantly clear from the authorities, the consent implied by the parties appearing at the hearing cannot serve to confer a jurisdiction upon the Registrar which the Rules clearly say he does not have.

I should add this: It may well be that Mr. Seru acted with the best of motives in endeavouring to assist the parties at a time when there was a judicial hiatus, the judges having been removed by Decree, but not the Registrars. However, the existing laws were continued. But be that as it may, while the summons to set aside was filed in November, 1987 during the hiatus period, by the time it was heard, on 22.1.88 the Court had been restored (by Decree dated 13.1.88). But in any event those circumstances and the best of intentions could not confer jurisdiction.

For the above reasons I hold that the Acting Chief Registrar did not have jurisdiction to hear the application and to make the order he purported to make

thereon on 17.10.88.

A I declare that Order to be a nullity and accordingly the parties are in the same position as they were when the final judgment was entered on 9.3.87. In the circumstances there is no need for me to consider the submissions as to the merits.

The Appeal is allowed. The Order of 17.10.88 is set aside. I will hear counsel as to the costs of this appeal.

B *(Appeal allowed; order of Acting Chief Registrar set aside.)*

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