**BOMBAY HIGH COURT**

Ramakrishna Timmappa Shetti

Vs.

Hanumant Patgavi

A.F.O. No. 99 of 1946

(Rajadhyaksha and Chainani, JJ.)

11.11.1948. 11.01.1949

**JUDGMENT**

**Rajadhyaksha, J.**

1. The facts giving rise to this appeal from order are these. The plaintiff is a nephew of defendant 1. The plaintiff's father died in about 1935, leaving behind him his widow, a minor son the present plaintiff and his brother defendant 1. In 1932 1933, the plaintiff's uncle defendant 1 took up a ferry contract, and as he did not pay the amount of the bid, the undivided property of the plaintiff and defendant 1 consisting of certain mulgeni rights in Survey No. 16 of Phattubele village was brought to sale and was eventually purchased by defendant 2 as an auction sale. In 1940, the plaintiff who was even then a minor brought a suit, No. 217 of 1910, through his guardian mother asking for a declaration that the auction sale held in 1935 in favor of defendant 2 was not binding upon the plaintiff's half share in the suit property and for an injunction restraining defendant 2 from taking the income of his share of the property. The suit was dismissed as the relief of possession which it was possible for him to claim had not been claimed. There was an appeal against that decision to the District Court, being Appeal No. 100 of 1942, and in that Court the plaintiff's mother withdrew the appeal with permission to bring a fresh suit. The order of the Appeal Court under Order 23, Rule 1(2), was in the following terms :

> (1) Appellant (plaintiff) should pay respondent (defendant 2) Rs. 15-8-0 as costs of the appeal.
> (2) Plaintiff should also pay defendant 2 Rs. 68-3-0 being his (defendant 2's) costs of the lower Court.
> (3) Plaintiff should pay defendant 2 these costs before the institution of the next suit.

2. In 1944, the plaintiff who had by that time attained majority filed the suit, which gives rise to the present appeal and asked for the same declarations and injunctions as in the earlier suit. But before the suit was filed, the order regarding the payment of costs which had been made in the earlier suit was not complied with. After the institution of the suit, defendant 2 filed a written statement raising various contentions, one of which was that the plaintiff had no right to bring the

present suit without paying the costs of the earlier suit, as the payment of coats was made a condition precedent to the filing of a fresh suit.

3. The learned trial Judge framed a preliminary issue, viz., whether the suit was maintainable in view of this contention, and answered that issue in the negative. Accordingly, the suit was dismissed. The plaintiff thereupon again appealed to the District Court and while the appeal was pending, the learned pleaders appearing on both sides filed a joint purshis to the following effect :

> "The appellant who was the plaintiff in the lower Court has cow paid to the pleader for the other side Rs. 15-8-0 for his costs of the previous appeal (No. 100 of 1942) and Rs. 68-3-0 for costs of the previous suit (No. 217 of 1940) and has thus fulfilled the condition laid down as precedent to his being entitled to file the suit. Hence the suit may now be taken as competent as from this date. The appeal may hence be allowed and the suit may be remanded to lower Court for trial on merits. Costs of this suit will be costs in the cause. The appellant may be ordered to pay the coats of the respondent in this Court of this appeal."

In accordance with the purshis filed by the pleaders on both sides, the learned District Judge made an order allowing the appeal and remanding the suit to the lower Court for trial. It is against this order that defendant 2 has now come in appeal.

4. When the appeal first came on for hearing before Sen, J. it was contended by Mr. Shanbhag, who has also appeared before us on behalf of defendant 2, that it was not clear whether the consent given by defendant 2's pleader was given on the authority or with the consent of defendant 2 himself. He further contended that even if such consent was given what was consented to was opposed to the decision in *Shidramappa Mutappa v. Mallappa Ramchandrappa*[1], and ought not therefore to have been regarded as a consent enabling the lower appellate Court to make the order which it did, having been in effect consent to something which was illegal. In order to appreciate this argument, the learned Judge thought that it was necessary first to see whether the consent stated to have been given by dafendant 2's pleader was based either on the consent or the authority given by defendant 2 or whether in any other sense the consent could be deemed to be the consent of defendant 2 himself. An issue on this point therefore was sent down and a finding was asked for within two months. On a construction of the vakalatnama the learned Judge found the issue in the affirmative, viz., Mr. Haldipurkar the pleader for defendant 2 had authority to give consent to the joint purshis on his client's behalf and that it must also be deemed that the consent given by Mr. Haldipurkar to the said purshis was really the consent of defendant 2 himself.

5. After this finding was returned, the appeal came on for bearing before Dixit, J. The matter was fully argued before the learned Judge. The learned Judge was of the opinion that the authority of *Sidramappa Mutappa v. Mallappa Ramchandrappa at*[2] did not staid in the way of the plaintiff and that it was open to the defendant, to waive the condition which was imposed in the earlier case for his benefit. The learned Judge made the following observations :

[1]55 Bom 206 : AIR 1931 Bom 257

[2](55 Bom 206 : AIR 1931 Bom 257)

> "As far as I have been able to understand the matter I do not see why a pleader duly

> authorized by his client should not bind his client in respect of a concession made by him in the course of the suit or of the appeal. Besides, there is nothing illegal or opposed to public policy in mating the concession such as the one which has been done. In this case the condition was entirely in favor of defendant 2 and the duly authorized pleader would be entitled to bind defendant 2 by the concession."

The learned Judge distinguished the case of *Shidramappa Muttappa v. Mallappa Ramchandrappa*[3] *:* The learned Judge also expressed the view that the condition imposed by the Court in favor of the party was a condition for his benefit and if the condition was broken, there was no breach of any law. It was a condition which could be waived. He referred to the case of *Ramakrishna v. Vandaya Thevart*[4] which was a case decided under Order 33, Rule 15, Civil Procedure Code In that case the Madras High Court held that

> "the Court need not dismiss the suit if costs are paid subsequently but should treat the suit as validly instituted from the date on which the costs were so paid."

Dixit, J. expressed his agreement with this view and applied the analogy of that decision to the case before him and held that there was no difference in principle between the two cases. But as he thought that the question was of general importance he considered it desirable that the matter should be heard by a Division Bench.

6. On the matter coming before us for hearing, Mr. Shanbhag on behalf of appellant-defendant 2 has again pressed us to construe strictly the conditions imposed for the filing of a fresh suit and has quoted in support the authorities of this Court in *Ambubai v. Shankarsa*[5]*,* and *Shidramappa Muttappa v. Mallappa Ramchandrappa*[6] The question has to be decided with reference to the wording of Order 23, Rule 1, Civil Procedure Code Under Order 23, Rule 1, Sub-Rule (2) –

> "Where the Court is satisfied -
> (a) that a suit must fail by reason of some formal, defect, or
> (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim."

7. In *Ambubai v. Shankarsa* [7]*:* the plaintiff withdrew the suit with permission of the Court and was ordered to pay the defendant's costs before filing a fresh suit. Without paying the defendant's costs, he filed a fresh suit. He paid the costs three days before the day fixed for the hearing of the evidence in the case. The Court dismissed the suit on the ground that the suit being filed without previous costs having been paid was bad ab initio. The plaintiff, however, considering that the permission given to him by the Court in the original suit was still surviving in spite of the second suit being dismissed, filed his third suit on the same cause of action. It was held that the

[3](55 Bom 206 : AIR 1931 Bom 257)
[4] AIR 1936 Madras 24 : (159 IC 1029)
[5]27 Bom LR 243 : AIR 1925 Bom 272
[6](55 Bom 206 : AIR (18 1931 Bom 257)
[7](27 Bom LR 243 : AIR 1925 Bom 272)

permission granted by the Court in the original suit could only extend to the filing of one fresh suit and not to the filing of any number of fresh suits, which might be dismissed each in its turn, without any trial on the actual merits of the case between the parties for failure to pay the costs of the first suit. That case, however, is somewhat different from the one with which we have to deal as there is no question in the present cage of a third suit being filed on the basis of the permission granted in the first suit. But the observations in the second case, viz. *Shidramappa Mutappa v. Mallappa Ramchandrappa*[8], are of somewhat greater significance. In that case the plaintiff was allowed to withdraw the suit and leave was granted to bring a fresh suit on condition that the plaintiff paid the defendant's costs. The second suit was in fact instituted without paying the coats of the first suit and leave was granted to withdraw that suit with liberty to bring a fresh suit. It was held that such leave was not valid in law and the fresh suit was not maintainable even if the costs of the first suit were paid before the institution of the fresh suit. In the course of the judgment Patkar, J. referred to the conflicting views which had been held on the interpretation of Order 23, Rule 1, by the Calcutta and Patna High Courts on the one side and the Madras High Court on the other. He referred to the case of *Shital Prasad v. Gaya Prosad*[9], in which it was held that where a suit was allowed to be withdrawn by the plaintiff with liberty to bring a fresh suit on the same cause of action on condition of paying costs to the defendant, the second suit could riot be dismissed for non-payment of the costs and that inasmuch as permission to withdraw and bring a fresh suit was made conditional on a certain payment, the original suit could not be deemed to be withdrawn until those costs were paid, and therefore, it must be deemed to be a pending suit which became dis. posed of as soon as the payment was made. The contrary view was expressed in the case of *Seshayya v. Subhayya*[10], in which it was held that as the withdrawal of the suit did not require the permission of the Court, it must be taken that the first suit was withdrawn when the order was passed and that the permission granted referred only to the filing of the subsequent suit on certain conditions. The Court criticized the Calcutta view that if the first suit was considered as still pending, it would be open to the plaintiff, instead of complying with the condition of the permission to go to the Court and demand that the trial on the first suit should be proceeded with however long the interval might be. This Court preferred to follow the Madras view and expressed its dissent from the view of the Calcutta High Court. Mr. Hattangdi on behalf of the respondent-plaintiff has again pressed us to accept the Calcutta view. But in view of the clear decision of a division bench of this Court in *Shidramappa Mutappa v. Mallappa Ramchandrappa*[11], we do not think that we are at liberty to take a different view. It is true that the decision is *Shidramappa Mutappa v. Mallappa, Ramchandrappa*[12], dealt with the validity of the order passed in the second suit which was instituted before the costs, as required by the order in the first suit, were paid. That case did not raise the point which has been raised in the present case, viz., the effect of the payment of costs after the institution of the second suit, although the order in the earlier suit had directed that the costs must be paid before the institution of the second suit. Patkar J. observed that (p. 213) :

> "The costs ordered to be paid in the first suit ought to have been paid before the institution of the second suit, and it cannot be said that the condition imposed is the first suit is fulfilled by payment of the costs after the disposal of the second suit when

[8](55 Bom 206 : AIR 1931 Bom 257)
[9]19 CLJ 529 : (AIR (1), 1914 Cal 207)
[10]47 MLJ 646 : AIR 1924 Mad 877
[11](55 Bom 206 : AIR 1931 Bom 257)
[12](55 Bom 206 : AIR 1931 Bom 257)

the costs ought to have been paid before the institution of the second suit."

From this it would appear that according to the learned Judge the costs had to be paid before toe second suit was instituted. Baker J. also cornea to the same conclusion when he says at p. 219 :

". . .I am to opinion that the condition on which the plaintiff was allowed to bring a second suit not having been complied with, the plaintiff had no right to bring a second suit, which should have been dismissed, and therefore the permission in that suit is of no avail."

In view of this decision, which is binding upon us, we consider that the condition imposed in the order of the first suit, viz., that the costs should be paid before the institution of the second suit, should be strictly complied with, and if the condition requisite is not fulfilled, then the suit is not properly filed and is liable to be dismissed. In our opinion the present suit was rightly dis. missed by the trial Court when it was brought to its notice that the costs of the earlier suit had not been paid before the institution of the second suit. In both the eases referred to above the basis of the decision was that the permission to bring a fresh suit on certain conditions enabled only one fresh suit to be brought by the fulfillment of that condition : *Ambubai v. Shankarsa*[13]*,*

If the second suit is defective by reason of non fulfilment of that condition, any permission given in the course of that suit to bring a fresh suit is not valid in law and a fresh suit will not be maintainable even If the costs of the first suit are paid before the institution of a fresh suit Skidramappa's case, (55 Bom 206 : AIR 1931 Bombay 257). In neither of these two cases the question as to the effect on the second suit of the payment of costs after the institution of the suit fell to be considered. In Skidramappa's case, (55 Bom 206 : AIR 1931 Bombay 257), there is an observation of Patkar, J. at p. 213 in which the learned Judge observes "that the costs were not paid even during the pendency of the second suit." Whether such payment would, in his opinion, have made the second suit valid or not is not quite clear from the judgment.

8. In the case of *Rachal Singh v. Sheo Ratan Singh*[14]*,* which was brought to our notice by Mr. Shanbhag, the Allahabad High Court has held that once the plaintiff has accepted the terms imposed by the Court, and the case is declared to be withdrawn and is no longer pending, the plaintiff must comply with those terms strictly or take the consequences by being barred from filing a second suit. But this decision of a single Judge of the Allahabad High Court has been dissented from in *Jadu Teli v. Mahboob Raza Khan*[15]*,* on which Mr. Hattangadi relies for the proposition that the costs of the first suit could be paid during the pendency of the second suit. In that case the plaintiff was permitted to withdraw his suit with liberty to file a fresh one on the terms that the costs of the defendant were to be deposited in Court before filing the fresh suit. A fresh suit was filed without the plaintiff having first deposited the costs. Subsequently in the course of the

[13](27 Bom LR 243 : AIR 1925 Bom 272) [15]56 All 10 : AIR 1933 All 810

[14] AIR 1929 All 692 : (118 IC 584)

suit, and before any objection on this score had been raised by the defendants, the plaintiff deposited the said costs. On the question whether, by reason of non-compliance with the terms of

the order, the suit was maintainable, it was held :

> "that as the second suit was filed without the condition having been fulfilled, the suit was, do doubt, defective, and it would be open to the Court to take a very strict view of the non-compliance. At the same time there was nothing to prevent the Court from allowing the plaintiff to fulfill that condition by depositing the costs subsequently, so long as no question of limitation arose. When the costs were deposited and the condition was fulfilled, the suit could, at any rate, be deemed to have been instituted on the date when the condition was fulfilled, unless limitation was a bar to the claim."

On the authority of this decision it was argued by Mr. Hattangadi that it was open to the Court to regard the second suit as properly instituted so long as the costs of the original suit were paid during the pendency of the suit and before any objection was taken by the other side. The reasoning of this decision is :

> "that if the non-payment of the amount before the institution of the suit is considered to be a defect so as to make the suit premature, the plaintiff may file another suit after he has made the deposit."

According to the learned Chief Justice as a fresh suit could be filed after the deposit of the costs, there was no point in having the second suit dismissed for reason of non-payment of the costs, merely to enable the plaintiff to file a third suit after the deposit of costs was made. But this reasoning is opposed to the decision of this Court in *Ambulal v. Shankarsa*[16], Mukerji J. has in fact referred to this case and expressed his dissent from the view taken by this Court. We do not therefore consider that the authority of *Jadu Teli v. Makboob Raza Khan*[17], is sufficient authority for us for holding that the defect in the institution of a second suit by reason of non-payment of the costs could be cured by a subsequent payment. Another case to which Mr. Hattangadi invited our attention was the case of *Bhagirthi v. Babvo*[18], In that case the plaintiff had been allowed to withdraw a suit under Order 23, Rule 1, with liberty to bring a fresh suit on the condition that ha pays the defendants costs. The order fixed no date for the payment of costs to the defendants. It was held that

> "it was a mere irregularity not attesting the merits and not resulting in prejudice or injustice and that the costs could be paid even after the institution of the suit."

The reasoning in this case also was the same as that of the Allahabad High Court in the case to which I have just referred. At p. 57 the learned Judge, Vivian Bose, J. observed : "therefore all that the plaintiff would have to do would be to pay or tender the costs and then file his suit afresh." According to the view held by the learned Judge, there was nothing to prevent the plaintiff from withdrawing the second suit and filing a third suit

[16](27 Bom LR 243 : AIR 1925 Bom 272) [18] AIR 1935 Nag 66 : (31 NLR 266)
[17](56 All 10 : AIR 1933 All 810)

after payment of the costs ordered to be paid in the first suit. This view is again in conflict with the decision of this Court in *Ambubai v. Shankarsa*[19], which is binding upon as. We do not therefore consider this case also as an authority for us to hold that the defect in the institution of

the second suit could be cured by the payment of costs daring the pendency of that suit.

9. Mr. Hattangadi has also invited our attention to the case of *Ramkrishna v. Vandaya Thevar*[20], which has been referred to by Dixit, J. in the referring judgment. That case has reference in the institution of a suit under Order 33, Rule 15, Civil Procedure Code That rule is in these terms :

> "An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the coats (if any) incurred by the Provincial Government and by the opposite party in opposing his application for leave to sue as a pauper."

The effect of the non-payment of the amount of coats was considered by Varadachariar and Panel rang Row JJ. and it was held that

> "the Court need not dismiss the suit if coats are paid subsequently but should treat the suit as validly instituted from the date on which the costs were so paid."

It is not quite clear from the report whether the costs were paid and accepted by the defendants. If they were accepted by the defendants, then the principle of waiver would come into operation. The decision, however, is based on the reasoning that it was unnecessary to go through the formality of a dismissal and a re-institution the very next moment after the payment of the costs ordered in the original suit. If the conclusion arrived at in that case were to be applied to the case before us, then it would be possible to hold that the payment of costs during the pendency of the suit would validate the suit, if the ratio of the decision could also be accepted, viz. the second suit could be allowed to be dismissed and a third suit filed after the payment of the costs. But that basis, as I have stated earlier, is opposed to the view taken by this Court in *Ambubai v. Shankarsa*[21], and we do not consider that the reasoning in *Ramakrishna v. Vandaya Thevart*[22], is a sufficient authority for us to hold that the defect in the institution of a second suit could be cured by payment of the costs during the pendency of that suit. Indeed there is authority of this Court in *Ramabai v. Shripad Balwant*[23], that payment of costs after the institution of the second suit would not cure the defect in the institution of the suit and the Court has no jurisdiction to proceed with the suit. Moreover, this decision of the Madras High Court has been dissented from by a division bench of this Court in *Abdul Rahman v. Aminabi*[24], although not on the ground which I have discussed above. It must therefore be held that a second suit instituted without fulfilling the conditions for the institution of that suit is bad and must be dismissed as the present suit was rightly dismissed by the trial Court.

[19](27 Bom LR 243 : AIR 1925 Bom 272)
[20](AIR (23, 1936 Mad 24 : 159 IC 1029)
[21](27 Bom LR 243 : AIR 1925 Bom 272)
[22] AIR 1936 Mad 24 : 169 IC 1029
[23]59 Bom 733 : AIR 1935 Bom 421
[24]45 Bom LR 768 : AIR 1943 Bom 409

10. But the position is somewhat complicated in the present instance by the fact that while the appeal against the dismissal of the suit was pending in the District Court, the learned pleader for the plaintiff offered and the learned pleader for the defendant accepted the payment of the costs and filed a purshis to the effect :

> "that the plaintiff had fulfilled the conditions laid down as a precedent to his being entitled to file the suit and that therefore the suit may now be taken as competent from this date."

The question is what is the effect of this purshis which was jointly submitted to the Court by the pleaders on both sides. We do not wish to express any opinion as to the effect of the payment of costs after the institution of the suit, although it was held by Divatia J. in the case of *Ramabai v. Shripad Balwant*[25], referred to above, that in a case arising under Order 83, Rule 15, non-payment of costs before the institution of the second suit was fatal to the jurisdiction of the Court to proceed with the suit and that subsequent payment would not care the defect. But we desire to confine ourselves to the position as it arises in this case viz., as to what is the effect on the second suit, if the costs are paid and accepted by the defendant in fulfillment of the conditions imposed for the institution of the second suit. In our view such action on the part of the defendant removes the bar for the institution of the second suit, a bar which was imposed in his interest and for his benefit. It is open to a party to renounce the benefit that a law or a contract confers upon him provided such renunciation is not opposed to the principles of public policy. In *Graham v. Ingleby*[26], Baron Alderaon observed (p. 657) :

> "that the principle upon which cases proceed is well-founded and it is this that an individual cannot waive a matter in which the public have an interest."

In *Post Master General, Bombay v. Chenmal Mayachand*[27], Divatia J. observed (p. 766) :

> "It is no doubt a general rule that any one may renounce a law introduced for his own benefit. But that rule applies only to rights and benefits of a personal and private nature created under an agreement or granted by law. There is a clear distinction between a contractual or a statutory right created in favor of and person for his own benefit and a right which is created on the ground of public interest and policy. The rule of waiver cannot apply to a prohibition based on public policy."

In the present instance the condition of the payment of costs before the institution of the second suit was designed to protect the interests of the defendant, and there is no question of public policy involved in the waiver of such condition. We, therefore, agree with the view taken by Dixit, J. that it was competent for the defendant to waive the condition which was imposed by the Court for his benefit. It was argued by Mr. Shanbhag for the appellant that defendant 2 could not, by accepting the costs, confer jurisdiction on the Court to entertain the second suit. He seemed to draw a distinction between jurisdiction which does not exist except by the fulfillment of the condition and jurisdiction which exists but which cannot be exercised before certain conditions are fulfilled; and he argued

[25](69 Bom 733 : AIR 1935 Bom 421) [27]43 Bom LR 758 : AIR 1941 Bom 389

[26](1848) 1 EX. 651 : (74 ER 808)

that in the latter case only it is open to a party for whose benefit the condition has been imposed to waive the condition and remove the bar for the exercise of the jurisdiction. The distinction which he has sought to draw is that which has been stated by Beaumont C.J. in *Devidatt v. Shriram*[28], where the principle is stated in the following terms (p. 238) :

> "In cases in which some condition has to be performed before the Court can entertain a suit, the question always arises whether the condition is a matter of procedure only, so that failure to perform it may be regarded as an irregularity which may be excused or waived or whether the condition as one going to the root of the Court's jurisdiction in which case the performance of the condition cannot be waived since it is not competent to parties by conduct or contract to enlarge the jurisdiction of the Court."

In none of the cases arising under Order 23, Rule 1, to which our attention has been invited has it been held that the Court has no jurisdiction to entertain a second suit. Indeed the Allahabad, Calcutta, Patna and Nagpur High Courts have permitted the costs of the first suit to be paid after the institution of the second suit. In our opinion this is a case not of the inability of the Court to entertain the suit, but of the disability of the party to institute it before fulfilling certain conditions imposed upon it by the Court. It is a disability imposed on the plaintiff before be can invoke the jurisdiction of the Court. A familiar instance of this kind is one arising under Section 80, Civil Procedure Code, under which no suit shall be instituted unless notice is given to Government as required by that section. Here, again, it is not that the Court has no jurisdiction to entertain the suit, but the party is precluded from invoking the jurisdiction of the Court until certain conditions are fulfilled, and it has been held that "it is open to the defendant to waive the requirements about notice and allow the suit to proceed." At page 129 of Mulla's Code of Civil Procedure, 11 Edn., the following observations occur :

> "But when the Court is not competent to entertain or try the suit there is a want of inherent jurisdiction which cannot be waived. But here again there are certain exceptions. If the Court has no jurisdiction owing to some privilege attaching to a party, the party may waive that privilege."

The argument regarding want of jurisdiction in the Court for entertaining the second suit arises owing to some privilege which attaches to a party, viz., defendant 2 in the present instance. It was, therefore, open to defendant 2 to waive the condition of the payment of costs before the institution of the suit and accept the payment as removing the bar to the institution of that suit. In a cage arising trader Order 33, Rule 15, it was held that the case was not one of inherent want of jurisdiction in the Court but an irregularity in the initial procedure capable of being waived : *Umabai Shankar v. Shankar Hari*[29], This view was approved in *Abdul Rahman v. Aminabi*[30], We are, therefore, of opinion that it was competent to defendant 2 to allow the bar to the plaintiff's instituting the second suit being removed by accepting the payment of costs as removing that bar.

11. It was lastly argued by Mr. Shanbhag that Mr. Haldipurkar appearing on behalf of

[28]34 Bom LR 236 : AIR 1932 Bom 291 [30]45 Bom LR 768 : AIR 1943 Bom 409

[29]41 Bom LR 1269 : AIR 1940 Bom 44

defendant 2 had not any authority to enter into the arrangement and allow the costs to be paid and the suit to be regarded as properly instituted. He referred us to the ruling in *Krishnaji v. Rajmal*[31], wherein it has been held "that a party to a suit was not bound by the admissions of his pleader if they are erroneous in law." To the same effect are the observations in *Narayan v. Venkatacharya*[32], where it has been held that :

> "A party is not bound, generally speaking, by a pleader's admission in argument on what is a pure question of law amounting to no more than his view that the question is unarguable."

On the view we have taken of the matter, it was perfectly competent in law for defendant 2 to waive the requirement of the payment; of costs, and the only question, therefore, which arises is whether Mr. Haldipurkar had authority to enter into such an arrangement with the pleader for the plaintiff. The authority is very widely worded and permitted Mr. Haldipurkar to put in an appearance on behalf of defendant 2 and to conduct all work relating to the case on his behalf and to carry on negotiations for a compromise with the plaintiff, if a compromise was arrived at, to sign such compromise application and to give consent to the same. In view of this we consider that Mr. Haldipurkar had full authority to agree to the joint purshis which was filed on behalf of the plaintiff and defendant 2 and we thick that defendant 2 is bound by that arrangement. As pointed out in *Vishnu Shankaram v. Krishnrao Malhar*[33]*,*

> "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 challenge the legality of the proceedings due to his own invitation or negligence."

We are, therefore, in agreement with the view expressed by Dixit, J. in his referring judgment on the question of waiver and the authority of Mr. Haldipurkar to enter into the compromise.

12. The appeal will, therefore, be dismissed with costs.
Appeal dismissed.

[31]2 Bom LR 25 : (24 Bom 360)
[32]6 Bom LR 434 : (28 Bom 408)
[33]11 Bom 153