

SUPREME COURT OF NIGERIA

28TH APRIL, 2006. SC. 312/2001

**CORAM:- S. M. A. BELGORE, U. A. KALGO, N. TOBI, A. M.
MUKHTAR, M. MOHAMMED, W. S. N. ONNOGHEN,
I. F. OGBUAGU, JJSC**

FASAKIN FOODS NIG LTD. APPELLANT
AND

MARTINS BABATUNDE SHOSANYA RESPONDENT

COURTS - Jurisdiction - Legislation - Power to transfer a matter - Under s. 22 of Federal High Court Act - Lagos State High Court cannot transfer matters to Federal High Court - Till State Assembly legislates on that subject (H1)

CONSTITUTIONAL LAW - Constitution - Supremacy of - Effect on other Laws or Acts - Where they are inconsistent with the Constitution - Court has jurisdiction to declare them invalid, null and void (H2)

COURTS - Jurisdiction - Where not available - Proper order for the court to make - Is an order striking out the proceedings - Not an order of transfer (H3)

FACTS

The Appellant in the High Court of Lagos State, Ikeja Judicial division, claimed against the Respondent several monetary reliefs. The action arose from alleged wrongful activities of the Respondent when he was a Receiver/Manager of the Appellant. The Appellant filed and served a statement of claim on the Respondent. In reaction to the same, the Respondent filed a Notice of Preliminary Objection challenging the jurisdiction of the State High Court to hear and determine the suit.

After hearing arguments from both counsel for the parties, the learned trial judge held that the State High Court lacked jurisdiction over the suit. However, he went ahead to transfer the suit to the Federal High

Court, Lagos Division, purportedly pursuant to s. 22(3) of the Federal High Court Act, having found that that court was the proper venue for the suit. The Respondent, being dissatisfied with the Ruling of the trial court, appealed to the Court of Appeal, which allowed the appeal and set aside the orders of the trial court. In their place, it made an order striking out the suit. It is against this decision of the Court of Appeal that the Appellant has brought the instant appeal before the Supreme Court.

ISSUE FOR DETERMINATION

1. Whether or not, the trial court, had the jurisdiction to transfer the said suit to the Federal High Court for hearing and determination.

HELD (Unanimously dismissing the appeal per **OGBUAGU JSC**)

Jurisdiction - Legislation - Power to transfer a matter

1. *“There can be no doubt that Section 22(3) of the Federal High Court Act, Cap. 134, Laws of the Federation, 1990 to the extent that it sets out what a State High Court should do if the State High Court is of the view that a cause or matter should have been initiated in the Federal High Court and not in a State High Court, is clearly not in conformity with Section 239 of the 1979 Constitution which vests such legislative authority on the State House of Assembly. The argument of the Respondent that the Federal High Court Act Cap. 134 LFN being an existing law could be modified to bring it in line with the 1979 (or 1999 Constitution) overlooks the fact that what is in issue here is not textual inconsistency of the said Section 22(3) Cap. 134, 1990 with any other law or Constitution but rather that the National Assembly could not in any case legislate over the practice and procedure in a State High Court. At the time the 1979 Constitution came into force, Lagos State has its State High Court law which was Cap. 52, 1973 Laws of Lagos State”.*

[the underlining mine]

Section 12 of the said High Court Law, was referred to and reproduced,

It thus means, that under the said High Court of Lagos State (Civil Procedure) Rules, 1972, there is no rule of procedure, which enables that court, to transfer a cause or matter, to the Federal High Court. That

court, cannot even in the circumstance, resort to or fall back to the practice and procedure in England as there appears to be no such provision of transfer from a High Court to the Federal High Court. So, as it stood or stands, the Lagos State House of Assembly, has not made any provision for the transfer of a cause or matter to the Federal High Court. The practice and procedure of a State High Court, is regulated by Section 239 of the 1979 Constitution.

I am aware that while the Federal High Court can transfer a cause or matter to a State High Court, by virtue of Section 22(2) of the Act. But there is no such provision applicable at least, in the Lagos State High Court Rules. (p. 1458 E)

Constitution - Supremacy of

2. The Constitution, as has been well settled, is Supreme; the Organic or fundamental law and it is the grundnorm of Nigeria.

This Court, has, therefore, the jurisdiction, to declare any other law or Act inconsistent with the provisions of the Constitution, invalid and therefore, null and void.

This is because, the Constitution, has also been described as the fons et arigo. This is why, it has made provisions for the procedural law applicable in the various courts established by it in Sections 216, 227, 233, 239, 244 and 249. This is also why, being the foundation of all laws, its provisions, must be read in their clear and ordinary meaning. Any Act which infringes or runs contrary to those organic principles or systems or provisions, must be declared to be inconsistent. (p. 1459 F)

Jurisdiction - Where not available

3. If the trial court acted under the said invalid Act, it was not right, having regard to the said provisions of Section 233 of the 1979 Constitution. This is because, it has long been settled in a number of decided cases, that where a court holds that it has no jurisdiction, the proper order to make, is to strike out the suit or proceeding. It does not transfer and cannot transfer. So, pursuant to Section 239 of the 1979 Constitution, the trial court's jurisdiction, was limited to just striking out the suit

in the circumstances. I so hold. I therefore, render my answer to the said lone issue of the Appellant, in the Affirmative.

So, whichever way one looks at this appeal, it is bound to collapse and it has failed. It is accordingly dismissed. I hereby affirm the said B decision of the court below. (p. 1460 F)

NOTABLE POINTS OF INTEREST

OGBUAGU JSC

C *1. Statutes - Duty of court is to give effect to clear words*

Section 22(3) of the Federal High Court, Act, (hereinafter called “the Act”) appears in Cap. 134, Laws of the Federation of Nigeria, 1990. So, it is the 1979 Constitution, that governs the subject-matter of the dispute between the parties.

D By the said Ruling of the High Court, it is my humble but firm view (and without prejudice to my eventual conclusion in this Judgment) that the learned Judge, was “*apparently*” right in simply complying with the clear and unambiguous provisions of the said Act. It is now firmly E established, that in the principle of construction or interpretation of a Statute or Constitution, the ordinary meaning of words, apply prima facie. That it is the duty of the court, to interpret words used in a Statute or Constitution. That ordinary meaning of the words used, should be given F its effect. Even where such interpretation, causes inconvenience to the parties - See recently, Hon. Justice E.O. Araka v. Hon. Justice Don Egbue (2003) 7 SCNJ. 114; or even if it gives an unreasonable or unfair result - See Victor Ndoma-Egba v. Chukwuogor & 3 ors. (2004) 6 NWLR (Pt. 869) 382. (p. 1455 D)

G

TOBI JSC

2. When a previous Constitution is inapplicable in interpreting current one

H In some desperate effort to convince the court to go along with his argument, learned counsel first cited *The Queen v. Owoh*. In that case the Supreme Court interpreted the provisions of the Nigerian (Constitution) Order-in-Council, 1954 and section 57(3)(b)(i) as amended by

the 1957 Order-in-Council. While I agree with learned counsel that section 57(3)(b)(i) is the precursor of section 274(1) of the 1979 Constitution, the provisions are not the same. Therefore Owoh cannot be valid authority in this case. Section 57(3)(b)(i) relied upon by learned counsel provides as follows:

“(b) an existing law shall, so far as it relates to any matter other than a matter included in the Exclusive Legislative List, have effect:

(i) in relation to a Region, as if it was a law enacted by the Legislature of that Region.”

Where is the above provision in section 274 of the 1979 Constitution to justify the position taken by learned counsel? I do not see any and there is none. Where a party relies on the provisions of a previous Constitution for purposes of interpreting the provisions of a more current one, the provisions of the previous Constitution must be the same as those of the current one. (p. 1465 E)

3. Only Federal High Court can borrow procedure from State High Court

As it is, sections 233 and 239 of the Constitution are vaguely similar. They are not precisely similar or the same. Although section 233 provides that the National Assembly by law will make provisions with respect to the practice and procedure of the Federal High Court, the section transitionally confers on the Federal High Court the power to make use of the practice and procedure for the time being in force in relation to a High Court of a State or to any other court with like jurisdiction. Section 239, the State High Court counterpart of section 233, does not contain any similar transitional power. By the section, the High Court of a State does not go to any court to borrow practice and procedure to exercise the judicial powers conferred on it in section 6 of the Constitution; rather it exercises jurisdiction vested in it by the Constitution or by any law in accordance with the practice and procedure from time to time prescribed by the House of Assembly of the State. (p. 1467 E)

REPRESENTATIONS

O. O. Delano, Esqr., for the Appellant.

Dr. BAM. Ajibade, for the Respondent.

CASES REFERRED TO

- Aluminium Manufacturing Co. (Nig.) Ltd. v. N.P.A. [1987] 1NSCC Vol.
B 18 page 224 @ 234: (1987) 1 NWLR (Pt. 51) 475: (1987) 1 SCNJ. 94
P.N. Emerah & Sons (Nig.) Ltd. & anor. v. The Attorney-General of
Plateau State & ors. (1990) 4 NWLR (Pt. 147) 788 @ 803 C.A.
The Attorney-General of Lagos State & The Hon. Justice Dosunmu (1989)
6 SCNJ. (Pt.II) 134 @ 166: (1989) 3 NWLR 552
C Kalu v. Odili (1992) 5 NWLR (Pt. 240) 130 @ 189; (1992) 6 SCNJ. 76
Uwaifo v. Attorney-General of Bendel State (1982) 7 S.C. 124 -per Idigbe,
JSC
Ikine v. Edjerode (2001) 18 NWLR (Pt. 745) 466; (2001) 5 SCNJ. 144
D Okoye & 7 ors. v. Nigerian Construction & Furniture Co. Ltd. & 4 ors.
(1991) 7 SCNJ. (Pt. II) 365 @ 388
NEPA v. Mr. Edeghero & 15 ors. (2002) 12 SCNJ. 173 @ 186
Arjay Ltd. & 2 ors. v. Airline Management Support Ltd. (2003) 7 NWLR
E (pt. 820) 577 @ 610; (2003) 2 SCNJ. 148 @ 173
The Queen v. Owoh (1962) 1 All NLR 659 at 661
Wakefield and District Light v. Rys Wakefield Corpn. (1906) 2 KB 140
Omisade v. Akande (1987) 1 NSCC 286 and Awoleye v. BOCE (1990) 2
F NWLR 490

STATUTES & RULES REFERRED TO

- Constitution of Nigeria 1979; ss. 233, 239, 274(1) and (3)
Federal High Court Act (Cap 134) L.F.N 1990; ss. 22(3) & (4)
G High Court of Lagos State (Civil Procedure) Rules, 1972

LEAD JUDGMENT BY OGBUAGU JSC

- This appeal from the facts, raises, an interesting constitutional
H question or point. The Appellant in the High Court of Lagos State, Ikeja
Judicial Division, in Suit No. ID/768/96 (not 786) as appears in the Judg-
ment of the Court of Appeal, Lagos Division - (hereinafter called “*the*
court below”), claimed against the Respondent, several monetary reliefs.

The action arises from alleged wrongful activities of the Respondent during or from 18th March, 1991 to 22nd February, 1994 when he was a Receiver/Manager of the Appellant. The Appellant, filed and served a Statement of Claim on the Respondent. In reaction to the same, the Respondent filed a Notice of Preliminary Objection on 14th April, 1997. B
The grounds of the objection are:

“i) That this Honourable Court lacks the jurisdiction to hear and determine this suit;

and

ii) That the filing of this suit in this Honourable Court constitutes an abuse of Court process”. C

After hearing arguments from both learned counsel for the parties, the learned trial Judge - Holloway, J. in his ruling of 4th June, 1999, held that the said suit, was not an abuse of the process of that court. That most of the complaints, involve the operation of the Company & Allied Matters Decree which are within the jurisdiction of the Federal High Court. He therefore, pursuant to Section 22 (3) of the Federal High Court Act, transferred the suit to the Federal High Court, Lagos Division. He stayed action on the proceedings pursuant to Section 22(4) of the said Act. D

The Respondent being dissatisfied with the said Ruling, appealed to the court below, which in its said Judgment delivered on 11th June, 2001, allowed the appeal and set aside the said orders of the trial court. In their place, it made an order striking out the said suit. It is against the said decision, that the Appellant, has brought the instant appeal. Without their particulars, the grounds, read as follows: E

“(i) *The Court of Appeal erred in law in deciding that Section 22(3) Cap. 134 Laws of the Federation of Nigeria 1990 is inapplicable in the Lagos State High Court because the Lagos State House of Assembly had not adopted the provision.* G

(ii) *The court below erred in law in holding or assuming that if it reached the conclusion in its judgment that Section 22(3) is not inconsistent with the 1979 Constitution, it must hold that the appeal is incompetent pursuant to Section 22(4) Cap. 134 LFN 1990 which made an order* H

of transfer pursuant to Section 22 (3) of Cap. 134 an unappealable decision”.

The Appellant has formulated one issue for determination, namely,

“Whether the provision of Section 22(3) of the Federal High Court Act is inconsistent with Section 239 of the 1979 Constitution”.

On the part of the Respondent, he also formulated one issue for determination, namely,

“Whether section 274 of the Constitution of the Federal Republic of -Nigeria, 1979 can be applied to deem a section of an existing statute to be a law made by the House of Assembly of a State while the statute itself is deemed an Act made by the National Assembly and if so, whether Section 22(3) of Federal High Court Act, Cap. 134 LFN 1990 is an appropriate Section to which it should be so applied”.

Briefs of Argument have been filed and exchanged by the parties.

On 31st January, 2006, when this appeal came up for hearing, the learned counsel for the Appellant - O. O. Delano, Esqr, adopted their Brief, sought and was granted, leave of the Court to amend paragraph 2 on page 5 of the said Brief by adding from the word “some”, the words “so long as they do not conflict with the provisions of the Constitution”. Thereafter, both learned counsel for the parties, made their respective oral submissions in amplification of their said respective Briefs. Most of the oral submissions, were really contained in the respective Briefs, the difference as conceded by Dr. Ajibade, being that they are not in the same language. In spite of the lengthy submissions/arguments both in the Briefs and orally, in my respectful view, the crucial or pertinent issue to be considered and determined, is whether or not, the trial court, had the jurisdiction to transfer the said suit to the Federal High Court for hearing and determination. It is not in dispute and the parties, are agreed to the fact that the learned trial Judge held that his court, has no jurisdiction to entertain the case. At page 26 of the Records, the following, inter alia, appear:

“.....It would appear from the 19 complaints contained on the Writ of Summons that one or 2 of Grey areas can come before this Court for determination. But by far most belong to the Federal High Court who

are the origin of the relationship as between the parties and who probably have custody of some needed facts (sic). Most of the complaints really involve operation of the Company And Allied Matters Decree which belongs to the Federal High Court

Since this Court has found that the case is more appropriate in the Federal High Court, the Section 22(3) Federal High Court Act has provided what could be done in the circumstance”.

[the underlining mine]

I note that the action leading to this instant appeal, was instituted on 6th March, 1996 while the Statement of Claim, was filed on 4th March, 1997. The learned trial Judge, found as a fact and held that most of the claims which he called “complaints”, involve the operation of the Company & Allied Matters Act which are within the jurisdiction of the Federal High Court. Section 22(3) of the Federal High Court, Act, (hereinafter called “the Act”) appears in Cap. 134, Laws of the Federation of Nigeria, 1990. So, it is the 1979 Constitution, that governs the subject-matter of the dispute between the parties. The relevant sub-sections, of Section 22 of the Act, provide as follows:

“(3) Notwithstanding anything to the contrary in any law, no cause or matter shall be struck out by toe High Court of a State or of the Federal Capital Territory, Abuja on the ground that such cause or matter was taken in the High Court instead of the Court, and the Judge before whom such cause or matter is brought may cause such cause or matter to be transferred to the appropriate Judicial Division of the Court in accordance with such rules of court as may be in force in that High Court or made under any enactment or law shall by virtue of this subsection be deemed also to include power to make rules of court for the purposes of this subsection”.

[the underlining mine]

“(4) Every order of transfer made pursuant to subsection (2) or (3) of this section shall operate as a stay of proceeding before the court before which such proceedings are brought or instituted and shall not be subject to appeal”.

[the underlining mine]

By the said Ruling of the High Court, it is my humble but firm view (and without prejudice to my eventual conclusion in this Judgment) that the learned Judge, was “*apparently*” right in simply complying with the clear and unambiguous provisions of the said Act. It is now firmly established, that in the principle of construction or interpretation of a Statute or Constitution, the ordinary meaning of words, apply prima facie - See Omoijahe v. Umoru & ors. (1999) 5 SCNJ. 280 and Ibrahim v. Ojomo & 3 ors. (2004) 4 NWLR (Pt. 862) 89.; (2004) 1 SCNJ. 309; (2004) 1S.C. (Pt.II) 136 @ 147. That it is the duty of the court, to interpret words used in a Statute or Constitution. That ordinary meaning of the words used, should be given its effect. See City Engineering (Nig.) Ltd, v. Nigerian Airport Authority (1999) 9 SCNJ. 263: (1999) 6 S.C. (Pt. II) 41 @ 47. Even where such interpretation, causes inconvenience to the parties - See recently, Hon. Justice E.O. Araka v. Hon. Justice Don Egbue (2003) 7 SCNJ. 114; or even if it gives an unreasonable or unfair result - See Victor Ndoma-Egba v. Chukwuogor & 3 ors. (2004) 6 NWLR (Pt. 869) 382; (2004)2 SCNJ. 117; (2004) 2 S.C. (Pt. 1)107 @ 115, citing few other cases therein and NDIC V. Okem Enterprises Ltd. & anor. (2004) 10 NWLR (Pt. 880) 107 @ 196: (2004) 4 SCNJ. 244; (2004) 4 S.C. (Pt. II) 77 @ 125,127.

Now, the court below, per Oguntade, JCA (as he then was), had earlier stated as follows:

“*From the ruling of the lower court, it is manifest that it acted under Section 22(3) of Cap. 134 above in transferring the plaintiffs’ suit from the Lagos State High Court to the Federal High Court. If I reach the conclusion in this judgment that Section 22(3) is not inconsistent with the 1979 Constitution, I must hold that this appeal is incompetent pursuant to Section 22(4) Cap. 134 LFN. 1990 above which makes an order of transfer pursuant to Section 22(3) of Cap. 134 an unappealable decision”.* [the underlining mine]

I cannot fault this finding as I agree with the same. This should have been the end of this appeal, but, if I must, let me for purposes of completeness and clarity, go a little bit further. This is because, it seems to me, (as was canvassed by the learned counsel for the Appellant in the

court below) as in this Court, that the argument or contention of the learned counsel, is not just that Section 22(3) of the Act, is inconsistent with the said Constitution, but also, that the said Section, to the extent that it makes a provision concerning the powers of a State High Court, is incompetent, since according to him, the National Assembly, did not in any case, have legislative authority or power, to make laws for the High Court of a State. B

I will therefore, for the avoidance of any doubt, reproduce the provisions of Section 233 of the 1979 Constitution whereby, the National Assembly, is vested with the powers to make laws with respect to the Federal High Court. It provides as follows: C

“233. The National Assembly may by law make provisions with respect to the practice and procedure of the Federal High Court (including the service and execution of all civil and criminal processes of the court), and until other provisions are made by the National Assembly, the jurisdiction hereby conferred upon the Federal High Court shall be exercised in accordance with the practice and procedure for the time being in force in relation to the High Court of a State or to any other Court with like jurisdiction”. D E

[the underlining mine]

Let me also reproduce, the provision of Section 239 of the said Constitution in respect of the legislative authority to make laws for the High Court of a State which is vested in a State House of Assembly. F

“239. The High Court of a State shall exercise jurisdiction vested in it by this Constitution or by any Law in accordance with the practice and procedure (including the service and execution of all civil and criminal process of the Court) from time to time prescribed by the House of Assembly of the State.” G

It could be seen from the above provisions of the said two Sections that while only the National Assembly, could make laws with respect to the practice and procedure in the Federal High Court, the power to make similar laws for the High Court of a State, is vested in the House of Assembly of a State. H

It need be stressed by me, that the Federal High Court Act, 1976,

was an existing law when the 1979 Constitution came into force.

Now, in relation with an existing law, Section 274(1) of the said Constitution provides that,

“Subject to the provisions of this Constitution an existing law shall have effect with such modification as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be:

(a) XX

(b) xxx

(3) Nothing in this Constitution shall be construed as affecting the power of a Court of Law or any tribunal established by law to declare invalid any provision of an existing law on the around of inconsistency with the provision of any other law, that is to say

D [a] any other existing law
[b] a Law of a House of Assembly
[c] an Act of the National Assembly, or
[d] any provision of this Constitution”.

E [the underlining mine]

The court below, at pages 98, and 99 of the Records, rightly, in my respectful view, stated as follows:

“There can be no doubt that Section 22(3) of the Federal High Court Act, Cap. 134, Laws of the Federation, 1990 to the extent that it sets out what a State High Court should do if the State High Court is of the view that a cause or matter should have been initiated in the Federal High Court and not in a State High Court, is clearly not in conformity with Section 239 of the 1979 Constitution which vests such legislative authority on the State House of Assembly. The argument of the Respondent that the Federal High Court Act Cap. 134 LFN being an existing law can be modified to bring it in line with the 1979 (or 1999 Constitution) overlooks the fact that what is in issue here is not textual inconsistency of the said Section 22(3) Cap. 134, 1990 with any other law or Constitution but rather that the National Assembly could not in any case legislate over the practice and procedure in a State High Court. At the time the 1979 Constitution came into force, Lagos State has its

State High Court law which was Cap. 52, 1973 Laws of Lagos State”.
[the underlining mine]

Section 12 of the said High Court Law, was referred to and reproduced,

It thus means, that under the said High Court of Lagos State (Civil Procedure) Rules, 1972, there is no rule of procedure, which enables that court, to transfer a cause or matter, to the Federal High Court. That court, cannot even in the circumstance, resort to or fall back to the practice and procedure in England as there appears to be no such provision of transfer from a High Court to the Federal High Court. So, as it stood or stands, the Lagos State House of Assembly, has not made any provision for the transfer of a cause or matter to the Federal High Court. The practice and procedure of a State High Court, is regulated by Section 239 of the 1979 Constitution. See Aluminum etc. V. N.P.A. (infra).

I am aware that while the Federal High Court can transfer a cause or matter to a State High Court, by virtue of Section 22(2) of the Act. See Aluminium Manufacturing Co. (Nig.) Ltd, v. N.P.A. [1987] E INSCC Vol. 18 page 224 @ 234: (1987) 1 NWLR (Pt. 51) 475: (1987) 1 SCNJ. 94, but there is no such provision applicable at least, in the Lagos State High Court Rules.

However, let me now deal with the Constitutionality of Section 22(3) & (4) of the Act vis-a-vis a State High Court. The provision of Section 233 of the 1979 Constitution, is clear and unambiguous. Section 22(3) & (4) of the Act in effect, is legislating for the State High Courts in an Act or provision, it has no power to do or make. The Constitution, as has been well settled, is Supreme; the Organic or fundamental law and it is the grundnorm of Nigeria. See P.N. Emerah & Sons (Nig.) Ltd. & anor. v. The Attorney-General of Plateau State & ors. (1990) 4 NWLR (Pt. 147) 788 @ 803 C.A.; The Attorney-General of Lagos State & The Hon. Justice Dosunmu (1989) 6 SCNJ. (Pt.II) 134 @ 166: (1989) 3 NWLR 552; Kalu v. Odili (1992) 5 NWLR (Pt. 240) 130 @ 189; (1992) 6 SCNJ. 76; Chief Imonikhe & anor. v. Attorney-General of Bendel State & 3 ors. (1992) 7 SCNJ. (Pt. 1) 197: Rossek & 2 ors. v. A.C.B.

Ltd. & 2 ors. (1993) 8 NWLR (Pt. 312) 382; (1993) 10 SCNJ. 20 @ 45 and recently, Alhaji Nuhu v. Alhaji Ogele (2003) 18 NWLR (Pt. 852)251: (2003) 12 SCNJ. 158 @ 173 and many others.

This Court, has, therefore, the jurisdiction, to declare any other law or Act inconsistent with the provisions of the Constitution, invalid and therefore, null and void. See Uwaifo v. Attorney-General of Bendel State (1982) 7 S.C. 124 -per Idigbe, JSC; Ikine v. Edjerode (2001) 18 NWLR (Pt. 745) 466; (2001) 5 SCNJ. 144 - per Ejiwunmi, JSC and recently, Attorney-General of Ogun State & 4 ors. v. Attorney-General of the Federation (2002) 12 SCNJ. 191 @ 207 - per Onu, JSC. **This is because, the Constitution, has also been described as the fons et arigo. This is why, it has made provisions for the procedural law applicable in the various courts established by it in Sections 216, 227, 233, 239, 244 and 249. This is also why, being the foundation of all laws, its provisions, must be read in their clear and ordinary meaning. Any Act which infringes or runs contrary to those organic principles or systems or provisions, must be declared to be inconsistent.** Although the courts are vested with the jurisdiction to so declare, it has no jurisdiction to pronounce on the validity of the making of such Edict, or Act. See Labiyi & ors. v. Alhaji Anretiola (1992) 8 NWLR (Pt. 258) 139 @ 162; (1992) 10 SCNJ. 1 @ 12 and Nuhu v. Ogele (supra).

If the trial court acted under the said invalid Act, it was not right, having regard to the said provisions of Section 233 of the 1979 Constitution. This is because, it has long been settled in a number of decided cases, that where a court holds that it has no jurisdiction, the proper order to make, is to strike out the suit or proceeding. It does not transfer and cannot transfer. See Okoye & 7 ors. v. Nigerian Construction & Furniture Co. Ltd. & 4 ors. (1991) 7 SCNJ. (Pt. II) 365 @ 388 and recently, NEPA v. Mr. Edegbere & 15 ors. (2002)12 SCNJ. 173 @ 186: Arjay Ltd. & 2 ors. v. Airline Management Support Ltd. (2003) 7 NWLR (pt. 820) 577 @610; (2003) 2 SCNJ. 148 @ 173 - per Onu, JSC, and Chief Lakanmi v. Adena & 3 ors. (2003) 4 SCNJ. 348 @ 355 - per Kalgo, JSC, to mention just but a few. **So,**

pursuant to Section 239 of the 1979 Constitution, the trial court's jurisdiction, was limited to just striking out the suit in the circumstances. I so hold. I therefore, render my answer to the said lone issue of the Appellant, in the Affirmative.

So, whichever way one looks at this appeal, it is bound to collapse and it has failed. It is accordingly dismissed. I hereby affirm the said decision of the court below. Costs follow the event. The Respondent is awarded N10,000.00 (ten thousand naira) costs payable to him by the Appellant.

C

BELGORE JSC

I agree that this appeal has no merit and I adopt the reasoning and conclusion of my learned brother, Ogbuagu JSC as mine in dismissing it. I make the same orders as to costs.

D

KALGO JSC

E

I have had the opportunity of reading in advance the judgment of my learned brother Ogbuagu JSC just delivered. I entirely agree with the reasoning and conclusions reached therein. The appeal lacks merit and ought to be dismissed. My learned brother Ogbuagu JSC has painstakingly considered the sole issue for determination formulated by the parties in their respective briefs, and has fully and clearly in my view dealt with all the questions arising there from. I adopt, as mine all the reasoning and conclusions reached in the leading judgment and accordingly find no merit in the appeal. I dismiss it and affirm the decision of the court of appeal. I award N10,000.00 costs in favour of the respondent.

F

G

TOBI JSC

H

This appeal raises a constitutional issue and it is whether a High Court of a State can transfer a suit to the Federal High Court on ground that it lacks the jurisdiction to hear it.

The appellant as plaintiff commenced an action at the Lagos High Court, Ikeja Division. The reliefs are many. They are nineteen; quite a mouth full. Following a preliminary objection by the defendant/applicant, challenging the jurisdiction of the High Court, Lagos State Ikeja
B Judicial Division, the learned trial Judge, Holloway, J. ordered that it be transferred to the Federal High Court, Lagos. In his ruling, the Judge said at page 26 of the Record:

*“Since this court has found that the case is more appropriate in
C the Federal High Court, the section 22(3) Federal High Court Act has provided what could be done in the circumstance. Order is therefore made that this case is transferred to the Federal High Court in the Lagos Judicial Division of the Court.”*

The respondent was not satisfied. It filed an appeal. The Court of
D Appeal upheld the appeal. Oguntade, JCA (as he then was) said at pages 99 and 100 of the Record:

*“In the light of what I have said above, the conclusion to be arrived at is that section 22(3) of the Federal High Court Act, Cap. 134,
E Laws of the Federation 1990 which vests power in a State High Court to transfer a cause or matter to the Federal High Court is inconsistent with section 233 of the 1979 Constitution. To the extent of such inconsistency, it must be pronounced invalid. I so pronounce it. Accordingly, this appeal
F succeeds. The orders made by the lower court on 4/6/99 transferring this suit to the Federal High Court; and staying proceedings at the lower court pursuant to section 22(3) and 22(4) of the Federal High Court Act, Cap 134 LFN, 1990 are set aside. In their place, I make an order striking out the suit brought by the plaintiff/respondent.”*

G Aggrieved by the judgment of the Court of Appeal, the appellant filed an appeal in this court. Counsel for the appellant formulated three issues for determination. Counsel for the respondent formulated one issue for determination.

H Learned counsel for the appellant submitted that the Federal High Court Act and in particular section 22(2) and (3) qualifies as an existing law prior to and after the enactment of the 1979 Constitution. Relating the provisions of the Federal High Court Act to section 6(6)(d) of the

1979 Constitution, learned counsel submitted that the section is a complete bar to any enquiry into the competence of the Federal Military Government to promulgate any Decree in the years from 1966 to 30th September, 1979 inclusive. He also examined the severability of statutory provisions, and whether section 22(3) of the Federal High Court Act is inconsistent with the Constitution. B

He cited the following cases in his brief: AG Imo State v. AG Rivers State (1983) NSCC 370 at 380; AG Lagos State v. Dosunmu (1989) 3 NWLR p.552; Aluminium Manufacturing Co. v. NPA (1987) 1 NSCC 224 at 239; The Queen v. Owoh (1962) 1 All NLR 659 at 661; Wakefield and District Light v. Rys Wakefield Corpn. (1906) 2 KB 140; Omisade v. Akande (1987) 1 NSCC 286 and Awoleye v. BOCE (1990) 2 NWLR 490. He urged the court to allow the appeal. C

Learned counsel for the respondent attacked the appellant's brief head-on. He took each point made by the appellant's counsel and raised arguments to dislodge the brief. He took the cases cited in the appellant's brief and distinguished the facts of the cases, where necessary, from the facts of this case. He urged the court to dismiss the appeal by holding that the provisions of section 274 of the 1979 Constitution cannot be applied to deem a section of an existing statute to be a law made by the House of Assembly of a State while the statute itself is deemed an Act made by the National Assembly. D E

The Constitution of the Federal Republic of Nigeria, 1979, like its successor, the 1999 Constitution, provided separately for the legislative power of the Federal and State Governments. Thus, section 4(1) of the 1979 Constitution vested legislative powers on the National Assembly, while section 4(6) of the Constitution vested legislative power on the House of Assembly of a State. This arrangement is consistent with federalism and a federal system of government. During the military regime, the power to promulgate Decrees was vested in the Federal Military Government, while the power to promulgate Edicts was vested in the Military Governments of the States. F G H

Taking a queue from the above, the Federal Revenue Court Decree of 1973 which metamorphosed to an Act, was promulgated by the

Federal Military Government. As a matter of law and fact, the Decree was signed by General Yakubu Gowon, who was the Head of the Military Government at the material time.

B While I agree with learned counsel for the appellant that both the Revenue Court Decree, 1973 and the Federal High Court Act, Cap. 134, Laws of the Federation, 1990 are existing laws within the meaning of section 274(4)(b) of the 1979 Constitution, I am unable to agree with his submission that the Federal High Court Act, ipso facto is deemed to be a law passed by the House of Assembly of a State.

C Construing the provision of section 274(1) of the 1979 Constitution, learned counsel submitted that on a plain and ordinary construction of the provisions, an existing law could either be deemed to be a State law or a Federal law. The deciding factor is the subject matter to which D the existing law relates. He did not stop there. He submitted as follows:

E *“If it is in respect of any matter on which the National Assembly is empowered to make law, i.e. a matter on the exclusive or concurrent list, then the existing law will be deemed to be a law made by the National Assembly. On the other hand, if it is in respect of any matter on which a House of Assembly is empowered to make laws, i.e. a matter on the residual list, then the existing law shall be deemed to be made by the State House of Assembly.”*

F The above interpretation is to some extent correct as it relates to section 274(1)(a) and (b). It is not however entirely correct. Learned counsel in an effort to justify his statement quoted Professor Nwabueze from his book titled Federalism in Nigeria under the Presidential Constitution:

G *“The use of and instead of or needs to be emphasised. Its implication is necessarily that an existing law may be either a federal law or state law where its subject matter lies within the exclusive competence of the National Assembly or a State Assembly, or it may be both a federal H and state law where it is within the concurrent authority of both assemblies. Its existence as a federal/or state law is altogether regardless of the legislature that originally enacted it, whether the federal parliament, a regional House of Assembly (before 1966), the Federal Military Gov-*

ernment or a State Military Governor..”

The above statement is correct and valid. The statement made by learned counsel purportedly supporting what Professor Nwabueze said is not exactly what the learned professor said. Counsel loaded the legislative powers of the Federal Government with matters both in the exclu- B
sive and concurrent lists. But that is not borne out by the arrangement in the legislative lists in the 1979 Constitution. That list in Part II of the Second Schedule to the Constitution made a distinction in respect of extent of federal and state legislative powers. And that is where counsel C
got it all wrong.

It is strange to me that a law enacted by the National Assembly under the legislative powers vested in it in section 4(1) can be deemed to be a law enacted by the House of Assembly of a State under the legisla- D
tive powers vested in it in section 4(5) of the 1979 Constitution. That cannot be the meaning of section 274(1)(a) and (b) of the 1979 Consti-
tution. Such a construction is a burden which the subsection cannot carry. The word “deemed” in section 274(1) before sub-paragraphs (a) and (b) clearly relates to the sub-paragraphs in their distinct meanings of E
an Act of the National Assembly and a law of a State House of Assembly.

In some desperate effort to convince the court to go along with his argument, learned counsel first cited *The Queen v. Owoh*. In that case the Supreme Court interpreted the provisions of the Nigerian (Con- F
stitution) Order-in-Council, 1954 and section 57(3)(b)(i) as amended by the 1957 Order-in-Council. While I agree with learned counsel that section 57(3)(b)(i) is the precursor of section 274(1) of the 1979 Constitu-
tion, the provisions are not the same. Therefore *Owoh* cannot be valid G
authority in this case. Section 57(3)(b)(i) relied upon by learned counsel provides as follows:

“(b) an existing law shall, so far as it relates to any matter other than a matter included in the Exclusive Legislative List, have effect:

*(i) in relation to a Region, as if it was a law enacted by the Legis- H
lature of that Region.”*

Where is the above provision in section 274 of the 1979 Constitu-
tion to justify the position taken by learned counsel? I do not see any and

there is none. Where a party relies on the provisions of a previous Constitution for purposes of interpreting the provisions of a more current one, the provisions of the previous Constitution must be the same as those of the current one.

B The above apart, in Owoh the Federal Supreme Court, dealing with the Criminal Code, said:

C *“The sections of the Criminal Code, creating the offences of conspiracy to steal, conspiracy to defraud, stealing, forgery and altering are not laws with respect to any matter in the Exclusive Legislative List... it follows from section 3(b) of the Nigerian (Constitution) Order in Council... that they have effect in Eastern Nigeria as if they had been enacted as Regional Laws in pursuance of the 1960 Order.”*

D The above is a correct interpretation of the constitutional provision at the material time. Since there is no such similar provision, counsel is not on a firm ground to make this court tow the decision of Owoh. The above apart, the enactment of the Federal High Court Act is within the legislative competence of the National Assembly. In the circumstances, E Owoh does not apply and I so hold.

F Learned counsel cited one English case and one Nigerian case and laboured vigorously and extensively to dichotomise between the words, enactment and Act. I do not intend to take the cases because I see no relevance in them in relation to the live issue before us. And when I say this, I do not forget the provision of section 22(3) of the Federal High Court Act. I therefore skip it.

G And that takes me to the issue whether section 22(3) of the Federal High Court Act is inconsistent with the provisions of sections 233 and 239 of the 1979 Constitution. I should take the liberty to first reproduce the sections for ease of reference. Section 22(3) of the Federal High Court Act provides as follows:

H *“Notwithstanding anything to the contrary in any law, no cause or matter shall be struck out by the High Court of a State or of the Federal Capital Territory, Abuja on the ground that such cause or matter was taken in the High Court instead of the court and the Judge before whom such cause or matter is brought may cause such cause or matter to be*

transferred to the appropriate Judicial Division of the court in accordance with such rules of court as may be in force in that High Court or made under any enactment or law empowering the making of rules of court generally, which enactment or law shall by virtue of this subsection be deemed also to include power to make rules of court for the purpose of this subsection.” B

Section 233 of the 1979 Constitution provides:

“The National Assembly may by law make provisions with respect to the practice and procedure of the Federal High Court (including the service and execution of all civil and criminal processes of the court); and until other provisions are made by the National Assembly, the jurisdiction hereby conferred upon the Federal High Court shall be exercised in accordance with the practice and procedure for the time being in force in relation to a High Court of a State or to any other court with like jurisdiction.” C D

Section 239 of the 1979 Constitution is in the following terms:

“The High Court of a State shall exercise jurisdiction vested in it by this Constitution or by any law in accordance with the practice and procedure (including the service and execution of all civil and criminal processes of the court) from time to time prescribed by the House of Assembly of the State.” E

As it is, sections 233 and 239 of the Constitution are vaguely similar. They are not precisely similar or the same. Although section 233 provides that the National Assembly by law will make provisions with respect to the practice and procedure of the Federal High Court, the section transitionally confers on the Federal High Court the power to make use of the practice and procedure for the time being in force in relation to a High Court of a State or to any other court with like jurisdiction. Section 239, the State High Court counterpart of section 233, does not contain any similar transitional power. By the section, the High Court of a State does not go to any court to borrow practice and procedure to exercise the judicial powers conferred on it in section 6 of the Constitution; rather it exercises jurisdiction vested in it by the Constitution or by any law in accordance with the practice and procedure from time to time F G H

prescribed by the House of Assembly of the State.

What is the purport of section 22(3) of the Federal High Court Act? It is a saving provision, so to say. It saves a matter duly and properly filed in a court of law from being struck out. Instead of striking out
B for lack of jurisdiction, section 22(3) vests in the High Court of a State the power to transfer the matter to the appropriate Judicial Division of the Federal High Court.

In the light of the practice and procedure provisions of sections
C 233 and 239 in relation to the Federal High Court and the High Court of a State respectively, I see section 22(3) of the Federal High Court Act, dictating to the Constitution what rule of court should be followed when a High Court of a State lacks jurisdiction of the Federal High Court. Is
D such a dictation emanating from a statute proper and acceptable to a Constitution? Is that consistent with the supremacy clause of section 1(3) of the 1979 Constitution? Why should a statute dictate terms for a Constitution to follow? Is it not the reverse position that is consistent with section 1(3) of that Constitution? A few questions are still boiling
E but I think I can stop here.

Learned counsel for the appellant cited three decisions of this court to support the case of his client. They are Aluminium Manufacturing Company (Nig.) Limited v. Nigerian Ports Authority (1987) 1 NSCC
F 224; Omisade v. Akande (1987) 1 NSCC 286 and Awolaye v. BOCE (1990) 2 NWLR 490. In the Aluminium case, section 22(3) was not involved. The section involved in that case was section 22(2). In Omisade, this court suo motu invoked section 22(3) and transferred the matter to the Federal High Court.

G In Awolaye v. Board of Customs and Excise (1990) 2 NWLR (Pt. 133) 490 the plaintiff/appellant claimed from the defendants/respondents at the High Court of Lagos State the sum of N546,000.00 being costs of plaintiff's goods unlawfully converted to the use of the defendants, or in
H the alternative damages for unlawful sale of the said goods. After the pleadings had been filed on both sides, the respondents applied for the transfer of the action to the Federal High Court on the ground that the High Court of Lagos State had no jurisdiction to entertain the matter and

that by virtue of section 7 of the Federal High Court Act, jurisdiction in respect of customs matters is vested in the Federal High Court. The learned trial Judge held that since the Judge had no jurisdiction to entertain the matter, he could not transfer it. He struck out the matter. On appeal to the Court of Appeal, that court dismissed the appeal, holding B that the learned trial Judge no longer had the power to transfer the case since the coming into force of the 1979 Constitution.

On appeal to the Supreme Court, it was held that since the commencement of the Constitution of the Federal Republic of Nigeria 1979 C and the unlimited jurisdiction conferred on the High Court by section 236 thereof, the State High Court can no longer exercise the power hitherto conferred by section 22(3) of the Federal High Court Act, 1973 to transfer to the Federal High Court a matter before it in which it had no jurisdiction. The court further held that as the High Court of Lagos State had D jurisdiction in the matter, it was wrong for the trial Judge to strike it out.

Unlike the Aluminium case. Awoleye dealt directly with section 22(3) as in this appeal. Again, unlike Omisade, the issue in respect of section 22(3) to transfer the case to the Federal High Court was not E raised suo motu by the court but was raised by the appellant.

I have taken some pains to go through the relevant Civil Procedure Rules of the High Court of Lagos State and I cannot place my hands on any rule vesting in a Judge of the High Court power to transfer a matter F to the Federal High Court. I do hope I am correct in saying that a Judge of the High Court of Lagos State can only apply the Rules of Court of the High Court. I do not think a Judge of the High Court of Lagos State can leave the enabling rules of his court and flirt with those of the Federal G High Court by applying them. That is not correct. That is not right. That is wrong.

It is the common law tradition, if I may say so, that where a court lacks jurisdiction, the order is to strike it out to enable the party commence the action de novo in a competent court of jurisdiction. See Oloriode H v. Oyebi (1984) 1 SCNLR 390; Din v. Attorney-General of the Federation (1986) 1 NWLR (Pt. 17) 471; Akinbola v. Plisson Fisko Nig. Ltd. (1988) 4 NWLR (Pt. 88) 335; Iwuaba v. Nwaosigwelem (1989) 5 NWLR

(Pt. 123) 623; *Dr. Onagoruwa v. Inspector General of Police* (1991) 5 NWLR (Pt. 193) 593.

Section 22(3) of the Federal High Court Act lacks the strength and capacity to ruin the common law tradition. The subsection was too ambitious and this court will cut it to size. I so cut it.

It is for the above reasons and the more detailed reasons given by my learned brother, Ogbuagu, JSC in his judgment that I too dismiss the appeal. I abide by the costs awarded in his judgment.

C

MUKHTAR JSC

In the High Court of Justice of Lagos State the appellant claimed various sums of money from the respondent for mismanaging the appellant's company whilst he was its Receiver/Manager. After the statement of claim had been filed and served, the respondent filed and moved a notice of preliminary objection that reads as follows; (inter alia) :-

“(i) That this honourable court lacks the jurisdiction to hear and determine this suit, and

(ii) That the filing of this suit in this Honourable court constitutes an abuse of court process.”

In support of the notice of preliminary objection are the following relevant depositions in the supporting affidavit :-

“5. That on the 8th of March, 1991 the defendant herein was appointed Receiver/Manager of the 1st plaintiff by order of the Federal High Court, Lagos pursuant to the motion on notice referred to in paragraph 4.

10. That it is common ground between the parties that, prior to the determination of the appeal, the defendant was the Receiver/Manager of the 1st plaintiff appointed by order of the Federal High Court dated 8th March, 1991 which said order subsisted until the determination of the appeal.

11. That the plaintiffs' cause of action in this suit is for :-

a) the refund of various sums of money withdrawn from the 1st plaintiff's account by the defendant during his tenure as the 1st plaintiffs

Receiver/Manager, which sums of money were allegedly utilized for purpose other than for the use and benefit of the 1st plaintiff;

b) failure to render up to date accounts and/or surrender company properties which came into his possession during his tenure as the 1st plaintiff's Receiver/Manager; and

c) damages for the defendant's mismanagement of the 1st plaintiff/company during his tenure as its Receiver/Manager.

12. That the defendant was at all time material to this action acting in his capacity as an officer and agent of the Federal High Court, appointed by the said Federal High Court to manage the affairs of a company incorporated in Nigeria”.

The trial High Court in its ruling on the preliminary objection held as follows :-

“..... It would appear from the 19 complaints contained on the Writ of Summons that one or two of Grey areas can come before this court for determination. But by far most belong to the Federal High Court are the origin of the relationship as between the parties and who probably have the custody of some needed facts. Most of the complaints really involve operation of the Company and Allied Matters Decree which belong to the Federal High Court.....

Since this Court has found that the case is more appropriate in the Federal High Court, the Section 22 (3) Federal High Court Act has provided what could be done in the circumstance. Order is therefore made that this case is transferred to the Federal High Court in the Lagos Judicial Division of the court. Consequently pursuant to Section 22(4) of the Act proceedings in this case is stayed.”

Dissatisfied with the decision the defendant appealed to the Court of Appeal. The appeal was allowed, but the plaintiff being unhappy with the outcome of the appeal, appealed to this court. The parties exchanged briefs of argument which were adopted at the hearing of the appeal. The kernel of this appeal centers on the validity of the provision of Section 22 (3) of the Federal High Court Act, and its legal status before or after the commencement of the 1979 Constitution. Since it is clear from the above reproduced portion of the trial court's judgment that it made the

order of transfer by virtue of the provision of the Federal High Court Act, it will be of assistance to reproduce the relevant provisions here below. Section 22 of the said Act states thus :-

B “(2) No cause or matter shall be struck out by the Court merely on the ground that such cause or matter was taken in the court instead of the High Court of a State or of the Federal Capital Territory, Abuja in which it ought to have been brought and the Judge of the Court before whom such cause or matter is brought may cause such cause or matter to be transferred to the appropriate High Court of a State or of the Federal C Capital Territory, Abuja in accordance with Rules of Court to be made under Section 44 of this Act.

(3) Notwithstanding anything to the contrary in any law, no cause or matter shall be struck out by the High Court of a State or of the D Federal Capital Territory, Abuja on the ground that such cause or matter was taken in the High Court instead of the Court, and the Judge before whom such cause or matter is brought may cause such cause or matter to be transferred to the appropriate Judicial Division of the Court in accordance with such rules of court as may be in force in that High Court or E made under any enactment or law empowering the making of rules of Court generally which enactment or law shall by virtue of this subsection be deemed also to include power to make rules of court for the purpose of this subsection.”

F Section 6 (6) (d) of the Constitution of Federal Republic of Nigeria, 1979 makes provision in respect of the competence of the Federal Military Government to promulgate any decree in the years from 1966 to 1979 when the Constitution was promulgated. The said Section (6) (6) G (d) states the following :-

“The judicial powers vested in accordance with the forgoing provisions of this section shall not, as from the date when this section comes into force, extend to any action or proceedings relating to any exiting law H made on or after 15th January, 1966 for determining any issue or question as to the competence of any authority or person to make any such law”.

The above provision is self explanatory. But then one has to look

at the provision of Section 274 of the Constitution supra visa-vis the potency of Section 22 (3) of the Federal High Court Act. Section 274 of the Constitution of 1979 supra stipulates the following :-

“274 (1) Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be -

(a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws.

(2) The appropriate authority may at any time by order make such changes in the text of any existing law as the appropriate authority considers necessary or expedient to bring that law into conformity with the provisions of this Constitution.

(3) Nothing in this Constitution shall be construed as affecting the power of a Court of law or any tribunal established by law to declare invalid any provision of an existing law on the ground of inconsistency with the provision of any other law, that is to say -

- (a) any other existing law;
- (b) a law of a House of Assembly;
- (c) an Act of the National Assembly; or
- (d) any provision of this Constitution.

The question now is the continued validity of Section 22 (3) of the Federal High Court Act after it must have been deemed to be a law made by the National Assembly in accordance with the dictates of the above provision. A careful perusal of the provisions of Section 274 supra, most particularly the opening of the section shows that the intent of the legislator was not to save all laws that were existing at the time, for they will be declared void if they are inconsistent with the other provisions of the Constitution as long as it is appropriate to do so. See *Adigun v. Attorney-General of Oyo State* 1987 1 NWLR, part 53 page 678 cited by learned H counsel for the respondent.

On the validity of the application of Section 22 (3) of the Federal High Court supra, I am in agreement with the court below when in its

judgment it held thus :-

“There is no doubt that Section 22 (3) of Cap. 134 is a desirable provision in that it saves a cause or matter commenced in a State instead of a Federal High Court from being struck out. But if a State House of Assembly considers it desirable it can adopt the provision. The Lagos State House of Assembly not having done so, the provision is inapplicable in Lagos State High Court.”

I have read in advance the lead judgment delivered by my learned brother Ogbuagu, JSC. I entirely agree with the reasoning and conclusion reached that the appeal has no merit and should be dismissed. I also dismiss it and abide by the consequential orders made in the lead judgment.

D

MOHAMMED JSC

I have had the privilege before today of reading in draft the judgment of my learned brother Ogbuagu JSC just delivered. I agree with him entirely that there is no merit in this appeal which ought to be dismissed.

The appellant which was the plaintiff at the High Court of Justice of Lagos State brought an action claiming damages against the respondent to which the respondent reacted as a defendant by filing a Notice of Preliminary Objection that the trial court lacked jurisdiction to hear and determine the action. In his ruling delivered on 4-6-1999, the learned trial judge came to the conclusion that the High Court has no jurisdiction to determine the bulk of the claims in the action but observed that the action is not an abuse of court process as claimed by the defendant in the preliminary objection and therefore proceeded to give the following order -

“Since this court has found that the case is more appropriate in the Federal High Court, the section 22(3) of the Federal High Court Act has provided what could be done in the circumstance.

Order is therefore made that this case is transferred to the Federal High Court in the Lagos Judicial Division of the Court. Consequently pursuant to section 22(4) of the Act the proceeding in this case is stayed.” Aggrieved by this order in the ruling on his preliminary objection, the

defendant appealed against it to the Court of Appeal, Lagos Division. In its judgment after hearing the appeal, that court allowed the appeal, set aside the orders of the trial court and struck out the action. The appeal to this court is by the plaintiff which feels that the orders made by the trial court ought to have been allowed to stay.

In substance, this appeal deals with the proper application of or the exercise of the powers conferred on the trial High Court by section 22(3) of the Federal High Court Act which states-

"22(3) Notwithstanding anything to the contrary in any law, no cause or matter shall be struck out by the High Court of a State or of the Federal Capital Territory, Abuja on the ground that such cause or matter was taken in the High Court instead of the court, and the Judge before whom such cause or matter is brought may cause such cause or matter to be transferred to the appropriate Judicial Division of the Court in accordance with such rules of court as may be in force in that High Court or made under any enactment or law empowering the making of rules of court generally which enactment or law shall by virtue of this subsection be deemed also to include power to make rules of court for the purpose of this subsection."

It is quite clear that the power of transfer conferred on the State High Court by section 22(3) of the Federal High Court Act is to be exercised -

".... in accordance with such rules of court as may be in force in that High Court...."

However, the court below in its judgment at page 99 of the record of appeal confirmed the absence of any such enabling provision, in the High Court (Civil Procedure) Rules of Lagos State when the court said-

"Now there is no rule of procedure under the High Court of Lagos State (Civil Procedure) Rules 1972 which enables the High Court of Lagos State to transfer a cause or matter to the Federal High Court."

Therefore in the circumstances of the present case on appeal, I am of the view that unless and until there is a clear enabling provision in the Lagos State High Court Law or that State High Court (Civil Procedure) Rules empowering the State High Court to exercise the powers

vested in it under section 22(3) of the Federal High Court Act not being a law made by the House of Assembly of the State pursuant to section 239 of the 1979 Constitution, the trial court has no power to transfer the appellant's action wrongly filed in that court to the Federal High Court, B Lagos Judicial Division. Consequently, the decision of the court below in allowing the respondent's appeal, setting aside the orders of transfer and of stay of proceedings given by the trial court and striking out the appellant's action, is quite in order.

C In the final result, I also find no merit in this appeal which I hereby dismiss with N10,000.00 costs to the respondent.

ONNOGHEN JSC

D This is an appeal against the judgment of the Court of Appeal, holden at Lagos delivered in appeal No. CA/L/359M/99 on 11th June, 2001 in which it set aside the ruling of the trial court ordering the transfer of suit No. ID/786/96 from the Lagos State High Court to the Federal E High Court, Lagos under the provisions of section 22(3) of the Federal High Court Act.

By a writ of summons issued on 6/3/96 the appellant, as plaintiff claimed against the respondent, then defendant, at the Lagos State High F Court, the following reliefs:

G *"1. An order that the Defendant do deliver up all documents belonging to the 1st plaintiff company including cheque books, Account Ledgers, Book Records and other documentation of whatsoever description belonging to the Plaintiff Company and being in the power and control of the Defendant.*

2. An order that the Defendant do render an account of all dealings and transactions in respect of his tenure as Receiver/Manager of the 1st Plaintiff Company from 8th March, 1991, up till 22nd February, H 1994, when he voluntarily vacated the premises of the 1st Plaintiff's Company.

3. The sum of N395,985.78 with interest thereon at the rate of 21% per annum from 12th August, 1991, until the entire sum is liqui-

dated, which sum was arbitrarily withdrawn from the 1st plaintiff's account by the Defendant as his "fees" without any order of court or agreement to that effect.

4. The sum of N20,013.00 wrongfully with drawn and paid by the Defendant out of the 1st plaintiff's Account to one Messrs Bode Wilfred B & Company without any justification.

5. The sum of N337,992.00 purportedly expended by the Defendant in refurbishing the Cold Rooms of the 1st Plaintiff Company.

6. The sum of N1,395,944.80 purportedly expended for electrical C repairs as well as repairs to Cold Rooms and refrigeration.

7. The sum of N298,628.55 representing a stock shortage of processed chicken from the 17th of June, 1992, to 7th September, 1992.

8. The sum of N13,320.00 purportedly expended by the Defendant D in procuring spare parts for the 1st plaintiff's Cold Room.

9. The sum of N253,333.85 purportedly utilised by the Defendant in settling creditors of the 1st Plaintiff's Company.

10. The sum of N76,625.80 collected by the Defendant from the 2nd plaintiff as personal I.O. Us and which was converted by the Defendant E to his own use.

11. The sum of N342,440.00 being interest charged on the 1st Plaintiff's Account number A151721419 with the Union Bank of Nigeria PLC of NO. 40 Marina, Lagos, in consequence of the Defendant F wrongfully freezing the said Account.

12. The sum of N1,290,000.00 being the estimated cost of rehabilitating the 1st Plaintiff's Factory at Anthony Village occasioned by the Defendant's mismanagement.

13. The sum of N340,000.00 being the estimated cost of reactivat- G ing the damaged 6 boreholes in the 1st Plaintiff's Factory and which damage was occasioned by the Defendant's mismanagement.

14. The sum of N1,008,844.00 being the estimated cost of rehabilitating the 1st plaintiff company's grounded vehicles. H

15. The sum of N1,062,090.00 being the estimated cost of the repairing of the 1st plaintiff's three Generating Plants.

16. The sum of N10,690,142.00 being the estimated cost of reha-

ilitating the 1st Plaintiff Company's Cold Rooms.

17. The sum of N25,000.000.00 being damages for loss of goodwill and business income as a result of the Defendant's mismanagement.

18. General Damage."

B Upon service of the processes on the defendant, learned Counsel for the defendant raised a preliminary objection to the jurisdiction of the Lagos State High Court entertaining the action. In a ruling delivered by Hon. Justice A.O. HOLLOWAY on the 4th day of June 1999, the learned trial judge concluded, inter alia, as follows:

C *"Since this court has found that the case is more appropriate in the Federal High Court, the section 22(3) Federal High Court Act has provided what could be done in the circumstance.*

Order is therefore made that this case is transferred to the Federal High Court in the Lagos Judicial Division of the court. Consequently pursuant to section 22(4) of the Act the proceedings in this case is stayed."

The Defendant was not satisfied with the above ruling so he appealed to the Court of Appeal, Lagos Division which concluded, in its judgment of 11th June, 2001, inter alia, as follows:-

In the light of what I have said above, the conclusion to be arrived at is that section 22(3) of the Federal High Court Act, Cap 134, Laws of the Federation 1990 which vests power in a state High Court to transfer a cause or matter to the Federal High Court is inconsistent with section 239 of the 1979 Constitution. To the extent of such inconsistency, it must be pronounced invalid. I so pronounce it," per OGUNTADE, JCA (as he then was).

G The plaintiff who was respondent at the Court of Appeal is dissatisfied with that judgment and has appealed to this court where the issue for determination, as formulated by learned counsel for the appellant, OLUYELE O. DELANO Esq in the appellant's brief filed on 18/12/03 and adopted in argument of the appeal is as follows:-

H *"Whether the provision of section 22(3) of the Federal High Court Act is inconsistent with section 239 of the 19 79 Constitution."*

Learned counsel also stated that the main issue as formulated supra calls for answer to three subsidiary questions, to wit-

“1. What was the legal status of the provisions of the Federal High Court Act prior to of at the commencement of the 1979 Constitution?

2. What was the legal status of the provisions of the Federal High Court Act after the commencement of the 1979 Constitution?

B

3. Is section 22(3) an enactment within the meaning of the term “existing Law” in the 1979 Constitution?”

I hold the view that subsidiary 1 supra is very irrelevant to the determination of the main issue before this court particularly as the cause of action neither arose nor the action instituted prior to the coming into effect of the provisions of the Constitution of the Federal Republic of Nigeria, 1979 thereafter referred to as the ; 1979 Constitution. That being the case, the said subsidiary issue will not be considered in this judgment. Looking closely at subsidiary issues 2 and 3 supra, it is my view that both are rolled into one because an answer to subsidiary issue 3 takes care of subsidiary issue 2.

On the other hand, learned counsel for the respondent, DR. B.A.M. AJIBADE in the respondent’s brief filed on 27/5/04 and adopted in argument of the appeal also formulated a single issue which is essentially the same with that formulated by learned counsel for the appellant. The issue is as follows:-

“Whether section 274 of the Constitution of the Federal Republic of Nigeria, 1979 can be applied to deem a section of an existing statute to be a Law made by the House of Assembly of a State while the Statute itself is deemed an Act made by the National Assembly, and if so, whether section 22(3) of the Federal High Court Act, cap 134, LFN 1990 is an appropriate section to which it should be so applied?”

In arguing the appeal, learned counsel for the appellant referred the court to section 274(1) of the 1979 Constitution for the definition of the term “existing Law” and submitted, rightly in my view, that an existing law could either be deemed to be a State or a Federal law, the deciding factor being the subject matter to which the law relates. Learned counsel then submitted that if the said law is in "respect to any matter on which the National Assembly is empowered to make law" then the existing law

Will be deemed to be a law made by the National Assembly and that if on the other hand the law is in respect to any matter on which a House of Assembly is empowered to make laws, then the existing law shall be deemed to be made by the State House of Assembly; that the intention of the draftman is to save all existing laws prior to the 1979 Constitution so long as they do not conflict with the provisions of the said Constitution.

However, the problem in the issue under consideration lies in the argument of counsel in relation to what he terms severability of statutory provisions. Here learned counsel submitted that when section 22(3) is severed from the rest of the Federal High Court Act it becomes an existing law that deals with the practice and procedure of the High Court of a State and as such learned counsel further submitted, it is saved by section 274(1) (a) of the 1979 Constitution. The above submission of learned counsel is said to be grounded on the interpretation of the term “enactment” as used in the definition of “existing law” as defined in section 274(1) (a) of the 1979 Constitution, thus:

“Existing law means any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made comes into force after that date.”

Learned counsel then proceeded to refer the court to the definition of the word “enactment” in section 277 of the 1979 Constitution and in the case of *Wakefield & District Light vs RYS Wakefield Corp. (1906) 2KB 140* per Ridley J at 145 - 146 and *A-G of Lagos State vs The Hon. Justice Dosunmu (1989) 3 NWLR (pt. 552) 601* per OBASEKI, JSC and submitted that a section or part of a section in an Act is an enactment and as such section 22 (3) of the Federal High Court Act is deemed to be an existing law of the state while the rest of the Act remains Federal Law !

On his part, learned counsel for the respondent submitted that the subject matter of the Federal High Court Act being to provide for the jurisdiction, powers, practice and procedure of the Federal High Court, it is a matter in respect of which legislative authority is expressly conferred upon the National Assembly by Sections 231(2) and 233 of the 1979 Constitution; that there is however no provision of the said Constitution

conferring legislative authority on the National Assembly to provide for the jurisdiction, powers, practice and procedure of the State High Courts as envisaged in section 22(3) of the Federal High Court Act. Learned counsel then submitted that the answer to the question whether the provisions of individual sections of existing laws can be severed from the provisions of the statute of which they form a part for the purpose of deeming the severed section to be an Act of the National Assembly or a Law made by a State House of Assembly with the parent statute retaining a different character is in the negative. Learned counsel further submitted that there is no hard and fast rule as to the interpretation to be given to the term “enactment” which term could refer to an entire statute as well as to a section or part of a section thereof, and that the determination of what it refers to in each case would be governed by the surrounding circumstances and the consequences of applying either of the two possible interpretations of the term; that to give the term the interpretation proffered by counsel for the appellants would result in absurdities which the court should avoid.

The resolution of the issue under consideration depends on the resolution of the primary issue whether section 22(3) of the Federal High Court Act is severable so as to make that section or sub-section a State Law by virtue of section 274(1) of the 1979 Constitution while the rest of the Act still retains its original status of a Federal Act. If, and that as a very important if, the sub section is severable then it becomes an existing law deemed to have been made by the relevant State House of Assembly to provide for the jurisdiction, powers, practice and procedure of the state High Court.

It is not disputed that under the 1979 Constitution, section 233 confers on the National Assembly the legislative power or authority to make laws to provide for the practice and procedure of the Federal High Court while section 239 makes similar provisions in relation to the practice and procedure of a High Court of a State but assigned the legislative authority on the issue to the State House of Assembly concerned. Also not disputed is the fact that the Federal High Court Act is a Federal legislation applicable to the Federal High Court and deemed by the provisions

of section 274(1) of the 1979 Constitution to be made by the National Assembly. Therefore when one looks at the Federal High Court Act as an existing law deemed made by the National Assembly and applicable by the provisions of section 233 of the said 1979 Constitution to the Federal High Court only, it becomes obvious or it follows logically that the said Act will be in conflict with the provisions of section 239 of the same Constitution if it is deemed to be applicable to the Lagos State High Court, there being no corresponding provision in the Lagos State High Court Law similar to section 22(3) of the Federal High Court Act. In fact, that is the position of the respondent and the Court of Appeal. The question is whether they are correct in their views of the law.

Section 274(4) (b) defines “existing law” to mean “any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force of which having been passed or made before that date comes into force after that date;”

While “enactment” is defined in section 277(1) of the 1979 Constitution as meaning:

“provision of any law or a subsidiary instrument.”

I have carefully gone through the legal authorities cited and relied upon by both counsel on the point and have come to the conclusion that though the term “enactment” means “a section or part of a section in an Act” or “a particular provision in a Statute” as decided in *Wakefield and District Light Railways vs Wakefield Corp Supra* at 145 - 146 and *A-G of Lagos State vs Hon. Justice L.J. Dosunmu Supra* at page 601 respectively, the language used is not mandatory but permissive and that whether what the draftsman intended is an interpretation which favours the whole Act or a section or part of a section will depend on the context in which the term “enactment” is used by the draftsman. When one takes a careful look at the definition of the term in section 277 of the 1979 Constitution earlier reproduced, it is clear that it does not talk of a section or part of a section, of an Act but simply the provision of any law or a subsidiary instrument.

In the circumstances of this case particularly having regards to

the provisions of section 239 of the 1979 Constitution which expressly provides that:

“The High Court of a State shall exercise jurisdiction vested in it by this Constitution or by any law in accordance with the practice and procedure (including the service and execution of all Civil and Criminal processes of the court) from time to time prescribed by the House of Assembly of the State.”

I am of the considered opinion that the proper interpretation relevant to the facts of this case is that of interpreting the term “*enactment*” to mean the whole Act not a section or part of a, section thereof. We must not lose sight of the fact that Nigeria is a Federation of States where powers and authorities are shared not only amongst the three tiers of government but the three arms of government. In the instant case the Federal High Court Act as a whole which is an existing law deemed made by the National Assembly by the provisions of the 1979 Constitution has to be interpreted as so applicable since it is within the legislative competence of the National Assembly to so enact.

The next sub issue is whether section 22(3) of the Federal High Court Act is inconsistent with section 239 of the 1979 Constitution and therefore void or unconstitutional. It is not in doubt that by the provisions of section 22(3) of the Federal High Court Act, being a section of an existing law within the competence of the National Assembly to make is valid and as such a Federal High Court can rely on same to transfer a suit before it which it considers to be outside its jurisdiction to a State High Court with jurisdiction to deal with same. That is what was decided by this court in Aluminium Manufacturing Co. Nig. Ltd vs Nigeria Ports Authority (1987) 1 NWLR (pt 51) 475 which is therefore irrelevant to the facts of this case; the facts of which are the reverse; that is the power of the State High Court to transfer a matter to the Federal High Court when it comes to the conclusion that it has no jurisdiction to deal with same as provided by section 22(3) of the Federal High Court Act. In the circumstance I hold the view that whatever was said by this court touching and concerning section 22(3) of the said Act in that case was obiter dicta, the said section not being in issue before the court. To that

extent, I hold the view that the issue of the inconsistency of section 22(3) of the Act with section 239 of the 1979 Constitution is still open for determination by this court.

In *Omisade & Ors vs Akande* (1987) 2 NWLR (pt, 55) 158 the exercise of the powers under section 22(3) of the Act came to play in this Court. It was a case in which this court after coming to the conclusion that the Lagos State High Court had no jurisdiction in the matter, *suo motu*, and without inviting arguments from counsel for both parties, proceeded to invoke the powers conferred by section 22(3) of the Act on the State High Courts to transfer the matter to the Federal High Court for determination. It has to be noted that in none of the cases was the issue of the constitutionality or validity or inconsistency of section 22(3) of the 1 Act on the front burner. Fortunately in the case of *Awoleye vs. B.O.C.E.* (1990) 2 NWLR (part 133) 490 this court specifically stated the position of the law by holding that since the commencement of the 1979 Constitution the State High Court can no longer exercise the powers hitherto conferred by section 22(3) of the Federal High Court Act 1973 to transfer to the Federal High Court a matter before it in which it had no jurisdiction.

I therefore hold the view that to the extent that section 22(3) of the Act sets out what should be done by a State High Court when it comes to the conclusion that it has no jurisdiction in a matter instituted before it but that the Federal High Court is the proper forum is obviously not in conformity with the express provisions of section 239 of the 1979 Constitution which vests legislative authority on the State House of Assembly to legislate on such matters. There is no evidence on record that the Lagos State House of Assembly has exercised its powers of legislation under section 239 of the 1979 Constitution by incorporating the provisions of section 22(3) of the Act in the laws applicable to the practice and procedure of the Lagos State High Court. Until that is done the Lagos State High Court is without jurisdiction to act under section 22(3) of the Federal High Court Act by transferring any matter before it if it comes to the conclusion that only the Federal High Court has jurisdiction to deal with the matter.

It is therefore my considered view that section 22(3) of the Federal High Court Act is clearly in conflict with the provisions of section 239 of the 1979 Constitution and consequently void to the extent of that inconsistency.

In conclusion, I agree with the lead judgment of my learned brother B OGBUAGU, JSC that the appeal is without merit and should be dismissed. I accordingly dismiss same with costs as assessed and fixed in the said lead judgment.

Appeal dismissed.

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