APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J. and Walmsley J.

UDOY CHAND PANNALAL

v.

KHETSIDAS TILOKCHAND.*

1924.

March 14.

Dismissal of Suit for want of Prosecution—Rules of the High Court (Original Side) Chapter X, Rule 36—Order of dismissal appealable as "judgment" within the meaning of clause 15 of Letters Patent—Rule not ultra vires.

The decision of a Judge on the Original Side of the High Court dismissing a suit for want of prosecution under Chapter X, Rule 36 of the Rules of the Court (Original Side) is a judgment within the meaning of clause 15 of the Letters Patent and an appeal lies from that decision.

The rule contained in Chapter X, Rule 36 of the Rules of the High Court (Original Side) is not *ultra vires* and the Court has jurisdiction to dismiss for default a suit which appears on the Special List prepared under that rule.

APPEAL by Udoy Chand Pannalal, the plaintiffs, from the judgment and order of Buckland J.

The suit out of which this appeal arose was one which came on the Special List for disposal before Buckland J. under Chapter X, rule 36 of the Rules of the High Court (Original Side) and was dismissed for want of prosecution. The following judgment was delivered by Buckland J.

BUCKLAND J. This suit is one of 138 suits which appeared in the Special List on the 19th of this month under Chapter X, rule 36 of the Orders of this Court.

It is also one of 21 suits out of the 138 in which the point which I have now to consider was taken. Rather than take up the time which argument on that day would have required, I adjourned the 21 suits to

*Appeal from Original Civil No 16 of 1924 in suit No. 2466 of 1922.

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this day for the purpose. They are all cases which, so far as the merits are concerned would have been dismissed on that day and the only point is one of law.

The point that has been taken is that the rule contained in Chapter X, Rule 36 of the Rules of this Court is *ultra vires* and the Court has no jurisdiction to dismiss for default a suit which appears in the Special List prepared under that rule. The rule impugned is as follows :—"Suits and proceedings which do not appear in the Prospective List within 6 months from the date of institution may be placed before the Judge in Chambers on notice to the parties or their Attorneys and be dismissed for default unless sufficient cause is shown to the contrary or be otherwise dealt with as the Judge may think proper."

The rule-making powers of this Court are to be found in section 129 of the Code of Civil Procedure and clause 37 of the Letters Patent of 1865.

Under the former the Court may make rules not inconsistent with the Letters Patent establishing it. Those Letters Patent, it is submitted, are the Letters Patent of 1862 because by them the Court was "established" whereas the Letters Patent of 1865, according to the decision in *Bardot v. The Augusta* (10 B. H. C. R 110), continued but did not establish the High Court. Clause 37 of the Letters Patent of 1862 provides that the proceedings in civil suits shall be regulated by the Code of Civil Procedure.

It is contended that the Code of Civil Procedure requires suits to be brought on for hearing on a date to be fixed and that there is no provision for dismissal for default such as this rule provides and therefore the rule is inconsistent with the Letters Patent of 1862 and *ultra vires*.

The former argument depends for its value upon the meaning of the word "establish" and the effect of the decision in the authority cited. As to the former the primary meaning of the word "establish" as defined in Murray's Oxford Dictionary is "to render stable or firm," an instance given being :—"Do we then make void the law through faith ? God forbid : Yes, we establish the law." (Rom iii 31).

In the case cited the learned Chief Justice appears to have regarded the word "establish" as used in the sense of "create," which, though one meaning, is not its etymological or primary meaning and is not that in which I regard it as having been employed in section 129 of the Civil Procedure Code. Section 129 in my opinion may legitimately be read as referring to the Letters Patent of 1865.

As regards inconsistency with the Code, if material, there is ample provision in the Code for dismissal of a suit even before the case is brought on for hearing, of which Order XI, r. 21, is an example.

The rule-making powers of the Court under Clause 37 of the Letters Patent of 1865 are admittedly more extensive. It is provided that the High Court shall be guided in making such rules and orders as far as possible by the provisions of the Code of Civil Procedure. Consequently, even if section 129 of the Code of Civil Procedure must be construed by exclusive reference to Letters Patent of 1862, it is immaterial because the powers conferred by clause 37 of the Letters Patent of 1865 are ample.

I hold that the rule is not *ultra vires* and that the Court has jurisdiction to dismiss a suit for default when it appears in the Special List under this rule ; I have already considered the merits and stated my views in regard to this and the other cases appearing in the Special List to-day.

The suit will be dismissed and there will be no order as to costs.

The plaintiffs appealed.

Mr. S. M. Bose, for the appellant.

Mr. S. C. Maity, for the respondent.

The arguments of counsel are fully stated in the judgment of Sanderson C. J. and are not repeated here.

SANDERSON C. J. This is an appeal from the judgment of my learned brother, Mr. Justice Buckland, which was delivered on the 21st of December 1923.

The judgment was delivered in respect of a notice which was issued by the Assistant Registrar of this Court on the 13th of December 1923 and addressed to the attorney for the plaintiff in the following terms : "Under Rule 36, Chapter X of the Rules of the High "Court, Original Side, 1914, notice is hereby given that "the above suit will be set down in a list to be taken "in Chambers on Wednesday, the 19th day of Decem-"ber instant, before the Hon'ble Mr. Justice Buckland "and will be dismissed for default unless, on the day, "good cause is shown to the contrary, or be otherwise 'dealt with as the Judge may think proper That was a notice which was in terms of Rule 36, Chapter X of the Original Side High Court Rules, which in

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its present form runs as follows: "Suits and proceedings which have not appeared in the Prospective List within six months from the date of institution, may be placed before a Judge in Chambers, on notice to the parties or their attorneys, to be dismissed for default unless good cause is shown to the contrary, or be otherwise dealt with as the Judge may think proper." The learned Judge dismissed the suit for want of prosecution and made no order as to costs of the suit.

The first point, with which it is necessary for me to deal, was taken by the learned counsel for the defendant respondent, namely, that there was no right of appeal to this Court from the decision of my learned brother. His main argument was based upon section 104 of the Civil Procedure Code which provides: "An appeal shall lie from the following orders, and, save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders." The learned counsel pointed out that neither section 104 nor Order XLIII, r. 1 provided for an appeal from the order of a learned Judge dismissing a suit for want of prosecution.

The learned counsel for the plaintiff appellant relied upon the following words in section 104, 'Save as otherwise expressly provided in the body of this Code or by any law for the time being in force," and he argued that the Letters Patent of 1865 of this Court are "a law for the time being in force:" and, that under clause 15 of the Letters Patent an appeal would lie because the decision of the learned Judge was a "judgment" within the meaning of that clause.

I am of opinion that the argument of the learned counsel for the plaintiff so far as it extended to the

meaning of the words "or by any law for the time being in force" is correct; and, that is made clear by the decision of the Judicial Committee of the Privy Council in the case of *Sabitri Thakurain* v. *Savi* (1); Lord Sumner in giving the judgment, dealt with this point at page 488 and said: "In order to appreciate the "full effect of section 104 it should be compared with "the corresponding section of the Act of 1882, "section 588. The earlier section enacted that appeal "should lie in certain cases which it enumerated, "'and from no other such orders.' This raised the "question neatly, whether an appeal, expressly given "by section 15 of the Letters Patent and not expressly "referred to in section 588 of the Code of 1882, could "be taken away by the general words of section 588, "'and from no other such orders.' The change in the "wording of section 104 of the Act of 1908 is signifi-"cant, for it runs, 'and, save as otherwise expressly "provided . . . . . by any law for the time "being in force, from no other orders.' Section 15 of "the Letters Patent is such a law, and what it ex-"pressly provides, namely, an appeal to the High "Court's Appellate Jurisdiction from a decree of the "High Court in its Original Ordinary Jurisdiction, is "hereby saved."

The question, therefore, arises whether the decision of the learned Judge is a "judgment" within the meaning of clause 15 of the Letters Patent.

In my opinion, there is no doubt that the learned Judge's decision was a "judgment." The effect of it was that the suit should not proceed and the plaintiff's right to have his claim adjudicated upon by the Court, so far as this suit was concerned, was at an end; and, in my opinion, it would be impossible under those circumstances to hold that the learned

(1) (1921) I. L. R. 48 Calc. 481.

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Judge's decision, which was a judicial decision after hearing the arguments and considering the facts, which were before him, that the plaintiff's suit should be dismissed, was not a "judgment." In my opinion, therefore, there is a right of appeal.

The next point, with which I must deal, was raised by the learned counsel for the appellant, namely, that the learned Judge had no jurisdiction to make the order because Rule 36, Chapter X of the Original Side Rules was beyond the powers of this Court and was *ultra vires*.

agree with the decision of the learned Judge that the Court had jurisdiction to dismiss the suit for default, when it appeared in the Special List under that rule.

The learned counsel argued that section 129 of the Civil Procedure Code, 1908, referred to the Letters Patent of 1862 because those were the Letters Patent which established this High Court. But it is to be noticed that at the time when the present Code of Civil Procedure was passed, namely, in 1908, the first Letters Patent of this Court, namely, those of 1862, had been revoked and the Letters Patent which were in force at that date were the Letters Patent of 1865; and I agree with the learned Judge that section 129 may legitimately be read as referring to the Letters Patent of 1865 which were in force at the time of the passing of the Code.

The learned Judge referred to the various meanings of the word "establish" in his judgment. It is not necessary for me to deal with this matter at any length. It is sufficient for me to say that I am of opinion that it is not unreasonable to assume that section 129 was intended to refer to the Letters Patent which were then in force, dealing with the establishment and continuance of the High Court.

But, apart from that, I am of opinion that the Court had jurisdiction to make the rule in question under clause 37 of the Letters Patent of 1865 which provides that "it shall be lawful for the said High Court "of Judicature at Fort William in Bengal from time to "time to make rules and orders for the purpose of "regulating all proceedings in civil cases which may "be brought before the said High Court, ... "Provided always, that the said High Court shall be "guided in making such rules and orders, as far as "possible, by the provisions of the Code of Civil Procedure." In my opinion, the rule is one of procedure and for the purpose of regulating proceedings in civil cases which are brought before the High Court. To my mind it is unreasonable to suppose that the Court would have power to make rules regulating proceedings in civil cases and at the same time would have no power to attach any sanction in respect of the breach of such rules.

The result is that I agree with the learned Judge's decision that the rule is not *ultra vires* and that he had jurisdiction to dismiss the suit for default after considering the facts and the arguments which were put before him, if in his discretion he thought it right to dismiss the suit.

I will now deal with the merits of the matter as presented by the learned counsel.

In this respect it is to be noticed that this case was marked as a Commercial suit and was brought to recover damages, which were alleged to be about Rs. 37,961, for an alleged breach of contract by the defendants to take delivery of certain goods. As far as I understand the nature of the case from the materials before me, it was the kind of case, which is tried frequently on the Original Side, and was of a simple nature. Nothing has been put before the

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Court to show that this case could not have been got ready for trial within a few months from the date of its institution. Cases are entered in the Commercial list not only because of the nature of the cases but also in order that they may have a more speedy trial than other cases; and, yet I find in this case a delay which I am bound to say is very serious indeed. This is an instance of the delays which do take place, I regret to say, even now on the Original Side, in respect of which the Court is in no way responsible. It cannot be denied that in this case the plaintiff and his attorney were solely responsible for the delay which took place.

I will now mention the material dates.

The suit was instituted on the 2nd of June 1922 as a Commercial suit; the summons was issued on the 16th of June and it was served on the defendants on the 24th of June. The defendant entered an appearance on the 28th of June and it is to be noticed that the defendants were bound under the rules of the Court to file their written statement within fourteen days from the date on which the summons was served upon them. Therefore, the defendants ought to have filed their written statement on or before the 8th of July 1922. When they did not file their written statement on or before the 8th of July 1922, the plaintiff could have made an application in Chambers to have the case put in the undefended list and if he had taken the ordinary and proper steps, one of two things would have happened: either the case would have been placed in the undefended list or there would have been a peremptory order upon the defendants to file their written statement within a reasonable time and in all probability the defendants would have been made to pay the costs of such application. But no such step was taken by the plaintiff or the plaintiff's attorney.

They did nothing until the 20th of November 1922. Then apparently, the plaintiff's attorney called upon the defendants for a copy of their written statement, but the written statement was not filed until the 12th of December 1922.

The delay to which I have already referred is inexcusable, so far as the plaintiff and his attorney are concerned.

After that another serious delay took place, because after the written statement was filed, the plaintiff and his attorney did nothing until the 24th of July 1923. Then the plaintiff called upon the defendants for their affidavit of documents, and, on the 28th of August 1923, a peremptory order was made upon the defendants that they should file their affidavit of documents within fourteen days. That affidavit of documents was filed within fourteen days: *viz*, on the 11th of September. It is said that the plaintiff and his attorney received no notice that the affidavit had been filed. But it is to be noticed that it was not until the 12th of December 1923 that the plaintiff's attorney obtained a copy of the defendants' affidavit of document. On the 13th of December the notice, to which I have already referred, was given and the case was placed on the learned Judge's Special List on the 19th of December, and, he gave his judgment on the 21st of December 1923.

It has been stated by the learned counsel for the plaintiff that the plaintiff is a man who cannot speak English. The learned counsel for the defendants has agreed that that is the case. If so, it is probable that the plaintiff himself was not conversant with the rules and procedure of the Court.

We asked the learned counsel for the plaintiff, in the course of the argument, to give an explanation for

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this delay. The learned counsel frankly admitted that at all events for a part of this delay the attorney was responsible. I desire to say nothing more than is necessary about this. I am however convinced that it must have been to a large extent the fault of the attorney that this inordinate delay took place. I do not say it is certain, but it may be that the plaintiff himself was not in any way responsible for the delay and, if it be the case that the attorney is solely responsible for the delay and the plaintiff himself is not responsible, that is a matter which may be taken into consideration in considering whether the plaintiff should be deprived of the opportunity of having his case tried. Having regard to the abovementioned matters and in view of the fact that when this application was heard, the plaintiff was ready and anxious to have his case tried, my learned brother and I are of opinion that the learned Judge's order may be varied to the following extent.

The plaintiff must pay to the defendants' attorney the costs of the application before the learned Judge and the costs of this appeal, which we for the present assess at the sum of Rupees one thousand, on or before Monday, the 24th instant, as a condition precedent to having his suit entered in the Prospective List for the purpose of being tried. Upon payment of the amount of Rs. 1,000 within the time fixed, his suit will be entered in the Prospective List and come on for trial in due course. If the abovementioned sum is not paid as directed, this appeal will stand dismissed with costs.

The abovementioned costs will be subject to taxation and, if the amount on taxation turns out to be more than the sum of Rs. 1,000, then the plaintiff will pay the balance, and if it be less, then the defendants' attorney will refund the amount overpaid. The

abovementioned costs are to be payable by the plaintiff in any event.

The defendants must present their bill of costs for taxation within a fortnight from the time the order is completed and we give a direction to the office to draw and complete the order as early as possible.

It appeared from some of the statements which were made by the learned counsel during the course of the argument, that some attorneys do not seem to have realised that it is their duty to take steps to place a suit in the Prospective List within six months from its institution. I do not understand why this has not been realised; for, I think the intention of the rules is clear. In future there will be no excuse for such delay as has taken place in this case: and, I hope that the time of the Court will not be taken up in hearing applications such as this, but that attorneys will endeavour to comply with the rules of the Court and expedite the proceedings with all reasonable despatch.

WALMSLEY J. I agree.

Attorney for the appellant: *P. N. Banerjee.*

Attorney for the respondent: *H. C. Banerjee.*

A. P. B.