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gagees. There was a covenant by the mortgagors to pay that sum with interest at 12 per cent. on the 4th August 1888, and on the other hand a power of sale reserved to the mortgagees on default being made.

The plaintiff and his mortgagee took possession under the mortgage and carried on the business till January 1888 when the Ice Company cancelled the contract with Watson and Co. and Watson and Co. filed a petition in the Insolvency Court. I think there can be no doubt that plaintiff did, by accepting the mortgage, promise to give time to Watson and Co. and thus render it impossible for him to sue Watson and Co. had the defendant as surety called upon him so to do. *Bailey* v. *Edwards*(1).

Mr. Johnstone referred to *Pogose* v. *Bank of Bengal*(2) and argued that here also there was nothing to show that the eventual remedy of the surety was prejudiced; but in that case the question turned upon section 139 of the Contract Act and it did not appear that time had been given in such a way as to make section 135 applicable.

Upon the question whether the defendant is discharged by the contract between plaintiff and Watson and Co., I must find in the defendant's favor. The result is that I dismiss the suit with costs.

Grant & Laing, attorneys for plaintiff.

Tyagarajayyar, attorney for defendant.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Muttusami Ayyar, Mr. Justice Parker, and Mr. Justice Wilkinson.

1889. August 13. December 20. 1890. January 8.

RAMASAMI (PLAINTIFF), PETITIONER,

v.

KURISU (DEFENDANT), RESPONDENT.*

Civil Procedure Code, ss. 623, 624, 626—*Review—Provincial Small Cause Courts Act —IX of* 1887, *s.* 17—*Deposit of costs.*

On 23rd February 1888 the Subordinate Judge of Tinnevelly dismissed a small cause suit on the ground that the plaintiff had not secured the attendance of his

(1) 4 B. & S., 761. (2) I.L.R., 3 Cal., 174.

* Civil Revision Petition No. 201 of 1888.

witnesses. On 29th February the plaintiff presented a petition for review on which notice was directed to issue, but he did not deposit in Court the amount of the costs payable under the decree. On 17th April the petition having come on for hearing, the Judge directed that the petitioner should "first" deposit the amount of the defendant's costs under s. 17 of the Provincial Small Cause Courts Act, which was accordingly done on the following day. On 21st April the petition, which proceeded on grounds other than those mentioned in s. 624 of the Code of Civil Procedure, came on for hearing before the Officiating Subordinate Judge, who had assumed charge of the Court between the last-mentioned dates: he entertained the petition, but dismissed it. The plaintiff preferred a revision petition against the order dismissing his petition:

Held by the Full Bench that the Officiating Subordinate Judge had jurisdiction to make the order sought to be revised.

Held by Parker and Wilkinson, JJ., that the provisions of s. 17 of the Provincial Small Cause Courts Act as to the deposit of costs on an application for review are not mandatory, but merely directory.

PETITION under section 25 of the Provincial Small Cause Courts Act praying the High Court to revise the order of S. Subbier, Acting Subordinate Judge of Tinnevelly, dated 21st April 1888, dismissing a petition for review of the judgment of Kanagasabai Mudaliar, Subordinate Judge of Tinnevelly, in small cause suit No. 927 of 1887.

The judgment of which review was sought proceeded on the ground that the plaintiff had omitted to secure the attendance of his witnesses and had not paid batta for summoning them in due time; and the petition of review set forth reasons why these omissions by the plaintiff should have been excused. The petition was admitted, but when it came on for hearing it appeared that the amount of the costs payable to the defendant under the decree had not been deposited in accordance with the provisions of Provincial Small Cause Courts Act, s. 17, and the hearing was thereupon adjourned for the payment to be made. At the adjourned hearing the Officiating Subordinate Judge, who had in the interval assumed charge of the Court, made the following order:—

"I do not think that sufficient grounds for a review of judgment have been put forth in this application. The plaintiff was represented by counsel and batta for witnesses was not paid in sufficient time. The allegation that plaintiff's son died does not appear to have been put forward at or before the time of the dismissal of the suit. The defendant appeared and denied the claim and opposes this petition. The permanent Subordinate

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Judge ordered notice to issue to the opposite party, but from this I have no reason to suppose that he was satisfied with the sufficiency of the grounds put forward. The petitioner, moreover, did not deposit the amount of the decree with this petition as required by section 17 of the Small Cause Act.

"I accordingly reject this petition with costs."

The plaintiff preferred this petition.

The further facts of this case appear sufficiently for the purposes of this report from the following judgments.

Rama Rau for petitioner.

Bhashyam Ayyangar for respondent.

PARKER, J.—This is a petition under section 25 of the Small Cause Court Act IX of 1887. This suit was dismissed on February 23rd, 1888, by the Subordinate Judge of Tinnevelly on the ground that the plaintiff had not secured the attendance of his witnesses, and had not paid the batta for summoning them in due time. On February 29th a petition for review was presented by the plaintiff under section 623 of the Civil Procedure Code, on which the Subordinate Judge ordered notice to issue on March 6th, fixing the date of hearing for March 26th. The plaintiff, moreover, failed to deposit the costs payable under the decree as required by section 17 of the Small Cause Court Act. The case does not appear to have been taken on March 26th; but on April 17th the Subordinate Judge passed an order that the petitioner should "first" deposit the amount of the defendant's costs. This was paid on April 18th, and on April 21st the petition came on for disposal. Between April 17th and April 21st there had been a change of Subordinate Judges, Mr. Kanagasabai Mudaliar having gone on leave and Mr. Subbier having been appointed to act for him. On April 21st the petition for review was dismissed by the latter on the grounds (1) that witness' batta was not paid in sufficient time, (2) that the order for notice was not sufficient ground for holding the permanent Subordinate Judge was satisfied with the excuse, and (3) that the costs had not been deposited with the petition as required by section 17, Act IX of 1887.

This order we are now asked to revise, and the defendant's pleader raised the preliminary objection that, under section 624 of the Civil Procedure Code, it was *ultra vires* for the Subordinate Judge (Mr. Subbier) to have disposed of the review petition at all

Pancham v. *Jhingari*(1). As against this contention, we were referred to the cases of *Karoo Singh* v. *Deo Narain Singh*(2) and *Fazel Biswas* v. *Jamadar Sheik*(3). The decisions of the Allahabad and Calcutta High Courts are directly in conflict.

The question is as to the construction to be put upon the word "made" in section 624 of the Civil Procedure Code. That section is a new one, but the effect of it is to give legislative sanction to the principles laid down by the Privy Council in *Maharajah Moheshur Singh* v. *The Bengal Government*(4) with reference to granting reviews of judgment. The reason for the rule is obvious; for, if another Judge were to admit a review of the judgment of his predecessor upon any other grounds than that of the discovery of new evidence or to correct a clerical error, he would practically be hearing an appeal from his predecessor's judgment, which is the function of a superior Court.

In this case I am unable to hold that the application has not been "made" to the Judge who delivered the judgment. The mere filing of the application in Court might be insufficient, but here the Subordinate Judge has exercised his judicial mind upon the application and has seen *primâ facie* ground for believing that his judgment required reconsideration. To hold otherwise would lead to this anomaly:—that, after registering the application and before finally disposing of it, the Judge who passed the decree might die or be removed, and the party lose his remedy both by way of review and by appeal (which might be barred). A provision of law should not be construed so as to cause injury to a suitor, nor can it be supposed that the Legislature having given a right to apply for a review when the same Judge is in office, and having allowed the Court to acquire jurisdiction, has left it in certain contingencies without the power to deal with the application or to exercise the jurisdiction acquired. The successor of the Subordinate Judge, to whom the application was made, must therefore exercise the jurisdiction as a case of necessity, since his predecessor can no longer do so. On these grounds, I concur in the view taken by the High Court of Calcutta.

Holding then that the Subordinate Judge (Mr. Subbier) had jurisdiction to make the order, it appears to me that the grounds

(1) I.L.R., 4 All., 278.
(2) I.L.R., 10 Cal., 80.
(3) I.L.R., 13 Cal., 231.
(4) 7 M.I.A., 283.

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of his order cannot be supported. The witnesses were all resident in Tinnevelly near the Court-house, and some of them, if not all, might have been served between February 17th and February 23rd—at all events the plaintiff was entitled to the issue of summons. The fact of the permanent Subordinate Judge having issued the order was evidence that he considered some *primâ facie* ground had been shown. With regard to the third point, viz., the deposit of costs with the application, I am disposed to hold that section 17 of the Small Cause Court Act is merely directory and not mandatory. The Court did require the costs to be deposited before the review was heard, and this, I think, is the intention of the section.

I would therefore set aside the order and remand the petition for rehearing. The costs to follow the result.

WILKINSON, J.—Small Cause Suit No. 927 of 1887 was dismissed by the Subordinate Judge of Tinnevelly, Mr. Kanagasabai Mudaliar, on 23rd February on the ground that plaintiff had failed to secure the attendance of his witnesses. On the 29th February plaintiff applied for a review. On the 6th March the Subordinate Judge ordered notice to go to the defendant to show cause why the review should not be allowed. On the 17th April he ordered plaintiff to pay into Court the costs decreed. The costs were deposited on the 18th April. Mr. Kanagasabai Mudaliar availed himself of leave on the 19th April, and on the 21st his *locum tenens*, Mr. S. Subbier, rejected the application to review.

We are asked to set aside his order on the ground that it is contrary to law.

The first question we have to decide is whether the Acting Subordinate Judge had power to pass any orders in review. On the one hand, it is contended on the authority of *Pancham* v. *Jhinguri*(1) that the words "shall be made" in section 624 of the Civil Procedure Code mean "shall be heard and determined," and that as the review was not sought on the ground of (1) new matter, or (2) clerical error, the Acting Subordinate Judge was not entitled to pass any orders in review of his predecessor's judgment. On the other side, it is argued on the authority of *Karoo Singh* v. *Deo Narain Singh*(2) followed in *Fazel Biswas* v. *Jamadar Sheik*(3) that the Judge whose judgment it was sought

(1) I.L.R., 4 All., 278. (2) I.L.R., 10 Cal., 80. (3) I.L.R., 13 Cal., 231.

to review having admitted the application, it was competent to his successor to dispose of it, and we are referred to the remarks of the Privy Council in *Maharajah Mokeshur Singh* v. *The Bengal Government*(1). There their Lordships say that the primary intention of granting a review was a reconsideration of the same subject by the same Judge. They went on to remark, "we do not say that there might not be cases in which a review might take place before another and a different Judge, because death or some other unavoidable cause might prevent the Judge who made the decision from reviewing it, but we do say that such exceptions are allowable only *ex necessitate*." These remarks were made in 1859 with reference to the law as laid down in the regulations. Having them in view, the Legislature has provided (section 623 of the Civil Procedure Code) that any person considering himself aggrieved by a decree or order may apply for a review of judgment *to the Court which* passed the decree or made the order, and has prohibited the entertainment of any such application by any Judge other than the Judge who pronounced the judgment, except in two cases, viz., (1) the discovery of new matter, or (2) clerical error. As was held in this Court in *Sarangapani* v. *Narayanasami*(2) where there has been a change of the presiding Judge, no application can be made to the new Judge except on the grounds stated in section 624. To hold that the issue of notice by the Judge who passed the decree entitles another Judge to pass final orders either granting or rejecting the application for review would render the provisions of section 624 completely nugatory. As I understand the code, the only cases in which a Judge other than the Judge who passed the decree can review the judgment of his predecessor are those provided in section 624, and the Legislature deliberately declined to lay down any other exceptions to the general rule. Where the correctness of the decision either in law or on facts is impeached by the person applying for review, the only Judge who can hear and determine the application is the Judge whose decision is impeached.

Being of opinion that the Acting Subordinate Judge had no jurisdiction to pass the order he did, I would set aside his order.

In consequence of the difference of opinion between their

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(1) 7 M.I.A., 283. (2) I.L.R., 8 Mad., 567.

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Lordships, the case was referred to a Full Bench, and their Lordships made the following :—

Order of Reference to the Full Bench :—The facts are sufficiently set forth in the foregoing judgments. The plaintiff applied for review of judgment on grounds other than those mentioned in section 624 of the Civil Procedure Code. The Subordinate Judge who had passed the decree received the petition and ordered notice to be given to the opposite party, but left the Court before passing any final order granting or refusing the review.

The question for the Full Bench is—whether, having regard to the provisions of section 624 of the Civil Procedure Code, the application may be heard and disposed of by his successor ?

The decisions of the Allahabad and Calcutta High Courts are in conflict—*Pancham* v. *Jhinguri*(1), *Karoo Singh* v. *Deo Narain Singh*(2), and *Fazel Biswas* v. *Jamadar Sheik*(3). We therefore refer the question to the Full Bench.

Rama Rau for appellant cited *Maharajah Moheshur Singh* v. *The Bengal Government*(4), *Sarangapani* v. *Narayanasami*(5), *Cheru Kurup* v. *Cheru Kanda Kurup*(6), *Fazel Biswas* v. *Jamadar Sheik*(3).

Desika Chari for respondent.

All the difficulties which arise here are anticipated and resolved in *Pancham* v. *Jhinguri*(1).

A review of judgment is, except where the application is made under section 624, a matter of discretion merely. The object of Chapter XLVII of the Civil Procedure Code is to enable the suitor to obtain the result of a maturer consideration by the same mind—see the recent changes in the law, sections 624, 626. And in this case no hardship would be involved for the plaintiff, for the permanent Subordinate Judge was only absent on leave for two months, and the plaintiff, if he had waited, might have had recourse to the provisions of section 627.

(WILKINSON, J.—Does that section apply to Small Cause Courts?)

Its application to such Courts is not excluded in terms, so it would apply the marginal note notwithstanding.

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(1) I.L.R., 4 All., 278.
(2) I.L.R., 10 Cal., 80.
(3) I.L.R., 13 Cal., 231.
(4) 7 M.I.A., 283.
(5) I.L.R., 8 Mad., 567.
(6) I.L.R., 12 Mad., 509.

(MUTTUSAMI AYYAR, J.—The first clause appears to presuppose that there are more than one Judge in the Court, and the position of the section in the chapter and the terms of section 628 point the same way. The Allahabad decision admits the hardship arising under section 624, but the Judges say they are bound by the Privy Council ruling—)

or rather by the words of the section.

(MUTTUSAMI AYYAR, J.—On the words of the section all the High Courts agree in construing "made" as referring not to the actual reception of the application for review, but to the judicial consideration of it.)

The Allahabad Court seems to go further than the Calcutta Court in applying it to the "hearing and determination" of the application. It must be observed that the Legislature in the Amendment Act did not carry out exactly the principle of the Privy Council decision, but made two exceptions only.

Rama Rau in reply.

As to section 627, it does not apply to Courts of Small Causes—see as to the weight to be attached to the marginal notes, Maxwell on the Interpretation of Statutes, p. 525, and *Venour* v. *Sellon*(1). (He was stopped on that point.)

The Full Bench delivered the following

JUDGMENT:—This is a case referred for the opinion of the Full Bench, and the facts giving rise to the reference are these.

The Subordinate Judge of Tinnevelly dismissed a suit on February 23rd, 1888, on the ground that plaintiff had not secured the attendance of his witnesses, and had not paid the batta for summoning them in due time. On February 29th a petition for review was presented by plaintiff under section 623 of the Civil Procedure Code, on which the Subordinate Judge ordered notice to issue on March 6th, fixing the date of hearing for March 26th. The plaintiff moreover failed to deposit the costs payable under the decree, as required by section 17 of the Small Cause Court Act. The case does not appear to have been taken up on March 26th; but on April 17th the Subordinate Judge passed an order that petitioner should "first" deposit the amount of defendant's costs. This was paid on April 18th, and on April 21st the petition came on for disposal. Between April 17th and April 21st there had

(1) L.R., 2 Ch. D., 525.

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been a change of Subordinate Judges, Mr. Kanagasabai Mudaliar having gone on leave and Mr. Subbier having been appointed to act for him. On April 21st the petition for review was dismissed by the latter on the grounds (1) that witness' batta was not paid in sufficient time, (2) that the order of notice was not sufficient ground for holding the permanent Subordinate Judge was satisfied with the excuse, and (3) that the costs had not been deposited with the petition as required by section 17, Act IX of 1887.

The question for the Full Bench is whether having regard to the provisions of section 624 of the Civil Procedure Code, the Acting Subordinate Judge was competent to hear and finally determine the application made to his predecessor.

The party aggrieved by a decree is entitled under section 623 to ask for a review of judgment on all the grounds mentioned therein when the Judge who passed the decree hears and finally determines his application. It is also clear from section 624 that, when the Judge who delivered the original judgment ceases to be attached to the same Court before the application for review is made, it can only be made on the specific grounds mentioned in that section. There are, however, two intermediate stages at which the Judge who delivered the original judgment may cease to be attached to the same Court, viz., (I) after the application is made and before he orders notice to issue under section 626, and (II) after he orders notice to issue and before he hears the opposite party in support of the original decree and finally determines the application. As regards the former, there is a consensus of opinion among the High Courts at Madras, Calcutta and Allahabad—that the term "made" in section 624 must be taken to signify that the application is brought under the judicial cognizance of the Judge who delivered the judgment to be reviewed and is considered, if not finally determined by him under section 626, see *Cheru Kurup* v. *Cheru Kanda Kurup*(1), *Karoo Singh* v. *Deo Narain Singh*(2), and *Pancham* v. *Jhinguri*(3). As regards the latter, the substantial question is, whether the term "made" signifies a final determination of the application by the same Judge that delivered the judgment of which it is desired to obtain a review.

Section 624 limits the scope of section 623 and restricts the

(1) I.L.R., 12 Mad., 509. (2) I.L.R., 10 Cal., 80. (3) I.L.R., 4 All., 278.

remedy provided by it, and unless the intention is clear it ought to be construed so as to advance the remedy. In their ordinary sense, the words "no application shall be made" cannot be taken to mean, "no application shall be finally determined." Again in form section 624 contains a direction to the party seeking to obtain a review of judgment, and in substance it must be taken to limit the power of the Court to entertain and deal with the application only to the extent to which the remedy is taken away from the party concerned. To hold otherwise would lead to this anomaly, viz., that after ordering notice and before finally disposing of the application, the Judge who passed the decree might die or be removed from the Court and the party lose his remedy both by way of review and by appeal (which might become barred). It would also contravene the ordinary rule of construction that a provision of law should be so interpreted, if possible, as to avoid injustice to a suitor or as not to leave a Court that is once seized of jurisdiction to entertain an application without power to determine it. It is no doubt true that section 624 is intended to give legislative sanction to the principles laid down by the Privy Council in *Maharajah Maheshur Singh* v. *The Bengal Government*(1) in which it was observed that a review was perfectly distinct from an appeal, that the primary intention of granting a review was a reconsideration of the same subject by the same Judge as contradistinguished from an appeal which is a rehearing before another tribunal, and that review should take place before the same Judge that delivered the judgment except in cases of necessity such as the death or removal of the Judge. Whilst taking these observations as a guide to the construction to be put upon section 624, regard should also be had to the mode in which legal effect was intended to be given to them by that section. According to the prior law as interpreted by the Privy Council, a review might take place in case of necessity before another Judge upon all the grounds mentioned in section 623 without reference to the question whether the Judge who delivered the original judgment ceased to belong to the Court before or after the application for review had been made. But section 624 contemplates the state of things when the application for review is made and permits or forbids a review according as the Judge who passed the original decree is

(1) 7 M.I.A., 283.

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or is not then attached to the same Court. Though the intention is clear not to provide even for a case of necessity before the Court acquires jurisdiction to deal with the application, yet it may well be that the exercise of jurisdiction which once vests in a Court, notwithstanding a subsequent change of Judges is regarded as a case of necessity. That this is the correct view is placed beyond doubt by clause (*c*) added to section 626 by the Amendment Act VII of 1888, s. 59. We concur in the view taken in *Karoo Singh* v. *Deo Narain Singh*(1) and *Fazel Biswas* v. *Jamadar Sheik*(2) and we are not prepared to follow the decision in *Pancham* v. *Jhinguri*(3).

We accordingly answer the question referred to us in the affirmative.

This petition coming on for final hearing before Parker and Wilkinson, JJ., the Court delivered the following

JUDGMENT :—The Full Bench having held that the Subordinate Judge had jurisdiction to make the order, we are of opinion that the grounds of his order cannot be supported.

The witnesses were all resident in Tinnevelly near the Court-house, and some of them, if not all, might have been served between February 17th and February 23rd—at all events the plaintiff was entitled to the issue of the summons. The fact that the permanent Subordinate Judge had issued the order was evidence that he considered some *primâ facie* ground had been shown, and we think that section 17 of the Small Cause Court Act is merely directory. The costs were deposited before the review was heard.

We therefore set aside the order and remand the petition for rehearing. The costs will follow the result.

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(1) I.L.R., 10 Cal., 80. (2) I.L.R., 13 Cal., 231. (3) I.L.R., 4 All., 278.