APPELLATE CIVIL—FULL BENCH.

Before Sir Charles Arnold White, Kt., Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

MADURAI PILLAI (DEFENDANT), APPELLANT,

v.

T. MUTHU CHETTY (PLAINTIFF), RESPONDENT.*

1913. November 5 and 1914 January 5.

Presidency Small Cause Courts Act (XV of 1882), ss. 9 and 38—New trial, application for—Right of a party to apply—Presidency Small Cause Court Rules, O. XLI, r. 2, ultra vires—High Court, power of, to make rules—Matters of practice or procedure—Right of a party to apply, not a matter of practice or procedure.

The rules of the Presidency Small Cause Court are made by the High Court under the powers conferred by section 9 of the Presidency Small Cause Courts Act, of 1882, as amended by the Act of 1895.

That section only empowers the High Court to make rules with reference to matters of practice or procedure and not matters of substantive right.

On a true construction of section 38 of the Act, the power given to the Court is really a right given to a party to apply for a new trial: such right like the right of appeal, is not a matter of practice or procedure.

Order XLI, rule 2 of the Presidency Small Cause Court Rules which requires at the time of presenting an application for new trial, either the deposit in Court of the decree amount or the giving of security for the due performance of the decree is inconsistent with the statutory right given by section 38 of the Presidency Small Cause Courts Act and is *ultra vires*.

Attorney-General v. *Sillen* (1864) 11 E.R., 1200; s.c., 10 H.L.C., 704, referred to.

Colonial Sugar Refining Company v. *Irving* (1905) L.R., A.C., 369, referred to.

PETITION under section 115, Civil Procedure Code (Act V of 1908), praying the High Court to revise the order of the Full Bench of the Court of Small Causes in Full Bench. Application No. 96 of 1912 in Small Cause Suit No. 12034 of 1912.

The necessary facts appear from the Order of Reference to the Full Bench.

V. Raghunatha Sastriyar and *C. Krishnamachariyar* for *K. Bhashyam Ayyangar* for the petitioner.

P. M. Sivagnana Mudaliyar for the respondent.

This petition came on for hearing before SANKARAN NAIR and AYLING, JJ., who made the following

ORDER OF REFERENCE TO THE FULL BENCH.

SANKARAN NAIR, J.—A decree was passed against the petitioner by a single Judge of the Madras Court of Small Causes. SANKARAN NAIR, J.

* Civil Revision Petition No. 952 of 1912.

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He made an application to the Small Cause Court to order a new trial and to set aside the decree, under section 38 of the Presidency Small Cause Courts Act, 1882. That application was rejected by the Full Bench on the ground that the full amount under the decree was not paid at the time of presenting the application, as required by Order XLI, rule 2, of the Presidency Small Cause Court rules. The petitioner now applies to this Court to set aside the order of the Small Cause Court, on the ground that the rule above referred to is *ultra vires*, as it contravenes section 38 of the Presidency Small Cause Courts Act and that, therefore, they were wrong in rejecting his application. Section 38 runs in these terms: "Where a suit has been contested, the Small Cause Court may, on the application of either party, . . . order a new trial to be held, or alter, set aside, etc." Order XLI, rule 2, runs in these terms "No application shall be entertained, unless the applicant shall, at the time of presenting his application, either deposit in Court the amount due from him under the decree or order, or give security to the satisfaction of the Court or the Registrar, for the performance of the decree or order in respect of which the application is made." The general rule is that, where a power to make regulations is given by a statute, no regulations made under it can abridge a right conferred by the statute itself. [See *Reg* v. *Bird*; *Needles, ex parte*(1). Now, in this case, the section confers no right upon the petitioner himself. He cannot, therefore, complain that any right of his has been taken away by the regulations.

The next question is, whether the right which is vested in the Small Cause Court under section 38 has been taken away by the regulations. The section states that the Small Cause Court *may* order a new trial; it is not imperative. I am of opinion, that it was open to the Small Cause Court to lay down certain conditions under which alone it would exercise the jurisdiction conferred by that section. If, therefore, the Small Cause Court had framed the rule under which this application of the petitioner was rejected, it would, apparently, be a valid rule. But the rule was made, not by the Small Cause Court, but by the High Court, and the question is, whether it is open

(1) (1898) 2 Q.B., 340.

to the High Court to cut down the jurisdiction of the Small Cause Court. The rule is said to have been framed by the High Court, "by virtue of the powers conferred by the Presidency Small Cause Courts Act, 1882, and the Acts amending the said Act and of all other powers hereunto enabling." If it is this Act itself that gives power to the High Court to frame rules, then, apparently, the High Court has no power to cut down the jurisdiction. The section in the Small Cause Courts Act under which these rules are framed, is apparently section 9 of the Act. That section places the Small Cause Court under the jurisdiction of the High Court, for the exercise of the powers which are conferred upon it by the Letters Patent, by the Civil Procedure Code, the Legal Practitioners Act and 24 and 25 Vict., c. 104, section 105. Now if that is the only section under which the High Court can frame these rules, then, as I have said before, I am disposed to think that the High Court had no jurisdiction to frame this rule.

But apart from the Small Cause Courts Act, the High Court has certain powers over the Civil Courts in the Presidency, under the enactments and Letters Patent above referred to, and the rules are also said to have been framed under all other powers enabling the High Court to make the rules. Therefore the question arises whether, apart from section 9 of the Small Cause Courts Act, the High Court had not the power under the other provisions of law to make the rule in question. This question has not been argued before us. Such power, if vested in the High Court under the above provisions of law, cannot be taken away by implication. If the Indian Legislative Council is entitled to cut down the power of the High Court, then it must be borne by express enactment and not by implication. I have also considered the question, whether the Small Cause Court, having acted under these rules or rules similar to these, framed under the same powers, from 1882 up to this date, may not have impliedly accepted the rules as their own. But I am not able to accept this suggestion. The mind of the Small Cause Court was never directed to the question, and they never considered whether they had the right to accept or discard these rules. The question is one of great importance and affects the procedure of the Court and might affect the validity of numerous decisions. I therefore refer to a Full Bench the question,

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AYLING, J.

whether Order XLI, rule 2 of the Presidency Small Cause Court Rules is *ultra vires*.

AYLING, J.—I agree to the reference proposed by my learned brother.

This petition coming on for hearing before the Full Bench, the Court expressed the following Opinion :—

V. Raghunatha Sastriyar and *C. Krishnamachariyar* for *K. Bhashyam Ayyangar* for the petitioner.

P. M. Sivagnana Mudaliyar for the respondent.

WHITE, C.J.

WHITE, C.J.— The question which has been referred to us in this case is,— " Whether Order XLI, rule 2 of the Presidency Small Cause Court rules is *ultra vires*." The rule provides that no application (for a new trial) shall be entertained unless the applicant at the time of presenting the application either deposits in Court the amount due from him under the decree or order, or gives security to the satisfaction of the Court or the Registrar for the performance of the decree or order in respect of which the application is made. The power to grant a new trial in a suit in the Presidency Small Cause Court is regulated by section 38 which provides " where a suit is contested, the Small Cause Court may on the application of either party made within eight days from the date of the decree or order in the suit, order a new trial to be held, or alter, set aside or reverse the decree or order upon such terms as it thinks reasonable." The rules of the Presidency Small Cause Court are made under the powers conferred by section 9 of the Presidency Small Cause Courts Act of 1882. Under the Act as it originally stood, there was a power in the Small Cause Court itself, with the previous sanction of the High Court, to make rules. In 1895 that section was repealed and the power to make rules was given to the High Court. The terms of the section which empowers the High Court to make rules in reference to the Small Cause Court are very wide. The general rule is, no doubt, that stated in the case referred in the order of reference, *Reg.* v. *Bird Needles* ex parte(1), that is, " where a power to make regulations is given by a statute, no regulations made under the statute can abridge a right conferred by the statute itself." That is the general rule. But if by statutory enactment a power is given to a rule-making authority

(1) (1898) 2 Q.B., 340.

to make rules, the rules, as it seems to me if they were within the power given, would be good even if they purported to abridge the rights given by the statute.

I think the only question we have to decide is, is this rule within the powers conferred upon the High Court by the section which was introduced into the Act in 1895? Now whatever may be the true construction of this section, one thing seems clear and that is, it only empowers the High Court to make rules with reference to matters of practice or procedure. It cannot, as it seems to me, be suggested that the terms of the section are wide enough to give this Court power to make rules with regard to matters of substantive right, or matters which are not practice or procedure. Then the question is,—can it be said that the right to apply for a new trial is a matter of practice or procedure? Section 38 which regulates this question of new trials is, perhaps, somewhat curiously worded. It does not say in so many words that a party has the right to apply for a new trial. It says that "the Small Cause Court may, on the application of the party, order a new trial." But I think on the true construction of the section it gives a right to a party to apply for a new trial.

As regards the right of appeal, the right of appeal being a creature of that statute, I think it is well settled that a right of appeal is not a matter of practice or procedure. I may refer to certain observations made by Lord WESTBURY in a case to which our attention has been called, *Attorney-General* v. *Sillem*(1). The LORD CHANCELLOR thus describes the right of appeal: he says "the right of appeal is the right of entering a superior Court and invoking its aid and interposition to redress the error of the Court below. It seems absurd to denominate this paramount right part of the practice of the inferior tribunal." Our attention has also been called to a decision of the House of Lords, *Colonial Sugar Refining Company* v. *Irving*(2), in which there is an observation by Lord MACNAUGHTEN:—"To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure." Now can we draw any distinction between a right of appeal conferred by statute and the right to

(1) (1864) 11 E.R., 1200 at p. 1209; s.c., 10 H.L.C., 704.
(2) (1905) L.R., A.C., 369.

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WHITE, C.J.

apply for new trial? I think we cannot. Our attention has not been called to any case in which any such suggested distinction has been drawn, nor to any case in which it has been held that the right to apply for a new trial is a matter of practice or procedure. Of course, there is no objection to the Small Cause Court, if they think fit, making it one of the terms which they are entitled to impose when they make an order for a new trial, that the condition imposed by Order XLI, rule 2, should be satisfied before they grant the application. But to say that the Small Cause Court has the power to do that is a very different thing from saying that the rule in question is a rule of practice or procedure and within the powers conferred by section 9. The preamble to the rules states that they are made "by virtue of the powers conferred by the Presidency Small Cause Courts Act of 1882 . . . and of all other powers hereunto enabling, the High Court . . . " Our attention has not been called to any power in the High Court in this connection outside the powers conferred by section 9 of the Presidency Small Cause Courts Act.

One word with regard to *Morgan* v. *Bowles*(1), which was cited in argument in support of the contention that the rule is bad. I do not think that either this case or *West Devon Great Consols Mine*(2), affords us any assistance with reference to the question as to whether the rule in question here is *ultra vires* or not. *Morgan* v. *Bowles*(1) had reference to a provision of an Act which imposed an obligation on a party appealing to give security for costs. Then certain rules were passed which did not reproduce this provision and it was held that the obligation to give security for costs under the Act continued. That case was decided upon the question of construction on the ground that the words of the rule did not abrogate the provision of the Act with reference to security for costs.

In *West Devon Great Consols Mine*(2), Lord BOWEN said with regard to this matter: "The rule 'generalia non specialibus derogant' applies" and he decided the question purely as one of construction. And Lord Justice COTTON in his judgment says: "Assuming, without deciding, that the Rule Committee had power to take away this condition with regard to the security

(1) (1894) 1 Q.B., 236. (2) (1888) 38 Ch.D., 51.

for costs or with regard to the deposit, they had not purported to do so."

It seems to me, for the reasons I have stated, the answer to the question referred to us is that the rule is *ultra vires*.

SANKARAN NAIR, J.—I agree that the rule is *ultra vires*.

OLDFIELD, J.—I concur.

K.R.

APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Seshagiri Ayyar.

PONNAMMAL (PLAINTIFF), APPELLANT,

v.

RAMAMIRDA AIYAR AND TWO OTHERS (DEFENDANTS). RESPONDENTS.*

1914. February 9, and September 21 and 24.

Civil Procedure Code (Act V of 1908), O. II, rr. 2 and 4—Previous suit for possession of lands only—Claim for past mesne *profits, not included—Subsequent suit for the same, not barred—Cause of action for* mesne *profits different from that for possession of land.*

Claim for possession and claim for mesne profits are separate causes of action and have been always so treated under the Codes of Civil Procedure.

Where a plaintiff sued for possession of lands only when he might have joined in the same action claims for *mesne* profits and damages, it is open to him to bring a subsequent suit against the same defendants for the profits which became payable before the institution of the former suit and which might have been included in such suit.

Monohur Lall v. *Gouri Sunkur* (1883) I.L.R., 9 Calc., 283; *Tirupati* v. *Narasimha* (1888) I.L.R., 11 Mad., 210; *Lalessor Babui* v. *Janki Bibi* (1892) I.L.R., 19 Calc., 615 and *Gutta Saramma* v. *Maganti Ramineâu* (1908) I.L.R., 31 Mad., 405, followed.

SECOND APPEAL against the decree of A. S. BALASUBRAHMANYA AYYAR, the Subordinate Judge of Kumbakonam, in Appeal No. 840, preferred against the decree of K. GOPALAN NAIR, the District Munsif of Mannargudi, in Original Suit No. 117 of 1909.

The material facts appear from the Order of Reference to the Full Bench.

This Second Appeal came on for hearing before SANKARAN NAIR and AYLING, JJ. who made the following.

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* Second Appeal No. 1804 of 1911.