

FULL BENCH.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice Jardine, Mr. Justice Parsons and Mr. Justice Farran.

1895.

March 28.

KHOJA' SHIVJI SOMJI, APPLICANT, v. HA'SHAM GULA'M
HUSSEN TEJPAR, OPPONENT.*

Zanzibar—Jurisdiction of High Court over Consular Court of Zanzibar—High Court at Bombay—Power of revision—Appeal—Jurisdiction—Civil Procedure Code (Act XIV of 1882), Sec. 622—Zanzibar Order in Council, 1884, Arts. 7, 8, 9, 21, 27, 30.†

The High Court at Bombay has no power of revision over civil cases tried by the Consular Court at Zanzibar, though it is authorized to hear appeals from the decisions of that Court as a District Court by the Zanzibar Order in Council of 1884.

A power of revision is not an incident of appellate powers, but on the contrary can only be exercised where there is no appeal, and had it been intended to give such powers to the High Court at Bombay, it would necessarily have been expressly provided for.

Per JARDINE, J. (dissenting):—Under any circumstances the Consular Court at Zanzibar is bound to obey a writ issued by the High Court for certifying the papers of a civil case. Under sections 9 and 10 of the Bombay Civil Courts' Act (XIV of 1869) taken with article 21 of the Zanzibar Order in Council of 1884 and section 622 of the Civil Procedure Code (Act XIV of 1882), the High Court is competent to exercise revisionary jurisdiction in civil matters tried by the Consular Court at Zanzibar.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against an order passed by H. W. de Sauzmarez, Her Majesty's Consul-General at Zanzibar.

* Application No. 234 of 1894 under the extraordinary jurisdiction.

† See the *Bombay Government Gazette*, 30th April 1885, Part I, page 537.

(1) Section 21.—Subject to the other provisions of this Order, 'the Code of Civil Procedure,' 'the Bombay Civil Courts Act, 1869,' 'the Indian Succession Act' and the other enactments relating to the administration of civil justice and bankruptcy for the time being applicable to Zanzibar, shall have effect as if Zanzibar were a zilla or district in the Presidency of Bombay. The Consul General shall be deemed to be the District Judge of the district and his Court the District Court or Principal Civil Court of Original Jurisdiction in the district. The High Court of Bombay shall be deemed to be the highest Civil Court of Appeal for the district and the Court authorised to hear appeals from the decisions of the District Court; and the powers both of the Governor-General in Council and the Local Government under those enactments shall be exercisable by the Secretary of State or with his previous or subsequent assent by the Governor-General of India in Council.

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One Fátmábái died in the year 1872-73, leaving a will disposing of her property and appointing executors. The will was duly proved by the executors and the estate administered, and a release was passed by the petitioner to the executors.

The petitioner was the nephew of Fátmábái's deceased husband. Alleging that he had ascertained that much more property had come into the hands of the executors than had been disposed of by the will he applied to the Consular Court at Zanzibar for an order directing the executors to file an inventory of the estate and an account of their administration. The Judge of the Consular Court issued a rule *nisi* calling on the executors to show cause why they should not file an inventory or an account. The executors having appeared and showed cause, the Judge discharged the rule and made the following order:—"No order. This application should never have been made at this late date. I do not think in view of the release this man has any right, but he is, in view of all the circumstances, out of all reasonable time."

On 21st December, 1894, the applicant obtained a rule from the High Court of Bombay in its extraordinary jurisdiction to set aside the order of the Judge.

The Judge on receipt of the notices containing the rule *nisi* served them on the executors, and certified the service to the High Court, but declined to send up the record of the case on the ground that, under article 21 of the Zanzibar Order in Council of 1884, the High Court of Bombay had only an appellate and not a revisional jurisdiction over the Consular Court at Zanzibar.

Mánekshah J. Taleyarkhán appeared for the applicant in support of the rule *nisi*:—Article 8, sub-clause (b), of the Zanzibar Order in Council makes the Civil Procedure Code applicable to Zanzibar, which is put on the same footing as a district in the Bombay Presidency.

[SARGENT, C. J.:—So far as civil matters are concerned, the expression used in article 21 of the Zanzibar Order is that the High Court of Bombay shall be deemed to be "the highest Civil Court of appeal," but with respect to criminal matters the expression used in article 9 is that the High Court of Bombay shall be "deemed to be the High Court." The difference in the

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language seems to show that in civil matters the High Court is not invested with revisional jurisdiction.]

The High Court is not given any power of interference under the Mámlatdárs' Act (Bombay Act III of 1876), and yet the High Court has been interfering under its revisional jurisdiction with orders passed under that Act. By analogy the High Court can, under its extraordinary jurisdiction, review the order passed by the Consular Court at Zanzibar.

SARGENT, C. J. :—We are of opinion that this Court has no power of revision over cases tried by the Consular Court at Zanzibar. This High Court derives its jurisdiction over the administration of civil justice in the Courts of Zanzibar created by the Order in Council of 29th November 1884, by article 21 of that Order¹. That section provides “that the Code of Civil Procedure shall have effect as if Zanzibar were a zilla or district in the Presidency of Bombay. The Consul General shall be deemed to be the District Judge of the district, and his Court the District Court or Principal Civil Court of Original Jurisdiction in the district. The High Court of Bombay shall be deemed to be the highest Civil Court of Appeal for the district and the Court authorised to hear appeals from the decisions of the District Court.” This Court is, therefore, by the above provision, created an appellate Court to hear appeals. But no such power of revision is given to it as belongs to the High Court over the Courts of the Presidency, and which, it is to be remarked, this Court possesses as a High Court by the express terms of section 622 of Civil Procedure Code, and not by virtue of its being a Court of appeal. A power of revision is not an incident of appellate powers, but on the contrary can only be exercised where there is no appeal, and had it been intended to give such power to this Court it would necessarily have been expressly provided for. This view derives confirmation from the difference of language used in article 9 relating to criminal matters, where it is provided that the High Court of Bombay shall be deemed to be the “High Court” and not merely an appellate Court for the purpose of applying the Code of Criminal Procedure and also from

(1) See note (1) *ante*, p. 480.

the provision of articles 27 to 30 with regard to making up the record to be sent to this Court which is confined to the case in which a memo. of appeal has been presented.

It was contended in argument that by sub-clause (b) of article 8 of the Order of Council the Civil Procedure Code of 1882 is made applicable to Zanzibar, and that all its provisions can be called in aid by the persons to whom by article 6 the Order is made applicable, but article 8 deals with the jurisdiction and procedure of the Courts in Zanzibar, and for such purposes no doubt the appropriate provisions of the Civil Procedure Code are to be applied, and can thus as constituting "provisions of the Order in Council" be properly invoked as provided for by article 7. For these reasons we think that the rule should be discharged.

BAYLEY and PARSONS, JJ., concurred.

JARDINE, J.:—Although I have the misfortune to differ from the rest of the Bench, and, therefore, have doubts, I am not prepared to hold that the learned Judge who issued the writ acted without jurisdiction; and under any circumstances I think it was the duty of the Consular Judge to obey the writ as section 10 of Act XIV of 1869 expressly requires. The omission doubtless occurred from his overlooking that enactment.

The Foreign Jurisdiction Acts 6 and 7 Vict., c. 94, 41 and 42 Vict., c. 97, and 53 and 54 Vict., c. 37, are intended for the government of persons; and to this end Courts and procedure are provided. The Zanzibar Order in Council of 1884, made under one of the earlier Acts, expressly applies to British subjects in Zanzibar, among others by article 6. By article 8, clause (b), certain laws, including the Indian Penal Code (XLV of 1860), are made applicable to Zanzibar; and thus, in my opinion, impose duties and confer rights on the persons to whom the Order in Council applies. This introduction of a system of personal law is more direct than that introduction of law by effect of charters creating Courts which has been considered by some authorities as the means whereby English law was introduced into British India—*Naoroji v. Rogers*⁽¹⁾. Among

(1) 4 Bom. H. C. Rep. 1.

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these laws is the Bombay Civil Courts Act, 1869 (some parts being excepted), section 10 of which taken with article 21 of the Order in Council requires the Judge at Zanzibar to obey all writs, orders or processes issued to him by the High Court, and to furnish such reports and returns and copies as may be called for by this Court. This and the requirement of section 9, that the Judge shall refer matters here where a rule ought to be made, go a certain way in conferring superintendence on this Court even without our jurisdiction of appeal. See *Pirbhai v. B. B. & C. I. Railway Co.* ⁽¹⁾ and *In the matter of John Thomson* ⁽²⁾. Among other laws the Code of Civil Procedure (Act XIV of 1882) has been extended in its entirety, subject, however, to the other provisions of the Order and to treaties. Among other provisions of the Order are the directing and modifying powers retained by the Secretary of State, *e.g.*, article 8, clause (d). A later Order in Council, dated the 16th May, 1893, makes substitutions and amendments of the Code of Civil Proceduree effectuated by the Governor General of India in Council in a legislative capacity take effect without special order of the Secretary of State.

It results, then, that section 622 of the Code of Civil Procedure is in force under the Order in Council, and neither the Code nor the Bombay Civil Courts Act, 1869, indicate any other tribunal but the High Court of Judicature at Bombay as competent to exercise the revisionary jurisdiction which section 622 contemplates. The words of section 622 imply that the Court subject to revision is one from which appeals lie. Under article 8, clause (d), ii, the Secretary of State has power to appoint a revisional tribunal. It is plain that he has not done so specifically. The argument of Mr. Manekshah was that the introduction of the Code in its entirety, *plus* the language of article 21 of the Order, should lead this Court to hold that the person under Her Majesty's jurisdiction at Zanzibar has the same right to apply for revision as the subject in any district of this Presidency, and by necessary implication that the Secretary of State has recognized the revisionary jurisdiction of this Court. I

(1) 8 Bom. H. C. Rep., 59, O. C. J.

(2) 6 Ben. L. R., 180,

would point out that when the Secretary of State makes an exception of part of a Code applied as law to the settlement, his practice appears to be to use specific language as in article 8 (b) dealing with the Bombay Civil Courts Act, 1869, article 32 (b) excluding this Court's jurisdiction where Zanzibar subjects are concerned, and the Order in Council, dated the 17th July, 1893, excluding Chapter 33 of the Criminal Procedure Code from the law applied by article 8 of the Order in Council of 1884.

I admit the force of the considerations that in article 9 dealing with the Code of Criminal Procedure the expression is that this Court "shall be deemed to be the High Court," whereas in article 21 dealing with civil matters, it is that this Court "shall be deemed to be the highest Civil Court of appeal for the district," but I think the last expression must be considered with article 7, clause 3. I do not think article 7, clause 3, intends to exclude the Privy Council. I admit also the force of the argument that if the Secretary of State had meant to confer on this Court power of revision in civil matters he might easily have used specific language. But I think that having introduced a personal law, to take effect as if Zanzibar were a district under Bombay, and making the local Court into a District Court by article 21, he may have considered that the subject or other person to whom the Order in Council applies by article 6 would by force of the Code and the Order have a right to come to this Court for the relief contemplated by article 21. The extension of certain substantive laws and laws of procedure to a class of persons by the Foreign Jurisdiction Acts of the Indian Legislature is noted in the judgment of Sargent, C. J., in *Queen-Empress v. W. D. Edwards* ⁽¹⁾; and the Secretary of State is of course aware of the high controlling powers this Court possesses noticed in that case by Scott, J. I do not think the Order in Council of 1884 shows an intention merely to confer a right under section 622, and then render that right futile by refraining to appoint a tribunal where the relief can be obtained. Thus the argument against clutching a jurisdiction used by the counsel in *In re the Judges of the Supreme Court of Bombay* ⁽²⁾ does

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(1) I. L. R., 9 Bom., 333, at 340.

(2) 1 Knapp., 1.

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not apply in the absence of any other tribunal to which the person aggrieved can go for redress. I think, then, that the maxim "*est boni judicis ampliare jurisdictionem*" is applicable in this matter.

FARRAN, J.:—In my opinion the High Court has no jurisdiction in the matter. By section 1 of Statutes 29 and 30 Vict., c. 87, repealed by and re-enacted in Statutes 53 and 54 Vict., c. 37, Her Majesty by Order in Council is empowered to confer on any Court in any of her possessions (out of the United Kingdom) any jurisdiction, civil or criminal, original or appellate, which Her Majesty in Council might lawfully by any such order confer on any Court in any country or place out of her dominions within which Her Majesty has power or jurisdiction, subject to such provisions and regulations as to Her Majesty may seem fit. This section enables Her Majesty to confer upon the High Court of Bombay such jurisdiction over Zanzibar Courts as Her Majesty may think expedient. Over her subjects and others in Zanzibar, Her Majesty has jurisdiction by reason of other powers and authorities comprised in or conferred by various treaties and statutes to which it is unnecessary to refer. They are all recognized and legalised by Statutes 29 and 30 Vict., c. 87.

The question which we have to determine is not, I think, what law or procedure Her Majesty has by her Order in Council of the 29th November, 1884, introduced into Zanzibar, but what jurisdiction, by virtue of the above quoted section, she has conferred on the High Court. Part II of the Order defines the persons in Zanzibar to whom it applies, and Part III points out the general laws and principles which Her Majesty's Courts in Zanzibar are to apply in cases, civil or criminal, coming before them, and determines the practice and procedure by which they are to govern themselves. Part IV deals with criminal matters. Part V deals with "civil matters," and in it article 21 provides that, subject to the other provisions of the Order, "the Code of Civil Procedure," "the Bombay Civil Courts' Act, 1869," "the Indian Succession Act" and the other enactments relating to the administration of Civil Justice * * * for the time being

applicable to Zanzibar shall have effect as if Zanzibar were a zilla or district in the Presidency of Bombay, the Consul General shall be deemed to be the District Judge of the District and his Court the District Court or Principal Civil Court of Original Jurisdiction in the District. The High Court of Bombay shall be deemed to be the Highest Civil Court of appeal for the District and the Court authorized to hear appeals from the decision of the District Court." Pausing there, it cannot, I think, be doubted that the High Court of Bombay while it is directly authorized to hear appeals from Zanzibar Courts is not directly authorized to act as a Court of Revision over such Courts. The latter authority, if it is conferred upon the High Court, can only be impliedly conferred on it by reason of the provision that the Code of Civil Procedure and the other enactments relating to the administration of Civil Justice shall have effect as if Zanzibar were a zilla or district in the Presidency of Bombay.

The question, therefore, narrows itself to this:—Does this provision constitute the Civil Courts in Zanzibar Civil Courts of the Presidency of Bombay within the meaning of clause 15 of the Letters Patent of the High Court, or does it merely for jurisdictional purposes assimilate the Zanzibar area to the area of a Bombay district in order that the application of the Procedure Acts to it may be exactly defined. In the former view the effect of the provision would, I apprehend, be to confer upon the High Court the power contained in section 622 of the Civil Procedure Code, inasmuch as it is by the combined effect of the Letters Patent, clause 15, and the Civil Procedure Code that this power is conferred upon the High Court over the Civil Courts in the Bombay Presidency. The latter view is, however, in my opinion, the correct one. The language employed appears to be apt to express it, while it is cumbrous and inapt language to employ to effect the former purpose. If it were intended to place the Zanzibar Courts in the same relation to the Bombay High Court as are the Courts in the Bombay Presidency, I think that it would have been done directly and not by such circuitous language as is contained in the 21st article. I am, therefore, of opinion that the High Court is not by implication made a Court of Revision over the Courts of Zanzibar.

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I am fortified in this conclusion by finding that there are elaborate provisions contained in the Order for preparing and sending an appeal record to the High Court (articles 27 to 30) and none for sending up papers under section 622. The intention is that original papers are not to be transmitted to Bombay except in exceptional cases. I am further fortified in it by a comparison of the language of article 9 relating to criminal jurisdiction with that of article 21, and I think that if it had been intended to make the High Court a Court of Revision over the Zanzibar Courts, it would have been done by direct language and not left to be gathered by doubtful implication. Lastly, the jurisdiction of the High Court over the class of suits referred to in article 32 is necessarily restricted by express words, as otherwise it would have under article 21 an appellate jurisdiction in respect of such suits, while it is not necessary to except the application of the provisions of section 622 of the Code from the Order as they relate to powers of the High Court which are not exerciseable in Zanzibar unless extended to it.

Rule discharged.

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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Parsons.

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April 1.

KRISHNA'SHET BIN GANSHET SHETYE (ORIGINAL DEFENDANT No. 2),
APPELLANT, v. HARI VALJI BHA'TYE TRADING IN THE NAME OF KHEMJI
LADHA'BHAI BHA'TYE (ORIGINAL PLAINTIFF), RESPONDENT.*

Negotiable Instruments Act (XXVI of 1881), Secs. 30, 93 and 106—Hundi—Local usage—Hundi drawn by a manager of Hindu family—Liability—Notice of dishonour to the drawer necessary.

The Negotiable Instruments Act (XXVI of 1881), in the absence of local usage to the contrary, applies to *hundis*.

A member of a Hindu family whom it is sought to make liable by a suit on a *hundi* drawn by the manager of the family is entitled to urge that no notice of dishonour had been given to the manager (drawer) so as to make the latter liable under section 30 of the Negotiable Instruments Act. (XXVI of 1881).

SECOND appeal from the decision of Ráo Bahádur Káshináth B. Márathe, First Class Subordinate Judge of Ratnágiri with

*Second Appeal No. 504 of 1893.