[ORIGINAL CIVIL.]

Before Sir Richard Couch, Kt. Chief Justice, and Mr. Justice Markby.

1872
Aug. 20 & 31.

BHAIRABDAN RAMCHAND *v.* BASSANTLAL BHAGAT.

Act IX of 1850, *ss.* 26 & 41—*3rd Rule of Practice of Calcutta Small Cause Court—Time for Service of Summons.*

Under s. 26 of Act IX of 1850, the time for service of summons on a defendant sued in the Small Cause Court must in all cases be fixed by the Rules for regulating the practice of the Court; consequently the Court has no power, under the 3rd Rule of Practice, to order service of summons on a defendant at any time before trial. The last six words of that rule are *ultra vires* (1)

CASE submitted, for the opinion of the High Court, by the first Judge of the Court of Small Causes, Calcutta, under Act XXVI of 1864, s. 7.

(1) The following sections of Act IX of 1850, and Rules of Practice of the Calcutta Small Cause Court are material for the purpose of this report:—

Act IX of 1850, *s.* 26.—On the application of any person desirous to bring a suit under this Act, the Clerk of the Court shall issue, under the seal of the Court, a summons which shall be numbered, and shall set forth the names of the plaintiff and defendant, the cause of action, with such particulars as shall be, from time to time, directed by the rules of the Court, and the amounts sued for; and shall be served on the defendant so many days before the day on which the Court shall be holden at which the cause is to be tried as shall be directed by the rules for regulating the practice of the Court; and delivery of such summons to the defendant, or in such other manner as shall be specified in the rules of practice shall be deemed good service.....

Act IX of 1850, *s.* 41—The Judges of each Court, holden under this Act, subject to the approval of the Judges of the Supreme Court, shall have power to make and issue all the general rules for regulating the practice and proceedings of the Court,.....and from time to time to alter any such rule.....; and the rules so made.....shall be observed.....in the Court of that Presidency, and shall be sent to the Supreme Court for approval, but shall be of force until disapproved.....

Rule 2.—The summons to appear to suits or actions shall be issued according to the forms in the schedule, and shall be dated as of the day when issued. Summonses shall be made returnable on the seventh day, but may be made returnable in a shorter or longer period, at the discretion of the Judge.

Rule 3.—Every such summons to appear to a suit or action shall be served by one of the bailiffs of the Court two clear days before the holding of the Court at which it shall be made returnable, unless the Court shall otherwise order.

Rule 6.—When any defendant shall, by keeping his house, place of abode, or place of business closed, or by ab-

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On the 23rd February last, the plaintiff's gomasta, on the affidavit marked A (1), obtained at 11 A.M. a summons against the defendant, returnable at 2 P.M. of the same day. At 3 P. M. the defendant was called on to appear, but did not, nor did any one on his behalf answer to his name. The gomasta was then sworn, and stated that he had gone with the bailiff of the Court to serve the summons, and had found the defendant's shop closed, and his doors padlocked; and that the summons had accordingly been served by posting it on the door. The bailiff confirmed this statement, and I held this sufficient service under Rule 6. The merits of the case were then gone into *ex parte*, and a decree with costs was given in favor of the plaintiffs, and their application for immediate execution was granted. Nine other plaintiffs adopted similar proceedings against the defendant's property, and obtained similar relief. All the defendant's moveable property was seized, and the last of the creditors attached his person, and he was lodged in the Presidency Jail On the 6th March a rule was granted, on the application of the defendant's attorney, calling on the plaintiffs to show cause why the proceedings should not be set aside, on the ground that the defendant had no sufficient notice of action. On the 20th March the rule was discharged for the defendant's default, subject to the opinion of the High Court on a reference. On the receipt of the opinion of the Honorable the Judges to the effect that it would have been better, notwithstanding the defendant's default, to have given him, under the special circumstances of the case, a short postponement, the defendant was brought up from jail and heard. His attorney's first objection was that the proceedings ought to be set aside on the ground that they were *ab initio* irregular and void, being founded on the six concluding

sconding, or by violence or threats, prevent any bailiff from serving any summons to appear to a suit or action, as hereinbefore directed, and such summons shall have been conspicuously fixed on, or near to, such place of abode or place of business, or otherwise served as nearly as may be according to the mode hereinbefore directed, such service may be deemed good service.

Rules 53.—It is ordered that summons shall in future be returnable on the fourteenth day, unless when the plaintiff shall apply for a summons at a shorter date in terms of the 2nd Rule of the Court.

(1) The affidavit was to the effect that the defendant was removing his person and property from the jurisdiction of the Court with fraudulent intent.

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words of the 3rd Rule of Practice of the Court which he contended were irreconcileable with s. 26 of Act IX of 1850. After listening to a lengthy argument on both sides on this point, I came to the conclusion that the defendant's contention was correct, and set aside the proceedings subject to the opinion of the High Court on the point following, *viz* :—

Whether I was correct in holding that any summons issued returnable in less than two days, is irregular under Act IX of 1850, s. 26, notwithstanding the six concluding words of the 3rd Rule of Practice of this Court.

The Legislature has not authorized the making of a reference for the opinion of the High Court, except in the case of a demand by one of the parties, or of the existence of a doubt in the mind of the Judge who tries the case. A reference has not in this case been demanded, and I cannot myself say that I see any ground of doubt. The practice now objected to is, however, of nineteen years' standing. It supplies, and was instituted with the express view of supplying, a very serious defect in the Act which regulated the procedure of this Court, a defect which still exists, *viz.*, that, while it provided for the seizure and detention of a fraudulent debtor's person, it furnished no means of attaching his property until after decree. Its operation has hitherto been admittedly very beneficial. On these grounds I should be glad to find that the Honorable the Judges considered my conclusion as to its illegality incorrect. But there is still another and a stronger reason which induces me to refer the question for the opinion of the High Court. I have the honor to forward herewith copy of a letter addressed in 1854 by Mr. Macleod Wylie, one of my predecessors, and his colleagues to the Judges of the late Supreme Court, through Mr. Henry Holroyd, the Prothonotary, and a book containing at p. 97, Mr. Holroyd's reply. It will be seen from the documents that the Judges of this Court fully detailed the reasons which induced them to ask the sanction of the Judges of the Supreme Court to the addition which they proposed to make to the then existing rule (1), and that such sanction was officially announced

(1) The reason given for the proposed addition was "to obviate the necessity in some cases of issuing a Bench warrant."

by Mr. Holroyd in the name of all the Judges, and attested by the endorsement of the Chief Justice, Sir Lawrence Peel. Under these circumstances I think it would be scarcely becoming in me to lay down on my own authority that an amendment which had received the express sanction of the late Supreme Court was *ultra vires*. I therefore request the opinion of the Honorable the Judges of the High Court on the point stated above.

Mr. *Gasper* for the plaintiffs.—Act IX of 1850, s. 26, provides for the service of summons on the defendant "so many days" before the day of trial "as shall be directed by the rules for regulating the practice of the Court." The rules relating to the time for return and service of summons are Rules 2, 3, and 53. The word "days" in s. 26, Act IX of 1850, is not an emphatic plural. See *Eyston* v. *Studd* (1), where it is said of the action of waste given by the Statute of Gloucester against him that holds for life or for years, that it is within the equity of the statute that a man shall have an action of waste against him who holds but for a year, or for twenty weeks. If the Legislature had intended the word "days" as an emphatic plural, there would have been a clearer expression of such intention, similar for instance to that contained in s. 16 of the Indian Divorce Act (IV of 1869) with respect to the time for making absolute a decree *nisi* for dissolution of marriage. I submit that the word "days" in s. 26, Act IX of 1850, is equivalent to period, *i. e.*, that service is to be within such period before the hearing as the Court by virtue of Rule 3 may direct. Rule 2, which provides that a summons may be made returnable in a shorter period than seven days at the discretion of the Court, is not opposed to any section of Act IX of 1850; the Court therefore might make the summons returnable on the same day; and if that is so, the Court has power under Rule 3 to order service within less than two clear days before the hearing. If, however, the word "days" in s. 26 is to be taken as an emphatic plural, s. 41 gives the Judges of the Small Cause

(1) Plowden, 467.

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Court power to make rules for regulating the practice and procedure of the Court, which rules are to be sent to the Supreme Court for approval, but are to be of force until disapproved. These rules were made in pursuance of the power so given, and they have been approved by the Supreme Court, they must, therefore, be taken to have the same validity as a section of the Act; and, then, if s. 26 and the rule are irreconcilable, the ordinary maxim will apply, *viz.*, that, where two sections of a statute are contradictory, the last shall prevail. [COUCH, C.J.—Can a rule which is made *ultra vires* be taken as a good rule, and then be set up against the Act?] No; but if the rule was *ultra vires*, the Judge ought not to have made the reference, but should have amended the rule, and sent it to the High Court for approval; till disapproved, s. 41 declares that the rule shall be of force. Even should the Court's opinion be adverse to this view, I submit that the judgment of the Small Cause Court ought not to be set aside. A reference like this is similar in its nature to a new trial by the Small Cause Court itself, and to obtain that the defendant must have a good defence on the merits. Mere insufficiency of service is not enough—Temple's Small Cause Court Practice, p. 86.

Mr. *Branson* for the defendant.—If Rule 3 means that the Court shall have power to direct service within less time than a period exceeding one day before the hearing, the rule is *ultra vires*, and the judgment cannot stand—Addison on Torts, 3rd edition, p. 702. If the rule be *ultra vires*, no confirmation by the Supreme Court can give it any effect.

Mr. *Gasper* in reply.

The opinion of the High Court was delivered by

COUCH, C J.—In this case the Judge of the Small Cause Court has set aside the proceeding subject to the opinion of this Court on the question whether he was correct in holding that a summons, returnable in less than two days, is irregular under Act IX of 1850, s. 26. With reference to the objection that it does not

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appear that there is a good defence on the merits of the case, and therefore a new trial ought not to be granted, we must consider that the Judge is satisfied that it is a proper case for setting aside the judgment if the summons was irregular, and s. 53 gives power to the Judges in every case whatever, if they shall think fit, to order a new trial. We think the meaning of s. 26 is that the time between the service of the summons and the day on which the Court is holden on which the cause is to be tried, shall in all cases be fixed by the Rules for regulating the practice of the Court. The only time fixed by Rule 3 is two clear days. The words "unless the Court shall otherwise order" do not fix any other time, but give the power in any case to disregard the rule and the Act, and to have the summons served at any time before the trial. S. 41 does not in our opinion authorize this. The Rules for regulating the practice and proceeding of the Court, cannot override the provisions of the Act, and dispense with fixing a time for the service when the Act has expressly required that it should be done. In our opinion the summons in this case was not properly served, and the judgment was irregular.

Attorney for the plaintiff: Mr. *Carapiet.*

Attorney for the defendant: Mr. *Fink.*

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Markby.

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June 6 &
August 31.

KALI PRASANNA ROY (ONE OF THE DEFENDANTS) *v.* AMBICA CHARAN BOSE (PLAINTIFF).

Principal and Surety—Acceptance of Interest in Excess—Giving Time—Discharge of Surety.

See also 15 B.L.R. 340.

In an action against a surety for principal and interest payable on a promissory note, *held*, overrulling the decision of the Court below (Macpherson, J.), that the creditor, by the mere acceptance, without the knwledge or consent of the surety, of interest in excess of what was due on the note, bound himself to give time to the principal debtor, and thereby discharged the surety.

APPEAL from the judgment and decree of Macpherson, J dated 8th of April 1872.