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so, we think that the lower Appellate Court, when remanding the case to the first Court, was quite right in holding that the map could not affect the question at issue between the parties.

It was argued that as the Amin had made use of this map in making the local investigation and had referred to it in his report, the plaintiffs ought to have objected to the Amin's report on the ground of this map having been improperly used by him, and that as they did not do so, we must take it that they had waived all objection to the accuracy of the map, and that the lower Appellate Court was therefore bound to accept it as accurately prepared. We do not think there is much force in this contention. The Amin referred to this map only for the purpose of drawing a certain line, but his conclusion was that the whole of the disputed land was included within the permanently settled estate Taraf Joy Narain Ghosal; and as that conclusion was entirely in favour of the plaintiffs, they were not bound to raise any objection to the Amin's report. For all these reasons we must hold that the first ground urged before us has not been made out.

[After deciding the second point, also against the appellant, his Lordship continued].

The grounds taken before us, therefore, both fail, and the appeal must be dismissed with costs.

F. K. D. *Appeal dismissed.*

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep, and Mr. Justice Ghose.

RAMHARI SAHU AND OTHERS (PETITIONERS) *v.* MADAN MOHAN MITTER (OPPOSITE PARTY.) *

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March 5.

Appeal—Appeal from Original Decree—High Court Rules, Part II, Chapter VIII, Rule 17—Deposit of costs for Paper-book—Dismissal for default—Application for re-admission—Review—Letters Patent of High Court, clause 15—Limitation.

The appellant in an appeal from an original decree having failed to deposit the estimated amount of costs for the preparation of the paper book, the

* Rule 1844 of 1894 in connection with appeal from Original Decree No. 278 of 1893, and appeal No. 6 of 1895 under section 15 of the Letters Patent from an order of Beverley, J., dated 4th February 1895.

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appeal was dismissed under Rule 17 of the High Court Rules, Part II, Chapter VIII. An application for re-admission of the appeal was then made on behalf of the appellant; and a rule granted by a Division Bench calling upon the opposite side to show cause.

Held (by PETHERAM, C.J., and PRINSEP and GHOSE, JJ., reversing the decision of Beverley, J.) that the matter before the Court was not an application for review of judgment and could not be disposed of by a single Judge of the High Court under section 627 of the Civil Procedure Code.

Semble.—An appeal lies under section 15 of the Letters Patent from a judgment of a single Judge disposing of such an application.

Held, also (by PRINSEP and GHOSE, JJ.), that the application was not one under section 558 of the Civil Procedure Code; that it was not barred under Article 168 of the Limitation Act; that it was an application under the Rules of the Court; and that the Law of limitation did not apply to such an application.

RAMHARI SAHU and others were appellants in appeal from Original Decree No. 278 of 1893, and Madan Mohan Mitter was the respondent. On the 6th March 1894 a notice was served on the vakil of the appellant under Rule 13 of the High Court Rules, Part II, Chapter VIII, directing him to deposit the amount of costs for the preparation of the paper book (estimated at Rs. 299-4-0) before the 5th April 1894, as laid down in Rule 15. On the 23rd April 1894 the Court granted one month's time to enable the appellants to deposit the money. The appellants having failed to make the deposit, the case was placed on the Lowazima Board on the 11th June 1894, and an order was made directing the case to be placed on the peremptory list of the following day. On the 12th June 1894 the appeal was dismissed under Rule 17 of the High Court Rules, Part II, Chapter VIII, by Trevelyan and Beverley, JJ. On the 20th August 1894 an application for re-admission of the appeal, supported by an affidavit of a Karpardaz of the appellants, was made to Trevelyan and Ameer Ali, JJ., then presiding over the group to which the appeal belonged. This application was rejected. On the 10th September 1894 a fresh application for re-admission of the appeal, supported by an affidavit of Ramhari Sahu himself, was made to Trevelyan and Ameer Ali, JJ., who granted this rule (1844 of 1894), calling upon the other side to shew cause why the order of the 12th June 1894 should not be set aside and the appeal re-admitted. When the rule came on for hearing,

Macpherson and Banerjee, JJ., who then presided over the group to which the appeal and rule belonged, directed that it should be put down for hearing before the Judges who had made the order of 12th June 1894. Meanwhile Trevelyan, J., one of the Judges who made the order of 12th June 1894, had gone on furlough, and on the 4th February 1895 the rule was set down for hearing before Beverley, J., under section 627 of the Civil Procedure Code.

Mr. *Allen* and Dr. *Asutosh Mookerjee* appeare in support of the rule.

Dr. *Rash Behary Ghose*, Babu *Bussunt Coomar Bose*, Babu *Taruck Nath Palit*, and Babu *Debendro Nath Ghose* appeared to show cause.

Mr. *Allen* took the preliminary objection that Beverley, J., sitting alone, had no jurisdiction to hear the rule, as the application for re-admission was not in the nature of an application for review of judgment, and section 627 of the Civil Procedure Code did not apply. This objection was overruled and the case was argued on the merits, and the following judgment was delivered by

BEVERLEY, J. (who, after stating the facts, continued)—

"On the rule being called on, a question was raised by Mr. Allen as to my jurisdiction to hear the rule sitting alone, but on a reference to section 627 of the Code the objection was abandoned.

"Three preliminary objections to the hearing of the rule were taken on the part of the respondents. It was contended that treating the application as an application for review of judgment—

"I. The application did not bear the proper Court-fee under Article 4 of Schedule I of the Court Fees Act, and

"II. The application was inadmissible under the last clause of section 629 of the Code.

"III. It was also contended that the application was not an application for review of judgment, and that it was barred by Article 168 of Schedule II of the Limitation Act.

"In support of the first contention reference was made to the case of *Ram Chandra Pandurang Naik* v. *Madhav Purushottam Naik* (1), and it was contended that the order dismissing the

(1) I. L. R., 16 Bom., 23.

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appeal for want of prosecution under Rule 17 above referred to was, in fact, the decree in the appeal, and that the present application was an application for review of judgment within the meaning of Article 4 of Schedule I of the Court Fees Act, and that the application having been presented on the ninetieth day from the date of the decree, it should bear the same stamp as the plaint or memorandum of appeal.

"Mr. Allen, on the other hand, contended that the application was correctly stamped with a Rs. 2 fee under Article I, clause (*d*) of Schedule II of the Court Fees Act, and in accordance with the usual practice in similar cases.

"In regard to the second objection taken it was argued by Mr. Allen that this was not an application to review the order passed on the application of August 20th, but another and separate application based on different materials.

"As regards the objection on the score of limitation, Mr. Allen contended that the application fell under Article 173 and not under Article 168 of Schedule II of the Limitation Act.

"It seems to me that the intention of the Rule 17, which under the provisions of section 652 of the Code has the force of law, is that when an appeal is dismissed under the rule for want of prosecution on default by the appellant, the dismissal shall have the same effect as an order of dismissal under section 556 of the Code. That being so, an application for the re-admission of the appeal may be made under section 558, but such an application must be made within thirty days as provided by Article 168 of Schedule II of the Limitation Act. The application is not strictly an application for review of judgment within the meaning of Article 173 of that Schedule, but if it were it is inadmissible in this case: (*a*) As being insufficiently stamped under Article 4 of Schedule I of the Court Fees Act, and further (*b*) by reason of the last clause of section 629 of the Code. The application of September 10th distinctly asks for a reconsideration of the order made on the application of August 20th. The grounds stated are precisely the same in both applications, the only difference being that the affidavit filed with the application of September 10th is somewhat fuller and made by a person other than the person who made the affidavit filed

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with the application of August 20th. It seems to me therefore that the preliminary objections must prevail.

"I may add that, even were the application otherwise admissible, I should feel it my duty to reject it on the merits. The only plea urged is that the appellants were unable to raise the necessary funds before the end of July, that is to say, nearly a year after the appeal was filed.

"The decree appealed from is dated the 22nd May 1893, and the appeal was presented on the 6th September 1893. The deposit in question was due on the 4th April 1894. The decree carries no interest after August 1893, and execution of it has twice been stayed at the instance of the appellants. It would seem that the object of the appellants is simply to delay by one or other means the execution of the decree.

"The rule is discharged with costs."

From this decision Ramhari Sahu and others preferred an appeal under section 15 of the Letters Patent, 1865, on the ground that Beverley, J., had no jurisdiction to hear the rule, as also on the ground that the decision was erroneous in law and upon the merits. Under the Rules of the High Court, Part I, Chapter II, Rule 2, paragraph 2, this appeal came on for hearing before Petheram, C.J., Prinsep, J., and Ghose, J., on the 13th March 1895.

The *Advocate-General* (Sir *Charles Paul*) and Dr. *Asutosh Mookerjee* for the appellants.

Dr. *Rash Behary Ghose*, Babu *Lall Mohan Dass*, Babu *Bussant Coomar Bose* and Babu *Taruck Nath Palit* for the respondents.

The *Advocate-General*.—Beverley, J., had no jurisdiction to hear the rule. The application was for re-admission of the appeal, and not for a review of the order of 12th June 1894, which may be assumed to have been correctly made upon the materials then before the Court. Section 627 of the Civil Procedure Code can have no application. The nature of a review is explained by the Judicial Committee in *Moheshur Sing* v. *The Bengal Government* (1). [Their Lordships here called upon the respondent.]

Dr. *Rash Behary Ghose* for the respondent contended that

(1) 7 Moore I. A., 283 (304.)

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section 15 of the Letters Patent was not applicable, and that no appeal lay from the judgment of Beverley, J. He referred to the cases of *Rughoo Bibee* v. *Noor Jehan Begum* (1), *Hurbuns Sahay* v. *Thakoor Pershad* (2), *Achaya* v. *Ratnavelu* (3), *Aubhoy Churn Mohunt* v. *Shamont Lochun Mohunt* (4), *Kishen Pershad Panday* v. *Tiluck Dhari Lall* (5), *Mohabir Prosad Singh* v. *Adhikari Kunwar* (6).

The *Advocate-General* in reply referred to the case of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (7) to show that the appeal would lie under section 15 of the Letters Patent.

The judgment of the Court was delivered by

PRINSEP, J. (PETHERAM, C.J., and GHOSE, J. concurring).—I am of opinion that in this matter Mr. Justice Beverley had no jurisdiction. It was not an application for review of judgment, but was a rule which had been granted by a Division Bench consisting of two other Judges calling upon the opposite party to show cause why the appeal, which had been dismissed in consequence of the default of the appellant in furnishing the money for the preparation of the paper book necessary for the purpose of hearing the appeal, should not be re-admitted. The application upon which this rule was granted was an application under section 558 of the Code, and could be heard only by a Division Bench of this Court appointed under the Letters Patent by the Chief Justice; and Mr. Justice Beverley not being constituted to sit alone for this purpose, it appears to me that he had no jurisdiction to deal with it. This appeal, therefore, is allowed, and the decision of Mr. Justice Beverley is reversed, the result being that the Rule No. 1844 of 1894 will be restored, and will, with the consent of both parties, be brought on for hearing before the usual Division Bench of this Court on Monday, the 18th instant, along with Rule No. 567 of 1895. The matter of costs will be dealt with at the hearing of the said rule. We direct that in the meantime the sale of the petitioners' property be stayed.

(1) 12 W. R., 459.
(2) I. L. R., 10 Calc., 108; 13 C. L. R., 285.
(3) I. L. R., 9 Mad., 253.
(4) I. L. R., 16 Calc., 788.
(5) I. L. R., 18 Calc., 182.
(6) I. L. R., 21 Calc., 473.
(7) 8 B. L. R., 433 (452.)

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The judgment of Beverley, J., being thus set aside, the rule came on for hearing before PRINSEP and GHOSE, JJ., on the 18th March 1895.

The *Advocate-General* (Sir *Charles Paul*) and Dr. *Asutosh Mookerjee* appeared in support of the rule.

Dr. *Rash Behary Ghose*, Babu *Lall Mohan Das*, Babu *Bussunt Coomar Bose*, and Babu *Taruck Nath Palit* appeared to show cause.

The *Advocate-General*.—There is no express provision in the High Court Rules for re-admission of an appeal dismissed under Rule 17, Part II, Chapter VIII. The matter is covered by Rule 30. An order under Rule 30, enlarging the time, may be made even after expiry of the time; the principle is the same as laid down by the Judicial Committee in *Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (1); see also *Ram Manohar Misr* v. *Lal Behari Misr* (2). The present application is clearly not one under section 558 of the Civil Procedure Code, which refers to dismissals only under sections 551, 556, 557. It is, therefore, not barred under Article 168 of the Limitation Act, which I contend refers only to dismissals under section 558 of the Civil Procedure Code. In the Limitation Act of 1859 there was no provision corresponding to Article 168. But section 347 of Act VIII of 1859 (which corresponds to section 558 of Act XIV of 1882), provided that applications for re-admission of appeals mentioned in that section must be presented within thirty days of dismissal. In the Limitation Act of 1871, Article 161 was for the first time introduced, and in the Civil Procedure Code of 1877, the words "thirty days" (which appeared in section 347 of Act VIII of 1859) were omitted from section 558. No limitation is, therefore, applicable in the case of an application for re-admission of an appeal dismissed under Rule 17. It is also extremely doubtful whether the High Court has any authority to make these Rules penal in their operation. See Maxwell on Statutes, pp. 357, 362.

Dr. *Rash Behary Ghose*.—I contend that the present application is barred under Article 168 of the Limitation Act, the language of which is almost identical with that used in Rule 17. That the

(1) I. L. R., 13 All., 300; L. R., 18 I. A., 55.
(2) I. L. R., 14 All., 343.

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present application is substantially one under section 558 of the Civil Procedure Code, appears clearly from the judgment of Prinsep, J., in the Letters Patent appeal in this very matter. Moreover, there is nothing in the merits to justify an extension of time. Poverty is not a sufficient cause. See the case of *Moshaullah* v. *Ahmedullah* (1).

The *Advocate-General* was heard in reply.

The judgment of the Court (PRINSEP and GHOSE, JJ.) was delivered by

PRINSEP, J.—This is a rule obtained for the re-admission of an appeal dismissed for default in consequence of the failure of the appellant to deposit the necessary costs of the preparation of the paper book in accordance with Rule 17. On the merits we are satisfied that the appeal should be restored, and that its preparation for a regular hearing should proceed on the appellant depositing, as it is said he is prepared to do, the necessary money to-morrow.

It has, however, been contended by the learned vakil for the opposite party that this application being an application under section 558 of the Code of Civil Procedure is barred under the Limitation Act, it having not been presented within thirty days from the date when the appeal was dismissed for default. An order of this Court dismissing an appeal under Rule 17 for default in depositing the costs necessary for the preparation of the paper book operates no doubt as an order dismissing an appeal for default of prosecution under the Code of Civil Procedure, and an application for restoration of the appeal may possibly be regarded as an application under section 588 of the Code. It would seem from the terms of the decision that was pronounced by this Court on the 13th instant in Letters Patent Appeal No. 6 of 1895 that it was so regarded, but as we were two of the Judges who delivered that decision, we may say that this point was not fully considered, and that by the expression so used we did not intend to hold that the application should be regarded as being only of that description. We did not then consider, nor was it necessary for the purposes of the matter then before us, to determine whether it might not be more properly an application under the Rules of

(1) I. L. R., 13 Calc., 78.

this Court to a Division Bench rather than under section 558. We do not therefore consider ourselves in any way embarrassed by the expression of that opinion, and the more so as on hearing this point fully argued, and after full consideration we have come to the conclusion that this application should be regarded as one under Rule 17 of the Rules of this Court rather than one under section 558. Taking it as such we are of opinion that it is not barred by the law of limitation, which does not apply to such an application.

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We are, therefore, of opinion that this rule should be made absolute, and the appeal restored upon condition that the appellant do deposit the costs to-morrow, otherwise the appeal will stand dismissed. We make no order as to costs.

S. C. C. *Rule made absolute.*

CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

MILAN KHAN (PETITIONER) *v.* SAGAI BEPARI (OPPOSITE PARTY.)*

1895 December 2.

Rule to show cause—Grounds for granting rule—Practice—Discretion of Court hearing a rule—Criminal appeal—Duty of Court trying criminal appeal.

Although rules to show cause are frequently granted on particular grounds, the form of any rule granted would ordinarily be such as to leave the action which the Court should take in case the conviction is set aside to the discretion of the Court which hears the rule.

Where a rule was granted "to show cause why the conviction should not be set aside and the case sent back for retrial," and it came on for hearing before a Bench other than that which had granted it: *Held*, that the terms of the rule did not prevent the Bench hearing it from discharging the accused.

If the Judge of the Appellate Court has any doubt that the conviction is a right one, whatever the original Court has done, the Judge of the Appellate Court should discharge the accused. In this respect the duty of an Appellate Court in criminal cases is not similar to that of an Appellate Court in civil cases. In the latter case the Court must be satisfied, before setting aside an order of

* Criminal Revision No. 650 of 1895, against the order passed by B. Bell, Esq., District Magistrate of Dacca, dated the 23rd of October 1895, affirming the order passed by D. Weston, Esq., Assistant Magistrate of Dacca, dated the 6th of September 1895.