

1871.
Chabulal
Lallubhai
v.
Municipal
Commissioner
Bombay.

granted, could not have had any reasonable apprehension that the acts complained of would be recontinued, the rule nisi must be discharged, but, under all the circumstances of the case, without costs.

Rule nisi discharged without costs.

Attorneys for the plaintiff : *Jefferson & Payne.*

Attorneys for the defendant : *Leathes & Crawford.*

June 15.

Suit No. 655 of 1868.

VAKHATCHAND LAKHMICHAND.....*Plaintiff.*

THE ADVOCATE GENERAL *et al.*..... *Defendants*

*Practice—Hearing of Suit—Joinder of new Parties—Civ. Proc. Code,
Sec 73—Proceedings in Commissioner's Office*

After a decree has been made whereby a suit has been referred to the Commissioner's office to have accounts taken and property sold, the Court has still power (if it should be found necessary) to add, as fresh parties to the suit, persons who are interested in its subject-matter and are likely to be affected by its results.

THIS suit was instituted by the plaintiff, Vakatchand Lakhnichand, as executor of the will of one Párvatibái who had devised and bequeathed one-half of her estate for certain charitable purposes. The estate of Párvatibái consisted amongst other things of a house (No. 66) in Boráh Bazar Street and a house (No. 51) in Bazar Gate Street.

The house (No. 66) in Boráh Bazar Street had been mortgaged by the plaintiff, in his capacity of executor, to the defendant Vailabhái Lallubhai, who, in the pretended exercise of a power of sale contained in his deed of mortgage had sold the house to the defendant Vrijál Gokaldáa.

The object of the suit was to have the last mentioned sale declared void and set aside; to have the house, the subject of that sale, and also the house (No. 51) in Bazar Gate Street, sold under the order of the court; and to have it referred to the commissioner of the court to ascertain and report how much of the proceeds of the houses was appli-

cable to the maintenance of the charity; to have that amount (when ascertained) invested, and to have (if necessary) a scheme framed for the management of the charity and the application of its funds, and to have the plaintiff appointed trustee and manager of the charity.

1871.

1871.
 Akatchaud
 Lakhmichand
 v.
 Advocate
 General
 et al.

The Advocate General was made a defendant to represent the charity.

The suit came on for hearing before Sir Joseph ARNOLD on the 2nd of February 1869, when, by consent, the sale of the house in Boráh Bazár Street was set aside, and the Commissioner was directed to sell both houses, to take an account of the administration of the estate of the testatrix, and to ascertain and report how much of the proceeds of the two houses was applicable to the charitable purposes mentioned in the will of the testatrix; and the sum of Rs. 5,540 was directed to be paid to the defendant Valiabhbhai Lallubhai in full satisfaction of his mortgage; the respective costs of the Advocate General and of the plaintiff down to the date of decree were directed to be paid out of the estate of the testatrix, the defendants other than the Advocate General being directed to bear their own costs. The question of further costs not provided for by the decree was reserved,

When the suit was in the Commissioner's office, one Abdul Rahim Mallikji came forward and claimed to be a mortgagee of the house in Bazár Gate Street under a mortgage made in his favour by the plaintiff, and requested the solicitors for the Advocate General to consent to his exercising his power of sale under the mortgage. This request was refused, and Abdul Rahim was informed that a motion was about to be made to the Court to have him made a party to the suit, when the property would be sold in the regular way before the Commissioner, and he (Abdul Rahim) would be paid his principal, interest, and costs out of the proceeds.

Abdul Rahim refused to consent to become a party to the suit on the ground that it was a more troublesome and expensive course than that of exercising his power of sale under his mortgage.

1871.
 Vakatchand
 Lakhnichand
 v.
 Advocate
 General
et al.

The Commissioner certified to the Court that, under the circumstances of the case, it was impossible for him to proceed with the sale of the Bazar Gate Street property.

On the 24th of April 1871 the Acting Advocate General (*the Honorable A. R. Scoble*) moved that the decree in the suit, and all proceedings therein, might be amended by making Abdul Rahim a party thereto, and that a direction might be made for the payment to Abdul Rahim, out of the money to come to the hands of the Commissioner from the proceeds of the sale of the house in Bazar Gate Street, of the principal, interest, and costs due to Abdul Rahim under his mortgage-deed. The motion, by consent, was adjourned, and came on for disposal on the 5th of June 1871, when.

The Acting Advocate General moved in the terms of the notice of motion.

Marriott, for Abdu, Rahim., opposed the application;—The only section of the Civil Procedure Code that gives power to the court to add a defendant to a suit is Sec. 73, which enacts that if at any hearing of a suit it appears to the court that all parties who claim an interest in the subject-matter of the suit have not been made parties to it, the court may adjourn the hearing and direct such persons to be made parties. The hearing of the suit is now over, a final decree has been made and the section has, therefore, no application. There would be no advantage in adding a defendant at this stage of the proceedings, as he could not be affected by the decree already passed in his absence. The proceedings must, therefore, all be commenced afresh [BAYLEY, J., refer to Sec. 35, where the language used is different. A plaintiff out of British India may be compelled to give mortgage security "in any stage of the suit,"] The wording of the section shows that the power of adding a party is internationally confined to the hearing. He cited *muthayammal v. Tirumala Gaudan (a)*, *Kaj Kishore Dossee v. Budhichander Chunder (b)* *Ridhnath Sahoo v. Gopee Sahoo (c)*.

(a) 4 Mad. H. C. Rep. 22. (b) 6 Calc. w. R. to Sep. Civ. R. 298.

(c) 14 *Ibid.*, Civ. R. 90. *house*

Mayhew, for the defendants other than the Advocate General, also opposed the application.

1877
Valatchand
Lakhmichand
v.
Advocate
General
et al

The Acting Advocate General, in reply :—A defendant may be added at any time prior to final decree—that is, final decree on appeal: *Krishnabai v. Sonabai (d)*. The only difficulty here arises from the anomalous position of the Commissioner, an officer not contemplated by the Code, to whom the court delegates a portion of its functions. What is going on before the Commissioner is, in contemplation of law, going on before the court. He is not acting ministerially only. He has judicial functions to exercise. The directions that he is carrying out would in the Mofussil be carried out by the court at the hearing. The hearing before Sir Joseph Arnould was in fact a portion of the hearing of the suit, and an interlocutory decree only has been made. The court has, therefore, I submit, power to make Abdul Rahim a party to the suit, for he claims an interest in its subject-matter, and is likely to be affected by its result.]BAYLEY, J. :—What is there here for me to adjourn ?] Your Lordship can stay or adjourn proceedings before the Commissioner, and fix a day for the hearing of the suit in court. [BAYLEY, J. :—If I grant this application, the proceedings will have to be commenced *de novo*.] Yes, in theory, but in fact there will be no difficulty in that respect. The matter will at once be sent back to the Commissioner, and he will then proceed with sale.

Cur. adv. vult

BAYLEY, J. (after stating the above facts and proceedings continued):—Now in these circumstances the present application is made by the Advocate General, under Sec. 73 of the Act of Civil Procedure, to have Abdul Rahim made a party to this suit. That section provides that "if it appear to the Court, at any hearing of a suit, that all the persons who may be entitled to, or who claim some share or interest in, the subject-matter of the suit, and who may be likely to be affected by the result, have not been made parties to the suit,

1871.
Vakatchand
Lakhmichand
v.
Advocate
General
et al.

the Court may adjourn the hearing of the suit to a future day, and direct that such persons shall be made either plaintiffs or defendants in the suit, as the case may be." If the words of the section I have just read are to be construed strictly and in a literal sense, the present application would probably be unsuccessful, as, speaking strictly, the proceedings which are now being carried on before Mr. Fox, the Commissioner of this court, can hardly be considered as a hearing of this suit. The suit has already been heard at least partially, by Sir Joseph Arncliffe, and it has been made in it. Having my power to make the proceedings in which it is desirable, I consulted with the Chief Justice, and he authorises me to state that the words of Sec. 73 of the Code, thinking that the words carry out the intention of the Code, seeing that it is now applied on the Original Jurisdiction side of the High Court, where the practice and machinery inherited from the Supreme Court are entirely different from the practice and machinery of the Courts in the Mofussil, for the regulation of the proceedings in which that Code was originally enacted. This section of the Code must, in my opinion, be construed liberally, and when necessary adopted *cy pres* to the requirements of this court on its ordinary Original Jurisdiction side.

power to be in and Alge before the Court. I paid his principal expenses of the ground suit. under his mortgage. 13

That such adoption may be sometimes necessary is indicated by the marked distinction between the mode in which the procedure of the High Court is regulated by the two Charters under which it was respectively established and continued, as will be seen on referring to Cl. 37 of the original Letters Patent and comparing its provisions with those of the corresponding section (Cl. 37) of the existing Letters Patent.

The original Letters Patent of 1862 provided that the proceedings in Civil suits of every description between party and party brought in the High Court should be regulated by the Code of Civil Procedure (Act VIII. of 1859), and by

such further or other enactments of the Governor General in Council in relation to civil procedure as were then in force.

1871.
 Wakatchand
 Lakhmichand
 &
 Advocate
 General
et al.

The existing Letters Patent of 1865 provide that it shall be lawful for the High Court of Judicature at Bombay from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases * * * Provided that the said High Court shall be guided, in making such rules and orders, as far as possible by the provisions of the Code of Civil Procedure, and the provisions of any law which has been made amending or altering the same by competent legislative authority for India. The inapplicability of the Code in its entirety to the High Court procedure was thus in 1865 expressly recognised, and the Judges were given power to modify its provisions so as to make them applicable to the state of things to which they were to be applied. Bearing this end in view, and considering that the suit is, to a certain extent, still being heard by the court's delegate, and that no final decree can be made until after his report has been submitted to the court, I think I must hold the words "at any hearing of a suit" to include such a case as the present, and read them as equivalent to "in any stage of a suit," the words used in Sec. 35, to which I drew attention during the course of the argument. A court sometimes feels compelled to construe the words even of an Act of Parliament in a sense different from the literal one, as for instance in the case of *H. H. Ruckmaboye v. Laloobhoy Mottichund (e)*, where the Lords of the Privy Council, after two arguments, and in a very elaborate judgment delivered by Sir John Jervis, C.J., held—reversing the decision of Sir Erskine Perry, C.J., and Yardley, J., in the Supreme Court of Bombay upon that and other points—that the words in the Statute of Limitations 21 Jac. I., c. 16, s. 7, "beyond the seas" were synonymous in legal import with the words "out of the realm" or "out of the land" or "out of the territories," and were not to be construed literally. I think, therefore, and so does the Chief Justice (who is not, however, responsible for the above reasoning), that the court has power to make

(e) 5 Moo. Ind, App. 254.

1871.
 Vakatchaud
 Lakhmichand
 v.
 Advocate
 General
et al.

Abdul Rahim a party, and I order him to be made a party as defendant. He must of course be summoned, and have an opportunity of being heard. The summons will issue forthwith, returnable on the first day of August nex, on which day the cause may be set down for hearing. A written statement must be filed by Abdul Rahim within four weeks from the service of the summons upon him. I order the costs of all parties who have appeared on this application to be paid out of the estate.

Attorney for the plaintiff: *Shamrav Pandurang.*

Attorney for the Advocate General: *R. V. Hearn*, Government Solicitor.

Attorney for Abdul Rahim: *H. E. Hope.*

June 27.

Suit No. 347 of 1870.

KHUMJI CHATURBHUI *et al.* *Plaintiffs,*
 SIR CHARLES FORBES, Baronet, *et al.* *Defendants.*

Jurisdiction—Cause of Action—Whole Cause of Action—Carrying on of Business—Letters Patent of High Court, Cl. 12.

The defendants resided and carried on business in London, and employed Sir C. F. and Co. as their commission agents in Bombay. The plaintiffs at Bombay executed a power of attorney in favour of the defendants to enable them to sue in England for certain money due to the plaintiffs, and handed the power of attorney to Sir C. F. and Co., who undertook to forward it to the defendants in London, and that the defendants should endeavour to recover the money so due to the plaintiffs. The defendants recovered the money in England for the plaintiffs, but did not transmit it to the plaintiff's in Bombay.

In a suit brought by the plaintiffs to recover the money so received by the defendants, it was held that the cause of action had not arisen wholly in Bombay, and that the High Court, under Cl. 12 of its Letters Patent had no jurisdiction to entertain the claim, the leave of the court to file the suit not having been obtained.

Where an English firm, upon the usual terms, employs a Bombay firm to act as to the English firm's commission agents in Bombay, such English firm does not thereby render itself liable to be sued in the High Court of Bombay, as it does not carry on business within the local jurisdiction of such High Court within the meaning of the above clause of the Letters Patent.

THE facts of this case are fully set out in the judgment of the court. It was tried by BAYLEY, J., in a Division Court, on the 8th of June 1871 and subsequent days.