

## ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Harington, Mr. Justice Geidt, Mr. Justice Mookerjee and Mr. Justice Chitty.

LALITESHWAR SINGH

v.

RAMESHWAR SINGH.\*

1907

March 27.

*Leave to sue—Letters Patent, 1865, cl. 12—Registrar, power of, to grant such leave—Rules and Orders of the High Court—Rules 515A, 515B(4)—Ultra vires—Delegation of power by High Court—Civil Procedure Code (Act XIV of 1882) ss. 637, 652—High Court, Constitution and Jurisdiction of—Limitation Act (XV of 1877) s. 14.*

The order granting leave to sue under clause 12 of the Letters Patent is a judicial and not merely a ministerial act; the leave has to be granted by a Judge of the Court, and it is not competent to the Court to delegate this function to one of its officers.

*Hadjee Ismail Hadjee Hubeeb v. Hadjee Mahomed Hadjee Joosub(1), DeSouza v. Coles(2), Mudelly v. Mudelly (3), Rajam Chetti v. Seshayya(4), Rampurtab Samruthroy v. Preamsukh Chandamal(5) referred to.*

Rule 515A of the Rules and Orders of the High Court, in so far as it authorises the Registrar or Master to grant leave under clause 12 of the Letters Patent, is *ultra vires*.

APPLICATION by the defendant.

On the 19th May 1906, Babu Laliteswar Singh instituted a suit against Maharaja Sir Rameshwar Singh Bahadur and others, praying, *inter alia*, for a declaration of his title to the property of the Durbhunga Raj, almost the whole of which lies outside the local limits of the Ordinary Original Civil Jurisdiction of the High Court. The suit was instituted in this Court with leave under clause 12 of the Charter, and such leave was obtained from the

\* Application in Original Suit No. 421 of 1906.

(1) (1874) 13 B. L. R. 91.

(3) (1875) 8 Mad. H. C. 21.

(2) (1868) 3 Mad. H. C. 384.

(4) (1895) I. L. R. 18 Mad. 236.

(5) (1890) I. L. R. 15 Bom. 93.

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Registrar under the new Rules 515A and 515B(4) of the High Court. These rules are in the following terms:—

“Rule 515A. All applications of the description specified hereunder shall be made to the Registrar or Master whose orders thereon shall be final; provided that the Registrar or Master shall refer any such application to be heard and determined by a Judge in chambers, upon its appearing either that both parties so desire and their consent is endorsed upon the summons, or that one of the parties or, in the case of uncontested applications, that the applicant so desires and the Registrar or Master is satisfied that the matter is a fit and proper one, by reason of its importance or difficulty or novelty or by the reason of the order to be made thereon being appealable, to be referred to a Judge in chambers. All acts done by the Registrar or Master under this Rule shall be deemed *quasi-judicial* acts within the meaning of section 637 of the Code of Civil Procedure.”

“Rule 51B(4). Applications for leave to sue under clause 125 of the charter.”

The defendant, Maharaja Sir Rameshwar Singh Bahadur of Durbhunga, now applied for the withdrawal of the leave granted to the plaintiff to institute the suit in this Court, on the ground that leave under clause 12 of the Letters Patent had not been properly obtained inasmuch as such leave could be granted only by a Judge of this Court.

The question in issue, therefore, was whether Rules 515A and 515B(4) which authorise the Registrar to grant leave were *ultra vires*.

Owing to the importance of the application it was heard by a Special Bench.

*Mr. Dunne* (*Mr. Sinha* and *Mr. B. C. Mitter* with him), for the defendant. Rule 515A in so far as it refers to applications for leave to sue under clause 12 of the Charter [rule 515B(4)] is *ultra vires*. Power to grant such leave cannot be delegated to the Registrar or Master. Moreover, orders passed on such applications cannot be final. It has been held by three Presidency Courts that orders in applications for leave under clause 12, are appealable. The rule was made under section 637 of the Civil Procedure

Code. But section 637 has no application as it refers only to non-judicial or quasi-judicial acts which are required to be done by a Judge under the Code. Leave to sue is not granted under the Code, but under the Letters Patent. In order to give itself jurisdiction to try such suits, the High Court must grant this leave. Under the Letters Patent the High Court has power to make rules only of procedure or for the direction of its ministerial officers. This rule cannot be considered one merely of procedure. It is a rule which purports to empower ministerial officers to exercise judicial discretion. It has been held by three Presidency Courts that the grant of leave under clause 12 is a judicial act: see *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub*(1), *Rampurtab Samruthroy v. Premsook Chandamal*(2), and *Rajani Chetti v. Seshayya*(3). Section 652 of the Civil Procedure Code refers to rules regulating procedure. The Royal Charter Act sections 2, 5, 13, 14, and the Letters Patent clauses 2, 8, 11, 12, 36, 37, were also referred to in the course of argument.

*Mr. Hill* (*Mr. L. P. E. Pugh* with him), for the plaintiff. The only question in issue here is, whether the rule empowering the Registrar to grant leave under clause 12, is *ultra vires*. The question as to the finality of the order does not arise. By section 9 of the Royal Charter Act, the High Court is invested, subject to the Governor-General in Council, with all the powers of the Supreme Court. By clause 37 of the Letters Patent, the High Court is given power to make rules and orders for the purpose of regulating all its *proceedings* and not merely *procedure*. Clause 18 of the Charter of the Supreme Court 1774, made the Supreme Court a Court of Equity with all the powers of the Court of Chancery. So the Supreme Court had power to appoint the Registrar in all matters concerning the administration of its equitable jurisdiction. Clause 38 gave the Supreme Court power to pass rules of practice and standing orders for the administration of justice.

[MACLEAN C. J. Was this Charter of 1774 superseded by the Charter of 1862?]

No; the Charter of 1862 continued all the powers of the old Supreme Court, vesting them in the High Court. The

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(2) (1890) I. L. R. 15 Bcm. 93.

(3) (1895) I. L. R. 18 Mad. 236.

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Supreme Court in its equity side delegated extensive powers to the Master in respect of references. This is in accordance with the practice of the Court of Chancery. In the Chancery Division the Judge makes his orders through the Master: see Judicature Act of 1873 ss. 63, 68; Judicature Act of 1875 s. 17; order 54, rule 12; order 58, rule 16; Annual Practice 1907 Vol. II p. 376; *Oppert v. Beaumont*(1), *Smeeton v. Collier*(2), *Lloyds Bank Limited v. Princess Royal Colliery Co.*(3), *In re Davidson*(4): It is by statutory enactments that the Court is empowered to delegate its judicial powers. The Legislature was aware of what the Supreme Court had done—that the Master was daily exercising judicial functions. The authority of the Court to delegate its functions has always existed and been recognised.

*Mr. Dunne*, in reply. Rules under the Judicature Acts stand on a very different footing from rules of this Court. Those rules were sanctioned by Parliament, and are statutory. Rules in the Annual Practice are really a part of the Act.

[MACLEAN C. J. The question arises, how clauses 36 and 37 of the Letters Patent are to be read together and harmonised?]

The Supreme Court never delegated its judicial discretion in questions of jurisdiction to the Master. The Supreme Court itself would not have had jurisdiction in a matter of this sort. Section 652 of the Civil Procedure Code was intended to incorporate the intention of the Legislature in clause 37 of the Letters Patent. The term “proceedings” was used in the sense of “procedure.” The argument as to “references” is illusory: the report of the Master on a reference is ministerially performed; it is not a judicial act.

*Cur. adv. vult.*

The judgment of the Court was delivered by

MACLEAN C.J. This is an application on behalf of the first defendant to withdraw the leave granted to the plaintiff under clause 12 of the Letters Patent to institute the suit in this Court. The suit was instituted on the 19th May 1906, and leave was

(1) (1887) 18 Q. B. D. 435.

(2) (1847) 1 Exch. 457.

(3) (1900) 48 W. R. 427.

(4) [1899] 2 Q. B. 103.

obtained from the Registrar under Rule 515-A. It is contended on behalf of the defendant that the leave under clause 12 of the Letters Patent has not been properly obtained inasmuch as such leave can be granted only by a Judge of this Court. The question therefore arises whether Rule 515-A which authorises the Registrar or Master to grant leave is *ultra vires*. The Rule in so far as it is applicable to the matter now before us is as follows:—

“515-A. All applications of the description specified hereunder shall be made to the Registrar or Master whose orders thereon shall be final; provided that the Registrar or Master shall refer any such application to be heard and determined by a Judge in Chambers, upon its appearing either that both parties so desire and their consent is endorsed upon the summons, or that one of the parties or, in the case of uncontested applications, that the applicant so desires and the Registrar or Master is satisfied that the matter is a fit and proper one, by reason of its importance or difficulty or novelty or by the reason of the order to be made thereon being appealable, to be referred to a Judge in Chambers. All acts done by the Registrar or Master under this Rule shall be deemed *quasi-judicial* acts within the meaning of section 637 of the Code of Civil Procedure.”

“515-B (4). Applications for leave to sue under clause 12 of the Charter.”

It is argued on behalf of the defendant that the Rule was made under section 637 of the Civil Procedure Code, that that section has no application, and consequently the Rule is *ultra vires*. Section 637 refers only to non-judicial or *quasi-judicial* acts which are required to be done by a Judge under the Code of Civil Procedure, and such acts may, under Rules of Court, be done by the Registrar or by such officer as the Court may direct. Leave to sue, however, is granted not under the Code, but under the Letters Patent, and section 637 consequently has no application. It does not follow, however, that the Rule is on this ground alone *ultra vires*, inasmuch as if the Court had authority to make it under some other provision of the law, it would not lose its validity merely because the Court purported to act under section 637 of the Code. It is therefore necessary to determine whether it was competent to the Court to make the rule under

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any other provision of law. It was suggested on behalf of the plaintiff that the penultimate paragraph of section 652 of the Code authorises the Court to make a rule of this description. That paragraph provides that "notwithstanding anything in this Code contained, any High Court established under the said Act (that is, 24 and 25 Vict, Cap. 104) for establishing High Courts of Judicature in India may make such rules, consistent with the Letters Patent establishing it, to regulate its own procedure in the exercise of its Original Civil Jurisdiction as it shall think fit." It is obvious that the Rule in question, if made under section 652 would be valid, only if it was consistent with the Letters Patent, the provisions of which must consequently be examined. But before we do so, it is necessary to refer briefly to some of the provisions of the High Courts Act, 1861 (24 and 25 Vict., Chap. 104).—Section 2 defines the constitution of the High Court and provides that the Court shall consist of the Chief Justice and as many Judges not exceeding fifteen, as Her Majesty may, from time to time, think fit to appoint. Section 9 defines the jurisdiction and powers of the High Court. Section 13 provides that the power vested in the High Court may be exercised by one or more Judges or by Division Courts to be determined by the Chief Justice under section 14. But for these sections, the power vested in the Court would have to be exercised by all the Judges acting together; the effect of these sections is to vest each Judge or Division Court with the powers vested in the High Court. If we now look to the terms of clause 12 of the Letters Patent (which is mentioned in section 9 of the High Courts Act), we find that in the case of certain suits, the leave of the Court has to be first obtained. *Prima facie*, therefore, the leave has to be granted by a Judge of the Court. Is it then competent to the Court to delegate this function to one of its officers? To determine this question, it is necessary to bear in mind the nature of the act granting leave to sue. It has been uniformly regarded as a judicial act, and the order has been treated as a judgment appealable under clause 15 of the Letters Patent: see *Hadjee Ismail v. Hadjee Mahomed Joosub* (1), where Sir Richard Couch describes the order as "not

(1) (1874) 13 B. L. R. 91, 101.

a mere formal order or one merely regulating the procedure in the suit, but an order that has the effect of giving a jurisdiction to the Court which it otherwise would not have ; it may fairly be said to determine some right between the parties, namely, the right to sue in a particular Court. This view that the order is judicial and not merely ministerial or administrative, has been adopted by the other High Courts, *DeSousa v. Coles*(1), *Mudelly v. Mudelly*(2), *Rajam Chetti v. Seshayya*(3), and *Rampurtab Samruthroy v. Premsookh Chandamal*(4), and has not been challenged before us. We see no reason to dissent from this view. The question therefore arises whether the performance of this judicial act could be delegated to an officer of the Court. It was suggested on behalf of the plaintiff that clause 37 of the Letters Patent is wide enough to cover the matter. Clause 37 empowers the Court to make rules and orders for the purpose of regulating all proceedings in civil cases, which may be brought before the Court ; if this clause had stood by itself, it might have lent some support to the contention of the plaintiff, but it has to be read along with clause 12 which provides that the leave to be obtained is the leave of the Court, and clause 36 which provides that any function which is directed by the Letters Patent to be performed by the Court may be performed by any Judge or by any Division Court thereof. Reading all the clauses together and giving effect to all their provisions as we must do, we are unable to hold that they empower the Court to make a Rule under which the judicial determination of the question whether the Court should or should not exercise jurisdiction in a particular matter, is delegated to an officer of the Court. There is considerable force in the contention of the defendant that, if such a wide construction as this was placed upon clause 37 of the Letters Patent, it would enable the Court to delegate the exercise of all its judicial functions to its subordinate officers. It may further be suggested that clause 37 refers to Rules and orders for regulating all proceedings in civil cases which may be brought before the Court, and would hardly include the determination of the question whether the Court is to take cognizance of or exercise jurisdiction

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over a particular matter. We are unable to hold, therefore, that clause 37 validates the Rule in question.

As a last resort, the learned counsel for the plaintiff relied upon section 9 of the High Court's Act 1861 which provides that the High Court to be established by Letters Patent shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in the Courts abolished under section 8, one of which was the Supreme Court. On this basis it was contended that, inasmuch as under section 18 of the Charter of the Supreme Court granted on the 26th March 1774, that Court was to be a Court of Equity and had full power and authority to administer justice as nearly as may be according to the rules and proceedings of the High Court of Chancery in Great Britain, this Court is competent to make rules and delegate the exercise of judicial functions to its officers, as it was suggested is done in England under the Rules of the Supreme Court, framed under the Judicature Acts. In our opinion there is no foundation for this argument. In the first place, the source of the authority under which the Rules of the Supreme Court are framed in England, is entirely different. In the second place, under section 9 of the High Courts Act, 1861, upon which reliance is placed, the powers of this Court are defined and controlled by the Letters Patent. In the third place, section 38 of the Charter of the Supreme Court which authorised that Court to frame rules of practice, required the rules to be submitted to the Privy Council for approval, alteration or rejection. In the fourth place we are unable to find that under the Rules of the Supreme Court as they stood at the time when the High Court was created, that Court ever delegated the exercise of judicial functions of the description now in controversy, to any of its officers; indeed, no such question could have arisen under those Rules. We must hold accordingly that Rule 515-A in so far as it authorises the Registrar or Master to grant leave under clause 12 of the Letters Patent is *ultra vires*. As leave of the Court has to be obtained before the institution of the suit, *Abdool Hamed v. Promotho Nauth Bose* (1), the defect cannot be cured by grant of leave at this stage of the litigation by a Judge of this Court. The application,

(1) (1860) 1 Ind. Jur. (N. S.) 218.

therefore, must be allowed, and the plaint directed to be taken off the file. Under the circumstances of the case, each party will pay his own costs. The costs will be taxed as between attorney and client on scale No. 2.

We understand that in several cases leave has been granted by the Registrar. In these cases there is nothing to prevent leave being granted by a Judge in a fresh action, in which event orders might possibly be passed for utilising pleadings, etc. which had been already filed. And should any question of limitation arise we may invite attention to section 14 of the Indian Limitation Act.

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*Application allowed.*

Attorneys for the plaintiff: *Pugh & Co.*

Attorneys for the defendants: *B. N. Bose & Co.*

J. C.