

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

A. J. KING

v.

SECRETARY OF STATE FOR INDIA.*

1908
Feb. 4.*Waiver—Jurisdiction—Leave to sue—Letters Patent (1865) cl. 12.*

Where there is no want of jurisdiction in this Court over the subject-matter of the action, but leave under cl. 12 of the Letters Patent is required before the Court can entertain the suit, the objection that such leave has not been properly obtained may be waived and will be considered to have been waived if the defendant files his written statement and applies for a commission to examine witnesses.

Moore v. Gamgee (1) followed.

ORIGINAL SUIT.

This suit was instituted by the plaintiff, Arthur John King to recover damages for wrongful dismissal. The plaintiff alleged that in 1884 he entered into an agreement with the Government of India for the management of the Government Tea gardens at Port Blair on a salary and commission, that in 1887 he entered upon his duties as manager, and that on the 18th July 1905 he was wrongfully dismissed from his employment, and thereby sustained serious loss and damage. In his plaint the plaintiff alleged that his cause of action arose partly in Calcutta, and prayed for leave under cl. 12 of the Letters Patent to institute this suit. Leave to sue was obtained from the Master.

The defendant duly filed his written statement joining issue with the plaintiff on the terms of the agreement under which he was employed, denying that the plaintiff had suffered any damage, and submitting that the plaint disclosed no cause of action, and that, in the alternative, if any cause of action be established that any suit relating to plaintiff's contract should be brought at Port Blair under the Regulations relating to the Andaman Islands.

* Original Civil Suit No 463 of 1906.

(1) (1890) L. R. 25 Q. B. D. 244.

On the defendant subsequently applying for a commission to examine certain witnesses, it was directed that the matter be set down for argument as to whether or not this suit was validly pending in this Court having regard to the fact that leave to institute the suit was obtained from the Master. It has previously been held by the Court in this suit that the Secretary of State for India in Council could not be said to reside within the jurisdiction of this Court, so that leave to sue under cl. 12 of the Letters Patent was necessary.

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The Standing Counsel (Mr. Sinhu), for the defendant. It is clear that the leave to institute this suit obtained from the Master was not properly obtained: *Laliteshwar Singh v. Rameshwar Singh*(1). The question now is whether by filing his written statement the defendant has waived his right to object that proper leave has not been obtained. Such leave under cl. 12 of the Letters Patent affects the very foundation of the jurisdiction: see *Rampurlab Samruthroy v. Preamsukh Chandamal*(2). The position in England is very different: see *Preston v. Lamont*(3).

[FLETCHER J. *In re Anglo-African Steamship Company*(4) expressly decides that this power is not inherent in the Court.]

The present matter does not come under that class of cases where by appearing without protest I may be taken to have waived the question of jurisdiction. The plaintiff has filed this suit in this Court without jurisdiction. There cannot be waiver of objection to jurisdiction. Even by consent I could not give this Court jurisdiction without the Court's leave: see *Ledgard v. Bull*(5). Objection to jurisdiction can be taken at any stage of the proceedings, even at the hearing of a suit and even on a second appeal. The authorities will be found collected at p. 98 of O'Kinealy's Code of Civil Procedure, 6th edition. We have taken no further step in proceedings since discovering that the Master was incompetent to grant leave under cl. 12 of the Letters Patent. *Keate v. Phillips*(6) and *Gurdeo Singh v. Chandrikah Singh*(7) were also referred to.

(1) (1907) I. L. R. 34 Calc. 619.

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

(3) (1876) 1 Exch. D. 361.

(4) (1886) L. R. 32 Ch. D. 343.

(5) (1886) I. L. R. 9 All. 191;

L. R. 13 I. A. 134, 145.

(6) (1878) W. N. 186.

(7) (1907) 5 C. L. J. 611.

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Mr. Pugh (*Mr. Thornhill* with him), for the plaintiff. It is true that the order granting leave to sue under cl. 12 of the Letters Patent has been held to be a judicial act, and that such leave, if granted by the Master, was bad. But the defendant after filing his written statement has taken a further step in proceedings and applied for a commission. This recognises the suit as a pending suit and amounts to a waiver of objection to jurisdiction: see *In re Anglo-African Steamship Company*(1) and *Fry v. Moore*(2). It has been held in *Doss v. Secretary of State for India*(3), that the Secretary of State must be considered to be in India as well as in England, and is capable of being sued in India. I mention *In the matter of the "Fannie Skolfield"*(4), as it is desirable that all the authorities should be placed before the Court.

Cur. adv. vult.

FLETCHER J. The present application comes before me in a somewhat unusual manner.

This suit is brought by the plaintiff to recover damages for wrongful dismissal. The plaintiff in his plaint alleges that his cause of action arises in part in Calcutta and prays for leave under clause 12 of the Letters Patent to institute this suit. Leave to institute this suit was granted by the Master. The defendant duly filed his written statement and applied to Court for a commission to examine certain witnesses. Upon this application coming on for hearing before Woodroffe J., he directed the matter to be set down for argument as to whether or not the suit is validly pending in this Court, having regard to the fact that leave to institute the suit was obtained from the Master. Now it has been decided by a special Bench in this Court in the case of *Lalteshwar Singh v. Rameshwar Singh*(5) that the granting of leave under clause 12 of the Letters Patent being a judicial act cannot be delegated to the Registrar or Master, and that the rules of the

(1) (1886) L. R. 32 Ch. D. 318.

(2) (1889) L. R. 23 Q. B. D. 395.

(3) (1875) L. R. 19 Eq. 509.

(4) (1889) I. L. R. 17 Calc. 337.

(5) (1907) I. L. R. 34 Calc. 619.

High Court in so far as they authorise the Registrar or Master to grant such leave are *ultra vires*.

But neither in that case nor in the present case until I pointed out the question to counsel was it argued whether the objection that the leave was granted by the Registrar or Master is one which can be waived. If the objection is one that cannot be waived the matter is one of far-reaching consequences. It means that in every case where the suit has proceeded even to judgment, the defendant can turn round and say that the whole proceedings are a nullity. Fortunately in my opinion this is not the result. The case is I think covered by the authority of *Moore v. Gamgee* (1) which though not referred to in the argument before me is not distinguishable from the present case. In that case there was an application by the defendant for a prohibition directed to the Judge of the County Court of Surrey to prohibit the proceedings in an action by the plaintiffs against the defendant in that Court. By the County Courts Act, 1888 (51 and 52 Vic. C. 43), section 74, it is provided that "Every action or matter may be commenced in the Court within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of commencing the action or matter, or it may be commenced by leave of the Judge or Registrar in the Court within the district of which the defendant or one of the defendants dwelt or carried on the business at any time within six calendar months next before the time of commencement or with the like leave in the Court in the district of which the cause of action or claim wholly or in part arose."

At the hearing of that action on the second day the solicitor for the defendant took the objection that the Court had no jurisdiction to entertain the action on the ground that the defendant did not dwell or carry on his business within the district of the Court at the time of the commencement of the action, and no leave had been obtained to bring the action in that Court. The County Court Judge held that the defendant by appearing and contesting the action had waived the objection and proceeded with the hearing. The defendant accordingly applied to a Divisional Court of the Queen's Bench Division (*Cave and A. L. Smith JJ.*)

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for a prohibition to prohibit the proceeding in that action. Now pausing here for a moment it will be noticed that section 74 of the County Courts Act is very similar to clause 12 of the Letters Patent. Doubtless in cases under section 74 of the County Courts Act leave may be granted by the Judge or the Registrar, whereas under clause 12 of the Letters Patent leave must be granted by a Judge. But in *Moore v. Gamgee*(1) no leave at all had been granted, and there can be no distinction between the case where no leave at all has been granted and a case where leave had been granted by a person not authorised to grant leave.

The judgment of the Court in *Moore v. Gamgee*(1) refusing the application for a prohibition was delivered by Cave J., who in the course of his judgment made the following pertinent remarks:—

“There are two senses in which it may be said there is no jurisdiction to entertain an action—first, where under no circumstances can the Court entertain the particular kind of action, as in cases within section 56 of the Act—that is, libel, slander, seduction, or breach of promise of marriage; secondly, there are the cases provided for by section 74, where under certain circumstances leave can be given to bring an action which the Court could not otherwise entertain; in these cases there is no want of jurisdiction over the subject matter of the action, but leave is required in the particular case before the Court can entertain the action, and it is an objection which may be taken to the hearing of the action, that the defendant does not dwell or carry on his business within the jurisdiction, and leave has not been obtained. In the present case the plaint was issued, and the case was heard, and partly decided, before the objection was taken. There is always some difficulty in drawing an analogy between proceedings in the High Court and proceedings in the County Court, because the High Court has jurisdiction by the common law, whereas the jurisdiction of the County Court is entirely created by statute; but there is some analogy between such a case as the present and a case in the High Court, where it is sought to serve a writ on a defendant who is resident abroad. In such a case in the High Court, if the defendant is served and takes any step in the action, except

(1) (1890) L. R. 25 Q. B. D. 244, 246.

moving to set aside the service, he waives the objection of want of jurisdiction, and cannot be heard; but a conditional appearance may be entered, which has not the effect of waiving the defendant's right to object to the jurisdiction. In my opinion the case is much the same in the County Court. . . . I think, therefore, that the objection of the Court may be waived by taking any step in the proceedings before applying to dismiss the action; and this view is borne out by a case which was not cited in argument: *In re Jones v. James*(1)."

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The remarks of the learned Judges in *Moore v. Ganjee*(2) appear to me to apply to a case where leave has been purported to be granted by some persons other than a Judge under clause 12 of the Letters Patent.

In such a case no leave within the meaning of clause 12 has been granted.

The present suit is one where there is no want of jurisdiction in this Court over the subject-matter of the action, but leave under clause 12 of the Letters Patent is required before the Court can entertain the suit.

The defendant in this suit ought to have known as a matter of law that there was a want of jurisdiction unless leave as provided by clause 12 of the Letters Patent had been granted. He has filed his written statement and applied for a commission to examine witnesses. By taking these steps the defendant has, in my opinion, waived his objection to the jurisdiction.

The application by the defendant for a commission to examine witnesses must be set down for argument on its merits.

Attorneys for the plaintiff: *Leslie and Hinds*.

Attorney for the defendant: *Kesteven*.

J. C.

(1) (1850) L. J. (Q. B.) 257.

(2) (1890) L. R. 25 Q. B. D. 244.