

in funds to conduct the litigation the attorney discharges himself: *Bluck v. Lovering & Co.*(1).

It makes no difference whether the promise to put the attorney in funds is made prior to or during the suit. I must, therefore, make the order for change in the form mentioned in the judgment of Ameer Ali J. in *Atool Chandra Mukerjee v. Shosee Bhusan Mukerjee* (2).

There will be no order as to the costs of this application.

*Application allowed.*

Attorneys for the applicants: *Manniel & Agarwalla. Leslie & Hinds* for themselves.

H. R. P.

(1) (1886) 35 W. R. 232.

(2) (1901) 6 C. W. N. 215

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## PRIVY COUNCIL.

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SECRETARY OF STATE FOR INDIA

*v.*

MOMENT.

P.C.<sup>s</sup>  
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Nov. 29 ;  
Dec. 10.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA, AT RANGOON.]

*Jurisdiction of Civil Court—Right of Suit against Secretary of State for India in Council—Burma Town and Village Lands Act (Burma Act IV. of 1898), s. 41 (b)—Act taking away power of subject to sue Government to determine any right to land—Power of Lieutenant-Governor in Council to pass Act—Legislation ultra vires—India Councils Act, 1861, (24 & 25 Vict., c. 67), s. 22—Government of India Act, 1858, (21 & 22 Vict., c. 106), ss. 65, 66, 67.*

<sup>s</sup> *Present*: THE LORD CHANCELLOR (LORD HALDANE), LORD MACNAGHTEN, LORD ATKINSON, LORD MOULTON, SIR JOHN EDGE, AND MR. AMEER ALI.

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*Held* (affirming the decision of the majority of a Full Bench of the Chief Court of Lower Burma), that section 41 (b) of the Burma Town and Village Lands Act (Burma Act IV of 1898) which enacted that "no Civil Court shall have jurisdiction to determine any claim to any right over land as against the Government," was *ultra vires* of the Lieutenant-Governor of Burma in Council, and therefore invalid.

Section 22 of the India Councils Act, 1861, (24 & 25 Vict., c. 67), provides that the Governor-General in Council shall have no power "to repeal or in any way affect (amongst other matters) any provision of the Government of India Act, 1858, (21 & 22 Vict., c. 106). And the effect of section 65 of the latter Act which enacted that, "all persons . . . shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the East India Company," was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in any case in which he could have similarly sued the East India Company. The words could not be construed in any different sense without reading into them a qualification which is not there, and may well have been deliberately omitted. The question was not one of procedure, but of the power of the Government to take away by legislation the right to proceed against them in a Civil Court in a case involving a right to land; and the suit in this case (for damages for interference with the respondent's property) was one which would have lain against the East India Company.

APPEAL from judgments and decrees (7th March 1910, and 23rd November 1911) of the Chief Court of Lower Burma, which respectively reversed and affirmed decrees (28th January 1908, and 28th November 1910) of the same Court in its Original Civil Jurisdiction.

The defendant was appellant to His Majesty in Council.

The only question for determination on this appeal was as to whether the enactment of the provisions contained in section 41(b) of the Lower Burma Town and Village Lands Act (Burma IV of 1898) was *ultra vires* of the Lieutenant-Governor of Burma in Council. That clause of section 41 was as follows:—  
 "No Civil Court shall have jurisdiction to determine

any claims to any right over land as against the Government."

The respondent was owner of a house, stabling, etc., standing on land known as 36A Sandwith Road, in the Cantonment of Rangoon.

The appellant, on 30th August 1904, instituted a suit (301 of 1904) in the Chief Court for possession of the land on payment of compensation for the buildings erected thereon, in which suit, on 30th May 1905, the Court made a decree for possession, and directed the appellant to pay Rs. 1,590 as compensation. In execution of the decree the appellant took possession of the land and buildings on 18th September 1905, and through the Executive Engineer, Rangoon Division, issued orders in October 1905 for the sale of the buildings on the land by public auction, stating in the instructions to the auctioneers that the purchaser would be required to dismantle the buildings and clear the site within two weeks from the date of sale.

Meantime the respondent had appealed from the decree of 30th May 1905.

The auction sale was held on 11th December 1905, and the dismantling of the buildings was commenced shortly afterwards by the purchaser. On 12th December 1905 the Government Advocate wrote to the Executive Engineer asking him to stop the dismantling of the buildings as the respondent had filed an appeal, and pointing out that, if it were held on appeal that the Court had no jurisdiction in the matter, the site and buildings would have to be restored to the respondent. The dismantling was accordingly stopped.

On 18th December 1905 the respondent's appeal was heard, and the Chief Court in its Appellate Jurisdiction reversed the decree of 30th May, held that the

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suit was barred under section 41 (b) of the Burma Act IV of 1898, and dismissed it with costs (1).

On 26th February 1906 possession of the land and buildings was restored to the respondent.

On 20th April 1906 a notice under Burma Act IV of 1898 was issued upon the respondent to quit and give up possession of the land within three months; and on 8th September 1906 the respondent, after due notice of action, instituted against the appellant the suit (304 of 1906) out of which the present appeal arose. In his plaint he claimed Rs. 2,010 as damages caused to his buildings by the dismantling of a portion of them in December 1905, and on account of the depreciation in value of the premises when restored to him; and Rs. 300 for subsequent damages with interest and costs of suit.

On 29th September a notice under section 21 of the above Act for immediate evacuation of the premises was served on the respondent, and he thereupon gave up possession of the land, and received compensation in full for the buildings in terms of the provisions of the Act.

The only defence to the suit now material was that the suit was barred by section 41 (b) of the said Act, and that question was tried as a preliminary issue, and the Judge of the Chief Court who heard the suit (MOORE J.) dismissed it on the 28th January 1908 on the ground that, with reference to that section and clause, the Court had no jurisdiction to entertain it.

The plaintiff appealed from that decision on the ground (*inter alia*) that section 41 (b) of the Act was *ultra vires*; and the question of law so arising was referred for consideration to a Full Bench of the Chief Court, and decided on 14th February 1910 by a majority of the Court (SIR C. E. FOX, Chief Judge, and

(1) (1905) 3 Lower Burma Rep. 165.

HARTNOLL and PARLETT JJ.) holding that it was *ultra vires*, whilst ROBINSON J. held that it was not.

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On 7th March 1910 the appeal came on for hearing again before the Appellate Bench (SIR C. E. FOX and PARLETT J.) and judgment was delivered in accordance with the ruling of the Full Bench that section 41 (b) did not form a bar to the suit, inasmuch as it was *ultra vires* and therefore invalid. The suit was accordingly remanded for trial on the merits.

Ultimately on 28th November 1910 judgment was delivered in the Original Court, and a decree was made in favour of the plaintiff for Rs. 562 with costs which on an appeal by the defendant was on 23rd November 1911 affirmed by the Chief Court (ORMOND and TWOMEY JJ.) in its Appellate Jurisdiction, the appeal being dismissed with costs.

The report of the case before the Full Bench will be found reported in 5 Lower Burma Cases, 163.

The following were the most important of the Statutes referred to in the arguments and in the judgment of their Lordships.

The Government of India Act, 1858 (21 & 22 Vict., c. 106), sections 65, 66, and 67.

" 65. The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate ; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company ; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India, or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company.

" 66. The Secretary of State in Council shall, with respect to all actions, suits, and all proceedings by or against the said Company pending at the time of the commencement of this Act, come in the place of the said

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company, and that without the necessity of substituting the name of the Secretary of State in Council for that of the said Company.

“67. All treaties made by the said Company shall be binding on Her Majesty, and all contracts, covenants, liabilities, and engagements of the said Company made, incurred, or entered into before the commencement of this Act may be enforced by and against the Secretary of State in Council in like manner and in the same Courts as they might have been by and against the said Company if this Act had not been passed.”

The Indian Councils Act, 1861 (24 & 25 Vict. c. 67), section 22, so far as material to the present case.

“22. The Governor-General in Council shall have power at meetings for the purpose of making laws and regulations as aforesaid, and subject to the provisions herein contained, to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force or hereafter to be in force in the Indian territories now (or hereafter) under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all courts of justice whatever, and for all places and things whatever within the said territories and for all servants of the Government of India within the dominions of princes and states in alliance with Her Majesty ;

“and the laws and regulations so to be made by the Governor-General in Council shall control and supersede any laws and regulations in anywise repugnant thereto which shall have been made prior thereto by the Governors of the Presidencies of Fort St. George and Bombay respectively in Council, of the Governor or Lieutenant-Governor in Council of any presidency or other territory for which a Council may be appointed, with power to make laws and regulations under and by virtue of this Act.

“ Provided always, that the said Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of this Act,

“ or any of the provisions of the Government of India Act, 1833, and of the Government of India Act, 1853, and of the Government of India Act, 1854, which after the passing of this Act shall remain in force :

“ or any provisions of the Government of India Act, 1858, or of the Government of India Act, 1859.”

On this appeal,

*Sir H. Erle Richards, K.C.*, and *A. M. Dunne*, for the appellant, contended that the Appellate Bench of the Chief Court erred in holding, in accordance with the decision of the Full Bench of that Court, that

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section 41(b) of the Burma Town and Village Lands Act was *ultra vires* of the Lieutenant-Governor in Council and therefore invalid and not a bar to the respondent's suit being entertained by the Court. That might be the case if the section had taken away all remedy against the Government in claims by suit to rights over land; but, it was submitted, it did not do that, but merely took away the jurisdiction of the Civil Courts to try such a suit, without depriving the plaintiff of all remedy against the Government. The intention and meaning of section 65 of the Government of India Act, 1858 (21 & 22 Vict., c. 106), was merely that the rights generally of a subject should not be taken away, nor that his rights should always remain precisely similar to those he had against the East India Company. It allowed an alteration in particular modes of enforcing the rights of a subject, and left power to the Legislature to enact a different procedure for the prosecution of a particular right against the Government. When by the Bengal Rent Act (X of 1859) the right of suing for rent in the Civil Courts was taken away, it was not considered to be *ultra vires* on the part of the Government: see Field's Landlord and Tenant (2nd Ed., 1885), page 781, paragraph 445. Nor was it thought that section 65 of the Government of India Act, 1858, had been contravened by the passing of the Pensions Act (XXIII of 1871) which excluded the jurisdiction of the Civil Courts in certain cases; and apparently in the case of *Vasudev Sadashiv Modak v. The Collector of Ratnagiri* (1), that Act was not thought by this Board to be *ultra vires* of the Legislature. [THE LORD CHANCELLOR. The point was not raised in that case.] It was submitted that such a restricted meaning should not be given to section 65 of the Government of India Act of 1858

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as to make the alteration of the procedure or tribunal by which a remedy might be enforced by a subject beyond the power of the Legislature. Reference was made to the Government of India Act, 1833 (3 & 4 Will. IV., c. 85), the Preamble, and sections 1, 9, 10 and 43 : Government of India Act, 1858 (21 & 22 Vict., c. 106), sections 1, 2, 65, 66, 67, 68 : The India Councils Act, 1861 (24 & 25 Vict., c. 67), sections 22, 48. *The Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India* (1) in which the effect of section 65 of the Government of India Act, 1858, was considered, reference being made to pages 4, 5 and 7 [LORD ATKINSON referred to a passage at page 15 of the report of that case] and to the Burma Town and Village Lands Act (Burma IV of 1898), section 41(b).

*De Gruyther, K.C., E. U. Eddis and A. P. Pennell* for the respondent, were not heard.

The judgment of their Lordships was delivered by  
 Dec. 10. THE LORD CHANCELLOR. This appeal raises the question whether the Government of India could make a law the effect of which was to debar a Civil Court from entertaining a claim against the Government to any right over land. The question is obviously one of great importance. The proceedings out of which the appeal arises related to an ordinary dispute about the title to land, in the course of which there emerged a claim to damages for wrongful interference with the plaintiff's property. The only point which their Lordships have to decide is whether section 41(b) of the Act IV of 1898 (Burma) was validly enacted. A majority of the Judges of the Chief Court of Lower Burma have held that it was not, and the Secretary of State appeals against the judgment.

(1) (1861) 5 Bom. H. C. App. A. 1.



The section enacts that no Civil Court is to have jurisdiction to determine a claim to any right over land as against the Government. In the Court below it was held that this enactment was *ultra vires* as contravening a provision in section 65 of the Government of India Act, 1858, that there is to be the same remedy for the subject against the Government as there would have been against the East India Company.

Their Lordships are satisfied that a suit of this character would have lain against the Company. The reasons for so holding are fully explained in the judgment of Sir Barnes Peacock, C. J., in *The Peninsular and Oriental Company v. The Secretary of State for India*,<sup>(1)</sup> and the only question is whether it was competent for the Government of India to take away the existing right to sue in a Civil Court. This turns on the construction of the Act of 1858, and of the Indian Councils Act of 1861. Their Lordships have examined the provisions of the Acts of 13 Geo. III., c. 63, and 3 & 4 Wm. IV, c. 85, to which reference was made in the course of the argument, but these statutes do not appear to materially affect the argument.

The Act of 1858 declared that India was to be governed directly and in the name of the Crown, acting through a Secretary of State aided by a Council, and to him were transferred the powers formerly exercised by the Court of Directors and the Board of Control. The property of the old East India Company was vested in the Crown. The Secretary of State was given a quasi-corporate character to enable him to assert the rights and discharge the liabilities devolving on him as successor to the East India Company. The material words of section 65 enact that "the Secretary of State in Council shall and may sue

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and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company." Section 66 is a transitory provision making the Secretary of State in Council come in place of the Company in all proceedings pending at the commencement of the Act, without the necessity of a change of name. Section 67 is also a transitory provision making engagements of the Company entered into before the commencement of the Act binding on the Crown and enforceable against the Secretary of State in Council in the same manner and in the same Courts as they would have been in the case of the Company had the Act not passed.

By section 22 of the Indian Councils Act of 1861 the Governor-General in Council is given power to make laws in the manner provided, including power to repeal or amend existing laws, and including the making of laws for all Courts of Justice. But a proviso to this section enacts that there is to be no power to repeal or in any way affect, among other matters, any provision of the Government of India Act, 1858.

Their Lordships are of opinion that the effect of section 65 of the Act of 1858 was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in any case in which he could have similarly sued the East India Company. They think that the words cannot be construed in any different sense without reading into them a qualification which is not there, and which may well have been deliberately omitted. The section is not, like

the two which follow it, a merely transitory section. It appears, judging from the language employed, to have been inserted for the purpose of making it clear that the subject was to have the right of so suing and was to retain that right in the future, or at least until the British Parliament should take it away. It may well be that the Indian Government can legislate validly about the formalities of procedure so long as they preserve the substantial right of the subject to sue the Government in the Civil Courts like any other defendant, and do not violate the fundamental principle that the Secretary of State, even as representing the Crown, is to be in no position different from that of the old East India Company. But the question before their Lordships is not one of procedure. It is whether the Government of India can by legislation take away the right to proceed against it in a Civil Court in a case involving a right over land. Their Lordships have come to the clear conclusion that the language of section 65 of the Act of 1858 renders such legislation *ultra vires*.

It was suggested in the course of the argument for the appellant that a different view must have been taken by this Board in the case of *Vasudev Sadasiv Modak v. The Collector of Ratnagiri* (1). The answer is that no such point was raised for decision.

Their Lordships will humbly advise that the appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitor for the appellant: *The Solicitor, India Office.*

Solicitors for the respondent: *Sanderson, Adkin, Lee & Eddis.*

J. V. W.

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