

BOMBAY HIGH COURT

The Municipal Officer

Vs

Abdul Karim Fateh Mahomed

(E.T. Condy, C.S.I., C.J. Chandavarkar, J.)

07.07.1903

JUDGMENT

E.T. Condy, C.S.I., Acting C.J.

1. The main question before us is whether the Civil Court of the Resident at Aden, as constituted by Act II of 1864, is subject to the superintendence of the High Court of Bombay within the meaning of Clause 13 of the Letters Patent, dated 28th December, 1865. If it is, then the High Court has power to remove the present suit from the Court of the Resident and to try and determine that suit, and it is dear on the admitted facts that for the purposes of justice it is proper that this should be done if the High Court has that power. In *Pirbhai v. B.B. and C.I. Railway Co^l*. Mr. Justice Green held that the Bombay Court of Small Causes, as constituted under Act IX of 1850 (amended by Act XXVI of 1864, Section 7), must be considered to be subject to the superintendence of the High Court for the following reasons: Subject to the conditions prescribed in Section 54 of Act IX of 1850, the High Court had authority under that section to remove causes from the Small Cause Court and itself to try and determine them. By Section 41 of the same Act, any general rules for regulating the practice and proceedings of the Small Cause Court made and issued by the Judges of that Court were to be sent to the High Court for approval.

2. Then there was the power of the High Court to prohibit the Bombay Court of Small Causes from proceeding where it was acting without jurisdiction or in excess of jurisdiction...and there was the power of reserving questions of law or equity for the opinion of the High Court, and the obligation to do so in oases above the value of Rs. 500, on the application of either of the parties such a power of reference was termed by Mr. Justice Phear in the matter of John Thomson (1870) 6 Beng. L.R. 180 a " modified form of appeal."

3. For the above reasons Mr. Justice Green held that the Bombay Court of Small Causes, though not subject in all respects, or perhaps generally, to the superintendence of the High Court, nor, strictly speaking, subject to its appellate jurisdiction at all, was so far subject to its

superintendence as to give the latter Court, under Clause 13 of the Letters Patent, power to remove, and try and determine any suit pending in the former Court, when the High Court for purposes of justice should think proper to do so.

4. The learned Advocate-General, who appeared before us against the rule, referred Section 6 of the present Presidency Small Cause Courts Act (XV of 1882) as showing that the Legislature deemed it necessary by special enactment to declare the Small Cause Court subject to the superintendence of the High Court within the meaning of the Letters Patent. But this may well have been for the sake of greater caution, and it is quite possible that the Legislature in framing the Presidency Small Cause Courts Act of 1883 had in mind the decision of Mr. Justice Green, which was delivered in 1871. For instance, Section 6 of Act XV of 1882 declares that the High Court shall have, in respect of the Small Cause Court, the same powers as it has under the Charter Act in respect of Courts subject to its appellate jurisdiction; and these powers include the power to make and issue general rules for regulating the practice and proceedings, the same power being given by Section 9 of the Act.

5. Act II of 1864 was passed after the Charter Act of 1861 and after the original Letters Patent of 1862. Not only is it stated in the preamble of Act II of 1864 that it is expedient to provide for the superintendence or revision of certain of the judgments and proceedings of the Resident at Aden by the High Court at Bombay, but the Act provides in Section 31 that the High Court of Bombay shall have power to make and issue general rules for regulating the practice and proceedings of the Court of the Resident, and also to frame forms, &c., all almost in the same language as is to be found in Section 15 of the Charter Act. It would seem therefore that the Legislature expressly intended that the High Court of Bombay should have superintendence over the Court of the Resident. No doubt the High Court of Bombay is not the "High Court" at Aden for such purposes as are governed by the definition of the High Court in the General Clauses Act; for it is not the highest Court of appeal. There is no appeal from decisions or orders, civil or criminal, of the Resident (Sections 3 and 29 of Act II of 1864). But nevertheless the High Court may have superintendence over the Resident's Court; and it is clear from Sections 8 to 13 of the Act II of 1864 that in certain cases a litigant in the Resident's Court has of right what is practically an appeal to the High Court. Mr. Soott would have us read Clause 13 of the Letters Patent and Section 15 of the Charter Act, together so strictly that the High Court can have no superintendence over a Court, unless an appeal properly so called lies from the decisions of such Court to the High Court. But that, as remarked by the present Chief Justice in *Bhagwandas v. Jedu*² would be to apply a narrow meaning not warranted by the Act.

6. For these reasons I think that this Court has jurisdiction under Clause 13 of the Letters Patent; and I would make the rule absolute. Costs to abide the result.

Chandavabkar, J.

7. This is an application made by Abdul Karim Fateh Mahomed under Section 13 of the Amended Letters Patent of 1865 for a transfer to this Court of the suit filed by the applicant in the Resident's Court at Aden against the opponent, the Municipal Officer at Aden. The ground of the application is that the opponent has in his written statement in the suit sought to justify the act complained of in the plaint as one done under the orders of the Resident.

8. The application is opposed by the learned Advocate-General, appearing for the opponent, on two grounds: first, that the Resident's Court is not subject to the superintendence of this Court within the meaning of Section 13 of the Amended Letters Patent of 1865, and second, that on the merits this is not a proper case for transfer.

9. Dealing first with the preliminary objection to the jurisdiction of this Court, it is clear from the preamble of Act No. II of 1864 (An Act to provide for the administration of civil and criminal justice at Aden) that one of the objects with which it was passed was "to provide for the superintendence or revision of certain" of the judgments and proceedings of the Resident's Court by this Court. It is contended, however, that the power of superintendents given by the Act to this Court is not a judicial but a purely ministerial power. It is true that according to Section 8 of the Act no appeal lies to this Court from any decision or order of the Resident; but the power given to this Court to hear and pass judgments in certain cases mentioned in the said Section when those cases are referred to this Court as prescribed thereby is undoubtedly a judicial, not a purely ministerial power. According to Section 8, in the trial of any suit in which the claim shall not exceed one thousand rupees in value, the Resident may, either of his own motion or on the application of any of the parties, refer, to this Court any question of law, or of usage having the force of law, or of the construction of a document affecting the merits of the decision, when he entertains reasonable doubt on the question. In the trial of any suit in which the claim exceeds one thousand rupees in value, the Resident of his own motion may, and on the application of any of the parties, shall refer "for the decision" of this Court any question of fact or of law, or of usage having the force of law, or of the construction of the document affecting the merits of the decision. Cases so referred to this Court have to be heard, under Section 9 by two or more Judges and this Court has to give "Judgment in every case." Under Section 11, the parties to the case are entitled to appear and be heard in this Court in person or by a pleader. According to Section 12, "the High Court, when it has heard and considered the case, shall transmit to the Resident a copy of its judgment under the seal of the Court and the signature of the Registrar." The combined effect of all these sections is that when this Court acts on a reference by the Resident, it acts as a Court superintending judicially certain judgments and proceedings of the Resident. It is true that this Court cannot of itself under the Act pass a decree in any case referred to it; the duty of

disposing of the case is cast by Section 12 of the Act on the Resident; but, according to that section, the Resident has to dispose of the case "conformably to the decision of the High Court." It is this Court which in effect decides the case, it is the tribunal which gives judgment and, according to Section 9, that judgment is an order of the Court.

10. But it was urged that in any case the Resident's Court was not within the meaning of Section 13 of the Amended Letters Patent of 1865, because, it was argued, a Court subject to this Court's "superintendence" must be a Court, subject, according to Section 15 of the Charter Act, to the appellate jurisdiction of this Court. Section 13 of the Letters Patent ordains: "That the said High Court of Judicature at Bombay shall have power to remove, and to try and determine as a Court of Extraordinary Original Jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Presidency of Bombay, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court." Section 15 of the Charter Act enacts that "each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction." The contention of the learned Advocate-General before us is that) Section 13 of the Letters Patent) must be read with Section 15 of the Charter Act, and a Court contemplated as subject to this Court's superintendence in the former is a Court subject to this Court's appellate jurisdiction as pointed out in the latter, and no other. The difficulty of accepting that view is that the Letters Patent of 1865 were granted, as the preamble shows, for the express purpose of conferring additional powers on this Court. Section 15 of the Charter Act dealt with Courts which might be subject to the appellate jurisdiction and brought them within the superintendence of this Court: but that it was not meant to exhaust those Courts as the only Courts subject to this Court's superintendence is apparent from Section 16 of the Letters Patent of 1865, which ordain that "the said High Court of Judicature at Bombay shall be a Court of appeal from the Civil Courts of the Presidency of Bombay, and from all other Courts subject to its superintendence." The result is that, as pointed out by Green, J., in *Pirbhai Khimji v. B.B. & C.I. Ry. Co*³. taking the Act and the Letters Patent together, "the High Court has superintendence where it has appellate jurisdiction, and has appellate jurisdiction where it has superintendence." The view taken by Green, J., in the case just cited was this. He said: "Section 15 of the Charter Act does not, in my opinion, limit the superintendence of the High Court to the Courts which may be subject to its appellate jurisdiction; it only says that over such Courts the High Court shall have superintendence, not that it shall have superintendence over those Courts which are subject to its appellate jurisdiction, and over no others." This view, I think, is borne out by Act II of 1864, which provides for the administration of civil and criminal justice at Aden. The Charter Act was passed in 1861; Act II of 1864 brought the Resident's Court at Aden under the

superintendence of this Court for certain purposes and in certain matters without giving any appellate jurisdiction to the latter over the former. Before the Letters Patent of 1865, there was then a Court subject to this Court's superintendence, but not subject to its appellate jurisdiction. Section 13 of the Letters Patent was obviously meant to include such Courts and not merely those referred to in Section 15 of the Charter Act. Even if we assume that the Courts referred to in Section 13 of the Letters Patent are Courts subject to the appellate jurisdiction of this Court and no other, I do not see any good ground for restricting the term "appellate jurisdiction" to its strict and technical sense. Where there is an appeal to the Court allowed by any law or regulation, in hearing the appeal it exercises its appellate jurisdiction; but the same jurisdiction may be exercised and is, as a matter of fact, exercised for all practical purposes where the Court decides a suit referred to it by law on Questions both of fact and of law. That was the view taken by Phear and Mitter, JJ., in *John Thomson*, (1870) 6 Beng. L.R. 180(Supra) where they held that a reference was "a modified form of appeal." That decision was noticed in terms of approval by Green, J. in *Pirbhai v. B.B. & C.I. Ry. Co.* and I see no reason to dissent from the view there taken. This view derives further support from the ruling of this Court in *Bhagwandas Narotamdas v. Jedu valad Babu and Ors.* (1902) 4 Bom. L.R. 970 where the present Chief Justice held that the term "appellate jurisdiction" in Section 15 of the Charter Act should be construed to include the power of revision.

11. But it was urged before us that this last ruling is opposed to the decision of a Full Bench of this Court in *Khoja Shivji v. Husham Gulam*⁴ and the remarks of Sargent, C.J., in his judgment in that case that "a power of revision is not an incident of appellate powers, but, on the contrary, can only be exercised where there is no appeal" were relied upon. But the conflict between the two decisions is, in my opinion more apparent than real. In the Full Bench case the fact was, as pointed out by Farran, J., in his judgment, that by an Order in Council the Civil Courts in Zanzibar were, for merely jurisdictional purposes, assimilated to the area of a Bombay District "in order that the application of the Procedure Acts" to those Courts "may be exactly denned." And the exact definition was, among other things, that this Court should be a Court of appeal according to the Civil Procedure Code from the decisions of the Zanzibar Court. The inclusion of the power to hear appeals under the Civil Procedure Code necessarily implied the exclusion of the power to act in revision under Section 622 of that Code. That was the ratio decidendi in the Full Bench case; but that reasoning can have no bearing on the question whether the term "appellate jurisdiction," as used, in the Charter Act and the Letters Patent, is not large enough to mean a jurisdiction of superintendence.

12. It follows then, from these considerations, that the Resident's Court at Aden is a Court subject to the superintendence of this Court within the meaning of Section 13 of the Amended Letters Patent of 1865. The fact that the superintendence is of a partial and limited character cannot

affect the question. There are some Courts subject to the appellate jurisdiction of a High Court in certain cases only, appeals in other cases being allowed by law direct to the Privy Council. As pointed out by Green, J., in the Bombay case above cited and by Phear, J., in the case already mentioned, the existence of appellate jurisdiction, though limited, is sufficient to bring a Court within the superintendence of the High Court. A fortiori, the power of interference given by Act II of 1864 to this Court on a reference, though limited to certain suits, does not make the Resident's Court less a Court subject to this Court's superintendence.

13. The preliminary objection must, therefore, be overruled. On the merits, it has not been denied before us that the act complained of in the plaint of the applicant was done under the Resident's orders. If it was so done, the Resident is practically interested in the suit. We have no doubt that that circumstance is not likely to weigh with him in trying and deciding the case; but the decided cases show that if a party has reasonable grounds for apprehending that the Judge who is to try his case is likely to be biased, he is entitled to a transfer of the case from that Judge. It is true that the applicant can have the suit referred to this Court under Act II of 1864; but I think that upon the whole the proper course to adopt is to order the transfer prayed for. Costs of this application to be costs in the cause.

Cases Referred.

1(1871) 8 Bom. 4214

2(1902) 4 Bom. L.R. 970 p. 971

3(1871) 8 Bom. H.C.R. 59, 60

4(1895) 20 Bom. 480