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plaintiff's claim, not merely apparent on the plaint, but which may be elicited by questioning the plaintiff."

We are, therefore, equally bound to dismiss the claim whenever it appears either that there is no cause of action, or that it is barred by limitation.

We, therefore, confirm the decree of the court below, with costs on the special appellant.

Decree confirmed.

July 28.

Miscellaneous Civil Application.

KA'SHINA'TH VITHAL, Vakíl, v. DA'JI GOVIND, First Class Subordinate Judge, Dhuliá.

Contempt of Court—Procedure—Crim. Proc. Code, Sec. 163—*Act I. of* 1846.

When a Civil Court omitted (as directed by Sec. 163 of the Code of Criminal Procedure) to call upon a person who was charged with contempt of court to make any statement he might wish to make in his defence, it was held that this irregularity was fatal to the order, and that the High Court would exercise its extraordinary jurisdiction, and reverse an order so made.

THIS was an application for the exercise of this court's extraordinary civil jurisdiction.

The facts appear from the judgment of the court.

The application was heard by GIBBS and MELVILL, JJ., on the 14th of July 1870.

Nánábhái Haridás and *Bhaíravnáth Mangesh* appeared for the petitioner.

No one appeared on the other side.

GIBBS, J., said:—In this case Káshináth Vithal, a Pleader duly authorised to practise in the courts of the Khándesh district, appeals to us, under the extraordinary jurisdiction of this court, to set aside an order or sentence of the First Class Subordinate Judge of Dhuliá, Dáji Govind, who fined him Rs. 5, and which sentence or order was confirmed in appeal by the District Judge. The ground on which the case comes before us is that the First Class Subordinate

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Judge and the District Judge erred in law in fining the petitioner in the manner they did. We called for the record and proceedings, and heard the petitioner by his vakíl, Mr. Nánábhái Haridás. No one appeared in support of the order, and we have, therefore, to consider the matter *ex parte*.

It appears from the proceedings that the Pleader, while conducting a case before the Subordinate Judge, pressed a question on the attention of the court, and desired that it might be put. The Subordinate Judge refused to put the question. Instead of being satisfied, the petitioner reiterated his demand, and insisted on a note of it being placed on record. The Subordinate Judge refused to do this, and there and then fined the Pleader Rs. 5, and in the proceedings stated that he did so for making a *takrár* (objection) in court, under the provisions of Act I. of 1846. The Honorable Mr. Hobart, the District Judge, to whom an appeal was made, was of opinion that the Subordinate Judge was wrong in fining the petitioner under Act I. of 1846. He states in his finding, after having arrived at the conclusion that the circumstances mentioned by the Subordinate Judge constituted an insult and a contempt, that "to continue to urge that the question was a proper one, after the decision of the court that it was not, was of the nature of at least an interruption to the proceedings of the court, and was punishable under Sec. 228 of the Penal Code; and I must take it, for the purpose of this appeal, that the appellant acted as stated in the Subordinate Judge's order, and the reasons for passing the order. I think the appellant rendered himself liable to fine for having so acted." Mr. Hobart then notices that the Subordinate Judge did not proceed regularly in the infliction of this fine. He ought, he said, to have adopted the procedure prescribed in Sec. 163 of the Criminal Procedure Code, and not to have omitted to record any statement the offender might have made. He did not record that he called for any statement from him; but, as no satisfactory explanation was offered in the appeal of the appellant's conduct, he considered that Sec. 439 of the Criminal Procedure Code prevented his setting aside the proceedings, as there did not appear to have been a failure of justice.

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The above are the facts of the case.

I will now proceed to consider the order of the Subordinate Judge. Referring to Act I. of 1846, we find that the only section to which we need turn our attention is the 10th, which says—"And it is hereby enacted that whenever a Pleader has rendered himself liable to a fine in the court of a Principal Sudder Ameen [who corresponds with the present First Class Subordinate Judge], or Sudder Ameen, it shall be competent to such Principal Sudder Ameen, or Sudder Ameen, to impose such fine: Provided that an appeal from all orders imposing such fines shall lie to the Zilla or City Judge, whose decision thereon shall be final." We have, therefore, to see under what circumstances a Pleader may render himself liable to a fine in the court of a First Class Subordinate Judge; and this leads us to refer to the only Regulation regarding Pleaders, namely, Reg. II. of 1827, Ch. VI. We there find that the only circumstances under which a Pleader can be fined are mentioned in Sec. 50, cl. 3, Sec. 51, cl. 2, and Sec. 54, cl. 1. Sec. 50, cl. 3, says: "If after receiving the retaining fee a Pleader shall engage with, or act for, the other party, or refuse or omit to act on behalf of his client, he may be punished by a fine not exceeding Rupees five hundred." Sec. 51, cl. 2, enacts that "it shall be incumbent on a Pleader, at the time of receiving any accounts, writings, or documents from his client, to give a written receipt for them, and to restore them when required, under penalty of a fine not exceeding Rupees one hundred." Sec. 54, cl. 1, provides: "If a Pleader is unable to attend the court in consequence of indisposition or other necessary cause, he shall notify the same to the court in writing.....and any Pleader absenting himself without written notice as above prescribed may be punished by fine not exceeding Rupees one hundred." None of these sections apply to the present case; and, therefore, it appears that this Pleader has not rendered himself liable to a fine under Act I. of 1846, and the order of the Subordinate Judge was, therefore, wrong.

I now go to the order of the District Judge. He sees the error of the Subordinate Judge. He takes, and very properly,

the facts as stated by that officer, and finds that they constitute an offence under Sec. 228 of the Indian Penal Code. This section provides that "whoever intentionally offers any insult or causes any interruption to any public servant while such public servant is sitting in any stage of a judicial proceeding shall be punished....." Mr. Hobart was of opinion that the case, as put by the Subordinate Judge in the short proceedings which he drew up, came within these words; and he declined to interfere with the fine.

A difficulty, however, arose in the District Judge's mind. The proceedings before the Subordinate Judge were not conducted according to Sec. 163 of the Criminal Procedure Code; but the District Judge considered Sec. 439 of that Code prevented his interfering with the matter. This section runs thus:—"No trial held in any Criminal Court shall be set aside, and no judgment passed by any Criminal Court shall be reversed, either on appeal or otherwise, for any irregularity in the proceedings of the trial, unless such irregularity have occasioned a failure of justice." The irregularity in this case was the omission to call upon the accused to make a statement or put in a defence, so that even in a Criminal Court it would be a grave error; but the proceedings were in a Civil Court, and the section does not apply.

I now refer to Sec. 163; it runs thus:—"When any such offence as is described in Section 175, 178, 179, 180, or 228 of the Indian Penal Code is committed in the view or presence of any Civil, Criminal, or Revenue Court, it shall be competent to such Court to cause the offender, whether he be a European British subject or not, to be detained in custody, and, at any time before the rising of the Court on the same day, to take cognisance of the offence, and to adjudge the offender to punishment by fine not exceeding two hundred rupees, or by imprisonment in the Civil Jail for a period not exceeding one month, unless such fine be sooner paid." The order passed under this section is appealable, under Sec. 413, to the District Judge, whose order is final. The section then goes on to say that "in every such case the Court shall record the facts constituting the con-

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tempt, with any statement the offender may make, as well as the finding and sentence." No special appeal lies to us. The law makes the decision of the District Judge final, but we have a power, under Reg. II. of 1827, Sec. v., cl. 2, to call for the record of any case, and pass such order as we think right, and it is a question whether we should interfere in the present case. We must take the record as drawn up by the Subordinate Judge before whom the contempt was committed, and then see if there is reason to interfere. There is a somewhat analogous example in the action taken by the Privy Council in such matters, which may guide us.

We find this the highest court of appeal has lately had two cases of this nature before it. The orders in both those cases were passed by Courts of Record, which the court of the Subordinate Judge is not; and it is a much more delicate matter to deal with an order of a Court of Record than of a Subordinate Judge in this country. The first case is that of *Pollard* v. *The Chief Justice of Hongkong* (*a*), which was referred to by Mr. Nánábhái in course of his argument. There the Lords of the Privy Council reported that "their Lordships do agree humbly to report to your Majesty that, in their judgment, no person should be punished for contempt of court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given to him, and that in the present case their Lordships are not satisfied that a distinct charge of the offence was stated, with an offer to hear the answer thereto, before sentence was passed." This is almost *verbatim* the course laid down to be followed in Ch. X. of the Code of Criminal Procedure. Their Lordships went on to observe that they were not satisfied that any of the acts imputed to Mr. Pollard amounted to a contempt of court, or legally constituted an offence, and they, therefore, recommended Her Majesty to remit the fine imposed upon him.

The other case is that of *McDermott* v. *The Judges of British Guiana* (*b*). An important point was there argued, whether the Colonial Supreme Court was a Court of Record or

(*a*) Law Rep. 2 P. C. Ca. 106. (*b*) Ibid. 341.

not, and it was decided that it was. Lord Chelmsford, in giving judgment, notices several cases of contempt of court which had been before the Privy Council (but not, apparently, that of Pollard). In noticing the case of *Rainy* v. *The Justices of Sierra Leone* (*c*), his Lordship said that "it had been decided that it (the Recorder's court) is a Court of Record, and that the law must be considered the same there as in this country, and, therefore, the orders made by the court, in the exercise of its discretion, imposing fines for contempts, are conclusive, and cannot be questioned by another court; and we do not consider that there is any remedy by petition to the Judicial Committee to review the propriety of such orders." This at first sight appears contrary to the ruling in Pollard's case; but the two cases are not really antagonistic, for Lord Chelmsford goes on to observe that "not a single case is to be found where there has been a committal by one of the Colonial Courts for contempt, where it appeared clearly upon the face of the order that the party had committed a contempt, that he had been duly summoned, and that the punishment awarded for the contempt was an appropriate one, in which this Committee has ever entertained an appeal against an order of this description." In noticing the case of *Smith* v. *The Justices of Sierra Leone* (*d*), Lord Chelmsford said "there was an order of the Recorder's court of Sierra Leone disbarring and striking off from the rolls a practitioner of that court for alleged contumelious conduct. But, in addition to this order, there was a distinct and separate one, ordering Mr. Smith to be fined and imprisoned for the same alleged contempt. Now, the mode in which the Committee dealt with those orders brings out the distinction as to the right to appeal in these cases in the clearest manner. Mr. Smith's petition was presented through the Secretary of State, and, after considerable delay, it was, by an Order in Council, referred to the Judicial Committee. Their Lordships in that case entertained the petition against the order for disbarring Mr. Smith and striking him off the roll, because they held that that was not an appropriate

(*c*) 8 Moo. P. C. 47. (*d*) 3 Moo. P. C. 361.

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punishment for a contempt of court. They took no notice of the order for imprisonment, which they seemed to consider to be in the same category with the fine; but with regard to the fine imposed by the court for contempt they held that they had no jurisdiction over it, and that they could not entertain the appeal." So the principle laid down by the Privy Council is clear, that no appeal lies from an order of a Court of Record punishing for contempt; but, nevertheless, the Privy Council will interfere where on the face of the proceedings it appears that there was no contempt, or that the accused was not called on to answer a charge specifically made, or that the punishment was not suitable for the offence.

Applying the principle so laid down by the Privy Council, we shall be justified in exercising our extraordinary jurisdiction, and interfering with the order of the Subordinate Judge in this case. If we had found here that the accused had committed contempt of court, and had been called up to state his defence, we should not have interfered; but as this latter procedure has been omitted, this is sufficient in itself to require us to reverse the order, and direct the fine to be repaid to the accused Pleader: and this will be the order of the court.

MELVILL, J., concurred.

Nánábhái Haridás:—Would your Lordships express any opinion as to whether a court is justified in dealing with a Pleader under Sec. 228 of the Indian Penal Code for the offence as stated by the Subordinate Judge in this case?

GIBBS, J.:—We are not called upon to decide that point.

Order reversed.