APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

1906. *June* 25.

NARAYAN SHANKAR (ORIGINAL DEFENDANT 1), APPLICANT, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL PLAINTIFF), OPPONENT.*

Civil Procedure Code (Act XIV of 1882), section 17 clause (c)—One of the defendants not residing within the jurisdiction of the Court—Leave given after institution of the suit.

Where one out of three defendants did not reside within the jurisdiction of the Court and leave to sue was given after the institution of the suit,

Held, that under section 17 clause (*c*) of the Civil Procedure Code (Act XIV of 1882) it was not necessary that the leave of the Court must have been first given. The leave, though subsequent, was good.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of C. A. Kincaid, District Judge of Poona, in original suit No. 3 of 1905.

One Narayan Shankar Rajvade entered into an agreement with the Secretary of State for India in Council for being trained up in the Imperial Forest School at Dehra Dun as a Government stipendiary forest student. Under the said agreement, which was dated the 10th January 1903 and which was executed at the village of Wani, Táluka Dindori in the Násik District, the Secretary of State for India engaged to educate Narayan Shankar Rajvade at the said school in all matters relating to forest science, forest work and forest administration and also to pay him Rs. 40 per month, and Narayan Shankar Rajvade undertook as the principal obligor with two sureties, namely, Vitthal Khanderav Devdhar and Vinayak Ganesh Apte, both residing at Poona, to indemnify the Secretary of State against losses which he might suffer by reason of his (Narayan's) giving cause for dismissal from the school and further to pay to the Secretary of State all sums spent by him in respect of his (Narayan's) education at the school. Narayan attended the school for some months and, by a resolution passed

* Application No. 325 of 1905 under extraordinary jurisdiction.

by a meeting of the officers of the school on the 3rd December 1903, he was removed from the school on account of his insufficient diligence and promise. The Secretary of State, thereupon, brought a suit against him as defendant 1 and his two sureties as defendants 2 and 3 in the District Court at Poona for the recovery of Rs. 505-14-10 alleged to have been spent for the education of defendant 1 at Dehra Dun. The suit was instituted on the 3rd February 1905.

Defendant 1 replied on the 15th March 1905 that he was removed from the school but not for insufficient diligence and promise as alleged in the plaint, that the District Court at Poona had no jurisdiction to entertain the suit inasmuch as (1) the said agreement was not entered into within the jurisdiction of that Court, (2) the defendant was actually and voluntarily residing at Dehra Dun and (3) the money was payable under the contract at that place.

The pleas of defendants 2 and 3 were immaterial.

On the said pleadings issues were framed in June 1905, and subsequently, on the 15th July 1905, the plaintiff applied for leave to institute the suit under section 17 clause (*c*) of the Civil Procedure Code (Act XIV of 1882) on the ground that two of the defendants, namely, defendants 2 and 3 lived within the jurisdiction of the Court. On the 29th August 1905, the leave sought for was granted.

Defendant 1, thereupon, applied under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) for setting aside the order granting the said leave on the grounds that the leave should have been asked for prior to the institution of the suit, that the Court had no jurisdiction to grant leave after the issues were framed and that the defendant having expressly pleaded want of jurisdiction in his written statement there was no acquiescence on his part in the institution of the suit.

A *rule nisi* having been issued requiring the plaintiff to show cause why the said order should not be set aside,

P. P. Khare appeared for the applicant (defendant 1) in support of the rule:—We executed the agreement at Wani in the

1906.

NARAYAN SHANKAR v. SECRETARY OF STATE.

Násik District and are at present residing and voluntarily working for gain at Dehra Dun where we have secured Government employment. The District Court at Poona had, therefore, no jurisdiction to entertain the suit against us. The plaintiff knew full well that we were living at Dehra Dun because in the plaint we are described as living at that place and the summons was served upon us there. The plaintiff should have therefore applied for leave to institute the suit at Poona at the very commencement under section 17 clause (*c*) of the Civil Procedure Code. There is a similar provision in clause 12 of the Letters Patent and it has been held that such leave must be obtained prior to the institution of the suit: *DeSouza* v. *Coles*(1), *Hadjee Ismail* v. *Hadjee Mahomed*(2), *Rampurtab* v. *Premsukh*(3). We, therefore, submit that the District Court at Poona had no jurisdiction to grant the leave. The order granting the leave should be set aside and the suit should be dismissed.

M. B. Chaubal (Government Pleader) appeared for the opponent (plaintiff) to show cause:—The language of clause 12 of the Letters Patent makes it clear that the leave must be obtained prior to the institution of the suit but it is not so under section 17 clause (*c*) of the Civil Procedure Code. The latter part of the proviso deals with the acquiescence of the defendant in the institution of the suit. Such acquiescence can only arise after the institution of the suit and not prior to it. Further, the defendant has not complied with the provisions of section 20 of the Civil Procedure Code, and so he must be taken to have acquiesced in the institution of the suit. Therefore he cannot now plead want of jurisdiction: *Ramappa* v. *Ganpat*(4). The permission requisite for suing or being sued under section 30 of the Civil Procedure Code can be obtained subsequent to the institution of the suit: *Fernandez* v. *Rodrigues*(5), *Chennu Menon* v. *Krishnan*(6).

A certificate under the Pensions Act and a conciliator's certificate under the Dekkhan Agriculturists' Relief Act are allowed

(1) (1868) 3 Mad. H. C. R. 384.
(2) (1874) 13 Beng. L. R. 91.
(3) (1890) 15 Bom. 93.
(4) (1905) 7 Bom. L. R. 289.
(5) (1897) 21 Bom. 784.
(6) (1901) 25 Mad. 399.

to be produced after the institution of the suit. So by analogy the leave to sue may be obtained after the suit is launched.

Assuming that the order granting leave is wrong, it is a mistake in law and it cannot be interfered with under section 622 of the Civil Procedure Code.

P. P. Khare, in reply:—Although the word "first" which occurs in clause 12 of the Letters Patent is wanting in clause (*c*) section 17 of the Civil Procedure Code, still the language of the section clearly shows that the institution of the suit must be subsequent to the grant of the leave. As regards analogy of section 30 of the Code the rulings in *Jan Ali* v. *Ram Nath Mundul*[1] and *Lutifunnissa Bibi* v. *Nazirun Bibi*[2] show that permission under section 30 must be obtained prior to the institution of the suit.

Cases of certificates under the Pensions Act and the Dekkhan Agriculturists' Relief Act bear no analogy. The certificates referred to in those Acts are to be obtained from the Collector and the conciliator respectively, that is, from persons other than the Judge himself, while the leave contemplated under section 17 clause (*c*) of the Code is to be obtained from the Judge, that is, the Court in which the suit is to be instituted.

When a Ruling Chief is to be sued in a British Court, permission of the Governor General is necessary under section 433 of the Civil Procedure Code. It has been held in *Chandulal* v. *Awad bin Umar Sultan*[3] that such permission must be obtained prior to the institution of the suit. This case deals with the question of jurisdiction and the present case also raises the same question.

As regards acquiescence under section 20 of the Code, we contend that the question of jurisdiction was raised by us at the very outset in our written statement. The plaintiff was fully aware of this and issues were subsequently raised. Although a regular application was not made under section 20, still in fact all the requisites had been substantially complied with. Therefore even now we should be allowed to apply under section 20

(1) (1881) 8 Cal. 32. (2) (1884) 11 Cal. 33.

(3) (1896) 21 Bom. 351.

1906.

NARAYAN SHANKAR v. SECRETARY OF STATE.

for the convenience of the parties. The ends of justice will be best served by instituting the suit in some Court having jurisdiction at Dehra Dun as it will be necessary for us to examine witnesses residing at that place.

In granting the leave the Court at Poona has taken cognizance of the suit which was not within its jurisdiction. The Court has thus committed error in exercising jurisdiction and its order can be interfered with under section 622 of the Civil Procedure Code.

JENKINS, C. J.:—A suit has been brought against three defendants in the District Court of Poona.

Two of these defendants at the time of the institution of the suit were actually and voluntarily residing within the local limits of the Poona Court.

The third was not.

Since the institution of the suit, an application has been made on behalf of the plaintiff for leave under section 17(*c*) of the Civil Procedure Code.

That leave was granted and it is to the order granting that leave that exception is now taken by the defendant affected thereby. He maintains that leave could not be granted after the institution of the suit.

No doubt, the words of the section are susceptible of that meaning, but the concluding provision as to acquiescence makes it clear that a defect at the institution can be subsequently cured, for, obviously, there could be no acquiescence at the time of the institution. And so we think, there is no necessity for reading the words of the provision in such a way as to say that the leave of the Court must have been first given. Such a conclusion would lead to great inconvenience, and possibly hardship, as in cases where the plaintiff honestly and reasonably believed that all the defendants were risiding within the jurisdiction. Therefore, we hold that the leave, though subsequent, was good and the rule must be discharged with costs.

Rule discharged.

G. B. R.