

APPELLATE CIVIL.

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

NANA BIN ABA (ORIGINAL PLAINTIFF), APPLICANT, v. SHEKU
BIN ANDU AND OTHERS (ORIGINAL DEFENDANTS), OPPONENTS.*

1908
January 28.

*Mámlatdárs' Courts Act (Bombay Act II of 1906), sections 7 and 23(1)—
Mámlatdárs' Courts Act (Bombay Act III of 1876), section 5(2)—
General Clauses Act (I of 1904), section 7—Repeal of the Mámlatdárs'
Courts Act (Bombay Act III of 1876) by the Mámlatdárs' Courts Act
Bombay Act II of 1906)—Suit commenced under the former Act—Effect
of the latter Act.*

The plaintiff filed a suit on the 24th February 1906 under the Mámlatdárs' Courts Act III of 1876.

* Application No 179 of 1907 under extraordinary jurisdiction.

(1) Sections 7 and 23 of the Mámlatdárs' Courts Act (Bombay Act II of 1906) are as follows:—

7. All suits under this Act shall be commenced by a plaint, which shall be presented to the Mámlatdár in open Court by the plaintiff, and which shall contain the following particulars:—

(a) The name, age, religion, caste, profession and place of abode of the plaintiff;

(b) The name, age, religion, caste, profession and place of abode of the defendant;

(c) The nature and situation of the property of which possession or use is sought, or the nature of the injunction to be granted, as the case may be;

(d) The date on which the cause of action arose;

(e) The circumstances out of which the cause of action arose; and

(f) A list of the plaintiff's documents, if any, and of his witnesses, if any, shewing what evidence is required from each witness, and whether such witnesses are to be summoned to attend, or whether the plaintiff will produce them on the day and at the place to be fixed under section 14.

23. (1) There shall be no appeal from any order passed by a Mámlatdár under this Act.

(2) But the Collector may call for and examine the record of any suit under this Act, and if he considers that any proceeding, finding or order in such suit is illegal or improper, may, after due notice to the parties, pass such order thereon, not inconsistent with this Act, as he thinks fit.

(3) Where the Collector takes any proceedings under this Act he shall be deemed to be a Court under this Act.

(2) Section 5 of the Mámlatdárs' Courts Act (Bombay Act III of 1876) was as follows:—

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On the 29th October 1906 the Mámlatdárs' Courts Act II of 190³ came into operation, and by section 2 of that Act the Mámlatdárs' Courts Act III of 1876 was repealed.

On 26th January 1907 the Mámlatdár dismissed the suit with costs.

On the 12th March 1907 the plaintiff, under section 23 of the Mámlatdárs' Courts Act II of 1906, presented an application for revision to the Collector.

Under the Mámlatdárs' Courts Act III of 1876 the Collector had no power of revision.

Held, that having regard to the wards of the Bombay General Clauses Act the Collector had no jurisdiction: to hold otherwise would be to affect a legal proceeding in respect of a right which had accrued under the old Act.

To disturb an existing right of appeal is not a mere alteration in procedure.

Gulam Rasul v. Balu Sayaji⁽³⁾ and *Vajechand Ramji v. Nandram Daluram*⁽⁴⁾, not followed.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of L. J. Mountford, Collector of Sholápur, in a revisional application against the decree of D. N. Bhosekar, Mámlatdár of Bársi in the Solágur District, in possessory suit No. 12 of 1906.

On the 24th February 1906 the plaintiff brought a possessory suit, No. 12 of 1906, against the defendants in the Court of the Mámlatdár of Bársi in the Sholápur District, under the pro-

All suits under this Act shall be commenced by a plaint, which shall be presented to the Mámlatdár in open Court by the plaintiff, and which shall contain the following particulars:—

- (1) The name, religion, caste, profession and place of abode of the plaintiff;
- (2) The name, religions, caste, profession and place of abode of the defendant;
- (3) The nature and situation of the property of which, or of the profits of which, possession or use is sought, or the nature of the injunction to be granted, as the case may be;
- (4) The date on which the cause of action arose;
- (5) The circumstances out of which the cause of action arose.
- (6) A list of the plaintiff's documents, if any, or of his witnesses, and what evidence is required from each witness, and whether such witnesses are to be summoned to attend, or whether the plaintiff will produce them on the day and at the place to be appointed according to section 11 of this Act.

(3) (1907) 9 Bom. L. R. 527.

(4) (1907) 31 Bom. 545.

visions of the Mámílatdárs' Courts Act (Bombay Act III of 1876), to recover possession of certain land, alleging that he, as tenant of one Anandrav Shivaji Kulkarni, had grown crops on the land and that the defendants had forcibly dispossessed him on the 18th January 1906.

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Defendant 1 contended that he was the owner of the land; that he had mortgaged it to the said Anandrav Shivaji; that he had taken it from the mortgagee for cultivation under an oral agreement and that the period of his tenancy was to expire on the 25th March 1906.

Defendant 2 answered that he was a tenant of defendant 1.

Defendant 3 pleaded that he had nothing to do with the land in dispute.

While the suit was pending the Mámílatdárs' Courts Act (Bombay Act III of 1876) was repealed by the Mámílatdárs' Courts Act (Bombay Act II of 1906), which came into force on the 29th October 1906.

The Mámílatdár, on the 26th January 1907, dismissed the suit, holding that the plaintiff's possession within six months before the institution of the suit was not satisfactorily proved.

Against the decree of the Mámílatdár the plaintiff, on the 12th March 1907, presented a revisional application under section 23 of the Mámílatdárs' Courts Act (Bombay Act II of 1906) to the Collector of Sholápur, praying for the reversal of the Mámílatdár's decree. The Collector, on the 6th April 1907, held that the rights of the parties had been finally determined under the Mámílatdárs' Courts Act (Bombay Act III of 1876), and that he was not competent to entertain the application. He, therefore, referred the plaintiff to the High Court.

The plaintiff, thereupon, preferred an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882), urging *inter alia* that the Collector had, in refusing to entertain the revisional application, failed to exercise the jurisdiction vested in him by law, that it was an error to hold that it was not competent to the Collector to entertain the application under section 7 of the General Clauses Act (I of 1904), and that the Collector erred in holding that the new

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Mámlatdár's Courts Act (Bombay Act II of 1906) did not Govern the decision of the suit. A *rule nisi* was consequently issued calling on the defendants to show cause why the order of the Collector should not be set aside.

N. V. Gokhale appeared for the applicant (plaintiff) in support of the rule:—The suit was instituted while the old Mámlatdár's Courts Act was in force and the decree was passed after the new Act came into operation. Therefore the question is whether the Collector had jurisdiction to entertain our application for revision. We submit that he had. The *rule nisi* was granted on the authority of the rulings in *Gulam Rasul v. Balu-Sayaji*⁽¹⁾ and *Vajechand v. Nandram*⁽²⁾. These authorities follow the principle that enactments relating to procedure are applicable to proceedings pending at the time they came into force unless there is anything to indicate a contrary intention. There was no provision in the old Act giving revisional powers to the Collector, while the new Act does specifically contain such a provision. We, therefore, submit that according to the rulings we rely on the Collector had jurisdiction to entertain our application for revision.

[JENKINS, C. J.:—The decisions you rely on are in conflict with the ruling of the Privy Council in *Colonial Sugar Refining Company v. Irving*⁽³⁾. Further, section 7 of the General Clauses Act is to be considered in this connection.]

If the word *right* in section 7 clause (c) of the General Clauses Act means and includes a right of appeal or revision or transfer or the right of suing in a particular Court, then the decisions referred to cannot be supported. But if *right* means a substantive right, then the right to sue in Mámlatdár's Court is not such a right. It is only a right to the expeditious procedure of a Mámlatdár's Courts and ought to be subject to the provisions of the new Act. No person has a vested right in any course of procedure and the right of prosecution of a suit or defence must be exercised in the manner prescribed by the law in force for the time being; Maxwell on Statutes, p. 314 (3rd Edn.)

(1) (1907) 9 Bom. L. R. 527. () (1907) 31 Bom. 545.

(3) (1905) A. C. 369.

In the case before the Privy Council, *Colonial Sugar Refining Company v. Irving*⁽¹⁾, the right of appeal to the Privy Council was sought to be transferred to a new tribunal and their Lordships held that it was tantamount to abolishing an appeal altogether. In the present case our right to invoke the revisional jurisdiction of the High Court has not been taken away at all. That right has remained intact. We have, under the new Act, acquired an additional right to ask the Collector to exercise his revisional powers under section 23 of the Act. Therefore the ruling of the Privy Council does not apply to the circumstances of the present case.

N. D. Jathar appeared for the opponents (defendants) to show cause:—Besides the said Privy Council ruling there is another ruling in *Hurrosundari Dabi v. Bhojohari Das Manji*⁽²⁾ which exactly meets the point and is on all fours with the present case. It lays down that the case should be governed by the old Act and not by the new Act which repealed the old Act. There is also another case which lays down the same principle: *Ratanchand Shrichand v. Hanmantrav Shivbakas*⁽³⁾.

Further, in section 7 clause (c) of the General Clauses Act the word *right* must mean and include a right of revision, appeal and transfer. That right is a substantive right because the decision does affect the merits of the case. If the Collector had entertained the plaintiff's application for revision and reversed the Mámlatdár's decree, we would have lost possession of the property and thus the exercise of jurisdiction by the Collector would have affected closely a substantive right. The word *right* in the General Clauses Act must, therefore, be construed as including a right of appeal. Thus, even in the light of the General Clauses Act, the Collector cannot be said to have jurisdiction in this matter. A right which was not in existence under the old Act with respect to proceedings held under that Act cannot be claimed although the new Act has conferred it.

JENKINS, C. J.:—This application for revision arises out of a suit commenced on the 24th February 1906 under the Mámlatdárs' Courts Act III of 1876.

(1) (1905) A. C. 369.

(2) (1886) 13 Cal. 26.

(3) (1869) 6 Bom. H. C. R. (A. C. J.) 166.

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On the 29th of October 1906 the Mámíatdárs' Courts Act II of 1906 came into operation, and by section 2 of that Act, the Mámíatdárs' Courts Act III of 1876 was repealed.

On the 26th of January 1907 the Mámíatdár dismissed the suit with costs.

On the 12th March 1907, the plaintiff presented a petition for revision to the Collector of Sholápur.

On the 6th of April 1907 the Collector held that he had no jurisdiction to entertain the application.

The plaintiff considering himself aggrieved by the Collector's order has presented this application to the High Court for revision.

Under the Mámíatdárs' Courts Act of 1876 the Collector had no power of revision.

By section 23 of the Mámíatdárs' Courts Act of 1906 it is provided as follows:—"The Collector may call for and examine the record of any suit under this Act." Section 7 shows what a suit under this Act is; it says: "All suits under this Act shall be commenced" in the manner therein indicated, and there is a variation, though only a very slight one, from the requirements of section 5, the parallel section of the Mámíatdárs' Courts Act of 1876. So that on the words of the Act itself it cannot be said that we are now concerned with a suit under the Mámíatdárs' Courts Act of 1906. In the enquiry before us reference has been made to two decisions of this Court which, it is argued, govern this case.

The first of them is *Gulam Rasul v. Balu Sayaji*⁽¹⁾ where it was held that the Mámíatdárs' Courts Act of 1906 took away the Mámíatdár's jurisdiction over houses not falling within the description contained in section 5 of that Act with the result that the Mámíatdár had no jurisdiction to proceed with a suit brought in respect of such houses though commenced before the Act came into operation. It was there considered by the learned Judge that the case was governed by

(1) (1907) 9 Bom. L. R. 527.

the rule laid down in Maxwell that "No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being, by or for the Court in which he sues." That decision was afterwards followed in *Vajechand v. Nandram*⁽¹⁾ and that decision would be binding on us unless it appears that it was opposed to the decision of a superior tribunal.

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It appears to us that those decisions are opposed to previous binding decisions which apparently were not brought to the notice of the Court. Thus in *Colonial Sugar Refining Company v. Irving*⁽²⁾ it was said: "As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment; and therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

That case shows that to disturb an existing right of appeal is not a mere alteration of procedure.

(1) (1907) 31 Bom. 545.

(2) (1905) A. C. 369 at p. 372.

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Then again in *Ratanchand Shrichand v. Hanmantrav Shivbakas*⁽¹⁾ a decision of a Full Bench, also apparently not cited, the Court had to consider the effect on a pending suit of an enactment which gave a different right of appeal, and it was there said: "A suit is a judicial proceeding, and the word 'proceedings' must be taken to include all the proceedings in the suit from the date of its institution to its final disposal, and therefore to include proceedings in appeal. It follows, in the judgment of the Court, that in all suits commenced before the passing of the Bombay Courts' Act, the procedure must (unless another mode of procedure is expressly substituted by that Act) be the same as it would have been if that Act had not been passed."

These cases are sufficient to justify us in treating the decisions in *Gulam Rasul v. Balu Sayaji*⁽²⁾ and *Vajechand Ramji v. Nandram Daluram*⁽³⁾ as not binding on us.

Now, turning for a moment to the Bombay General Clauses Act (I of 1904), we find it is there provided (section 7) as follows:—"Where this Act, or any Bombay Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed or affect any investigation, legal proceeding or remedy in respect of any such right and any such investigation, legal proceeding or remedy may be instituted, continued or enforced as if the repealing Act had not been passed."

Now, the right in respect of which this suit is commenced was a right acquired under the *Mámlatdárs' Courts Act* of 1876, and his suit was commenced under that Act.

On the words of the Bombay General Clauses Act, therefore, it appears to us that it would be wrong to hold that the Collector had jurisdiction; so to hold would be to affect a legal proceeding in respect of a right which had accrued under the old Act.

(1) (1869) 6 Bom. H. C. R. (A. C. J.) 166 at p. 169.

(2) (1907) 9 Bom. I. R. 527.

(3) (1907) 31 com. 545.

If authority be needed for this, then we think it is to be found in the decision pronounced by Mr. Justice Wilson in *Hurrosundari Dabi v. Bhojohari Das Manji*⁽¹⁾ which closely resembles in its circumstances the present case. What was there sought was to take advantage of a power of appeal given after the suit had been commenced. After referring to *Ratanchand Shrichand v. Hanmantrav Shivbakas* and two other similar cases, it was said: "These cases are on all fours with the present case, with this exception, that there an appeal was given under the repealed Act, and it was held that the repealing Act did not take away the appeal. Here the repealed Act excluded an appeal. It follows, on the same principle, that the repealing Act cannot give an appeal."

In the same way here we hold that the repealing Act cannot give the right of revision in respect of proceedings commenced under the Mámlatdárs' Courts Act of 1876.

In our opinion the Collector took the correct view and we must therefore discharge this rule with costs.

Rule discharged.

G. B. R

(1) (1886) 13 Cal. 86. (2) (1869) 6 Bom. H. C. R. (A. C. J.) 166 at p. 169.

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

MAHANT BIHARIDASJI GURU GOVINDDASJI (ORIGINAL PLAINTIFF), APPLICANT, v. PARSHOTAMDAS RAMDAS AND ANOTHER (ORIGINAL DEFENDANTS), OPPONENTS. 1908
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Civil Procedure Code (Act XIV of 1882), sec. 373—Withdrawal from suit—Application for withdrawal with liberty to bring fresh suit—Costs.

Section 373 of the Civil Procedure Code (Act XIV of 1882) contemplates a withdrawal not, of the suit, but, from the suit, and such a withdrawal may be either with or without liberty to bring a fresh suit. If

* Application under extraordinary jurisdiction No. 138 of 1907.