1908.

ARDESIR BEJONJI SURTI v. SYED SIRDAR ALI KHAN.

J.'s judgment it is distinctly stated that it was admitted before him that if the second respondent's claim was prior he (the appellant) would get nothing. The correctness of that statement in the judgment was not at all assailed before us. And the appellant's deposition (page 82 of the paper book in appeal) confirms Russell J.'s remark as to the admission. We cannot in this state of the pleadings allow the case to be reopened, because that would be encouraging parties to argue their cases piecemeal and shift their grounds of claim so as to prolong litigation. Respondents to have separate sets of costs.

Decree confirmed.

Attorneys for appellant: Messrs. *Wadia, Ghandy & Co.*
Attorneys for defendant: Messrs. *Captain & Vaidya.*

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Russell.

BAI MOOLBAI *v.* CHUNILAL PITAMBER.*

1909. *March* 23.

Contempt of Court—Notice of motion for committal—Service of notice—Personal service necessary—Service upon attorneys not sufficient—Appeal pending from order.

Where an application is made for committal of a person to jail for disobedience of the Court's order, it is necessary not only that the order should be served upon the defaulting party personally, but the notice to commit should also be similarly served upon him. Service upon the party's attorneys is not sufficient.

When proceedings are taken for committal of a person for contempt of a Court's order, the Court is not obliged to stay those proceedings merely because an appeal has been filed from such order.

Gordon v. *Gordon*(1) followed.

NOTICE of motion.

The defendant's attorneys were served with a notice of motion in the following terms:—

"Please take notice that on Monday next the 22nd instant or so soon thereafter as Counsel can be heard Counsel will move on behalf of the plaintiff before

* O. C. J. Suit No. 31 of 1909.
(1) [1904] P. 163.

the Hon'ble Mr. Justice Russell on the grounds of the affidavit of Shivshankar Dalsukram copy whereof is sent herewith for an order committing your client to jail for contempt of the Court he having failed to hand over to R. D. Sethna, Esquire, the Receiver appointed herein, the property in his possession of the estate of the late Ambaram Motichand in the plaint herein mentioned and for such other order as the Court may think proper to make and for costs. The affidavit in support of notice of motion is sent herewith."

This notice was served upon the defendant's attorneys on March 20th at 4 p. m.

J. D. Davar for defendant:—We submit that this notice cannot be heard because it has not been served upon the defendant personally. There are no Indian cases on the point, but the Court will follow the English practice which is laid down in *Mander* v. *Falcke*[1]; see also *Re Cunningham*[2] and Oswald on contempt (1892 Edition), pp. 106—110.

We also submit that this notice cannot be heard because we have not had four clear days' notice as provided for in the Rules and no leave has been obtained from the Court for service on short notice.

Lowndes for plaintiff:—The case of *Mander* v. *Falcke*[1] cited by the defendant is in our favour. That case lays down distinction between proceeding in attachment and in committal. Attachment proceedings are taken when the person sought to be attached neglects to do what he has been ordered to do; and committal proceedings are taken against a person who has done what he has been ordered not to do. In the former case personal service is not necessary. There is no such distinction made in the practice prevailing in India as obtains in England between these two kinds of proceedings. No authority has been quoted to contradict this by the other side.

We submit (1) If English law or practice on the point has been adopted out here our motion can be heard as it would correspond to attachment proceedings at England. (2) If the English law or practice does not apply then our motion is equally good, for, the authority quoted above can show no reason for differentiating between the two proceedings with regard to service of notice.

(1) [1891] 3 Ch. 488. (2) (1886) 55 L. T. 766.

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As to point of short notice we have not as yet brought on the notice of motion. Counsel for the defendants has merely raised points by way of demurrer, but we now ask for leave to have this notice of motion set down for hearing tomorrow.

[RUSSELL, J.:—I will deliver judgment on this question to-morrow and the defendant must be present in person.]

RUSSELL, J.:—The plaint in this suit was filed on the 18th January 1909 and the plaintiff is the daughter of one Ambaram Motichand, who left property of a very considerable value, and the defendant is the executor of his will. He is described in the plaint as a law-tout; but whether or not he is so I do not know. The suit is for the construction of the will in various particulars and also for an account.

On the 1st of March 1909, Mr. Sethna was appointed Receiver, which I apprehend implies with it that it would be the duty of the executor to hand over all the property of the deceased in his hands to the Receiver; and also an order was made restraining the defendant from dealing with the property of the deceased. It appears from the proceedings, which I have gone through, that the order for Receiver could not be served upon the defendant until the 19th of March 1909 and on the 20th of March the following notice was written by the plaintiff's attorneys to the defendant's attorneys:—

[His Lordship then read the notice as set out above and proceeded:—]

That notice is dated the 20th of March 1909 and it was served on the defendant's attorneys only and not upon the defendant; and on the 22nd March the notice came on for argument before me, when Mr. Davar for the defendant raised two objections to this notice. The last objection I will deal with first as it is the less important one. This objection is that four clear days at least had not elapsed between the service of the notice of motion and the day named for showing cause as directed by Rule 377 "unless the Court or a Judge gives special leave to the contrary." The way I read those words is that it is open to the Court or a Judge to give special leave to the contrary at any time. In any emergent matter where a notice of motion has been given for

less than four days, the Court, if it thinks fit, can give special leave under the Rule after such notice has been given; and, therefore, I do not think I ought to hold this objection of Mr. Davar to prevail. In my opinion this is a case in which the Court will be fully justified in not adhering to the strictness of that rule.

With regard to the other objection, however, it appears to me that different considerations must apply. A number of cases have been decided in the Bombay and Calcutta High Courts with reference to what the contempt of Court really is and with regard to its jurisdiction. Thus in one case, *Martin* v. *Lawrence*[1], it has been held that the jurisdiction of the High Court to imprison for contempt is a jurisdiction which it has inherited from the old Supreme Court and was conferred upon that Court by the Charters of the Crown, which invested it with all the powers and authority of the then Court of King's Bench and of the High Court of Chancery in Great Britain, and this jurisdiction has not been removed or affected by the Civil Procedure Code. To a similar effect is the case of *Navivahoo* v. *Narotamdas Candas*,[2] and also the leading case of *Surendra Nath Banerjee* v. *The Chief Justice and Judges of the High Court*[3]; and as mentioned in Mr. Mulla's Civil Procedure Code (3rd Edition) the power to commit is "amongst the inherent powers" of the Court, a list of which is to be found at page 275 of that work.

It was held by the Privy Council, in *In re Pollard*[4] (which is referred to with approval in *Kashinath Vithal* v. *Daji Govind*[5]), that in their Lordship's 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." Therefore, it appears that the proceeding for contempt of Court is in the nature of a criminal offence; and to the same effect, as I read

(1) (1879) 4 Cal. 655.
(2) (1882) 7 Bom. 5.
(3) (1883) 10 Cal. 109.
(4) (1868) L. R. 2, P. C. 106.
(5) (1870) 7 Bom. H. C. R., A. C. J. 102.

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it, is the case of *In re Vallabhdas* [1]—which is an Insolvency case but the principle seems to be the same—where it was held (following *Ex parte Van Sandau*[2]) that in all criminal cases it is necessary that there should be a charge, a finding and a conviction, as a foundation for the sentence and that as there was no charge, the order for imprisonment was wrongly made.

While I am on this point, I may also refer to the case of *Balwantrao* v. *Ramchandra*,[3] where the Court say :—"It is admitted that the injunction of this Court was personally served on Ramchandra on the 28th April last." I refer to that for showing that evidently the Court was of opinion that in that case personal service on Ramchandra was necessary.

Now Mr. Lowndes for the plaintiff raised a very ingenious argument upon the case Mr. Davar referred to—the case of *Mander* v. *Falcke*[4]. Mr. Lowndes said that that case showed that in England there was a distinction between "attachment" and "committal." That, no doubt, was so before the Judicature Act, and in *Callow* v. *Young*[5], it was held that attachment was the proper application in cases of omission and committal in cases of commission; that is to say, if a person did that which he was not entitled to do he ought to be committed, and if he did not do that which he was ordered to do he ought to be attached. In India I find no distinction has ever been drawn between "attachment" and "committal"; and committal being to my mind a serious matter, seeing that committal is in the nature of a criminal proceeding, it is of the greatest possible importance that all applications to commit a person for contempt of this Court's order should be served personally. *Mander* v. *Falcke*[4], it seems to me, is an authority to that effect and does not admit of the distinction upon the ground that Mr. Lowndes endeavoured to distinguish it and knowing what the practice is in this country, it seems to me, it is impossible to lay too great a stress upon the importance of the matters of this sort, because the power of committal is one of the most effectual powers—a power which the Court can exercise *brevi manu* and is the most powerful

(1) (1903) 27 Bom. 394.
(1844) 1 Phillips 445 at p. 457.
(2) (1892) Unrep. Cri. Ca., 615.
(3) [1891] 3 Ch. 4 8.
(4) [1887] 56 L. J, Ch. 690.

engine at its disposal. I can conceive no greater danger than if I were to hold that service of notice for committal of a person to jail was sufficient if it was served upon his attorneys alone. Further, another danger one has to bear in mind in this country is, that it is inconceivable that this Court would sanction notices being served upon attorneys of persons in a language which would probably not be understood by the latter; and I would be extremely sorry to commit a person for not obeying a notice of motion which was served upon his attorneys in a language which he did not understand and *non constat* that it was ever explained to him. And I think I am justified in holding that where an application is made it is necessary not only that the order should be served upon the defaulting party, but the notice to commit for disobedience thereof should also be served upon him. That has been the practice ever since the days of Lord Eldon and before that time.

It may, however, be said in the present case that the defendant ought to have protested at once and certainly it does not appear in his affidavit that he did protest; but Mr. Davar did raise the preliminary protest at once and said that he protested against this notice on the ground that it had not been duly served. Upon this point it must be remembered that it has been held over and over again that appearance is not a waiver of the objection on the ground of irregularity in a case affecting the liberty of the subject; and to the same effect will be found the rulings as to waiver in the Encyclopœdia of the Laws of England. A man appearing cannot be held to waive a question which relates to the validity or invalidity of an order.

On being informed that the defendant had appealed from my original order appointing Mr. Sethna Receiver, I was considerably impressed with that fact and thought that I ought not to make an order in this present matter but should wait until the appeal had been decided; but following the case of *Gordon* v. *Gordon*[1], in my opinion the fact of this appeal pending does not oblige me to stay further proceedings in the present matter. In that case Vaughan Williams, L. J., says:—

(1) [1904] P. 163.

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"If an order has been made in the exercise of the discretion of the Court, and some one who is oppressed, or thinks himself oppressed by that order, appeals, saying that the Court has exercised its discretion wrongly, that person, if he is in contempt, cannot be heard to say anything of the kind until he has purged his contempt. *Garstin* v. *Garstin*(1) is an instance of that kind."

Then he goes on :—

"But when you come to the case of a order which it is suggested may have been made without jurisdiction, if upon looking at the order one can see that that really is the gound of the appeal, it seems to me that such a case has always been treated as one in which the Court will entertain the objection to the order, though the person making the objection is in contempt."

That, therefore, draws the difference between an order made in the discretion of the Court and the case where the objection is that it is made *without jurisdiction.**

W. L. W.

* Note :—At this stage Counsel informed the Court that an arrangement had been arrived at between the parties. [Ed.]

(1) (1865) 4 Sw. Tr. 73.

APPELLATE CIVIL.

Before the Honourable Mr. Chandavarkar, Acting Chief Justice, and Mr. Justice Heaton.

1909. *June* 21.

ISMALJI YUSUFALLI (ORIGINAL DEFENDANT 1), APPELLANT, *v.* RAGHUNATH LACHIRAM MARWADI (ORIGINAL PLAINTIFF), RESPONDENT.*

Salt Act (Bom. Act II of 1890), sections 11 and 47(1)—Salt pans—Lease under a license from Collector—Lessee not to sublet without Collector's permission—Sub-lease by the lessee without such permission—Deposit by sub-lessee with lessee—Illegal contract—Suit by sub-lessee to recover deposit cannot lie.

Y obtained from Government a lease of certain salt pans to manufacture salt under a license. One of the conditions of the lease was that the lessee should not sublet the salt pans without the written permission of the Collector.

* Second Appeal No. 538 of 1907.

(1) Sections 11 and 47 of the Salt Act (Bom. Act II of 1890) are as follows :—

11. No salt shall be manufactured and no natural salt and, except under the provisions of section 14, no salt-earth shall be excavated or collected or removed, otherwise than by the authority and subject to the terms and conditions of a license