

(1874) 07 CAL CK 0003

Calcutta High Court

Case No: None

Madhub Chunder
Poramanick

APPELLANT

Vs

Rajcoomar Doss and
Others

RESPONDENT

Date of Decision: July 21, 1874

Judgement

Sir Richard Couch, Kt., C.J.

The case, as stated, assumes that Act IX of 1872 applied, and when the case was first argued before us, no question was raised as to the application of that Act, but, subsequently, when we were about to give our judgment upon the question which had been stated in the case, it was submitted to us that the Act did not apply in the Small Cause Court to a case of this kind between Hindus; that the law as it was before the Act was passed continued applicable, and the case was governed by, Hindu law. Although, the question was not raised in the case, we thought it desirable to have it argued, and I propose first to give our opinion upon it. S. 37 of Act IX of 1850, by which the Small Cause Court, Calcutta, was regulated, provides that "the Judges of the Court shall be empowered to determine all questions as well of fact as of law and equity, as administered in the Supreme Court, in all cases which they have authority to try." The words "as administered in the Supreme Court" must be construed as referring, not to the law or equity which might, at the time when the Act was passed, be administered in the Supreme Court, but to the law or equity administered at the time of the suit. The intention of the Legislature was that, the Small Cause Court having given to it a jurisdiction to entertain suits which were not allowed to be brought in the Supreme Court, there should be a uniformity of law or equity in the two Courts. If the law or equity administered in the Supreme Court was, either by legislation or the decision of the Judges in any way altered, I think it was the duty of the Small Cause Court to adopt such alteration, and from time to time to decide the questions which came before it in the same way as they would be decided in the Supreme Court. Then Act XXVI of 1864 was passed for the purpose of extending the jurisdiction of the Small Cause Court: and by s. 16, it is provided that it and

the Act IX of 1850 shall be read and construed as one Act, as if the several provisions contained in Act IX of 1850 not inconsistent with the provisions of the later Act were repealed and re-enacted in it. The effect of that appears to be that from the time when Act XXVI of 1864 was passed the Small Cause Court was regulated by a new Act consisting of such of the provisions of Act of IX 1850 as were not in consistent with Act XXVI of 1864, and also of the provisions contained in that Act. If you incorporate, as you must, s. 37 of Act IX of 1850 with the Act of 1864, it would literally read that the law to be administered in the Small Cause Court is the law which was administered in the Supreme Court; but it is clear that this could not have been the intention because the Supreme Court had ceased to exist and the High Court had been substituted for it. And the 1st section of Act XXVI of 1864 says that the words "Local Government" and "High Court," as used in that Act, were to bear the same meaning as the words "Governor in Council" and "Supreme Court," as used in Act IX of 1850.

2. The result is that by virtue of Act XXVI of 1864 suits in the Small Cause Court were to be decided according to the law or equity administered in the High Court. Then the question is what is the law which is administered in this Court? The Charter of 1865, in the 19th clause, provides for that. It is--"We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued." This renders it necessary to see what was the provision in the Charter of 1862. Cl. 18 of that Charter is:--"We do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction, such law or equity shall (until otherwise provided) be the law or equity which would have been applied by the said Supreme Court at Calcutta to such case if these Letters Patent had not issued." It is to-be the law or equity which would have been applied by the Supreme Court of Calcutta if the Letters Patent had not issued; but the law or equity to be administered in the High Court, does not depend upon any previous Act of Parliament. The Act 21 Geo. III, c. 70, which gave to Mahomedans and Hindus the right to have matters of contract and dealing between party and party, inheritance, and succession, determined by their laws and usages, was an Act which was applicable to the Supreme Court. If the provision has effect in the High Court, it is not by virtue of the Act, but by virtue of the Charter, which by its terms introduces into it the directions contained in the Act. The right or privilege before the Contract Act was passed (subject to what I shall say as to that Act) no longer depended on the Act of Geo. III, but upon the Charter itself. Her Majesty had power by the Act which authorised the establishment of the High Courts to give to them such jurisdiction as she thought fit, and to make the provisions which are contained in the Charter; and all that is done, is to provide that the law or equity to be applied to each case shall, until otherwise provided, be the law and equity which would have been applied by the Supreme Court. "Until otherwise provided" shows that there was an intention to give to the Government here in its legislative capacity a power

to make alterations which would affect this provision. There are not only those words, but there is the 44th clause of the Charter of 1865, where it is expressly declared that the provisions in it are subject to the legislative powers of the Governor General in Council.

3. Therefore we have to see whether Act IX of 1872 governs cases between Mahomedans or Hindus brought before the High Court in the exercise of its original civil jurisdiction. If it does, it will certainly also govern cases which have to be decided by the Small Cause Court. The 1st section says in the most general terms that the Act is to extend to the whole of British India. These words would certainly include the limits of the original jurisdiction of this Court, and all persons living within those limits, who sue or are sued in it. Unless we find in the Act something to limit the meaning, we ought to come to the conclusion that this was the intention of the Legislature. There are several Illustrations in the Act which show that it was the intention of the Legislature to apply it to Hindus. It was replied to this by Mr. Bonnerjee that these Illustrations may be accounted for by the Act being applicable to Hindus in the mofussil, and that it does not follow from them that it was the intention to apply it within the limits of the original jurisdiction of this Court. Still, the circumstance that it was evidently the intention of the Legislature that it should apply to Hindus beyond the limits of the original jurisdiction, makes it more incumbent on a person seeking to establish an exception in respect of the original jurisdiction to show that the exception is apparent in the Act. There are no words showing that it was intended that there should be such an exception. The only provision which might raise a doubt about it is that which follows in the 1st section, where it is said:--"The enactments mentioned in the schedule hereto are repealed to the extent specified in the third column thereof; but nothing herein contained shall affect the provisions of any Statute, Act, or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act."

4. The grammatical construction of this is that the words "not inconsistent with the provisions of this Act" apply to "any usage or custom of trade" or "any incident of any contract." This excludes any repeal by implication, because the Legislature has said that unless the enactment is mentioned in the schedule it is not to be affected by the Act. This Act of Geo. III is not mentioned in the schedule, and, therefore, it cannot be considered to be repealed. This would be important if it had been necessary to repeal the Act of Geo. III, and there would have been great difficulty in deciding the question before us. But for the reasons I have stated, it was not necessary to do so. The Act of Geo. III had ceased to have operation as an Act. The Court to which it applied had ceased to exist. The substance of it, no doubt, continued to be the law till the Contract Act came into force, but it was the law by virtue of the Charter which was subject to alteration by the Legislative Power. For these reasons I think that the Contract Act must be considered to apply to the present case.

5. The question which remains for us to determine is, whether by s. 27 of the Act this agreement is rendered void. We must take it that there was a contract, for the learned Judge of the Small Cause Court has found that the parties had come to that agreement.

The words of s. 27 are:--"Every agreement by which any one is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void." I cannot agree in what the learned First Judge says as to the meaning of this agreement being that it was only to prevent the plaintiff from carrying on business in that particular house, and that he might have carried it on in the house immediately adjoining. It is obvious that the intention was to restrain him from carrying on business in that locality. The object of entering into the agreement could only be attained by preventing him from carrying on business in the locality. The words "restrained from exercising a lawful profession, trade, or business" do not mean an absolute restriction, and are intended to apply to a partial restriction, a restriction limited to some particular place, otherwise the 1st Exception would have been unnecessary. It says:--"One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein, provided that each limits appear to the Court reasonable."

6. If the section did not apply to cases of carrying on business, within specified local limits, this would be unnecessary, because it would have been made unlawful for persons to make such an agreement. In the following section (s. 28) the Legislative Authority when it intends to speak of an absolute restraint, and not a partial one, has introduced the word "absolutely." It says:--"Every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

7. The use of this word in s. 28 supports the view that in s. 27 it was intended to prevent not merely a total restraint from carrying on trade or business, but a partial one. We have nothing to do with the policy of such a law. All we have to do is to take the words of the Contract Act, and put upon them the meaning which they appear plainly to bear. In my opinion they must be held to apply to such a case as the present, and the agreement on the part of the plaintiff not to carry on his business in that locality is to that extent void.

8. The First Judge of the Small Cause Court seems to have thought that although the agreement on the part of the plaintiff might be void, he might enforce the agreement for the payment of the money to himself. There is no foundation for such an opinion. If the agreement on the part of the plaintiff is void, there is no consideration for the agreement on the part of the defendants to pay the money; and the whole contract must be treated as one which cannot be enforced. Therefore we must reply to the question which has been referred to us that the agreement is a void contract, and that the plaintiff has no right to recover the money which he has claimed. We direct judgment to be entered for the defendants with the costs of suit, including the costs of reserving and arguing this case.