

(1934) 12 CAL CK 0011
In the Calcutta High Court

Dorman Long and Co. Ltd.

APPELLANT

Vs

Jagadish Chandra Mahindra and Another

RESPONDENT

Date of Decision : 19-12-1934

Acts Referred:

Patents and Designs Act, 1907 — Section 65, 77, 9
Specific Relief Act, 1877 — Section 45

Citation : 163 Ind. Cas. 997

Hon'ble Judges : Lort-Williams, J; Jack, J

Bench : Division Bench

Judgement

Lort-Williams, J.—This is an appeal against an order of Mr. Justice Remfly dismissing an application in respect of two orders made by the Controller of Patents and Designs, by which he refused to issue two subpoenas. The learned Judge was asked to issue writ of certiorari in order that the orders might be quashed and to issue a mandatory injunction directing the Controller to issue the two subpoenas. With regard to the form of the application, the learned Judge pointed out that it was defective, because the remedies asked for would not be effective unless the Court also directed the Controller to hear and adjudicate on the evidence of the two witnesses concerned. The petitioners had applied for a patent in respect of an alleged invention relating to steel alloys. Their application was opposed before the Controller of Patents on the ground that the invention was not new, and had not been sufficiently described in the specification. The learned Judge observed in his judgment that "pending the decision of this application, the Controller: has undertaken not to proceed with the matter". The hearing before the Controller had been protracted owing to the fact that the petitioners obtained time to file affidavits by experts in England, or to call such experts. Eventually they elected to file affidavits, and the Controller directed them to be ready with their affidavits and witnesses on March 20, 1934. The learned Judge next observed that on March 22, the opposer was about to close his case, and the petitioners, apart from interposing a witness, had not opened their case. After considerable discussion on that day the Controller made an

order that the applicants must file their affidavits by March 28, and that the opposer must file any affidavits in reply ten days thereafter. These orders seem to show that the Controller assumed, from what had already taken place, that the applicants did not intend to call witnesses other than the one whose evidence they had already interposed, and that otherwise they intended, to rely on affidavits.

2. The learned Judge observed, and I think it is a fair observation, that the applicants On "March 22, never suggested to the Controller that they intended or desired to call any further witness or witnesses. On the other hand, owing to the fact that proceedings, such as these, are not intended to be carried on strictly in the way in which a hearing is conducted in a Court of Law, there was no definite closing of the applicant's case nor any definite statement that they did not intend to call farther evidence. But an order appears to have been made about March 22, by the Controller to this effect:

Preliminary affidavits of both parties to be filed by March 28, 1934, parties respectively affording copies to the other side. Affidavits in reply within 10 days thereafter. Proceeding adjourned sine die to enable parties after studying the affidavits to suggest a convenient date for hearing argument.

3. This shows, I think, that at any rate the Controller was under the impression that no further witnesses were to be called by either side, and that all that remains to be done was to hear arguments. Owing to the fact that the parties could not or did not agree upon a date for the hearing, the Controller himself fixed April 17, for the hearing of arguments. There upon the petitioners filed the petition asking inter alia for a subpoena to Mr. Gibson to give evidence as an expert on April 19. The Controller refused to issue the subpoena. On April 18, the petitioners applied for a subpoena duces tecum to Mr. Davar. This application also was refused, and it is these two orders of refusal which are the subject-matter of this appeal. The Controller took the view that although the petitioners originally had the right to call witnesses, having regard to the order that they must be ready with their witnesses on March 20, and to the order of March 22, they could no longer claim that as of right after April 17, and the matter was then within the discretion of the Controller. He thought that the evidence of Mr. Gibson would not be of any assistance to him, for reasons which he gave, being mainly that this witness would only give evidence of facts which had been spoken to at considerable length in the affidavits of expert witnesses which had been obtained in England. Further, the Controller seems to have taken the view that what happened on March 22, and the order made at that time was the result of an agreement between the parties, but apparently there was no such agreement. The reason given for the refusal of the second subpoena was that Mr. Davar was the patent agent for the opposer, and was in the position of a Pleader u/s 126 of the Evidence Act and, therefore, privileged. The facts show that Mr. Davar was duly appointed by the opposer to act for him as agent in the proceedings before the Controller under the Patents and Designs Act.

4. The learned Judge then proceeded to consider whether the Court had jurisdiction to issue a writ of certiorari or prohibition or a mandatory order u/s 45 of the Specific Relief Act against the Controller, and he dealt with the law on this subject, especially with the fact that under the Patents and Designs Act there was a right of appeal to the Governor-General in Council, and he came to the conclusion that he ought not to issue a writ of certiorari in the circumstances of this case, and that a mandatory injunction would not be effective and, further, in view of the fact that the applicant had a right of appeal, he was unwilling to grant any relief and dismissed the application. There can be no doubt that the issue of writs of certiorari or prohibition is a matter of discretion, They are extraordinary remedies and the Court does not have recourse to them except in extraordinary situations in which justice cannot otherwise be done. The writ of mandamus can no longer be issued by this or any other High Court, but it is practically replaced in effect by the provisions of Section 45 of the Specific Relief Act. The exercise of the powers given by that section, however, is subject to various provisos, one being that the applicant has no other specific and adequate legal remedy.

5. Mr. Barwell on behalf of the opposer, I think, intended to argue that the Court has no power to issue much writs against the Controller of Patents and Designs in circumstances such as this. I have no hesitation whatever in rejecting that contention. In *Rex. v. Electricity Commissioners* (1924) 1 K.B. 171 : 93 L.J.K.B. 390 : 130 L.T. 164 : 88 J.P. 13, Lord Justice Atkin said as follows:

The question now arises whether the persons interested are entitled to the remedy which they now claim in order to put a stop to the unauthorized proceedings of the Commissioners. The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King's Courts restrained Courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the Court to be sent up to, the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division issuing these writs. I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari, I think that

prohibition will lie to restrain it from so exceeding its jurisdiction.

6. I have no doubt whatever that this Court has the right to exercise a similar controlling jurisdiction to that which is exercised by the King's Bench Division in England, over matters arising within the jurisdiction of this Court and over persons or bodies exercising duties within the jurisdiction such as are referred to in the statement which I have just quoted. Before, however, these extraordinary remedies are used, the Court must be sure that they will be effective.

7. Now in this case, after the order had been made by Mr. Justice Remfry, the Controller, before the order had actually been drawn up, proceeded to give judgment. The applicants did not get any specific undertaking from the Controller not to give judgment until this appeal had been heard and decided; and in fact. They have already appealed against that decision to the Governor-General in Council under the provisions of Section 9, and the provision made in r. 62 of the Act. It is clear, therefore, that the Controller has ceased to have seisin of the matter. The case is now in the hands of the Governor-General in Council, being in that sense the Appellate Court. So far as there is any record in the legal sense in cases such as these, that record has already been sent to the Appellate Court. The Controller is functus officio, and if any writ issued by this Court were directed against him he would not be able to obey it. There are, in fact, no pending proceedings before the Controller with which this Court can interfere. For all those reasons, therefore, this Court cannot at this time grant the remedies which the applicants sought from Mr. Justice Remfry. That this is the present position is, I fear, due to some extent to a misapprehension on the part of the Controller, because, as I have already quoted from Mr. Justice Remfry's judgment; he gave an undertaking, pending the decision of this application, not to proceed with the matter. He seems to have understood the words "this application" to mean "the application before Mr. Justice Remfry", that is to say, he was under the impression that his undertaking came to an end when Mr. Justice Remfry gave his decision. No doubt, matters such as these cannot, be decided upon the mere question of the intention of the giver of the undertaking. It must depend upon the meaning of the words used, and in my opinion, "decision of this application" ought to be construed to mean the "final" decision that is to say, the undertaking was in force until a decision had been given by this Court on appeal, or the time limited for appealing had run out. It is curious that there appear to be hardly any reported cases upon this point. The only one I have been able to find is the decision of Mr. Justice Page and Mr. Justice Graham in *Mahesh Chandra Sadhu and Others Vs. Jogendra Lal Sarkar and Others*, This was a decision relating to the words of Order XXI, Rule 29 in which it is provided that the Court may stay execution of the decree "until the pending suit has been decided". It was held that the words "until the pending suit has been decided" mean "until the claim in the pending suit has been finally decided", that is to say, by the decree in the Appellate Court. In my opinion, this is the correct view and that was the meaning of the undertaking given by the Controller. If that undertaking had been adhered to strictly, the present difficulties would not have arisen. I am

satisfied, however, that the breach of this undertaking was not intentional on the part of the Controller.

8. Apart from the considerations with which I have dealt, these extraordinary remedies will not be used by the Court where there is, as described in Section 45 of the Specific Relief Act, another specific and adequate legal remedy, such as a right of appeal. The existence of such a right of appeal, however, is not conclusive, because it may not be adequate, and in some circumstances the remedy given by the issue of such writs may be more speedy and more convenient and less costly. Thus in the case of *R. v. North, Ex parte Oakey* (1927) 1 K.B. 491 : 96 L.J.K.B. 77 : 136 L.T. 387 : 70 S.J. 1181 : 43 T.L.R. 60, although an appeal was open to an injured party in that case, it was held that on the facts of that case that fact was no ground for refusing prohibition. Lord Justice Atkin at page 506 said as follows:

Only two grounds were suggested why the writ of prohibition should not go. One was that the Vicar ought to have appealed from the order to the Court of Arches. In the first place, I am personally far from satisfied that he had any right of appeal at all, for I think it is very doubtful whether a person who is not a party to a suit, by reason of his neither having been specially cited nor having appeared to a general citation can have any right of appeal. But whether that is so or not, I think it is quite plain that the fact of there being a remedy by way of appeal is no answer to a writ of prohibition, where the want of jurisdiction complained of is based upon the breach of a fundamental principle of justice, such as I conceive to have been the case here. There is plenty of authority for the proposition that in such cases prohibition will lie notwithstanding that there is a right of appeal.

9. In this case, at first I was doubtful whether the right of appeal to the Governor-General in Council was adequate to enable the tribunal to grant the remedy asked for by the applicants, that is to say, whether the Governor-General in Council under this Act has power to remand the case to the Controller for further hearing or rehearing or to hear further witnesses. The power of remand is not specifically given in the Act, whereas in the CPC such power is specifically given to this and other Courts in India. Rule 62 of the Act which contains the provisions relating to appeals, makes no mention of any such power of remand. Mr. Barwell, however, has drawn our attention to an unreported case, in which he was engaged, which was tried by the Controller of Patents in Calcutta, and from which there was an appeal to the Governor-General in Council, in which an order of remand was made. Moreover, I am of opinion, that all Courts of Appeal have inherent powers of remand, and in this sense, I find it difficult to distinguish the power which has been given to the Governor-General-in-Council as a Court of Appeal from the decision of the Controller in Patent cases. In *Fletcher Moulton on Patents*, 1913, at page 284, there is a note to the effect that the law officer has power to send the case back to the Controller for rehearing. The authority for this is *Warwaris Application* Griff L.O.C. 43, *Chambers' Application for a Patent* (1915) 32 R.P.C. 416 at p. 417, Lord Buckmaster (then Sir S.O. Buckmaster

Solicitor-General) said:

I always regard an appeal before me strictly as a rehearing, and when it comes to hearing witnesses, it appears to me there is no meaning in an appeal if the witnesses are confined to what they said before. I understand that my predecessors have acted in the same way before as I have. I should certainly admit any evidence on both sides, unless there was some very good reason why I should not.

11. It is to be remembered that the Law Officer in England was in the same position regarding appeals as the Governor-General-in-Council is in India. It is clear, therefore, that the applicants have an adequate remedy given to them by the provisions of the Act, and that they may raise these matters upon appeal to the Governor-General-in-Council, and if it be necessary, a remand may be ordered and further witnesses examined by the Controller, or the case may be ordered to be reheard.

12. A question has been argued at considerable length by both sides, whether the Controller has any discretion to grant or refuse the issue of these subpoenas. Mr. Barwell has suggested that there is no provision in the Patent Act which makes it obligatory upon the Controller to hear the evidence of any witness. At first sight I was impressed with that argument in view of the provisions of the Act. Section 9 provides that any person may give notice of opposition to the grant of a patent on various grounds and that where such notice is given, the Controller shall give notice of the opposition to the applicant, and shall, on the expiration of three months, after hearing the applicant and the opponent, if desirous of being heard, decide on the case. Rule 20 provides that notice of opposition to the grant of a patent should be given in duplicate, and one should be sent by the Controller to the applicant. Rule 21 provides that within fourteen days of giving such notice, the opponent must leave at the office a full written statement in duplicate, setting out fully the nature of the opponent's interests, the facts upon which he bases his case and the relief which he seeks. The Controller must then furnish a copy of the statement to the applicant, and the applicant may file a reply. If there is a reply, the Controller must furnish the applicant with a copy of it, and he may file a rejoinder. A copy of the rejoinder, if any, must be sent by the Controller to the applicant. The Controller may require at any time that any written statement, reply or rejoinder shall be in the form of an affidavit. It is clear, therefore, that r. 21 provides for something in the nature of pleadings. Rule 22 provides that on the completion of these proceedings, that is to say, after the pleadings have been closed, the Controller shall appoint a time for the hearing of the case, and shall give the parties notice of such hearing. If either party desires to be heard, he shall leave Form 7 at the Office. The Controller may refuse to hear any party who has not left Form 7 prior to the date of hearing. After hearing the party or parties desirous of being heard, or if neither party desires to be heard, then without a hearing, the Controller shall decide the case.

13. In my opinion, the words "after hearing the applicant and the opponent" in Section 9 cannot be read as meaning that the Controller need only hear the applicant and the opponent, and can refuse to hear any evidence which either or both wish to adduce. "Hearing" means "the hearing of the party and his evidence". If it were to be held that Section 9. means that the Controller need hear only the applicant and his opponent, there would be no obligation for him to hear evidence even by affidavit. It has not been suggested that the Controller's discretion is such that he may, if he chooses, refuse even to accept evidence upon affidavit. It can see, therefore, no reason for restricting his obligation to that of hearing the parties and of considering such affidavits as they may file. It must extend to the evidence of witnesses if the party chooses to call them. We know that in practice, in the great majority of such cases, evidence is given by witnesses and especially by expert witnesses. But the point raised by Counsel for the opponent was, that there was no obligation upon the Controller to allow such evidence to be given, but that Section 65 of the Act gave him the powers of a Civil Court, and, therefore, if he chose to hear viva voce evidence he could do so and had the power to administer oaths and enforce the attendance of witnesses.

14. If, therefore, it is obligatory upon the Controller to hear viva voce evidence, if tendered by either of the parties, it seems to follow that he cannot refuse to issue subpoenas in order to enforce the attendance of witnesses. It is to be observed that the position in England is different to that in this country. There it is specifically provided in Section 77 of the Patents and Designs Act, 1907, that subject to rules under this Act, in any proceedings under this Act before the Controller, the evidence shall be given by statutory declaration in the absence of directions to the contrary; but in any case in which the Controller thinks it right so to do, he may take evidence viva voce in lieu of or in addition to evidence declaration or allow any declarant to be cross-examined on his. declaration. It is clear, therefore, that under the English Act the Controller is under no obligation to hear evidence viva voce, and it is specifically provided that in the majority of cases, except where a special direction is given to the contrary, evidence shall, be given by means of statutory declarations. There is no similar provision in the Indian Act. It seems to follow, therefore, that there is no such discretion in the Controller here as has been suggested, and that he must conduct the proceedings before him upon lines which are consonant with natural justice, that is to, say, the parties must be allowed to decide for themselves what evidence and in what form, is necessary to support the case which they desire to put forward before the Controller. The result is, in my opinion, that the Controller must issue subpoenas if asked for by either of the parties in order to enable them to enforce the attendance of any of the witnesses whose evidence they desire to place before the Controller. His position is the same as that of any Judge under the provisions of Order XVI, Rule 1 of the Code of Civil Procedure.

15. A. number of cases has been referred to by Mr. Ormondson behalf of the applicant to show that the Court has no discretion in issuing subpoenas, to witnesses and I do not think that the contrary can possibly be argued. The

parties are entitled as of right to summonses to witnesses. In the note to the rule referred to in Mulla's CPC 9th Edition the cases on this point are collected. So long as the application is made after the institution of the suit the Court is bound to issue the summons. Nor does it matter that the application is made at such a late stage of the proceedings that the witnesses cannot be present in Court before the final disposal on the suit. The Court may in either of these, cases refuse to adjourn the hearing for the attendance of the witnesses, but it has no power to, refuse to issue summonses. The only case in which the Court has power to refuse to issue summonses is where the application is not made bonafide. In such a case the Court may, in the exercise of its inherent power to prevent the abuse of its own process, refuse to issue. the summons. In the case of Abdul Bari Dewan and Others Vs. Hrishikesh Mittra and Others, , the late Sir B.B. Ghose described the function of the Civil Court in issuing summonses as. Akin to that of a. post office and it has no power to refuse issue of such summonses. In the case of Gora Ghana" Ghose v. Raj Koomar Dass 5 W.R. 111, it was held that

although a party to a suit may not be entitled as of right to ask for a postponement to enable him to procure the attendance of his witnesses, yet, when the trial of the case is delayed, the Court has no discretion to refuse an application for summonses for witnesses at any time before the case is tried.

16. In the case of Huree Dass Bysack v. Afeer Moazzum Hossein 15 W.R. 447 at p. 448, it was held that

a party to a suit has a legal right to apply to a Court for a summons to a witness or for a. commission to examine a witness. The Court should grant the application as a matter of course, without considering whether the applicant can derive any advantage therefrom.

17. In the judgment of Mr. Justice Ainslie it is said that

it is for the party and not for the Court to consider whether he can derive any advantage from his application. If he has delayed it so long that he fails to get the process executed insufficient time, he of course must take the consequence of his delay and the Court will not adjourn the case to remedy his neglect. But unless it appears clearly that it is not only improbable but impossible, for the process to be effectually issued, the application should certainly be complied with. Indeed, I have great doubts whether it should not be complied with in every instance, as it may happen that the case may not be called up for hearing on the day originally fixed and possibly the witness or the return to the commission might be in Court on the day to which it may be adjourned.

18. Though either party has a right to adduce viva voce evidence if he so desires, he has no right to demand an adjournment for this purpose. The question of adjournment is always within; the discretion of the Controller, though like all other persons exercising judicial or quasi-judicial functions, such discretion must be exercised judicially. Apart altogether from any question of the right of either,

party to call witnesses, when once either party has called them obviously the same advantage cannot in justice be denied to his opponent. The Controller must act impartially and according to rules of natural justice, and it would not be just or fair to allow one party a free hand in this matter and call whatever number of witnesses he pleased, and then seek to limit the opportunity offered to his opponent. As Mr. Justice Panckridge said in the case of *In re National Carban Co. Incorporated* 38 C.W.N. 729 at p. 735 : 152 Ind. Cas. 914 : 61 C. 450 : 7 R.C. 329 : AIR 1931 Cal. 721, when referring to proceedings before, the Controller of Parents,

the principles underlying the Code, in so far as they are principles of natural justice, must of course be observed by him, as they must be observed by all authorities exercising judicial or quasi-judicial functions.

19. However, I am satisfied that all these matters are well within the jurisdiction of the appellate tribunal, which has ample power to grant appropriate remedies if it should be deemed just and necessary to do so.

20. The result is that this appeal must be dismissed.

21. The appellants must pay the opponent's costs. There will be no order as to the costs of the Controller. Refreshers will be allowed to Counsel.

Jack, J.

22. I agree.