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decided cases, even if it did not amount to fraud, as probably the Referee meant to find that it did. Both Courts below adopted this report and therefore there are concurrent findings of fact against the appellants and no question of law is raised at all.

Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: *Burton, Yeates & Hart.*
Solicitors for the respondents: *Watkins & Hunter.*

J. V. W.

CIVIL RULE.

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Feb. 2

Before D. Chatterjee and Chapman JJ.

SIVAPRASAD RAM

v.

TRICOMDAS COVERJI BHOJA.*

Jurisdiction—Proceeding under s. 10, Civil Procedure Code—High Court's jurisdiction to interfere with interlocutory orders—Civil Procedure Code (Act V of 1908), s. 10.—Charter Act (24 & 25 Vict. c. 105), s. 15.

The jurisdiction of a Court in a proceeding under s. 10 of the Code of Civil Procedure is limited to stopping a new suit if the circumstances mentioned in that section as conditions precedent to the passing of the order be found by the Court to exist. Courts have no jurisdiction to decide the question of *res judicata* in such a proceeding.

Where a Court has jurisdiction to pass an order, but it has been exercised in violation of the provisions of the law and under a misapprehension

* Civil Rule No. 1302 of 1914, against the order of Beraja Chandra Mitra, Subordinate Judge of Burdwan, dated Dec. 17, 1914.

of the questions at issue, the Court must be held to have acted with material irregularity in the exercise of its jurisdiction.

Venkubai v. *Lakshman Venkoba Khot* (1), *Seo Bux Bogla* v. *Shib Chunder Sen* (2). *Jugobundhu Pattuck* v. *Jadu Ghose* (3), *Tarini Charan Banerjee* v. *Chandra Kumar Dey* (4) referred to.

The High Court is entitled to interfere under s. 15 of the Charter Act, if not under s. 115 of the Code, with interlocutory orders, when they might lead to failure of justice or irreparable injury.

Dhapi v. *Ram Pershad* (5), *Gobinda Mohan Das* v. *Kunja Behary Dass* (6), and *Amjad Ali* v. *Ali Hussain Johar* (7) referred to.

RULE obtained by Sivaprasad Ram and others, the plaintiffs.

This Rule arose out of an application by the opposite party for stay of proceedings under s. 10 of the Code of Civil Procedure in Suit No. 18 of 1913 in the Court of the Subordinate Judge of Burdwan which was filed by the petitioners against the opposite party and another. The Subordinate Judge granted the application and ordered proceedings in the suit to be stayed pending the decision of an appeal in the High Court. Thereupon the plaintiffs applied to the High Court for setting aside the order staying proceedings. The other material facts appear from the judgment in this Rule.

Defendant No. 2 did not appear in the Rule.

Babu Bipin Behari Ghose (with him *Babu Mohinee Nath Bose*), for the petitioners. The parties are not the same. The plaintiff in the previous suit is no party in the present suit and there is a new defendant here. The claim in the previous suit was for extra-royalty and was based on contract. The present suit is based on tort. It cannot be said that

(1) (1887) I. L. R. 12 Bom. 617.
(2) (1886) I. L. R. 13 Calc. 225.
(3) (1887) I. L. R. 15 Calc. 47.
(4) (1910) 14 C. W. N. 788.
(5) (1887) I. L. R. 14 Calc. 768.
(6) (1909) 11 C. W. N. 147.
(7) (1910) 15 C. W. N. 353.

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the matter is *res judicata*. No party says that it is so. The reliefs claimed in the two suits are also different. In the previous suit we were only *pro-formâ* defendants and we could not have claimed any relief. It is very hard on us that proceedings in our suit should be stayed while the suit brought by the opposite party against us would go on. The appeal pending in this Court may not be decided for some time. Moreover, a suit cannot be indefinitely postponed. *Amir Hassan's Case* (1) cannot apply. It is not a case of mere error of law. There is a distinction between a mere error of law and an error of procedure in misapplying a section to a case where obviously it has no application. *Amir Hassan's Case* (1) was discussed in *Sew Bux Bogla* v. *Shib Chunder Sen* (2). See also *Debo Das* v. *Mohunt Ram Charn Dass Chella* (3). There are several other well-known cases in which this Court has interfered in its revisional jurisdiction. Even if we cannot come under section 115 of the Code, I can ask your Lordships to interfere under section 15 of the Charter Act, as grave injury will result if the order is not set aside. In cases of grave injury this Court has interfered in an interlocutory order.

Dr. Rashbehary Ghose (with him *Dr. Dwarkanath Mitra* and *Babu Tarakeshwar Pal Chaudhuri*) for the opposite party. It is not right to contend that s. 10 of the Code does not apply to the facts of this case. S. 10 of the Code of 1908 is wider than the corresponding section of the Code of 1882. The provisions of the section in the new Code apply, though the relief claimed in the second suit may not be the same as that claimed in the first suit. S. 12 of the old Code contained the words "for the same relief"

(1) (1884) I. L. R. 11 Calc. 6. (2) (1886) I. L. R. 13 Calc. 225, 230.
(3) (1898) 2 C. W. N. 474, 477.

after the words "previously instituted suit." Hence it was absolutely necessary to the application of the section not only that the matter in issue in the second suit should be also directly and substantially in issue in the first suit, but that the second suit must be *for the same relief* as that claimed in the first. Those words have been omitted in the present section. The effect of this omission has been to render the provisions of the section in the new Code applicable, even though the relief claimed in the subsequent suit may not be the same as that claimed in the first suit. What is now essential is really the identity of the matter directly and substantially in issue. The identity of the relief claimed is immaterial. See Mulla's notes on the section. Reads the plaint and the issues in the former suit. Even if s. 10 does not apply, the Subordinate Judge has at most committed an error of law. This Court cannot interfere under section 115 with an error of law: see *Amir Hassan's Case* (1). This is again an interlocutory order, and this Court cannot interfere for "no case has yet been decided" within the meaning of the section.

Cur. adv. vult.

D. CHATTERJEE J. The petitioners and the opposite party hold two contiguous collieries under the Maharaja of Pachete. The Maharaja brought a suit No. 391 of 1910 in the Court of the Subordinate Judge of Burdwan against the opposite party for the recovery of extra royalty for coal said to have been appropriated by him by encroaching on the lands of the colliery of the petitioners, who were made *pro formâ* defendants. The claim was based on the terms of the contract entered into by the opposite party with the Maharaja. In that suit the opposite party pleaded

(1) (1884) I. L. R. 11 Calc. 6.

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that the encroachment, if any, was made not by him but by his vendor who was not a party to the said suit. One of the issues in that suit was whether the opposite party had made any encroachment on the lands of the petitioners and the Court found that they had. Pending the decision of that suit the petitioners brought the present suit in the same Court against the opposite party as defendant No. 1 and his vendor as defendant No. 2 for damages for the encroachment found in the previous suit as well as further encroachment and loss caused by flooding the petitioners' mine and other reliefs. The opposite party also filed a suit against the petitioners making counter-charges of encroachment. These two fresh counter-suits were ordered to be tried together. The opposite party then made an application under section 10 of the Civil Procedure Code for stopping the suit of the petitioners and the learned Subordinate Judge has passed an order which has the effect of stopping the trial of the petitioners' suit for an indefinite time whilst the opposite party is at liberty to proceed with his suit against the petitioners. The petitioners obtained this Rule on the ground that the order was incompetent, illegal and irregular. I think that the order made by the learned Subordinate Judge ought not to stand. Section 10 of Civil Procedure Code requires among other things that the suits should be between parties litigating under the same title. The Maharaja was suing in the previous suit as landlord for royalty under contract and the present suit is by one tenant of the Maharaja against another and based on tort. Then again the issue can hardly be said to be the same, as the encroachment charged in this suit covers a larger area than that found in the prior suit. This is quite sufficient to take the case out of the purview of section 10, but the learned Subordinate

Judge says he is clearly of opinion that the decision in the previous suit would operate as *res judicata* between the two defendants in that case and would therefore bar this suit. I do not think it proper to express any opinion on this point at this stage of the case and the learned Subordinate Judge was not called upon to express the opinion that he has expressed in this connection in a proceeding under section 10.

It is contended by the learned vakil for the opposite party that we cannot interfere with the order of the Court below as it does not violate any rule of jurisdiction. Reliance is placed on the decision of the Privy Council in the case of *Amir Hassan Khan* v. *Sheo Baksh Sing* (1). It is also contended that the case has not been decided and we have no jurisdiction to interfere with an interlocutory order.

As regards the question of jurisdiction, I feel no difficulty. The learned Subordinate Judge had no jurisdiction to decide the question of *res judicata* in a proceeding under section 10. His only jurisdiction in this proceeding was to stop the new suit if he found the existence of the circumstances mentioned in the section as conditions precedent to the passing of the order. He has come to no finding as to whether the parties were litigating under the same title. If he had come to a finding right or wrong that would have been another matter; but he has come to none and I think he had no jurisdiction to pass the order; but supposing he had the jurisdiction, he has exercised it in violation of the provisions of the law and under a misapprehension of the questions at issue, and has therefore acted with material irregularity in the exercise of his jurisdiction: see *Venkubai* v. *Lakshman*(2), *Sew Bux Bogla* v. *Shib Chunder Sen*(3),

(1) (1884) I. L. R. 11 Calc. 6. (2) (1887) I. L. R. 12 Bom. 617.
(3) (1886) I. L. R. 13 Calc. 225.

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Jugobundhu Pattuck v. *Jadu Ghose* (1), *Tarini Churan Banerjee* v. *Chandra Kumar Dey* (2).

As regards the second objection there is ample authority in this Court for our interference with interlocutory orders when they might lead to failure of justice or irreparable injury: see *Dhapi* v. *Ram Pershad* (3), *Gobinda Mohon Das* v. *Kunja Behary Dass* (4), *Amiad Ali* v. *Ali Hussain Johar* (5). Even if it were doubtful whether section 115 does empower us to interfere in a case of this kind, I think that our powers under section 15 of the Charter Act are wide enough to enable us to do justice. In this case the opposite party may go on encroaching on the petitioner's land, he may flood the petitioner's mine or even let down the surface and make investigation impossible, and yet the petitioner would not have a word to say until the previous suit is finally decided years later, when investigation may be impossible, when evidence may have disappeared and when a decree may be nugatory: and while the petitioners are thus handicapped by the order of the Court, the opposite party may run his own suit against the petitioners unhampered by either the suit of the Maharaja or the suit of the petitioners. I cannot conceive of a greater injustice and I have no hesitation in setting aside the order of the learned Subordinate Judge and making the rule absolute with costs.

CHAPMAN J. I agree.

S. M. *Rule absolute.*

(1) (1887) I. L. R. 15 Calc. 47.
(2) (1910) 14 C. W. N. 788.
(3) (1887) I. L. R. 14 Calc. 768.
(4) (1909) 14 C. W. N. 147.
(5) (1910) 15 C. W. N. 353.