ORIGINAL CIVIL.

Before Ghose J.

RAM CHANDRA SAGOREMULL

v.

AMARCHAND MURALIDHAR, *In re.**

1920

Feb. 17.

New Trial, application for—Presidency Small Cause Courts Act, 1882, 1895, ss. 9, 38—Notice returnable before Full Bench—Practice in the Small Cause Court of Calcutta—High Court, power of, to frame rules—Matters of procedure and practice—Calcutta Small Cause Court Rules 92, 93, 94 and 95.

By a notification dated the 9th July 1919 and published in the *Calcutta Gazette* of the 16th July 1919, Part I, page 1128, the following rule framed by the High Court under section 9 of the Presidency Small Cause Courts Act, 1882, 1895, was added to rule 92 of the Rules of Practice of the Court of Small Causes of Calcutta :

"Provided that the Court may, if in its opinion no sufficient grounds "are shown for the application, dismiss it without directing service on the "party against whom the application is made."

Held, that the addition to rule 92 was not *ultra vires*, but that the rule did not contemplate the exercise by one Judge of the Small Cause Court of the powers conferred on the Court by section 38 of the Presidency Small Cause Courts Act, 1882, 1895.

Madurai Pillay v. *T. Muthu Chetty* (1) referred to.

THIS was an application under section 115 of the Civil Procedure Code, 1908, to set aside certain orders made by the 2nd Judge of the Small Cause Court, Calcutta, upon applications made by the petitioner under section 38 of the Presidency Small Cause Courts Act, 1882.

The material facts of the case are fully stated in the judgment.

* Small Cause Court Suits Nos. 8785 and 9532 of 1919.

(1) (1913) I. L. R. 38 Mad. 823.

1920

RAM CHANDRA SAGOREMULL v. AMARCHAND MURALIDHAR, *In re.*

Mr. A. N. Chaudhuri, for the petitioner, referred to section 9 of the Presidency Small Cause Courts Act and to rules 92 to 95* of the Rules of Practice of the Court of Small Causes, Calcutta. The addition to rule 92 was framed by the High Court under section 9 of the Act and published in the *Calcutta Gazette* of the 16th July 1919, Part I, page 1128. A colon is substituted at the end of rule 92 for the full stop and the proviso is then added. The effect of it has been that a substantive right hitherto enjoyed by all litigants in the Small Cause Court, has been taken away. Section 38 of the Act gives a substantive right of appeal. That appeal a litigant is entitled to have heard under Rule 95 by a Bench of two Judges of the Court. An appeal cannot be heard by the same Judge who tried the case. The reason why the trial Judge is associated with another Judge on the hearing of what may be called the admission of the appeal is because the Small Cause Court is not a Court of Record and the trial Judge is likely to remember facts which are not on record. In Bombay and Madras, the Bench which hears the applications for new trial consists of

* "92. Every application under Rule 62, 64, 67 or 69 or under section 38 of the Act shall, when presented to the Court, be accompanied with a copy of such application, and such copy shall be served through the Court, or through some other Court, on the party as against whom the application is made, and ordinarily at least four clear days before the date fixed for hearing the application. Such service shall be made in the same manner as the service of summons. An application under section 38 of the Act need not be verified.

In every such application the grounds shall be fully and distinctly set out, and the applicant shall at the hearing be restricted to the grounds contained in his application."

"93. Every application under section 38 of the Act shall, when the applicant has appeared at the original hearing by advocate or pleader, ordinarily be supported by a certificate of such advocate or pleader that in his opinion there are good grounds for the application."

two Judges. Refers to Bombay Rule 38 and Madras Rule 41: *Madurai Pillay* v. *T. Muthu Chetty*(1). In so far as the addition to Rule 92 empowers the trial Judge sitting singly to summarily dismiss an application for new trial, it is *ultra vires*.

Mr. Pearson (with him *Mr. D. N. Bose*), for the opposite party. Section 9 of the Act provides for the exercise by one or more Judges of the Small Cause Court of any of the powers conferred on the Court by the Act. The Act does not define the term 'Court' but the rules give the definition. Refers to Rule 2. The question under discussion really turns upon the construction of Rules 92 and 95. Rule 95 is in the same position as any other rule framed by the High Court under the Act. It is not a rule of substantive right but a rule of procedure and practice, and it is open to the High Court to alter it. There is nothing in the Act itself regarding the formation of a Bench of two or more Judges for the purpose of applications under section 38. The right of the litigant, if any, arises not under the statute but from Rule 95. No question can therefore arise as to a substantive right being cut down by the proviso to Rule 92

"94. The Court may at any time after any application mentioned in Rule 92 is presented to the Court, put the parties on such terms as to furnishing security for costs, or for the amount of the claim and costs by payment into Court or otherwise, as it shall think fit."

"95. Every application under section 38 of the Act shall be heard before two Judges at least, one of whom shall be the Judge who tried the matter in respect of which the application is made, and the other the Chief Judge. If the matter in respect of which the application is made was heard by the Chief Judge, one or more Judges shall sit with him to hear the application. The Chief Judge, or, in his absence, the senior Judge, may, under special circumstances, direct that any Judges other than those specified may hear any application under section 38 of the Act."

(1) (1913) I. L. R. 38 Mad. 823.

1920

RAM CHANDRA SAGOREMULL v. AMARCHAND MURALIDHAR, *In re.*

when the right itself arises, if at all, under a rule admittedly of practice and procedure. The jurisdiction of the Small Cause Court to make an order for a new trial is not appellate but revisional: *E. D. Sassoon* v. *Hurrydas Bhukut* (1), *In re Shivlal Padma* (2), *Srinivasa Charlu* v. *Balaji Rau* (3). The case of *Madurai Pillay* v. *T. Muthu Chetty* (4) is on a different point. The Court there said that a substantive right of appeal having been conferred under section 38, the High Court attempted to impose a condition precedent to the application of that right which they held was a clog on the right.

Mr. A. N. Chaudhuri, in reply. Whether an application for new trial is in the nature of an appeal or revision or rehearing of the case, the statute nowhere says that it is to be heard by the same Judge who tried the case.

Cur. adv. vult.

GHOSE J. This is an application on behalf of a firm called Ramchandra Sagoremull for an order under section 115 of the Code of Civil Procedure for the setting aside of certain orders made by the Calcutta Court of Small Causes. The application has arisen under the following circumstances.

On the 17th April 1919 the applicant firm instituted a suit in the Small Cause Court against the firm of Amarchand Muralidhar for the recovery of a sum of Rs. 400 as damages for breach of a certain contract by which the latter firm had agreed to sell to the applicant firm three bales of mullmull on certain terms and conditions to which it is unnecessary to refer. That suit was numbered 8785 of 1919. On or about the 30th April 1919, the firm of Amarchand Muralidhar filed

(1) (1896) I. L. R. 24 Calc. 455.
(2) (1909) I. L. R. 34 Bom. 316.
(3) (1896) I. L. R. 21 Mad. 232.
(4) (1913) I. L. R. 38 Mad. 823.

a cross-suit against the applicant firm for the recovery of a sum of Rs. 157-8-0 as being the damages alleged to have been sustained by them on account of the applicant firm not having taken delivery of the goods referred to above under the said contract. The last-mentioned suit was numbered as 9532 of 1919. The said two suits came on for hearing before the learned second Judge of the Small Cause Court on the 24th November 1919. The applicant firm's suit was dismissed and a decree for a sum of Rs. 58-2-0 was passed in the suit which had been instituted by Amarchand Muralidhar against the applicant firm. On the 1st December 1919, two applications were filed before Mr. Dobbin who was the Trial Judge in the Small Cause Court, by the applicant firm in the said two suits, asking that the order of dismissal in the first suit and the decree in the second suit should be set aside and praying for new trials in the said two suits. These applications were refused by Mr. Dobbin on the 1st December 1919. It is alleged by the applicant firm that the said applications were presented to the Trial Judge, so that he might, in accordance with what is stated to be the usual practice in the Small Cause Court, order the issue of notices on the firm of Amarchand Muralidhar returnable before the Full Bench of the Small Cause Court in order that they might show cause why the order of dismissal in the first suit and the decree in the second suit should not be set aside or such other order made as the circumstances of the two cases required. It is urged that Mr. Dobbin in summarily dismissing the two applications referred to above acted without jurisdiction and with material irregularity. It is further urged that any power conferred on a Judge of the Small Cause Court to refuse to issue notices on applications like the ones referred to above is *ultra vires* and bad.

1920

RAM CHANDRA SAGOREMULL v. AMARCHAND MURALIDHAR, *In re.*

GHOSE J.

In support of the applicant firm's contentions, Mr. Chaudhuri has taken me through Rules 92 to 95 of the Rules of Practice of the Small Cause Court as they stood before the amendments to the rules published in the *Calcutta Gazette* of the 16th July 1919 on page 1128 thereof came into effect. He argues that the addition to Rule 92 of the Rules of Practice of the Small Cause Court under the notification of the 9th July 1919 published as above, if it authorised a single Judge to dispose of applications like these, is *ultra vires* inasmuch as the applicant for a new trial has been deprived of what is described as a right, hitherto enjoyed, of having applications for new trials considered by a Bench of the Judges of the Small Cause Court, usually composed of the trying Judge and the Chief Judge, and in support of his contention he has referred me to the case reported in I. L. R. 38 Mad. 823.

Now the power given to the High Court to make rules under the Presidency Small Cause Courts Act is to be found in section 9 of the Act, and it is laid down there that the High Court may, from time to time, by rules having the force of law, prescribe the procedure to be followed and the practice to be observed by the Small Cause Court and that rules made thereunder may provide, amongst other matters, for the exercise by one or more of the Judges of the Small Cause Court of any of the powers conferred on the Small Cause Court by the Act or any other enactment for the time being in force. The application for a new trial is made under section 38 of the Act, and it is laid down therein that the Small Cause Court may, on the application of either party within eight days from the date of the decree or order in a suit, order a new trial to be held, or alter, set aside or reverse the decree or order upon such terms as it thinks reasonable and may

in the meantime stay the proceedings. There is, it will be observed, nothing in the Act itself regarding the formation of a Bench of Judges for the purpose of applications under section 38, and it may be noticed in passing that the only provision in the Act about the formation of a Bench with more Judges than one is to be found in sections 11 and 69. The Act makes no distinction between a Judge and more than one Judge of the Small Cause Court and what is spoken of is the Small Cause Court, whether it consists of one Judge or more than one Judge. I do not propose to go into the question as to whether the jurisdiction exercised by the Small Cause Court under section 38 of the Act is appellate or revisional, as to which there has been a good deal of controversy. [See *Shivlal Padma, In re*, (1), *Budhu Lal* v. *Chattu Gope* (2) and *Srinivasa Charlu* v. *Balaji Rau* (3)].

Now the question arises has the High Court made a Rule for the exercise by one Judge of the Small Cause Court of the powers conferred on the Small Cause Court by section 38 of the Act? To my mind, it has not. The addition to Rule 92 does not in my opinion indicate that a Bench need not henceforth be formed on the lines laid down in Rule 95 for the purpose of giving the applicant a preliminary hearing. I am strengthened in my view by the fact that Rule 95 remains unaltered. Rule 92 as it stood before the amendment precluded a preliminary hearing for the purpose of finding out whether there were grounds for applications such as were indicated in the Rule itself. The object of the addition to Rule 92 was to get rid of this difficulty and to provide for a preliminary hearing in two classes of applications (i) in the applications referred to in Rules 62, 64, 67 or 69 and (ii) in

(1) (1909) I. L. R 34 Bom. 316. (2) (1916) I. L. R. 44 Calc. 804.
(3) (1896) I. L. R. 21 Mad. 232.

1920

RAM CHANDRA SAGOREMULL v. AMARCHAND MURALIDHAR, *In re.*

GHOSE J.

applications under section 38 of the Act. The addition to Rule 92 is not *ultra vires*; but so far as applications under section 38 of the Act are concerned, the preliminary hearing must be before a Bench formed on the lines laid down in Rule 95 with the result that no notice would issue thereafter except on good grounds in order that opportunities for protracting cases might be diminished.

In this view of the matter, the orders of the 1st December 1919 in the two suits referred to above must be set aside and the application for new trials in the two suits mentioned above must be considered again by a Bench of the Small Cause Court formed on the lines laid down in Rule 95. No order as to costs of this application.

A. P. B.

Attorney for the petitioner: *P. N. Bannerjee.*

Attorney for the opposite party: *M. N. Mitter.*

APPEAL FROM ORIGINAL CIVIL.

Before Mookerjee and Fletcher JJ.

1920

Feb. 17.

KRISHNA KISHORE DE

v.

AMARNATH KSHETTRY.*

Mortgage—Property in the mofussil—Sub-mortgage including property in Calcutta—Suit by sub-mortgagee—Frame of suit—Forum—Jurisdiction of High Court—Waiver—Res judicata.

The mortgagee of a certain property situate in the mofussil transferred his interest therein to a sub-mortgagee and included in that document a certain other property in Calcutta as further security:

Held, that the sub-mortgagee could enforce in the mofussil Court the security under the original mortgage against the original mortgagor just as the mortgagee might have done.

* Appeal from Original Civil No. 30 of 1919 in suit No. 986 of 1918.