

ORIGINAL CIVIL.

Before Ameer Ali J.

A. K. TOPS

v.

THE KARNANI INDUSTRIAL BANK, LTD.*

1931
May 14.

*Revision—Code of Civil Procedure (Act V of 1908), s. 115 : O. XXI, r. 63—
Presidency Small Cause Courts Act (XV of 1882), ss. 60, 61, 38.*

Section 60 of the Presidency Small Cause Courts Act provides for summary and immediate relief against distraint. It allows a debtor to come in and obtain time and an order to procure release of the property distrained upon upon terms.

Section 61 provides for adjudication of the claimant's right and title to the property. In a proceeding under this section, the mere fact that the summons was not served in the way prescribed in the first portion of the section, although otherwise the trial proceeded in a regular way, does not deprive the court of jurisdiction or vitiate the trial.

APPLICATION.

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

S. C. Mitter for the petitioner. The Small Cause Court in entertaining the second application under section 61 of the Act was acting without jurisdiction and the previous order under section 60 was final and conclusive.

Order XXI, rule 63 of the Civil Procedure Code did not apply. Taking of evidence and deciding on the merits could also be done in the application under section 60. That being the position, the claimant, in moving under section 61, was clearly hit by the doctrine of *res judicata*.

The procedure in section 61 not having been followed, the Court was acting without jurisdiction; therefore, this was a fit and proper case for the exercise of revisional jurisdiction by the High Court under section 115 of the Civil Procedure Code.

[AMEER ALI J. You could have moved the High Court under section 63 of the Presidency Small Cause Courts Act.]

*Calcutta Small Cause Court Suit, No. 6698 of 1931.

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Ordinarily in such a case, I can, but my alternative remedy is to apply to the High Court under section 115 of the Civil Procedure Code. In this particular case, the order having been made in my favour, under section 60 of the Presidency Small Cause Courts Act, there was no occasion to move the High Court under section 63 of the same Act. *Ismail Solomon Bhamji v. Mahomed Khan* (1), *Deno Nath Batabyal v. Nuffer Chunder Nundy* (2), *Shew Prosad Bungshidhur v. Ram Chunder Haribux* (3).

Respondent, in person.

AMEER ALI J. This is an application under section 115 of the Civil Procedure Code.

The short facts appear to be as follows :—

There was a lease by the Karnani Industrial Bank, Limited, of premises No. 45, Park Street to a firm of chemists, Chandler & Co. Chandler & Co.'s rent fell into arrears and, on the 25th March, 1931, the landlord distrained.

On the 27th March, 1931, the lady, who is the respondent to this application, Mrs. A. K. Tops, applied to the Small Cause Court for release of the goods distrained upon. That application was under section 60 of the Small Cause Courts Act and in her petition Mrs. Tops stated that she was prepared to pay the arrears of rent. How precisely that application was dealt with is not clear: but, apparently, Mrs. Tops did not pay the rent in arrear and there was an order by the judge, before whom the application was made, on the 30th March for sale of the goods, distrained upon. That is the whole order. It does not purport to deal with the question of title.

On or about the 1st April, 1931, Mrs. Tops applied (in fact before another judge) under section 61 of the Small Cause Courts Act. The application was (as it should be) in the form of a plaint and in this application, as opposed to the previous application, Mrs. Tops claimed to be entitled to the property as

(1) (1891) I. L. R. 18 Calc. 296.

(2) (1899) I. L. R. 26 Calc. 778.

(3) (1913) I. L. R. 41 Calc. 323, 338.

mortgagee in possession as a matter of right. It appears that the details of the procedure or the machinery specified in part I of section 61 of the Small Cause Courts Act were not followed, that is to say, the summons was not issued by the Registrar, on the application of the bailiff. But notice in some form or other was given to the Karnani Industrial Bank, Limited and the bank appeared: it filed a written statement, in which every possible point was taken and the matter was tried on evidence by Mr. Remfry. The learned judge delivered a judgment on the 27th April, 1931, which has been read to me, finding in the claimant's favour. From this finding, an appeal was preferred under section 38 to the Full Bench, which rejected the appeal.

This application was made on the 12th May, 1931, and an *interim* injunction was obtained restraining Mrs. Tops from dealing with the property. Mr. Mitter appears for the Karanani Industrial Bank. Mrs. Tops appeared in person. Mr. Mitter has argued the matter fully and has given me every assistance.

Mr. Mitter's first point is that an application, having once been made under section 60 of the Small Cause Courts Act and having resulted in a final order, whatever the form of that order, there is no right in the claimant to proceed under section 61, and that if the court entertains the suit or proceeding under section 61, in these circumstances, it does so without jurisdiction. He has argued that the analogy of application under Order XXI of the Civil Procedure Code, and subsequent suit under rule 63 of that order by the party dissatisfied with the result of the application does not apply to proceedings in the Small Cause Court. I do not think it is necessary to invoke analogy. To my mind the effect of these two sections is as follows:—The first section provides for summary and immediate relief against distraint. It allows a debtor to come in and to obtain time: it allows the owner to procure immediately a release of the property upon terms. Section 61, on the other hand, provides for the adjudication of the claimants' right and title

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to the property. I, therefore, think that Mrs. Tops, having made her application under section 60 (whatever the result of that application), was not precluded from taking further steps to establish her title.

The second point, namely, that the precise procedure provided for in section 61 was not followed and that, therefore, there was a defect in jurisdiction, also to my mind fails. It is true that the only method specified for initiating these proceedings is that described in clause (1) of section 61. But, to my mind, the mere fact that the summons or notice did not proceed in the peculiar way prescribed in the first portion of section 61 does not, where a trial takes place, both parties having had notice, having filed pleadings, having appeared, evidence having been taken, deprive the court of jurisdiction or vitiate the trial. The matters specified in section 115, Code of Civil Procedure, are in a sense matters of procedure, but all matters of procedure do not come within section 115.

In my opinion, the grounds put forward do not entitle the bank to an order under that section.

I, therefore, dismiss the application. The injunction will be discharged. No order as to costs.

Attorney for petitioner: *H. C. Banerjee & Co.*
 Respondent in person.

O. U. A.