ORIGINAL CIVIL.

Before Cunliffe J.

GOURILAL MATILAL

v.

JITMAL MAHATA.*

1934

Aug. 13.

Revision—Order for retrial by Full Bench of Small Cause Court—Irregularity —Code of Civil Procedure (Act V of 1908), s. 115.

Where the Full Bench of the Small Causes Court was influenced to send a case back for retrial by what was told them in their private room, at an *ex parte* interview, the order of the Full Bench ought to be set aside and the judgment of the original trying court should be restored.

APPLICATION by the plaintiffs.

The facts of the case appear fully from the judgment.

N. N. Bose for the petitioners. The Full Bench of the Small Causes Court has no jurisdiction to set aside, alter or reverse the decree of a trial judge of that court on pure questions of fact. *Sai Sikandar Rowther* v. *Ghouse Mohidin Marakayar* (1), *M. L. Chuckerbutty* v. *Olof Borin* (2), *Baldeodas Lohia* v. *Balmukund Brijmohan* (3).

Further, the Full Bench acted with material irregularity, in so far as the judges constituting the bench heard counsel for the applicant before them in their private chambers, in the absence of the other side. The counsel gave the judges information which was injurious to the other side and so prejudiced the judges. The trial in Court was a mere mockery.

B. C. Ghose (with him *J. N. Mazumdar*) for the respondents. The Full Bench have jurisdiction to set aside, alter or reverse the decree of a trial judge even

*Application *in re* Small Cause Court Suits, No. 9061 of 1933, and No. 10448 of 1933.

(1) (1916) I. L. R. 40 Mad. 355. (2) (1923) I. L. R. 50 Calc. 919.
(3) (1929) I. L. R. 57 Calc. 612.

1934

Gourilal Matilal v. *Jitmal Mahata.*

on questions of facts. The section is quite clear. See also *Sassoon* v. *Hurry Das Bhukut* (1), *Johan Smidt* v. *Ram Prasad* (2). Further, there were two questions of law argued before the Full Bench.

As to the information given to the judges in their private chamber, counsel for the applicant before the Full Bench having spoken to the advocate for the other side and the other side having accepted the suggestion of the judges, there is no substantial irregularity.

CUNLIFFE J. This is the petition of one Jitmal Mahata, the plaintiff in a suit in the Small Causes Court, to obtain an order setting aside a direction of the Full Bench of that court which allowed a reopening of two cross-actions originally heard by the sixth judge of that court.

The learned judge in question is no longer a judge of the Small Causes Court. When the hearing for the new trial came on before the Full Bench, he had been succeeded by another learned judge.

It is the practice of the Small Causes Court to form their Full Bench from the trial judge and the Chief Judge of the Small Causes Court. On this occasion, the Chief Judge was sitting with the successor of the trial judge.

The application was made under section 38 of the Presidency Small Causes Court Act. The matter comes before me by virtue of the provisions of the well-known section 115 of the Code of Civil Procedure.

It is a somewhat curious and unusual combination of facts which has been detailed in the various affidavits before me now. The conduct of the petitioner's case in the trial court was in the hands of a Mr. Banerji. When this application for the new trial came on (and I may mention that it was launched by the respondents to this application, who were the opponents of Jitmal Mahata), a Mr. Dutt was briefed to look after their interests. On the other side, leading Mr. Banerji, was another Mr. Dutt. Before

(1) (1896) I. L. R. 24 Calc. 455. (2) (1911) I. L. R. 38 Calc. 425.

the learned judges entered the court, when they were still in their private room, a certified copy of the schedule of the debts and assets in insolvency of the trying judge was placed in the hands of Mr. Dutt, the advocate for the respondent. Mr. Dutt looked through the schedule and there he found that Jitmal Mahata, the petitioner here, figured as a creditor of the trying judge to the extent of Rs. 500. Mr. Dutt showed this schedule to the other Mr. Dutt, and I imagine that both gentlemen at once appreciated that an awkward and embarassing position had arisen. Mr. Dutt for the respondents, after some conversation with the lawyers on the other side, announced his intention of communicating this information to the learned judges in their room.

What exactly happened there is somewhat in doubt. Mr. Dutt was called before me and gave his evidence, I thought, in quite a straightforward manner; but he did not say in chief, in answer to Mr. Ghose, that he told the judges that he had informed the other Mr. Dutt of what had been found out and that he had asked him to come with him into the judges' room and be present at the interview. Cross-examined rather severely, however, he stated that he told the learned judges that he had communicated with his opponent and asked him to be present at the interview. Subsequently, he admitted his recollection was not clear on the point.

The line taken by the learned judges at the end of the interview was that the Chief Judge advised Mr. Dutt to go back into court, see his opponent and suggest to him that, in the public interest and in the interest of the reputation of the judiciary, they should come to an agreement privately that a new trial should take place. He did this, but the other Mr. Dutt refused to settle.

In answer to me, Mr. Dutt, in the witness box, admitted that, when he obtained this information about the trial judge, he at once realised that he had an asset on his client's behalf and he had a new weapon

1934

Gourilal Matilal v. *Jitmal Mahata.*

to use in his application for a new trial. The learned judges seem to have appreciated this too. There is no other inference to be drawn from the advice the Chief Judge gave to Mr. Dutt.

It was argued also, though rather half-heartedly, that there were two other legal arguments developed before the learned judges in addition to the insolvency point. In the upshot, the Full Bench allowed the new trial; and it is from that order, as I have already indicated, that this petition arises.

I have to make up my mind whether the Full Bench was influenced to send the case back for retrial by what was told them in their private room at this *ex parte* interview.

With regard to this question, the whole matter seems to me to turn on the manner it was presented to the Full Bench. Is it proper, is it professional, that counsel should go alone before a judge or judges in their private room and impart to the judges in question a matter very inimical to the other side? And is it proper also that, on having received that information, the judges in question should give advice as to what course should be taken when they had only heard one side of the question?

It seems to me that there can be no doubt that this is an undesirable and improper course to adopt, both on the part of the advocate and on the part of the learned judges. It was the advocate's duty either not to visit the learned judges at all and bring the matter out in open court; or, if he was going to communicate with them privately, to insist on taking the legal advisers of the other side with him. On the other hand, it seems to me that it was no less the duty of the judges in their private chamber either to disregard the information altogether or to insist on hearing it communicated in the presence of the legal advisers of the other side, and to hear their argument and contentions on this very controversial point as soon as possible.

As I pointed out, these were not the courses which were adopted, and, from my own view, I am convinced

1934

Gourilal Matilal v. *Jitmal Mahata.*

Cunliffe J.

that the real reason why the case was sent back for retrial was because of this very striking, very harmful piece of *ex parte* evidence which was presented to the judges of the Full Bench in private.

The two other arguments which are said to be legal arguments, one based on a question of discount and the other based on a question of interest, do not seem to me, in truth and in fact, to be legal arguments at all. Those of us, who have practised at the bar, know how easy it is to dress up a question of fact into a question of law, which, on investigation, proves to have no legal aspect whatever, or a legal aspect of such a minor character as not to deserve the dignity of the adjective.

In these circumstances, I think that this order of the Full Bench of the Small Causes Court ought to be set aside, and that the judgment of the original trying court should be restored.

I may add that it has been pointed out to me that there is a possible explanation of the connection of the petitioner here with the debt to the learned judge. Nothing has really been decided, because both sides have not been heard, and I am not going to suppose that judicial human nature is necessarily going to be unduly influenced by the fact that a judge is engaged in trying one of his own creditor's case. It may be very undesirable that a case should be tried by a judge where his creditor is concerned. It may very well be that such a question may be the subject of an order for transfer; but once a judge has undertaken the duty of trying a case of this nature, I am not going to presuppose that he would necessarily decide it in a dishonest fashion.

For these reasons the order I have indicated will be the order of the Court. Costs will follow the event.

Application allowed.

Attorney for applicant: *S. K. Dutt.*

Attorney for respondents: *C. C. Bose.*

S. M.