ORIGINAL CIVIL.

Before Panckridge J.

HAJI MOHAMED DIN

v.

ALLAN.*

1938

June 28, 29, 30.

Calcutta Small Cause Court—New Trial, Second application for—Order in execution proceeding, if subject of application for new trial—Jurisdiction—Presidency Small Cause Courts Act (XV of 1882), s. 38.

The Small Cause Court has no jurisdiction to deal with an order under s. 38 of the Presidency Small Cause Courts Act, unless such an order disposes of the suit. An order under O. XXI, r. 2, of the Code of Civil Procedure made in execution proceedings, does not fall within the scope of the section.

Quaere. Whether the Small Cause Court is competent under s. 38 of the Presidency Small Cause Courts Act to entertain more than one application for a new trial in respect of a particular order or decree ?

Surrut Coomari Dassee v. *Radha Mohun Roy* (1); *Bissessur Das* v. *Johanne Smidt* (2) and *Baldeodas Lohia* v. *Balmukund Brijmohan* (3) referred to.

APPLICATION under s. 115 of the Code of Civil Procedure against an order of the Full Bench of the Calcutta Small Causes Court.

The facts of the case and arguments in the application are fully set out in the judgment.

S. C. Ray for the applicant.

Clough for the respondent.

PANCKRIDGE J. This is an application under s. 115, Code of Civil Procedure.

After I had heard counsel on both sides I indicated that the order which I thought should be made in the exercise of my discretion was one dismissing the application without costs.

*Application in a Small Cause Court suit.

(1) (1895) I. L. R. 22 Cal. 784. (2) (1905) 4 C. L. J. 46.
(3) (1929) I. L. R. 57 Cal. 612.

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Although the parties were not willing to consent to such an order, neither of them offered any vigorous opposition to its being made, and strictly there is no necessity for me to deliver a formal judgment.

Inasmuch, however, as one of the points raised is of considerable importance with regard to the procedure observed in the Court of Small Causes, I think it desirable to express my views upon it.

The plaintiff on August 5, 1935, obtained a decree for rent amounting to Rs. 213-14. On October 1, 1935, one Mohamed Yusuf stood surety for the amount due under the decree. On December 11, 1936, an application was made by the surety for an order under O. XXI, r. 2, s.-r. (*2*) for recording adjustment of the decree.

This was tried on evidence and on December 22, 1936, one of the learned Judges of the Small Causes Court came to a finding that the plaintiff had accepted a certain sum in full satisfaction of the decree, and ordered that his finding should be recorded.

Mr. Ray for the plaintiff has drawn my attention to the fact that the application was made by the surety and not by the judgment-debtor. He states that this is a procedure which the Code does not contemplate. That may very well be so, but this somewhat technical point was only raised by Mr. Ray in his reply, and I do not propose to consider it further.

On January 2, 1937, the decree-holder applied under s. 38 of the Presidency Small Cause Courts Act, a section with which I shall have to deal in greater detail hereafter, and a Bench of two Judges of the Small Cause Court on March 23, 1937, set aside the order made on December 22, 1936. The result of this was that the plaintiff became entitled to execute his decree in full.

On March 31, 1937, the judgment-debtor in his turn made an application under s. 38, and on March 23, 1938, a Bench of three Judges made an order

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setting aside the order made by the two Judges on March 23, 1937, thereby restoring the order of December 22, 1936.

It does not clearly appear whether the first Full Bench order, that is to say, the order of March 23, 1937, reversed the order of December 22, 1936, on grounds of fact or on grounds of law, and I will assume that the order is not open to criticism by reason that it proceeded on grounds of fact only.

Mr. Ray has maintained that the second order made under s. 38 was made without jurisdiction, because the Court's power to deal with the order of December 22, 1936, under s. 38 was exhausted when the first Full Bench made the order of March 23, 1937.

He submits as a general proposition that the Court has no power under s. 38 to deal more than once with any order made in the suit.

For this he relies on *Baldeodas Lohia* v. *Balmukund Brijmohan* (1), where Lort-Williams J. held that where a Full Bench had granted an application for a new trial, a subsequent Full Bench had no jurisdiction under s. 38 to make an order setting aside the previous order.

For the general principle that statutes should be construed in such a manner as will secure the finality of legal decisions Mr. Ray has referred to a case on which Lort-Williams J. relied *The Great Northern Railway Company* v. *Mossop* (2).

Lort-Williams J., however, distinguished the facts in *Baldeodas Lohia* v. *Balmukund Brijmohan* (*supra*) from the fact in *Surrut Coomari Dassee* v. *Radha Mohun Roy* (3) where Sale J. decided that the Small Cause Court had power under s. 38 to hear more than one application for a new trial in the same cause.

(1) (1929) I. L. R. 57 Cal. 612. (2) (1855) 17 C. B. 130; 139 E. R. 1018.
(3) (1895) I. L. R. 22 Cal. 784.

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Mr. Clough for the defendant has relied on *Bissessur Das* v. *Johanne Smidt* (1), where Woodroffe J. distinguished cases in which the result of an application under s. 38 is to reverse the previous order from cases where the result is to affirm it. The learned Judge appears to have held that under s. 38 there is jurisdiction to entertain applications with regard to the former class of case but not with regard to the latter.

The facts of this case appear to me in this respect to be more akin to the facts in *Bissessur Das* v. *Johanne Smidt* (*supra*) and in *Surrut Coomari Dassee* v. *Radha Mohun Ray* (*supra*) than to those in *Baldeodas Lohia* v. *Balmukund Brijmohan* (*supra*). However, I do not think it necessary to say anything with regard to the broad question, as I hold on other grounds that both the Full Bench orders were made without jurisdiction, because the original order made on December 22, 1936 was not one falling within the scope of s. 38.

Sections 37 and 38 form part of Chap. VI of the Presidency Small Cause Courts Act, 1882, and that Chapter is headed "New Trials and Appeals". The two sections were originally one, but I must construe them, if I can, as they stand, and without regard to the language of the repealed section for which the present sections have been substituted. Section 37 is as follows:—

> Save as otherwise provided by this Chapter or by any other enactment for the time being in force, every decree and order of the Small Cause Court in a suit shall be final and conclusive.

Therefore, no order made in a suit by the Small Cause Court can be questioned unless it falls within the succeeding section, s. 38. Further, I think it is plain that the Small Cause Court has no power to vary or amend any order that it may make unless it derives such power from some statutory source.

(1) (1905) 4 C. L. J. 46.

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Section 38 runs thus :—

> Where a suit has been contested, the Small Cause Court may, on the application of either party, made within eight days from the date of the decree or order in the suit (not being a decree passed under s. 522 of the Code of Civil Procedure), 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.

I must emphasize the fact that to fall within the scope of s. 38 an order must not only be made in the suit, but it must be *the* order made in the suit; and I take this to mean that it must be an order which in some way or other disposes of the suit, for example, an order dismissing a suit for default. Unless it is the order made in a suit in this sense the Court has no power in my opinion to deal with it under s. 38.

It is clear that an order made in execution proceedings, such as an order under O. XXI, r. 2, cannot be the order made in the suit in this sense.

A further argument for this view is to be found in the opening words of the section. It is quite reasonable that where a suit has not been contested there should be nothing in the nature of an appeal against the order disposing of it. But it would be quite illogical to make the right to appeal against orders made in execution proceedings dependent upon whether the suit had been contested or uncontested. For example, if proceedings are taken under O. XXI, r. 50, to execute a decree against someone who has not been served with the summons in the suit, on the ground that he is liable as partner in respect of the decree, it ought not to affect his right of appeal, if any, that the suit has not been contested by the persons who have been served with the summons.

It is perhaps significant that in *Kanji Vishram* v. *Jivraj Dayal* (1) where a person whom it was sought to render liable under O. XXI, r. 50, desired to invoke s. 38 in respect of an order making him liable, the argument proceeded on the basis that the

(1) [1930] A. I. R. (Bom.) 412.

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proceedings under O. XXI, r. 50, were "the suit" within the meaning of s. 38.

Mr. Ray has not proceeded upon this ground, but has argued that the order of December 22, 1936, was an order made in the original suit, that is to say, the suit in which the decree for rent was passed.

The position, therefore, is this: The first Full Bench had no jurisdiction by their order of March 23, 1937, to vary the order made on December 22, 1936, because it was not the order made in the suit within the meaning of s. 38. The proper course for the defendant, if he felt aggrieved, was to apply to this Court under s. 115 as soon as the first Full Bench had made their order. Similarly the order of the First Full Bench was not the order made in the suit, and accordingly the second Full Bench should have dismissed the application made to it as not falling within the scope of s. 38. The result is that the defendant had had an order passed against him which the Court had no jurisdiction to make. On the other hand he has himself to blame for seeking his remedy in a Court, which in its turn had no jurisdiction to deal with the matter.

In these circumstances, in the exercise of my discretion I think that the justice of the case will be as satisfactorily met as the circumstancces allow if I dismiss the application without costs.

Application dismissed.

Attorneys for applicant: *N. C. Bural & Pyne.*

Attorney for respondent: *B. Biswas.*

G. K. D.