REVISIONAL CIVIL.

1918
May, 6.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

JHUNKU LAL (DEFENDANT) *v.* BISHESHAR DAS AND ANOTHER (PLAINTIFFS). *

Civil Procedure Code (1908), *order XXIII, rule* 1; *section* 115—*Application by plaintiff to withdraw suit with leave to bring a fresh one made when hearing of suit was nearly concluded—Leave granted to bring fresh suit—Exercise of discretion—Revision.*

A suit was instituted in the court of the Munsif. After the evidence had concluded and either during or after the argument, the plaintiffs applied for leave to withdraw with liberty to bring a fresh suit. They based their application upon the fact that they had failed to give formal proof of a plaint which was essential to their success. The court granted leave to bring a fresh suit. Upon an application in revision against this order: *held* that the court had jurisdiction to grant leave to the plaintiffs to bring a fresh suit, and the fact that the court may have exercised, and probably did exercise, a wrong discretion in granting the plaintiff's application was not sufficient to bring the case within the purview of section 115 of the Code of Civil Procedure.

IN this case the plaintiffs instituted a suit in the court of a munsif. After the evidence had been concluded, and either during or after the arguments, the plaintiffs applied for leave to withdraw, with liberty to bring a fresh suit. They based their application upon the fact that they had failed to give formal proof of a certain plaint which was apparently considered by the parties to be essential to the plaintiffs' success. The court granted leave to bring a fresh suit. The defendant thereupon applied to the High Court in revision under section 115 of the Code of Civil Procedure.

Munshi *Panna Lal*, for the applicant.

Babu *Durga Charan Banerji*, for the opposite parties.

RICHARDS, C. J.—This is an application in revision and arises under the following circumstances. The plaintiffs instituted a suit in the court of the munsif. After the evidence had concluded, and either during or after the arguments, the plaintiffs applied for leave to withdraw, with liberty to bring a fresh suit. They based their application upon the fact that they had failed to give formal proof of a certain plaint which was apparently considered by the parties to be essential to the plaintiffs' success.

* Civil Revision No. 217 of 1917.

The court granted leave to bring a fresh suit. The present application is made under section 115 of the Code of Civil Procedure. That section provides that "the High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears—

(*a*) to have exercised a jurisdiction not vested in it by law, or

(*b*) to have failed to exercise a jurisdiction so vested, or

(*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit." It is argued on behalf of the applicant that the munsif acted illegally or with material irregularity in granting permission to bring a fresh suit. Order XXIII, rule 1, deals with the withdrawal and adjustments of suits. Rule 1 is as follows :—"At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim, where the court is satisfied—

(*a*) that a suit must fail by reason of some formal defect, or

(*b*) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may grant the plaintiff permission to withdraw with liberty to institute a fresh suit."

In support of the application the case of *Bai Kashibai* v. *Shidapa Annapa* (1), the case of *Khub Chand* v. *Ajodhya Prasad* (2), and the decision of their Lordships of the Privy Council in the case of *Watson* v. *The Collector of Rajshahye* (3) have been cited. I may say, speaking for myself, that I consider that a court ought to be very slow to give liberty to bring a fresh suit after a case has been heard out on the merits and probably an appellate court ought seldom or never to do so except where an application has been made to the first court and the appellate court thinks the first court should have granted the application. I do not think that it ever was intended that a plaintiff should have the power

(1) (1913) I. L. R., 37 Bom., 682. (2) (1912) 11 A. L. J., 733.
(3) (1869) 13 Moo., I. A., 160.

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of trying out his case and then at the last moment asking for leave to withdraw with permission to bring a fresh suit. The mere ordering of the plaintiff to pay the defendant's costs does not compensate the latter for being sued a second time. But the real question before us is whether or not we can interfere in revision upon the ground that the Munsif either had no jurisdiction, or that he exercised his jurisdiction with material irregularity. It will be noted that the rule is divided into two parts, first, where a suit fails for a "formal defect," and secondly, where there are "other sufficient grounds." It was for the Munsif to say whether or not there were "other sufficient grounds" in the present case. It is somewhat difficult to definitely decide that the absence of a witness could under no possible circumstance be "other sufficient grounds" within the meaning of the rule However this may be, it seems to me that even if the Munsif be taken to have made a mistake in law, we nevertheless are not entitled to interfere in revision. In the very recent case of *Balakrishna Udayar* v. *Vasudeva Ayyar* (1) their Lordships dealing with section 115 of the present Code of Civil Procedure say as follows :— "It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved." In the Privy Council case referred to on behalf of applicant the original court had dismissed the plaintiff's suit, at the same time recording in its "proceedings" that the order was not intended to bar the plaintiffs from proceeding as if the action had not been brought. The question which their Lordships had to decide was whether the appearance of these words in the "proceedings" enabled the plaintiff to bring a fresh suit, notwithstanding the dismissal of the first one, the defendant having pleaded *res judicata*. Their Lordships incidentally, it is true, dealt with the meaning of the expression "sufficient cause" appearing in section 97 of Act VIII of 1859 and no doubt took the view that that section was not intended to allow or enable a plaintiff to bring a fresh

(1) (1917) I. L. R., 40 Mad., 793 (799).

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suit after it had been heard on the merits. I would reject the application.

BANERJI, J.—I also am of opinion that the application should be rejected, but I would confine myself to this ground in rejecting it that it is not maintainable under section 115 of the Code of Civil Procedure. It cannot be said that the court below exercised a jurisdiction which was not vested in it by law. In the exercise of the jurisdiction which it undoubtedly had it may have committed an error, and apparently it did commit an error in the present case; but that alone would not justify this Court in interfering under section 115 as interpreted by their Lordships of the Privy Council in previous cases, and also in the recent case to which the learned Chief Justice has referred. This being so, the application for revision cannot in my opinion be entertained and must be rejected.

BY THE COURT.—The order of the Court is that the application is rejected with costs.

Application rejected.

REVISIONAL CRIMINAL.

Before Justice Sir George Knox.

HET RAM v. GANGA SAHAI AND OTHERS. *

1918
May, 7.

Act No. XLV of 1860 (*Indian Penal Code*), *section* 494—*Offence triable by Court of Session—Accused discharged—Order directing complainant to pay compensation—Criminal Procedure Code, section* 250—*Judgment written by magistrate.*

Section 250 of the Code of Criminal Procedure is not applicable where the charge which is being inquired into by a magistrate is one which is exclusively triable by a Court of Session. Neither in such a case is the magistrate empowered to write a judgment; all that he is empowered to do is to record reasons for a discharge, if he make such an order, and to pass the order of discharge, *Fattu* v. *Fattu* (1) referred to.

A MAGISTRATE of the first class was inquiring into a charge against certain persons under section 494 of the Indian Penal Code. There were also subsidiary charges under sections 363 and 420 of the Code. The Magistrate wrote a more or less lengthy judgment, in which he criticized the evidence with great

* Criminal Reference No. 135 of 1918.

(1) (1904) I. L. R., 26 All., 564.