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April, 26.

REVISIONAL CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr Justice Walsh.

BHARGAVA AND Co. (DEFENDANTS) *v.* JAGANNATH, BHAGWAN DAS (PLAINTIFFS) *

Civil Procedure Code (1908), *section* 115—*Revision—Powers of High Court—Order, preliminary to the hearing of a suit, deciding whether or not the trying court had jurisdiction.*

The decision of a question of jurisdiction by the court of first instance as a preliminary to the hearing of the suit before it and after taking evidence and hearing arguments is, within the meaning of section 115 of the Code of Civil Procedure, 1908, the decision of a "case" from which no appeal lies, and is therefore open to the revisional jurisidiction of the High Court, and the High Court may properly consider the evidence given in the court below. *Bihari Lal* v. *Baldeo Narain* (1) approved. *Balakrishna Udayar* v. *Vasudeva Ayyar* (2) and *Rashmoni Dasi* v. *Ganada Sundari Dasi* (3) referred to.

THE facts of this case were briefly as follows :—

This was an action to recover sixty thousand and odd rupees. The plaintiffs were a firm carrying on business at Agra. It was alleged that the defendants who carried on business at Delhi had agreed to supply to the plaintiffs 100 bales of *dusuti* of a particular quality, but the *dusuti* supplied by them was of a quite different quality. Hence the suit, for refund of price paid to them with damages. The claim was resisted on the following among other grounds, namely, that the Agra court had no jurisdiction to entertain the suit, as the contract had taken place at Delhi. The Subordinate Judge of Agra before framing any other issue framed an issue with regard to jurisdiction, and, after hearing evidence on that point, came to the conclusion that he had jurisdiction to try the suit. The present application in revision was directed against the decision on that particular issue.

The Hon'ble Munshi *Narain Prasad Ashthana*, for the opposite party, showed cause. No revision lay. Under section 115 of the Code of Civil Procedure two conditions were necessary to be fulfilled before a litigant could invoke the revisional powers of the High Court, namely, *(i)* that the 'case' must be decided; *(ii)* that he had no other remedy. As regards *(i)*

* Civil Revision No. 34 of 1919.

(1) (1918) I. L. R., 40 All., 674. (2) (1917) I. L. R., 40 Mad , 793.
(3) (1914) 26 Indian Case , 275.

the order passed was an interlocutory order; the case had not been decided. The word 'case' had not been defined in the Civil Procedure Code or in any other Statute. No doubt the word could not be confined to a litigation in which there was a plaintiff who sought to obtain some relief in the shape of damages or otherwise against a defendant. It might include an *ex parte* application praying that the person in the position of trustees or officials should perform their trust or discharge their official duties, as was held in *Balakrishna Udayar* v. *Vasudeva Ayyar* (1). Here the issue as to whether the court had jurisdiction to try the suit had been disposed of, that decision was passed in the course of the suit, it was a part of the case which was still undecided. As regards *(ii)*: Though the party aggrieved might not have a present right of appeal against the order passed, yet he had the remedy open to him of making the alleged wrongfulness of the order a ground of attack in the appeal from the final decree in the case. It was well settled that the revisional powers should not be exercised unless as a last resource for an aggrieved litigant. He must satisfy the court that he had no other remedy.

The following cases were cited:—*Muhammad Ayab* v. *Muhammad Mahmud* (2), *Mul Chand* v. *Juggi Lal* (3), *Moti Lal* v. *Ganga Dhar* (4) and *Makhan Lal* v. *Chunni Lal* (5). When the court upon evidence had come to a finding that it had jurisdiction, the High Court in revision could not interfere. It was not challenged that the Subordinate Judge had no jurisdiction to try the question of jurisdiction and if in the exercise of his jurisdiction he committed a mistake in law the High Court in revision could not interfere; *Jwala Prasad* v. *E. I. Railway Co.* (6).

The cases of *Shiva Nathaji* v. *Joma Kashinath* (7) and *Muhammad Husain* v. *Ajudhia Prasad* (8) were also cited.

Babu *Lalit Mohan Banerji*, for the applicant, called the attention of the Court to *Bihari Lal* v. *Baldeo Narain* (9).

(1) (1917) I. L. R., 40 Mad., 793.
(2) (1910) I. L. R., 32 All., 623.
(3) (1914) 12 A. L. J., 460.
(4) (1915) 13 A. L. J., 435.
(5) (1918) I. L. R., 41 All., 42.
(6) (1918) 16 A. L. J., 535.
(7) (1883) I. L. R., 7 Bom., 341.
(8) (1888) I. L. R., 10 All., 467.
(9) (1918) I. L. R., 40 All., 674.

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The preliminary objection was over-ruled and the case was heard on the merits.

MUHAMMAD RAFIQ and WALSH, JJ. :—We have come to the conclusion that this application must be granted. The circumstances of the case are exceptional and the form in which the matter comes before us is also exceptional. We do not propose to lay down any general proposition as to what ought or ought not to guide this Court in interfering in revision with what may be called preliminary. interlocutory or subsidiary orders made by the courts below. In this particular case a substantial dispute has arisen with regard to a contract made between two business men carrying on business respectively at Agra and Delhi. The purchasers under the contract, having reason, as they allege, to complain of the performance of the contract, sued the vendors for damages in the Subordinate Judge's court at Agra. The defendants were the vendors carrying on business at Delhi, and at the earliest possible opportunity they took the objection that, inasmuch as the contract was made at Delhi and was by its terms to be performed outside the Agra jurisdiction, the court at Agra had no jurisdiction to entertain the suit at all. Thereupon, without objection by either party, the Subordinate Judge entertained that objection as a matter wholly independent of the merits of the suit which he had to determine, if it turned out that it was within his jurisdiction to determine, and evidence was called on both sides and considerable argument took place on either side and eventually an elaborate judgment was written upon the sole but important question "is the suit cognizable by this court." The learned Judge himself says it was thought proper to decide the question of jurisdiction first. He decided that question in favour of the plaintiffs on the ground that the contract was made in Agra. An order was drawn up on the 2nd of February, 1919, in the following terms :—"This case coming on for disposal on the 6th of Februray, 1918, it is ordered that the case is cognizable by this Court." It is not contended that there is an appeal from that order. We have come to the conclusion that it is impossible to say that such an objection, dealt with in the way this objection was dealt with, by what really amounted to a trial, by a very careful

and thorough judgment, ending in a formal order of the court, is not a case decided in which no appeal lies within the meaning of section 115 of the Code of Civil Procedure. We think sufficient justification for taking that view is to be found in the recent decision of the Privy Council in *Balkrishna Udayar* v. *Vasudeva Ayyar* (1).

We do not desire to depart in any way from the general rule which has been laid down that an application of this kind in revision ought not to be treated as an appeal; that findings of fact bearing upon an issue properly before a court cannot be and ought not to be reviewed by the court exercising revisional jurisdiction, but, without discussing the cases upon the point, we think the trend of authority in the various High Courts in India is to this effect—it cannot be more clearly stated than in the language of Mr. Justice MOOKERJI, in the case of *Rashmoni Dasi* v. *Ganada Sundari Dasi* (2)—that "when a court as a court of revision looks into evidence, it does so with a view to determine whether the subordinate court has assumed a jurisdiction which it did not possess." The same view has been recently given effect to by a judgment of Mr. Justice RYVES, as he was then, sitting in this Court in June, 1918, in a case reported in *Bihari Lal* v. *Baldeo Narain* (3), the reasoning in which we entirely approve and adopt.

We have, therefore, to consider whether on the evidence before the learned Judge there was really anything which could justify him in holding that he had jurisdiction to entertain this suit on the ground that the contract was made at Agra. We have come to the conclusion that there is nothing. As a matter of fact, with certain unimportant exceptions, we do not differ from his conclusions of fact, but the learned Judge unfortunately wholly misdirected himself and confused the negotiations with the bargain, and the terms of the contract with a binding acceptance. The facts as sworn to may be simply stated. One Kanhaiya Lal, who is said to be a broker or agent for the defendants, was endeavouring to obtain a purchaser for this cloth, which is suitable for use as tents, for the defendants at Delhi from persons in Agra. It may here be observed that it has

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been assumed that he was an agent of the defendants. There is not a scrap of evidence to that effect except the bare statement of the plaintiff and that statement is consistent with the broker being, as they often are, agent for both parties. He may have been an agent for the purchasers; he may have been an agent for the vendors; he may have been an agent for both parties. Like most brokers he was extremely anxious about earning his commission, as is made clear by the evidence; but it is not clear from whom he expected to receive it. The best test of a man's employment is the question who is liable to pay his commission. It may be assumed for the purpose of this inquiry only, that he was the agent of the defendants. He had an interview with one of the members of the defendants' firm in Delhi and having represented that there were purchasers of this *dusuti* at Agra he obtained from them two typewritten forms. This method of making a contract is one very commonly adopted among mercantile people; one document constitutes the offer and the other constitutes the acceptance, both of them being left blank, both as regards the name of the purchaser and the contract rate, neither of which were known at that time. He was told that the defendants were ready to sell at Re. 1-13-0 or Re. 1-12-6 per ℔ and he went to Agra with these two documents. Eventually he obtained an offer for Re. 1-12-0 from the present plaintiffs. That offer was signed by Banke Lal, a member of the plaintiffs' firm, addressed to the defendants at Delhi and the blank for the price was filled in with Re. 1-12-0 per ℔. At the same time, according to the plaintiffs' evidence, which we see no reason to discredit upon this point, the plaintiffs' clerk filled in upon the other form intended for acceptance the name of the plaintiffs' firm as purchasers and the price. It is to be observed that this price was less than the price which the defendants had told Kanhaiya Lal they were prepared to accept, and there is not a scrap of evidence, indeed everything in the case including the documents points to the contrary, that the defendants authorized Kanhaiya Lal to complete a binding contract on their behalf on any terms that he was able to negotiate. This conclusion, we understand, the learned Judge came to as a matter of law or inference. What invalidates the

finding to our mind is that it is absolutely out of the question, that the defendants armed their agent with documents formally signed by them as binding contracts with the price left blank and with *carte blanche* authority to fill them up for any price which he saw fit to arrange. Such a proceeding is almost incredible on the part of a reasonable business firm. What actually happened is testified to by the direct evidence of Keshab Deo, one of the members of the defendants' firm, and is confirmed in every possible way by the documentary evidence. Having arranged this price with the plaintiffs and confident that he would persuade the defendants to accept it, he wired to the defendants at Delhi that he had sold. The learned Judge attaches great importance to this telegram. So do we; but we think it points exactly in the opposite direction to that in which the learned Judge thinks it ought to be taken. So far as Kanhaiya Lal was concerned he had sold in the sense that he had arranged a sale for his principals, but he had no authority to complete the contract, and if he had, there would have been no necessity for his journey to Delhi. He went to Delhi personally to report what he had done. He was at once rebuked by his principal for having used the word "sold" in the telegram. His explanation was that it was a piece of commercial licence to prevent the defendants disposing of the goods anywhere else, and he then, and, we are satisfied, for the first time, at that interview disclosed to the defendants the price at which he had arranged to sell. The defendants not unnaturally pointed out that it was not the price which they had told him they were willing to accept. According to Keshab Deo he made an almost piteous appeal to them in his own interest as well as in the interest of the defendants to close the bargain and the bargain was then accepted. There are to our minds two pieces of internal evidence upon the document itself which the learned Judge has wholly left out of view which conclusively show the truth of this story. The signature of the vendors, the accepting firm, is dated the 8th of August, the day after the telegram, the day after the blanks had been filled in at Agra, the day of Kanhaiya Lal's interview with his principals at Delhi. The second point is that the writing of the signature of the

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name of the firm, across the stamp accepting the contract is the same as the initials of G. S. B. against the price which had been filled in in the contract. The plaintiffs' clerk made a feeble attempt to claim that these intitials had been put there by him but receded from that position on looking at the document. We are satisfied that the terms were initialled by the same person who signed the document. Under these circumstances the learned Judge having wholly ignored the importance of the fact that the document was in fact signed and the contract completed by the defendants themselves as principals, has therefore failed to investigate the question where and under what circumstances that which alone would make the contract a binding contract in law at all took place. He has assumed jurisdiction over a matter which, if he had properly applied himself to the facts, he was bound to hold he had no jurisdiction to try.

Revision is a discretionary jurisdiction, but, in an important matter of this kind, if the law enables us to do it, it is to the best interests of the parties themselves and of the public that if these preliminary questions of jurisdiction can be finally determined by an authoritative decision before a large expenditure of time and money over prolonged litigation, it is better that it should be done, and we, therefore, quash the order of the 10th of February, and direct the plaint to be returned for presentation to the proper court. The applicants must have their costs of this application.

Application allowed.