

REVISIONAL CIVIL.

Before Mr. Justice Ashworth.

1927
January, 7. ABDUL HAQ (APPLICANT) v. SHEO RAM (OPPOSITE PARTY).*

Criminal Procedure Code, section 476—Civil Procedure Code, section 115—Order in appeal directing prosecution—Revision—Jurisdiction.

An appellate order passed under section 476B of the Code of Criminal Procedure is open to revision on the civil side and not on the criminal side of the High Court, the alterations in section 476 introduced by the Criminal Procedure Code (Amendment) Act, 1923, not having affected the arguments or the decision in the case of *In the matter of the petition of Bhup Kunwar* (1).

And this being so, the High Court, under section 115 of the Code of Civil Procedure, cannot interfere with a case where a Judge may have decided to prosecute on wrong or insufficient grounds. *Banwari Lal v. Jhunka* (2), referred to.

THIS was an application in revision against an appellate order of the District Judge of Cawnpore directing the prosecution of the applicant for an offence alleged to have been committed in the Court of the Subordinate Judge, who himself had refused to prosecute. The facts of the case sufficiently appear from the judgement of the Court.

Mr. *A. P. Dube*, for the applicant.

Pandit *Uma Shankar Bajpai*, for the opposite party.

ASHWORTH, J.:—This is an application in revision under section 115 of the Code of Civil Procedure, made by one Abdul Haq against an order of Mr. L. S. White, District Judge of Cawnpore, on

* Civil Revision No. 73 of 1926.

(1) (1903) I.L.R., 26 All., 249.

(2) (1925) 24 A.L.J., 217.

the 6th of March, 1926, allowing an appeal against an order of the Subordinate Judge of Cawnpore who refused to make a complaint under section 476 of the Code of Criminal Procedure for the prosecution of the present applicant Abdul Haq on the ground of perjury.

The facts are as follows:—Three brothers claimed certain property. They had not sufficient means to bring and prosecute a suit for the same. Accordingly they made an arrangement with Abdul Haq that he would finance them. The arrangement was recorded in a sale-deed of a share of the interest of the three brothers in the property claimed. There was a stipulation in this deed that Abdul Haq, in the event of the suit being successful, would not be entitled to any share of any costs that might be awarded by the civil court. A decree was passed on the 22nd of January, 1925, in favour of the three brothers and of Abdul Haq and the decree provided for the plaintiffs getting their costs. No apportionment was made of these costs and no stipulation in the decree was entered that Abdul Haq should not be entitled under the decree to any share in these costs. Subsequently by an application, dated the 30th of April, 1925, Abdul Haq asked to be allowed to realize the whole of the costs which had been deposited in court, saying that he was himself entitled to one-half of them. Presumably this application must be interpreted to mean that as a joint decree-holder he was entitled under the decree to realize the whole costs but that under some arrangement with the other decree-holders he would only be entitled to retain one-half of those costs and would be bound to pay the other half over to the other decree-holders. The execution court, whose attention had been drawn by this time to the sale-deed by the three brothers in favour of Abdul Haq

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which resulted in Abdul Haq being a plaintiff in the civil court, asked Abdul Haq to explain how in view of the stipulation in that sale-deed he could be entitled to any costs. Apparently his explanation was satisfactory, or else the execution court ultimately considered that it could not go into the matter as an execution court. Anyway, an order was passed allowing Abdul Haq to take the costs deposited.

Now one of the three brothers had gone to South Africa. One of the other two put in an application to the Subordinate Judge complaining that Abdul Haq had committed perjury in his application of the 30th of April, 1925, which application was verified by an affidavit, in stating that he was entitled to half the costs, and asking the Subordinate Judge to make a complaint to the criminal court for his prosecution in respect of this perjury. The Subordinate Judge rejected this application, but the District Judge of Cawnpore on appeal passed an order allowing the appeal and stating that he would himself make a complaint to the District Magistrate. It is against this order that this application in revision is filed.

Abdul Haq at first brought the matter in revision to this Court under section 439 of the Code of Criminal Procedure. The present Acting Chief Justice by an order, dated the 4th of May, 1926, expressed an opinion that the District Judge of Cawnpore should not have made the order that he did in the circumstances, but he held that an application in revision did not lie to the High Court on the criminal side. He allowed Abdul Haq to re-present his application on the civil side without any further payment of stamp or fee.

It is incumbent on me to accept the view that the application in revision must be presented on the civil side. I would refer to the Full Bench ruling

in *In the matter of the petition of Bhup Kunwar* (1). I concur with the view of SULAIMAN, J., in *Banwari Lal v. Jhanka* (2) that the alterations in section 476 introduced by the Criminal Procedure (Amendment) Act, 1923, have not affected the arguments or the decision in the Full Bench case referred to.

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It is clear to me that, having regard to the language of section 115 of the Code of Civil Procedure, no revision of the District Judge's order can be made on the civil side. I concur with the view of the Acting Chief Justice that in the circumstances of this case it is not proper to order the prosecution for perjury of Abdul Haq, but this opinion must remain a mere *obiter dictum*. The order of the District Judge may have been based on a faulty appreciation of the facts or may have been based on a faulty view of the law. I mean that Abdul Haq in his application, where he stated that he was entitled to realize the costs, may have meant that legally he was entitled as a joint decree-holder to realize the costs under the decree. Be this as it may, the District Judge has not in my opinion exercised a jurisdiction not vested in him or failed to exercise a jurisdiction vested in him. Nor again has he acted illegally or with material irregularity in the exercise of his jurisdiction to accept the appeal under section 439 (b) of the Code of Criminal Procedure.

It appears to me that some alteration of the law is desirable to obviate the undesirability of such an application as this being dismissed on the ground that it cannot be entertained under section 115 of the Code of Civil Procedure. The real position appears to be this. Section 476 is part of the Code of Criminal Procedure and the legislature, when drafting it, doubtless considered that sections 436 to 439 of the Code

(1) (1909) I.L.R., 26 All., 249.

(2) (1925) 24 A.L.J., 217

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of Criminal Procedure would operate to afford means whereby the High Court could set aside such an order now impugned if it thought fit. Unfortunately, by reason of the Full Bench decision of this Court it is not sections 435 to 439 of the Code of Criminal Procedure that will govern such an application in revision but section 115 of the Code of Civil Procedure. The language of section 115 is too narrow to meet the case where the Judge by his order decides to prosecute the person on insufficient grounds or on wrong grounds. The consequence is that an application like this has to be rejected and what appears likely to be an abortive criminal suit has to be allowed to take place.

For the reasons stated this application is dismissed but, in the circumstances, I make no orders as to costs.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Dalal and Mr. Justice Pullan.

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January, 12.

ONKAR MAL (DEFENDANT) v. ASHIQ ALI (PLAINTIFF).*

Act No. IX of 1872 (Indian Contract Act), section 23—
Stifling a criminal prosecution—Compromise—Incidental
withdrawal of a petty charge of theft.

A compromise which is otherwise a fair and reasonable one is not invalidated because in connexion therewith a trifling charge of theft between the servants of the parties has been withdrawn. *Dwijendra Nath Mullick v. Gopi Ram Gobindaram* (1), followed.

THE facts of this case sufficiently appear from the judgement of the Court.

* Second Appeal No. 869 of 1924, from a decree of Baij Nath Das, Second Additional Judge of Gorakhpur, dated the 13th of February, 1924, reversing a decree of Harihar Prasad, Additional Subordinate Judge of Gorakhpur, dated the 21st of November, 1923.