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The last contention that the sentence is illegal is undoubtedly valid. This matter seems to have escaped the notice of the trying Magistrate as well as the learned Sessions Judge. Under section 500 of the Indian Penal Code the imprisonment cannot be rigorous, but needs must be simple. The result is that I allow this application to this extent that I alter the nature of the punishment and direct that the three months' imprisonment shall be simple. It is not possible for me to reduce the term of imprisonment or to remit the fine inasmuch as there is not the slightest doubt that the accused aggravated the offence by adducing evidence to show that Babu Mathura Prasad had really demanded illegal gratification through Mahadeo, chaprasi, and that that justified the imputation. With the above modification I dismiss this revision.

REVISIONAL CIVIL

1932

December, 19

Before Mr. Justice Kendall

KISHAN LAL BABU LAL (PLAINTIFF) *v.* RAM CHANDRA (DEFENDANT) *

Civil Procedure Code, section 115; *order VI, rule* 17—*Order refusing amendment of plaint—Revision—"Case decided"—Other remedy available.*

In a suit for money due on account of certain business transactions between the parties the defendant took a plea that some of the items claimed were barred by limitation. Thereupon the plaintiff applied to amend the plaint by introducing a reference to an acknowledgment which the plaintiff alleged had been made by the defendant. The Munsif refused to allow the amendment on the ground that the application was unduly delayed and that it would be unfair to the defendant to allow it. In revision from the order of refusal—

Held that the revision was maintainable. The effect of the order being definitely to shut out a part of the plaintiff's claim, the order was a final decision of the court on that part of the case and so could be brought within the meaning of the words

* Civil Revision No. 441 of 1932.

"case decided" in section 115 of the Civil Procedure Code. Having regard to the provisions of order VI, rule 17, it was the duty of the court to have allowed the amendment, which was not one that would have altered the nature of the suit, in order to enable the questions in controversy between the parties to be determined once for all, and in refusing to allow the amendment it failed to exercise a jurisdiction vested in it by law.

The plaintiff had, no doubt, another remedy against the order of refusal, by way of a ground of appeal from the ultimate decree; but it could not be laid down as a general proposition that the High Court would not interfere in revision whenever there was another remedy open. Where the effect of allowing a revision, in a matter in which an appeal might also lie, will be a convenience to the parties and will save expense, the court will be inclined to interpret the provisions of section 115 liberally and to interfere with an order which has been passed without jurisdiction, or illegally or with material irregularity in the exercise of its jurisdiction.

Mr. *S. B. L. Gaur*, for the applicant.

Dr. *N. C. Vaish*, for the opposite party.

KENDALL, J. :—This is an application for the revision of an order of the Munsif of Kasganj refusing to allow the applicant, who is the plaintiff in the suit, to amend his plaint. The suit was one for a sum of Rs.307 odd, said to be due on account of certain business transactions between the parties from the 11th of December, 1926, to the 11th of March, 1929; and after the original *ex parte* decree had been set aside and the suit restored, the plaintiff made an application to amend his plaint in answer to the written statement. In the written statement it had been pleaded that some of the items named in the plaint were barred by limitation, and the plaintiff therefore applied to amend the plaint with reference to an acknowledgment said to have been made by the defendant on the 27th of July, 1929. The Munsif refused to allow the amendment on the ground that the application was unduly delayed and that it would, in the circumstances, be unfair to the defendant to allow the application.

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Under rule 17 of order VI of the Code of Civil Procedure an amendment of the pleadings may be allowed at any stage, and "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." If therefore it was necessary to decide as between the parties whether this alleged acknowledgment was to be proved or not, the court should not, it is argued, have allowed considerations of equity to interfere with the mandatory provisions of rule 17.

The application has been opposed on the grounds that the decision of the court does not amount to a "case decided" as contemplated by section 115 of the Code of Civil Procedure, that the court has not dismissed the application summarily or without consideration, and finally because no application for revision ought to be entertained where another remedy lies.

The question of whether the decision of the court below amounts to a "case decided" can be answered shortly by pointing to the fact that it does virtually shut out a part of the plaintiff-applicant's claim. It is not necessary here to refer to all the definitions of a "case decided" which have been recorded in the various High Courts, because in fact the word "case" in this section has not received a final and authoritative definition. In a recent decision of this Court a Bench of this Court remarked: "It therefore seems to us that the Full Bench case, i.e., the well known decision in *Buddhu Lal* v. *Mewa Ram* (1), is an authority for the proposition that no revision lies from a finding recorded by the trial court on *one or more issues out of several that are before it for disposal*. There was no majority in favour of the broad proposition that no revision lies from an interlocutory order." Where the effect of the order of the court below is definitely to debar the plaintiff from proving a part of his claim, that is a final decision of the court on that part of the

(1) (1921) I.L.R., 43 All., 564.

case, and in my opinion it can be brought within the meaning of the words "case decided" under section 115.

As regards the second argument, the Munsif has no doubt considered the point, but he has not considered it from the right point of view. It is quite clear that the application made by the plaintiff, if allowed, would not have changed the nature of the suit. He merely wished to prove an acknowledgment, and that acknowledgment would not have been, as Dr. *Vaish* suggested for the opposite party, a new cause of action, but merely a piece of evidence. There was a controversy between the parties about money due on business transactions, and whether the acknowledgment was a genuine one or not, this matter had to be set at rest for the purpose of determining the real question in controversy between the parties. The fact that the application for amendment may have been "unduly delayed" might influence the Munsif in deciding whether the acknowledgment was genuine, but ought not to have constrained him to dismiss the application itself.

The most serious objection that has been made to the present application is that it has been held by this and by other High Courts that no revision will lie where there is an appeal. The question of whether a pleading should be amended has been more than once made the subject of appeal. Dr. *Vaish* has been able to point to the cases of *Bisheshar Prasad* v. *Gobind Ram* (1), in which a similar question of amendment was the only point urged in the appellate court, and *Mumtaz Ali* v. *Kasim Ali* (2), where it was certainly one of the grounds in appeal. In the case of *Nand Ram* v. *Bhopal Singh* (3) a Bench of this Court has ruled that " an application under section 115 of the Code of Civil Procedure cannot be entertained in the case of those interlocutory orders against

(1) (1914) 12 A.L.J., 833. (2) (1913) 11 A.L.J., 423.
(3) (1912) I.L.R., 34 All., 592.

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which, though no immediate appeal lies, a remedy is supplied by section 105, which provides that they may be made a ground of objection in appeal against the final decree"; and I have also been referred to a case of the Madras High Court in *Penumarli Vasantarayadu* v. *Reddi Subbamma* (1) in which the identical question at present raised was decided against the applicant for amendment. On the other hand in the case of *Lila* v. *Mahange* (2) it has been held by a Bench of this Court that "It cannot be laid down as a general proposition that the High Court has no power of interference at all or should not interfere where there is another remedy. . . open to the applicant. . . Each case must be considered on its own merits." It is true that the case of *Nand Ram* v. *Bhopal Singh* is not referred to in that decision and may not have been brought to the notice of the Bench; but in another recent decision in *Ram Sarup* v. *Gaya Prasad* (3) a Full Bench of this Court interfered in revision with an appellate order which might apparently have been made the subject of an appeal, and in the course of the judgment all three of the learned Judges expressed views differing from that expressed by the Bench in *Nand Ram* v. *Bhopal Singh*. The view has been expressed more than once that where the effect of allowing a revision, in a matter in which an appeal might also lie, will be a convenience to the parties and will save expense, the court will be inclined to interpret the provisions of section 115 liberally and to interfere with an order which has been passed without jurisdiction, or irregularly, illegally or with material irregularity in the exercise of its jurisdiction. The present case is not without difficulty, but I am strongly of opinion that the court ought to have allowed the amendment in order to enable the controversial matter between the parties to be settled once for all; and that in refusing to allow the amendment it failed to exercise a jurisdiction vested in it by law.

Dr. *Vaish* has finally referred to an unreported decision of a Bench of this Court, the case of *Ghulam Husain* v.

(1) (1913) 22 Indian Cases, 39. (2) (1931) I.L.R., 54 All., 183.
(3) (1925) I.L.R., 48 All., 175.

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Ghulam Mohammad, in which it has been held that no revision lies against an order refusing permission to amend a written statement in such a way as to change the entire nature of the defence. The Bench held in that case that there had been no case decided and that no revision was maintainable. The circumstances are clearly distinguishable from the present case in which, as I have held, a case has been decided because a refusal to allow the plaint to be amended does shut out a part of the plaintiff's claim, and the proposed amendment itself does not alter the nature of the plaintiff's suit.

For these reasons I allow the application with costs and direct that the amendment prayed for by the applicant be made in the plaint, and that the court shall thereafter proceed to hear the suit on its merits.

REVISIONAL CRIMINAL

Before Mr. Justice Bajpai.

EMPEROR *v.* MUHAMMAD HASHIM.*

1932
December, 21

Criminal Procedure Code, sections 435, 439—*Revision—Practice of High Court—Previous application in revision to Sessions Judge or District Magistrate essential to High Court entertaining revision.*

According to a practice of the High Court an application in revision to the Sessions Judge or to the District Magistrate is an essential step in the procedure of filing a criminal revision in the High Court, and failure on the part of the applicant in this respect operates as a bar to the application being entertained by the Court.

The fact that there has been an appeal to a Magistrate, first class, or even to the District Magistrate is not a compliance in principle with this rule. Inasmuch as a revision should and generally does cover different grounds from an appeal, an appeal to the District Magistrate does not serve the object underlying the rule in the same way as a revision would.

* Criminal Revision No. 648 of 1932, from an order of Shambhu Nath, Magistrate, first class, of Benares, dated the 9th of August, 1932.