1927

MAHARAJA JAGATJIT SINGH v. BRIJ MOHAN DAS

a trust in a tenure where the tenure can come to an end on default or even on the exercise of volition on the part of the trustee. In the present case the right of occupancy, which the plaintiff's predecessor had obtained in the lands in suit from the settlement court, was liable to be extinguished altogether in the event of non-payment, or refusing to pay rent to the superior proprietor.

Hasan, J.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Muhammad Raza.

TIKAI CHOBAY (DEFENDANT-APPLICANT) *v.* FIRM SHEO DAYAL AND RAMJI DAS (PLAINTIFF-OPPOSITE PARTY).*

1927. *December*, 21

Civil Procedure Code (Act V of 1908), order XXIII, rule 1 and section 115—Permission to withdraw a suit with liberty to bring a fresh suit, when to be granted—Withdrawal of suit with the object of instituting it afresh and producing the evidence he omitted to produce—Revision—Section 115 of the Code of Civil Procedure, applicability of.

Before the trial court can grant the plaintiff permission to withdraw from the suit with liberty to institute a fresh suit it is necessary for it to be satisfied that the suit must fail by reason of some formal defect, or that there were other sufficient grounds *ejusdem generis* for permitting them to institute a fresh suit.

Where the plaintiff endeavoured to produce documentary evidence at a period when it could not be admitted, and petitioned the court that he did not want to produce any further evidence and preferred to withdraw the suit and to bring it again, and then to produce the evidence which he

* Section 115, Application No. 35 of 1927, against the order of Bhudar Chandra Ghosh, Subordinate Judge of Bahraich, dated the 15th of August, 1927, allowing withdrawal of suit.

1927

TIKAI CHOBAY v. FIRM SHEO DAYAL AND RAMJI DAS.

omitted to produce at the right time and the court allowed the suit to be withdrawn, *held*, that the court in so doing committed a material irregularity in exercise of its jurisdiction by utilizing its jurisdiction so as to give it authority which the law had not given it, and the High Court could interfere under section 115 of the Code of Civil Procedure.

Section 115 applied to jurisdiction alone, the irregular exercise or non-exercise of it. Unless it can be established that the court has acted without jurisdiction, or has failed to exercise the jurisdiction vested in it or acted in the exercise of its jurisdiction illegally or with material irregularity, section 115 has no application, but in each particular instance the court has to look at the facts of the case as to whether the necessary conditions have been satisfied. *Jhunku Lal* v. *Bisheshar Das and another* (1), explained. *Mohammad Ejaz Rasul Khan* v. *Mubarak Husain* (2), *Balkrishna Udayar* v. *Vasudeva Aiyar* (3), *Robert Watson and Co.* v. *The Collector of Rajshahye* (4), and *Chhajju Ram* v. *Neki and others* (5), relied upon.

Mr. *Niamatullah*, for the applicant.

STUART, C. J., and RAZA, J. :—These are applications in revision under section 115 of the Code of Civil Procedure which have arisen in the following circumstances. A firm called Sheo Dayal Ramji Das, which carries on business in Calcutta and is also engaged in commercial activities in Oudh, instituted a suit on the 27th of November, 1926, in the Court of the Subordinate Judge of Gonda against the Secretary of State for India in Council, and Tikai Chaube on the following allegations. The firm asserted that it was a lessee from the Nepal State under a lease, dated, approximately, September, 1925, of the right of cutting and removing *bankas* grass for commercial purposes over a certain tract in Nepal. The plaint continued that a Calcutta firm called Heilgers & Company held a similar contract on the British side for collecting such grass as grew in the Government forest and that Heilgers & Company

(1) (1913) I.L. R., 40 All., 612. (2) (1924) 27 O.C., 231.
(3) (1917) L.R., 44 I.A., 261, (267). (4) (1869) 13 M.I.A., 160.
(5) (1922) L.R., 49 I.A., 144.

had assigned their rights under their contract to the plaintiff firm. It is not clear what connection this latter allegation had with the subject-matter of the suit. The actual allegations of importance in the plaint were allegations that the plaintiff firm had cut and stacked some thirteen hundred maunds of *bankas* grass in the Nepal territory over which they held the contract, and that the Forest Ranger of the Sohelwa Circle had, without any shadow of right, removed this grass to British territory and sold it in collusion with Tikai Chobey. Therefore the plaintiff firm claimed Rs. 4,000 damages. The hearing of the suit was transferred to the Subordinate Judge at Bahraich. Written statements were filed by the defendants, in which they stated that they had no knowledge as to whether the plaintiff firm had or had not a contract to collect *bankas* grass in Nepal. They absolutely denied that they had ever removed any *bankas* grass in the possession of the plaintiff at any time or any place. The 22nd of April, 1927, was fixed for the framing of issues, but the issues were not actually framed until the 12th of May, 1927. Before the issues were framed it was within the knowledge of the plaintiff firm that it was necessary for them to produce their contract with the Nepal Government if they wished to rely on it, and under order VII, rule 14, part 2 as it then stood if they relied upon this lease they should have noted its existence in a list filed with the plaint. They did not do so. Further, under order XIII, rule 1, as it then stood, it was their duty at the first hearing of the suit to produce all the documentary evidence in their possession. They did produce certain documents, but we find that they did not produce others. The 4th of August, 1927, was fixed for the hearing of evidence, and on that date the plaintiff firm applied for permission to produce a large number of documents in evidence. The trial Judge, under the provisions of order XIII,

Stuart, C. J. and Raza, J.

1927

TIKAI CHOBAY v. FIRM SHEO DAYAL AND RAMJI DAS.

rule 2, refused to receive this evidence, as no good cause had been shown for its non-production previously. The plaintiff firm then proceeded to produce oral evidence on the 4th of August, 1927. The hearing was then adjourned to the 15th of August, 1927. On that date the plaintiff firm put up an application of which the following is the translation :—

Stuart, C. J. and Raza, J.

> "It is submitted that in the above-noted case certain important documents had been rejected by the court from being made part of the evidence, that as the documents are the basis of the suit and consequently a legal defect has arisen in the case, and as it is apprehended that in future this would be a defect on the merits of the case; hence it is prayed that permission to withdraw the present suit and to bring a fresh one be granted under order XXIII, rule 1."

Both the defendants opposed this application but the learned trial Judge allowed it in the following words :—

> "I allow the suit to be withdrawn with liberty to the plaintiff firm to bring a fresh suit. In view of the fact that the case has not advanced far after the framing of the issues, I think it proper to allow only half the costs to the defendants barring the costs of summoning witnesses which they will get in full."

It is against this order that the present applications in revision have been filed. Notice has been served upon the plaintiff firm. They have not, however, appeared. We have satisfied ourselves that the notice has reached them, and proceed with the matter *ex parte*. The first question which we have to decide is, whether an application in revision under section 115 of the Code of Civil

1927

TIKAI CHOBAY v. FIRM SHEO DAYAL AND RAMJI DAS.

Stuart, C. J. and Raza, J.

Procedure does or does not lie. There is a decision of the Allahabad High Court in *Jhunku Lal* v. *Bisheshar Das and another* (1) which might be read as showing that in no circumstances can a decision under order XXIII, rule 1, be questioned in revision. As we shall point out later, we do not consider that the decision really lays down such a proposition. There is a decision of the late Court of the Judicial Commissioner in *Mohammad Ejaz Rasul Khan* v. *Mubarak Husain* (2), which we consider is of great assistance. But before we approach that decision we consider it advisable to refer to the remarks of their Lordships of the Judicial Committee in *Balkrishna Udayar* v. *Vasudeva Aiyar* (3), where they lay down the limitations within which a right of revision under section 115 of the Code of Civil Procedure can be exercised. They say there :—

> " 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. And if the appellant's contention be correct, then if the civil court should absolutely and whimsically decline to exercise its jurisdiction and refuse to make any orders as to the filling up of vacancies, no matter how many existed, there would not, in a case such as the present, be any remedy available under this section, and no appeal would lie."

We consider that the words of the greatest importance here are " that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it." Unless it can be established that the court has acted without jurisdiction, has failed to exercise its jurisdiction vested

(1) (1918) I.L.R., 40 All., 612. (2) (1924) 27 O.C., 231.
(3) (1917) L.R., 44 I.A., 261. (267).

1927

TIKAI CHOBAY v. FIRM SHEO DAYAL AND RAMJI DAS.

in it or acted in the exercise of its jurisdiction illegally or with material irregularity, section 115 has no application. But in each particular instance we have to look at the fact as to whether the necessary conditions have been satisfied. In our opinion in *Jhunku Lal* v. *Bisheshar Das and another* (1), the Bench laid down no more than that the particular application before them must be rejected, because it did not raise any ground which came under section 115. We agree absolutely with the decision to that effect, but this decision in no way lays down as a general proposition that no order under order XXIII, rule 1, can be challenged under section 115. What we have to look at is, whether the particular circumstances bring or do not bring an order under section 115, and it is in considering this latter question that we find the decision in 27 O. C. 231 of great value. This decision is authority for the proposition that, before a court can grant the plaintiff permission to withdraw from a suit with liberty to institute a fresh suit in respect of the same subject-matter, the court must be satisfied that the suit must fail by reason of some formal defect, or that there are other sufficient grounds *ejusdem generis* for allowing the plaintiff to institute a fresh suit. We consider that the decision of their Lordships of the Judicial Committee in *Robert Watson and Co.* v. *The Collector of Rajshahye* (2), is of assistance in deciding the point, and we further consider that the decision of their Lordships of the Judicial Committee in *Chhajju Ram* v. *Neki and others* (3) is of great assistance. There their Lordships laid down that in construing the meaning of the words " for any other sufficient reason " where they occur in order XLVII, rule 1, the only proper construction to be placed upon these words was that the other sufficient reason must be *ejusdem generis*. The word used in order XXIII, rule 1, are " other sufficient

Stuart, C. J. and Raza, J.

(1) (1918) I.L.R., 40 All., 612. (2) (1869) 13 M.I.A., 160.
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1927

TIKAI CHOBAY v. SHEO DAYAL AND RAMJI DAS.

grounds " but the same process of reasoning must, in our opinion, be applied and we are in complete accord with the views taken in 27 O. C. 231. We approach this particular case then with the preliminary remarks that before the trial court could grant the plaintiff firm permission to withdraw from the suit with liberty to institute a fresh suit it was necessary for it to be satisfied that it must fail by reason of some formal defect or that there were other sufficient grounds *ejusdem generis* for permitting them to institute a fresh suit. What are the facts? The facts are that the plaintiff firm came into court asserting the existence of a certain contract. As far as we can see the success or failure of the suit in no way required that assertion to be proved. The plaintiff, however, preferred to assert it. The other side had put him to proof. He then failed to prove the point as required by law. Now even had the matter rested there, there would have been no harm done to the plaintiff firm for if the plaintiff firm had been able to establish that this grass had been cut and stacked by them, that it was in their possession in the place in which it was alleged that it was in their possession, that it was removed by the Forest Subordinate Official as alleged from their possession, that it had then been disposed of by that official and Tikai as joint tortfeasors and that the damages, had amounted to a certain figure, the plaintiff firm could undoubtedly have succeeded without the production of any documents at all. What the plaintiff firm did at that stage was to produce one witness. They then refused to continue with the case. There was nothing to show that the suit must fail by reason of some formal defect. There was no formal defect. It could not be suggested seriously that there was any formal defect. There were certainly not sufficient grounds, in our opinion, of any sort or kind for permitting the withdrawal with liberty to bring a fresh suit, and there can, in our opinion, be no possible doubt as to the fact that there were no grounds *ejusdem*

Stuart, C. J. and Raza, J.

1927

TIKAI CHOBAY v. FIRM SHEO DAYAL AND RAMJI DAS.

Stuart, C. J. and Raza, J.

generis. The case put forward by the plaintiff firm was this alone. They said: "Our firm has in contravention of the law upon the subject endeavoured to produce documentary evidence at a period when it cannot be admitted. Our firm does not want to go on and produce any further evidence. It would prefer to withdraw its suit and bring it again and then when the suit is brought again to produce the evidence which it omitted to produce at the right time before." The court allowed this. In our opinion in so doing the court committed a material irregularity in exercise of its jurisdiction by utilising its jurisdiction so as to give it authority which the law had not given it, and for these reasons we accept the revision on the main point. It is unfortunate that the plaintiff firm is not represented. It has, however, had every opportunity of being represented. We set aside the order by which the plaintiff firm is permitted to bring a fresh suit upon the same cause of action. One further point remains. The learned trial Judge has for a reason which we do not quite understand awarded the successful defendants only half costs. He has not, in our opinion, exercised his discretion judicially. We allow these applications each with costs against the plaintiff firm and direct that the plaintiff firm pay each of the applicants separately his full costs in the court below.

Application allowed.