CIVIL REVISION.

Before Mr. Justice Baguley.

1933

Jan. 11.

DAW MIN BAW
v.
A.V.P.L.N. CHETTYAR FIRM AND ANOTHER.*

Revision—High Court's powers—First and second appeals—Direct exercise of Revisional Powers—"Case"—Another remedy available—Discretion of the High Court—Civil Procedure Code (Act V of 1908), s. 115.

Under s. 115 of the Civil Procedure Code, the High Court is entitled to entertain an application for revision from the decision of any Court subordinate thereto from which no direct appeal lies thereto. The fact that an appeal lies from such decision to a lower appellate Court and thereafter a second appeal to the High Court, does not prevent the High Court from exercising its revisional powers directly in a proper case. The word "case" in s. 115 of the Civil Procedure Code includes not only original cases but also first appeal cases. *Mathura Nath* v. *Umesh Chandra*, 1 C.W.N. 626; *Ramgopal* v. *Ghalak*, 49 C.L.J. 81; *Tirupati Raju* v. *Vissam Raju*, I.L.R. 20 Mad. 115—*explained.*

Beni Madho Ram v. *Mahadeo Pandey*, 28 A.L.J. 924—*dissented from.*

The High Court normally will not interfere in revision if the party has another remedy by way of appeal to a subordinate Court or by way of a regular suit. This however is a rule of practice and the question of interference by way of revision must be decided according to the circumstances of each case.

Administrator-General of Burma v. *C.R.V.V.S. Firm*, I.L.R. 5 Ran. 742; *Emperor* v. *Bihari Lal*, I.L.R. 51 All. 338; *Indubhushan Das* v. *Haricharan*, I.L.R. 58 Cal. 55; *Khushnud Husain* v. *Janki Prasad*, I.L.R. 53 All. 532; *Mahadeo Prasad* v. *Khubi Ram*, I.L.R. 51 All. 1023; *Umed Mal* v. *Chand Mal*, I.L.R. 54 Cal. 338—*referred to.*

Anklesaria for the applicant.

Hay and *Chari* for the respondents.

In Civil Execution No. 9 of 1931 of the Subdivisional Court of Kyauktan, the A.V.P.L.N. Firm (the 1st respondent) attached certain paddy belonging to two of their judgment-debtors, Maung Hla Maung and Ma Ein Myaung. On behalf of Ma Ein Myaung and himself Maung Hla Maung applied for stay of

* Civil Revision Nos. 171 and 172 of 1932 from the orders of the Subdivisional Court of Kyauktan in Civil Execution Case No. 9 of 1931.

execution and offered a piece of paddy land as security for the due satisfaction of the decree. The paddy land was standing in the name of Ma Ein Myaung and her mother Ma Min Baw (the applicant). An affidavit was produced purporting to bear the mark of Ma Min Baw in which she stated that she had authorized Maung Hla Maung to act as her agent and to sign the security bond on her behalf. The security was accepted by the Court and the bond was signed by Ma Ein Myaung and by Maung Hla Maung for himself and as agent of Ma Min Baw. As the decree was not satisfied, the land was ultimately sold in execution and was bought by the 1st respondent firm.

Ma Min Baw now applied to have the sale set aside alleging that she had never agreed to stand surety and never authorized Maung Hla Maung to execute any bond on her behalf or to charge her property in any way. She said she had no notice of the sale proceedings and asked for an enquiry. The Subdivisional Court held that the application to set aside the sale came under Order 21, rule 89, or rule 90 of the Civil Procedure Code, and in either case under the rules, as amended by the Rule Committee of the High Court, the applicant must deposit a sum of money in Court, and, as no money was deposited, the application was dismissed.

Ma Min Baw appealed to the District Judge of Hanthawaddy who directed that an enquiry should be held by the executing Court under s. 47 of the Civil Procedure Code. On the application of the 1st respondent firm this order was set aside by the High Court as made without jurisdiction.

Ma Min Baw now filed two applications for revision in the High Court, one to revise the order of the Subdivisional Court directing execution to proceed without notice to her and the other against

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the order dismissing her application to have the sale set aside. The High Court thought it sufficient to deal with the first application only.

BAGULEY, J.—[after stating the facts continued]: It was first of all argued that no application for revision lay to this Court. It is admitted that s. 145, Civil Procedure Code, states that when a person has become liable as surety the decree may be executed against him as a decree and it is laid down that such notice as the Court in each case thinks sufficient must be given to the surety. It is not contended that any such notice was given but as an appeal will lie from an order passed under s. 145 to the District Court and from any order passed in appeal another appeal will lie to this Court, it was strongly urged that an application for revision under s. 115 will not lie because the case had been decided by a Court subordinate to this Court and although no direct appeal lay to the High Court, a second appeal would lie and consequently under s. 115 no application for revision can be made. It was argued that the word "appeal" in s. 115 refers not only to first appeals but also to second appeals and stress was laid upon a note in Mulla's commentary "The High Court cannot act under this section in any case in which an appeal lies to that Court. The word 'appeal' is not confined to first appeal; it includes second appeal." A reference is given in the footnote to three cases. On examination of these three cases it will be found that they do not support the statement in the commentary as interpreted in the above argument.

The first is *Tirupati Raju* v. *Vissam Raju and another* (1). This was a case in which a certain

(1) (1896) I.L.R. 20 Mad. 155.

inter-pleader suit had been filed and decided. An appeal was filed to the District Judge who confirmed the decision of the lower Court. One of the parties then came to the High Court in revision. It was held that an appeal lay from the appellate decree of the District Judge and consequently no application for revision could be entertained. The correct enunciation of the principle laid down in this case would be not that the word "appeal" is not confined to first appeals but includes second appeals but that the word "case" includes not only original cases but also first appeal "cases."

The next case referred to is *Mathura Nath Sarkar and another* v. *Umesh Chandra Sarkar* (1). This is a ruling of two Judges and the case was decided and the application for revision dismissed because the High Court considered that it had no jurisdiction to interfere with the appellate order for it could not be said that the lower appellate Court acted in the exercise of its jurisdiction illegally or with material irregularity. In any event this case is only one in which the Court, although it refused to interfere, did consider it had jurisdiction to deal in revision, if necessary, with the order of an appellate Court.

The third case referred to is *Ramgopal Sanyal and another* v. *Narendra Nath Ghatak* (2). This was an application in revision of an order passed by a District Judge dismissing an appeal on the ground that no appeal lay from the order of the trial Court to him. The Court declined to interfere because it held that the appellate order was itself appealable and an application for revision was consequently barred by the provisions of s. 115.

As I have said this statement in the commentary that the word "appeal" includes second appeal

(1) 1 C.W.N. 626. (2) 49 C.L.J. 81.

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although correct from one point of view is in my opinion misleading at any rate on the cases mentioned because these cases do not warrant the assertion that if a case can be brought in second appeal to this Court, it follows that no application for revision will lie. The 1st respondent's advocate however has succeeded in discovering one case in which this point was held. It is *Beni Madho Ram* v. *Mahadeo Pandey* (1). In this case it is stated :

> "It seems to us that no revision lies under s. 115 of the Code of Civil Procedure. It was clearly a case of a decree which could have been appealed against to the District Judge from whose decree a second appeal could have been filed to this High Court. It is therefore not a case in which no appeal lies to the High Court at all although no appeal could have been filed from the original decree of the first Court direct. In our opinion there is no ground for restricting the scope of the words 'in which no appeal lies thereto' to cases where no appeal lies from the order sought to be revised. So long as the party has a right to come up to the High Court by way of an appeal and has failed to avail himself of that opportunity by first going up to the District Judge and then coming up to the High Court, he cannot ask the High Court to interfere in revision."

No reasons are given for this view. The rest of the judgment shows that it was in the nature of an *obiter* because the judgment goes on to say "It also appears to us that there is absolutely no ground for interference in revision." It may also be noted that the case does not appear in the authorised reports and in view of this fact I am unable to accept it as a correct exposition of the law. It seems to me to be based on the idea that every case must normally be decided finally in a High Court either by a series of appeals or in revision or in some such way. An appeal seems to be regarded as a natural concomitant

(1) 28 A.L.J. 924.

of the case and the idea seems to be that every case must be expected to be appealed against to the utmost point allowed. It must be remembered that the Civil Procedure Code itself seems to prefer the expression "appeal from appellate decree" to second appeal. S. 100 definitely refers to appeals from a decree passed in appeal and so does Order 42.

It has been laid down that when a decree has been confirmed or altered in appeal the decree of the lower Court is merged in the decree of the Appellate Court and it is that decree which has got to be executed and it is the date of that decree which governs matters connected with limitation with regard to its execution. If an appeal is filed from that appellate decree it cannot be regarded as a second appeal against the original decree, because that decree had become merged in the appellate decree and had ceased to have a separate existence. Further if a decree had been reversed in appeal the party who appeals against that appellate decree is, as a rule, trying to restore the decree of the trial Court and it cannot be argued that a party is filing a second appeal against a decree in order to bring that decree once more into existence. For these reasons I hold that this application in revision will lie.

The next point taken is that the applicant having her remedy by way of a regular suit no application in revision will lie. It is true that, speaking generally, when a party has another remedy by way of appeal to a subordinate Court or by way of a regular suit, this Court will not as a rule interfere in revision; but this is simply a rule of practice which arises from the optional nature of s. 115 which says that the High Court may make such order in the case as it thinks fit. In the ordinary way when a party has a good legal remedy in a subordinate Court, the High Court does not view with favour the case being

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brought before it; but many instances can be given of cases in which a High Court has entertained an application for revision although another remedy was open to the party.

In *Administrator-General of Burma* v. *C.R.V.V.S. Chettyar Firm* (1) the party aggrieved had a right by way of appeal to the District Court but the High Court, regarding the case as an exceptional one, interfered in revision.

In *Emperor* v. *Bihari Lal* (2) it was laid down that there is no invariable rule of the High Court under which an application for revision under s. 115 should be refused where any other remedy is open, excepting, of course, in cases where an appeal lies to the High Court.

In *Mahadeo Prasad* v. *Khubi Ram* (3) it was pointed out that s. 115 does not require that no appeal in the meantime should have been preferred to the District Judge, or that, if it is preferred, it is only the order of the District Judge that can be revised and in a case where an appeal had been filed to the District Judge from which no appeal lay to the High Court, the High Court dealt in revision with the order of the original Court.

In *Umed Mal* v. *Chand Mal* (4) the Privy Council upheld the decision of the Chief Commissioner of Ajmer-Merwara acting as a High Court, in which he dealt under s. 115 with a decree which had been confirmed on first appeal and from which no second appeal lay because the point taken up was entirely a point of fact.

In *Indubhushan Das* v. *Haricharan Mandal* (5) it was laid down, in terms of the headnote, that it is

(1) (1927) I.L.R. 5 Ran. 742.
(2) (1928) I.L.R. 51 All. 338.
(3) (1929) I.L.R. 51 All. 1023.
(4) (1926) I.L.R. 54 Cal. 338.
(5) (1930) I.L.R. 58 Cal. 55.

not an invariable rule of the High Court to refuse to make use of its revisional powers under s. 115 when there is another legal remedy open, for example, by way of a regular suit. It is a question to be decided in the circumstances of each case whether a Court will go into the matter in revision or relegate the party to a suit, and the same principle was laid down in *Khushnud Husain* v. *Janki Prasad* (1).

In the present case the applicant, if her allegations are true, has been grievously wronged and her allegations have as yet not been enquired into. At present she only asks for an enquiry. The facts which I have mentioned show that if Maung Hla Maung is acting dishonestly the proceedings had taken a turn which undoubtedly played into his hand. He had only to produce some woman to put a cross-mark on a petition before the Commissioner for Oaths and the whole transaction would go through facilitated by the fact that notices were issued not to Ma Min Baw but to himself, because he says he was her agent. It is I fear a most common practice of all Subordinate Courts to confuse agents with principals and to regard the principal as the agent. Obviously in this case notices should have been issued in name, at any rate, to Ma Min Baw and not to Maung Hla Maung. The applicant had been doing her best to get an enquiry. She may have been ill-advised in the remedy which she sought but that was the fault of her legal advisers, not of herself. She has already filed an appeal which has been dealt with in revision and now the present applications for revision are being dealt with and the order complained of is nearly two years old. To direct her to initiate proceedings yet again would be, in my opinion, most undesirable.

(1) (1931) I.L.R. 53 All. 532.

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S. 115 says that the High Court may make such order as it thinks fit and it is a matter for consideration what the form of that order may be. If Ma Min Baw either by her own action or by the action of her duly authorised agent or by some form of estoppel is bound by the security bond executed, then undoubtedly all these proceedings ought to stand. If on the other hand the security bond does not bind her, then the sale of her interest in the land dealt with must undoubtedly be set aside. I therefore direct the trial Court to issue the notices which should have been issued in April 1931, under s. 145, to Ma Min Baw and give her an opportunity of showing cause why her interest in the land should not be sold. If she shows good cause, then the sale of her interest in the land will be set aside.

[The rest of the judgment dealt with the question of costs.]