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JOGODANUND SINGH v. AMRITA LAL SIRCAR.

Banerjee, with this reservation, that it does not appear to me from the report of the case of *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (1), that the learned Judges who decided that case intended to base their judgment in any way on section 6 of the General Clauses Act I of 1868.

*Rule made absolute.*

S. C. G.

## ORIGINAL CIVIL.

*Before Mr. Justice Sale.*

1895
*June* 3.

SURRUT COOMARI DASSEE AND ANOTHER *v.* RADHA MOHUN ROY.[a]

*Small Cause Court (Presidency Towns)—New Trial, Second application for—Presidency Small Cause Court Act (XV of 1882), section 37—Practice—Civil Procedure Code (Act XIV of 1882), section 622—Act IX of 1850, section 53.*

The Judges of the Calcutta Small Cause Court have power to entertain in the same suit more than one application for a new trial. There is nothing in section 37 of Act XV of 1882 prohibiting such a practice. It is in accordance with the practice of Courts in England to allow such applications.

*Pursonchund Golacha* v. *Kanooram* (2) followed.

ON the 23rd May 1894 a suit was instituted in the Small Cause Court before the Third Bench by Radha Mohun Roy against Nilrutton Sen and Kader Nath Mitter, two of the executors of the will of Kherode Chunder Mitter, deceased, to recover the sum of Rs. 258-9-6.

On the 6th June 1894 that suit was dismissed.

On the 14th June 1894 the plaintiff made an application for a new trial under section 37 of Act XV of 1882 (the Presidency Small Cause Court Act), which came on for hearing before the Chief Judge and the Third Judge on 11th August 1894, when the original order dismissing the suit was set aside and a decree entered in favour of the plaintiff for the sum of Rs. 258-9-6 to be realized

[a] Application In the Matter of section 622 of the Code of Civil Procedure and In the Matter of claim suit 22510 in the Calcutta Court of Small Causes.

(1) I. L. R., 14 Calc., 636.
(2) 10 B. L. R., 355 ; 19 W. R., 203.

out of the assets of the estate of Kherode Chunder Mitter, deceased. In order to satisfy this decree, certain immoveable property, belonging to the estate of Kherode Chunder Mitter, was, on the 21st September 1894, attached in execution.

Kherode Chunder Mitter, deceased, had, however, by his will, appointed five executors, one of whom had renounced probate, but the remaining four had proved the will, and acted as *de facto* managing executors of the estate of the deceased. They all resided within the jurisdiction of the Small Cause Court.

The remaining two executors, Surrut Coomari Dassee and Nundo Lall Bose, on 3rd November 1894, instituted, before the Fifth Bench of the Small Cause Court, a claim suit against Radha Mohun Roy, the plaintiff in the original suit, for the release of the attachment on the immovable property of Kherode Chunder Mitter, deceased, on the ground that they were not made parties to the original suit under section 438 of the Code of Civil Procedure; and that, therefore, the order of attachment had no binding force against the estate, which vested in all four of the executors under section 4 of the Probate and Administration Act. On the 5th December 1894 that suit was dismissed, and on the 7th December 1894 the plaintiff-executors made an application for a new trial under section 37 of Act XV of 1882, which, on the 21st of January 1895, came on for hearing before the Chief Judge and the Fifth Judge. The original order dismissing the claim suit was thereupon set aside, and an order made for the release of the properties attached.

On the 26th January 1895 Radha Mohun Roy, the plaintiff in the original suit, applied for a second new trial, which came on for hearing before the Chief Judge and the Fifth Judge on the 22nd February 1895; but the application was dismissed, the learned Judges holding that they had no power or jurisdiction to entertain such an application.

On the 18th March 1895 a rule was obtained in the High Court under section 622 of the Code of Civil Procedure, by the plaintiff in the original suit, Radha Mohun Roy, calling on the plaintiffs in the claim suit to shew cause why the High Court should not call for the records of the case, and make such order as it may think fit.

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The rule came on for hearing before SALE, J.

Mr. *Garth* showed cause.

Mr. *Dunne* in support of the rule.

On the 3rd June 1895 the rule was made absolute on the following grounds :—

SALE, J.—The question involved in this rule is as to whether the Judges of the Small Cause Court have power to hear more than one application for a new trial in the same cause. The question arises in this way : The plaintiff, on the 11th August 1894, obtained a decree for a sum of Rs. 258-9-6, and in execution of the decree proceeded to attach certain property. Two claimants then applied to have the attachment set aside. On the 5th December 1894, the claim was dismissed. On the 7th December 1894 an application for a new trial was made by the claimants, and on the 21st January 1895, the Bench hearing the application made a decree in the claim suit directing the property to be released from the attachment. On the 26th January 1895 the plaintiff applied to have a new trial of the application, which had been granted on the 21st January 1895, under which the property had been released from attachment. The learned Judges, before whom the application was made, thought they had no power to entertain a fresh application, holding, apparently, that, under section 37 of the Small Cause Court Act, there could only be one application for a new trial in the same suit. The question is whether that view is correct. Section 37 provides : "Save as is herein especially provided, any decree of the Small Cause Court shall be final and conclusive. But the Court may, on application of either party, made within eight days from the date of the decree or order in any suit (not being a decree passed under section 522 of the Code of Civil Procedure), order a new trial to be held, or alter, set aside or reverse the decree or order upon such terms as it thinks reasonable, and may, in the meantime, stay the proceedings."

Now, in this instance, the learned Judges in making their order on the application for a new trial did not direct a rehearing, but directed the property to be released from attachment. That order, therefore, became the existing decree or order in the claim suit.

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Mr. Garth contends that it was never intended by section 37 that there should be successive applications for new trials, and he points out the inconvenience which might result from any such view. But the question is, whether the Legislature has thought fit, by the words which they have adopted in section 37, to prevent more than one application being made for a new trial in the same suit, and it is quite clear, if Mr. Garth's contention is correct, that the words "decree or order" must be read as "the original decree or order." But it seems to me, I am not at liberty to put any such restrictive meaning upon the words. I think the words "decree or order" must be read "the decree or order existing or subsisting in the suit." The same view was adopted by Sir Richard Couch and Mr. Justice Pontifex in the suit of *Pursonchund Golacha* v. *Kanooram* (1), which was a reference to the High Court by the first and second Judges of the Small Cause Court of Calcutta. In that case the same question arose under the provisions of section 53 of Act IX of 1850. The words of that section are not precisely the same as the words of section 37; but I think that the meaning, both of section 37 of the present Act, and of section 53 of the old Act, is substantially the same. As regards the earlier section, Sir Richard Couch says: "The language of section 53 of Act IX of 1850 is certainly sufficiently large to allow of an application for a new trial, after a previous trial," and he proceeds to point out that to allow such new trials after previous new trials, would be in accordance with the practice of the Courts in England. He says: "There are instances in England in the Common Law Courts and in the Courts of Equity, where more than one trial has been granted, it appearing proper that it should be done. We think the same rule may be applied here. We must assume that the Judges of the Small Cause Court will not exercise this power, unless it appears to them to be right to do so, and they have power to impose such terms as they may think reasonable."

It appears to me it was not the intention of the Legislature, in using the words of section 37, to change the practice laid down under the previous Act, and if any change is to be made

(1) 10 B. L. R., 355; 19 W. R., 203.

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it ought to be so made by clear statutory enactment rather than by the adoption of a construction which would be at variance with the existing rule regulating the practice of the Court. I think, therefore, the Judges of the Small Cause Court have the power to hear the application for a new trial. That is the only point that I decide.

The costs of the present application will abide the result of the application for a new trial.

Attorney for the plaintiffs in the claim suit : Babu *Kedar Nath Mitter*.

Attorney for Radha Mohun Roy the plaintiff in the original suit : Mr. *W. Swinhoe*.

C. E. G.

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# PRIVY COUNCIL.

THE ADMINISTRATOR-GENERAL OF BENGAL (DEFENDANT) *v.* PREMLAL MULLICK (PLAINTIFF) AND OTHERS.

P. C.* 1895 *February* 20. *March* 30.

[On appeal from the High Court at Calcutta.]

*Administrator-General's Act (II of 1874), section 31—Transfer by Hindu executor to Administrator-General—Construction of Statutes.*

The right of executors to devolve the property of their testator, with all powers and duties relating to its administration, upon the Administrator-General, conferred by section 31 of Act II of 1874, is not confined to any particular class of executors or of estates. The right is given to any executor *in whom estate of* the deceased has been vested by virtue of the probate upon the one condition that the Administrator-General shall consent.

It is not required that in a consolidating statute each enactment, when traced to its source, must be construed according to the state of things which existed at a prior time when it first became law ; the object being that the statutory law, bearing on the subject, should be collected and made applicable to the existing circumstances ; nor can a positive enactment be annulled by indications of intention, at a prior time, gathered from previous legislation on the matter.

Proceedings of the Legislature in passing a statute are excluded from consideration on the judicial construction of Indian, as well as of British, statutes.

* *Present* : LORDS WATSON, HOBHOUSE, MACNAGHTEN, and SHAND, and SIR R. COUCH.